

Yugoslav war crimes takes protective measures for victims and witnesses

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A particular problem is the production of pirated CDs from these factories, including CD-ROMs and videos. CDs has increased significantly. Many of these pirated products are now coming into the U.S. in volume. China has told the U.S. it is preparing to crack down on offenders.

Number codes on compact disks is another issues. Although China has promised to require these on compact disks in order to track the origin of CDs, not all factories have complied in stamping all CDs molds with the number codes. China has agreed to have all molds in compliance by November 1, 1995 and to take action against those not in compliance.

China has formed 30 "intellectual property conference committees" or task forces composed of senior ministerial officials and representatives of government agencies to act against intellectual property rights issues. However, U.S. officials say that only a few of them have taken action. The negotiations show the increasing interaction between trade, investment, and international enforcement cooperation. The material and adjective aspects of international enforcement cooperation are now inextricably entwined in many trade and investment negotiations.³¹

XIV. LAW OF WAR

A. Yugoslav War Crimes Tribunal Takes Protective Measures for Victims and Witnesses

by André Klip³²

The Trial Chamber in the case of Dusko Tadic (Case No. IT-94-1-T) took a decision on the prosecutor's motion requesting protective measures for victims and witnesses on August 10, 1995. In its response the Defense had partly contended the prosecutor's motion and agreed to other aspects of it. The Trial Chamber considered two *amicus curiae* briefs. The hearing on the prosecution's motion took place in closed session on June 21, 1995.

In a two-one majority decision the Trial Chamber ordered that the names, addresses, whereabouts and other identifying data concerning six persons (given pseudonyms F, G, H, I, J and K) shall not be disclosed to the public or to the media. This data shall be sealed and not included in any of the public records of the International Tribunal. 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 retraumatization of these witnesses. The testimony of all six witnesses shall be heard in closed session. The prosecutor shall disclose to the defense and the accused the name and complete statement of witness F not less than thirty days in advance of the firm trial date. The prosecutor may withhold from the defense 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. The prosecutor shall disclose to the defense 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 days in advance of the firm trial date. 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. The accused, the defense 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

³¹ For other discussions of efforts to enforce intellectual property protection in Southeast Asia, see *Taiwan Strengthens Criminal Enforcement of Intellectual Property Law Violations in an Effort to Avoid U.S. Trade Sanctions*, 9 INT'L ENFORCEMENT L. REP. 117 (March 1993); and *Philippines and South Korea Enforcement of Intellectual Property Rights Results in U.S. Promise to Improve Trade Relations with the Philippines*, 9 INT'L ENFORCEMENT L. REP. 162 (Apr. 1992).

³² Dr. André Klip is a lecturer in (international) criminal law of Utrecht University, The Netherlands.



public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witnesses adequately. 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.

In the analysis of the Trial Chamber the protective measures fall into five categories; those seeking confidentiality, whereby witnesses would not be identified to the public and the media; those seeking protection from retraumatization by avoiding confrontation with the accused; those seeking anonymity, whereby the witnesses would not be identified to the accused and his counsel; miscellaneous measures for certain victims and witnesses; and general measures for all victims and witnesses who may testify in the future.

In interpreting the Statute and the Rules of the Tribunal, the Trial Chamber stands for the question which sources of law it should apply. The Trial Chamber emphasizes that the Statute is a *sui generis* legal instrument and not a treaty; however, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant. The international criminal tribunals of Nuremberg and Tokyo had only rudimentary rules of procedure and offer little guidance to the present criminal tribunal.

In paragraph 22 of the decision the Trial Chamber states that another unique characteristic of the International Tribunal is its utilization of both common law and civil aspects. Although the Statute adopts a largely common law approach to its proceedings, it deviates in several respects from the purely adversarial model. There are no technical rules for the admission of evidence and the judges are solely responsible for weighing the probative value of evidence. A Chamber may order the production of additional or new evidence *propria motu*. The absence of plea-bargaining underlines that the International Tribunal constitutes an amalgam of these two systems. Another indication of the uniqueness of the Tribunal is that its judges can mold its Rules and Procedure themselves. In the present decision the judges even amended the rules applicable to measures of protection of witnesses after the prosecution had filed its motion and the defense had responded. This power of the Tribunal raises the question whether the contents of a motion could cause an amendment of the Rules of Procedure and Evidence.

