Commentary by André Klip on the Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-link

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In issuing summons on request of the defence, the Trial Chamber rightly compensates the limited powers and possibilities of the defence in collecting evidence. Where the defence receives no cooperation from national authorities, Tribunal requests have to be complied with. In doing so the Trial Chamber fulfils a prerequisite for a fair trial. By indicating that the witness should be informed about the penalty for non-compliance, the Trial Chamber apparently takes the view that there is also a personal obligation to comply with Tribunal's orders. However, it does not indicate its legal basis. There is nothing in the Rules of Procedure and Evidence about non-compliance of witnesses. Rule 77 deals with the obligation to answer questions when before a Chamber only.[1] While the Trial Chamber accepts for some witnesses that there is no obligation to come to The Hague (those who may give testimony through video-links) it imposes an obligation on others. This seems to be contradictory.

In this decision the Trial Chamber tries to find a balance between theory and reality. In theory, a safe conduct will never be necessary, because the powers and jurisdiction of the Tribunal are unlimited and extended over the entire world. States have to cooperate with orders of the Tribunal, even if they have to change their law in order to comply with it. Giving a safe conduct to individual witnesses therefore means that the Tribunal voluntarily limits its own powers (as well as those of the Prosecutor).

The reality is of course different. Especially in the Serbian territories, the actual powers of the Tribunal and of its Prosecutor are in practice rather limited. The difficulties in obtaining the indicted Karadžić and Mladić before the Tribunal in The Hague are but an example of that situation. In trying to find solutions to such problems the Tribunal has to enter new legal land in almost any occasion.

Apart from the unwillingness of national authorities, the witness himself may be unwilling to come to the Tribunal. Witnesses may fear serious risks of reprisals. In this case the Tribunal, which has jurisdiction throughout the world, limits the safe conduct to the Netherlands. The comparison drawn by Trial Chamber between states that have issued orders for safe conduct for witnesses beyond their jurisdiction and the situation of the Tribunal, overlooks that the Yugoslav Tribunal always summons witnesses within its jurisdiction. In its effect the order is directed to the authorities of the Netherlands (who were already bound by the safe conduct provision of Article XVIII of the Host Country Agreement between the Netherlands and the United Nations) and to the Prosecutor of the Tribunal for his or her actions within the Netherlands. The effect of this is that there is no legal impediment for the Prosecutor to use his or her powers and to ask any other country in the world except the Netherlands to arrest and to detain the witness, while travelling to or from the Netherlands. The Prosecutor may request the state of residence or a transit state to make such an arrest. If the Prosecutor were to do so, it is certain that in the future no witness who would otherwise be willing to show up in The Hague, will ever do so. One must not forget that a safe conduct serves to take distrust and fear on the side of the witness away.

Other elements correspond much better with the rationale behind a safe conduct. The witness will be informed about the exact dates of commence and expiring of the safe conduct in the Netherlands. The Prosecutor may not take opportunity from any misfortune to the witness by illness or of arrest by the Netherlands for any new crimes, which might prevent him from leaving the country.

The Trial Chamber stresses that it prefers the appearance of the witness before it, instead of using video-links. However, with regard to some witnesses who are unwilling to come to the seat of the International Tribunal, it allows the use of video-link testimony. The Trial Chamber regards the evidentiary value of testimony provided by video-link weightier than that of testimony given by deposition, but not as weighty as testimony given in the courtroom.

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1 I regard both Rule 77 and Rule 91, introducing new crimes, as being beyond the mandate given to the Judges of the Tribunal in Article 15 of the Statute to adopt rules of procedure and evidence. See André Klip, Witnesses before the International Criminal Tribunal for the Former Yugoslavia, 67 International Review of Penal Law 1996, p.267-295.

The decision to allow video-link testimony should be welcomed in all its aspects. The Trial Chamber underlines the preference for having the witness in the courtroom. However, testimony by using video-link could present a sufficient alternative second best option. The guidelines to be followed in case of this testimony all tend to create a situation in which only the location of the witness is different from the courtroom. This corresponds to the rationale behind the use of this technique, to take away an obstacle for testifying.

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