The Trial Chamber considers the interpretation given by other judicial bodies to Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention of Human Rights only of limited relevance in applying the provisions of the Statute. Unlike the Statute, these conventions do not list the protection of victims and witnesses as one of its primary considerations. The Tribunal has to seek a balance between the accused's right to a fair and public trial and the protection of victims and witnesses.

In determining whether the fair and public hearing requirement of Articles 20 and 21 of the Statute allow that certain stages of the proceedings are held in camera, the Trial Chamber referred to decisions of the European Court of Human Rights and the United States Supreme Court. The Trial Chamber also stated that, especially in civil law jurisdictions, the law of various states provide for protective measures to prevent the disclosure of the identity of certain victims and witnesses from the public or press. The Trial Chamber believes that adequate protection can be provided to certain witnesses without resorting to closed 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 demeanor of the witness.

The Trial Chamber sees five factors determining whether a witness can remain anonymous. There must be real fear for the danger of the witness or her or his family. The testimony must be important to the prosecutor's case. The Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy. A fourth factor is whether a witness protection program is effective. Finally, any measures should be taken strictly as necessary. The Trial Chamber takes the case of *Kostovski v. The Netherlands* before the European Court of Human Rights (Decision of November 20, 1989, Publications of the European Court of Human Rights, Series A-Vol. 166) as



a guidance as to what standards should be employed to ensure a fair trial can be ascertained. However, the situation before the Trial Chamber differs in one important aspect. In the *Kostovski* case, the accused never had the opportunity to question the anonymous witness at all.

In a separate opinion, Judge Stephen examined the terms of the Statute and Rules on the balance between the rights of the defense and the protection of victims and witnesses. In doing so, he sees a marked contrast in the language of Article 20 (1) of the Statute between what it says about ensuring that proceedings are contended with full respect for the rights of the accused and what it then says about proceedings being conducted with due regard for the protection of victims and witnesses.¹ In the opinion of Judge Stephen, Article 22 of the Statute does not provide for wholesale anonymity, but for protection by means of in camera proceedings, devices to avoid confrontation with the accused in court, and careful control of cross-examination.

XV. TERRORISM AND POLITICAL OFFENSE EXCEPTION TO EXTRADITION

A. 9th Circuit Court Reverses District Court and Orders Extradition of IRA Member

On July 27, 1995, the U.S. Court of Appeals for the 9th Circuit reversed and remanded for order allowing extradition of James Joseph Smyth, an Irish Catholic fugitive convicted of attempted murder of a prison guard, to the United Kingdom.¹

1. Background and District Court's Decision

Mr. Smyth was convicted of the attempted murder of a prison officer in Belfast, Northern Ireland in 1978 and sentenced to 20 years' imprisonment. In September 1983, Mr. Smyth escaped from the Maze Prison in Northern Ireland and arrived in San Francisco several months later. The U.K. seeks Smyth's extradition to Northern Ireland to serve the remainder of his prison term pursuant to the U.S.-U.K. Extradition Treaty of June 8, 1972,² and the Supplementary Extradition Treaty of June 25, 1985.³

The district court denied certification of extradition. The appeal requires the court for the first time to examine the unique defense to extradition found in the 1986 Supplementary Extradition Treaty between the U.S. and the U.K.

The Supplementary Treaty's key substantive provision, Article 3(a), establishes a defense to extradition. It provides:

Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality or political opinions, or that he would, if

¹ Original emphasis.

¹ U.S. v. James Joseph Smyth, 61 F.3d 711 (9th Cir. 1995).

² U.S.-U.K. Supplementary Extradition Treaty 28 U.S.T. 227.

³ U.S.-U.K., reprinted in S.Exec.Rep. No. 17, 99th Cong., 2d Sess. 15-17 (1986)(Supplementary Treaty).