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THE PROTECTION OF WITNESSES IN BOSNIAN WAR CRIMES TRIALS: A FAIR BALANCE BETWEEN THE INTERESTS OF VICTIMS AND THE RIGHTS OF THE ACCUSED?

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INTRODUCTION

In early war crimes trials such as in Nuremburg, documentary evidence was decisive in convicting the defendants. Witness evidence was of lesser importance.[1] By contrast, in Bosnian war crimes trials the testimony of witnesses is essential, forming much of the evidential weight upon which the courts decisions are based. If witnesses are not found or if they are unwilling or unable to give evidence in court, trials are unlikely to proceed.

Witnesses in war crimes trials are often at the same time victims of the most horrific acts of brutality. They are fearful and traumatised and are often reluctant to come to court and tell their story in public and in front of the accused. Specific measures to protect and support witnesses and victims are employed to enable witnesses to give evidence in court. They are designed to ensure their safety and to make the experience of testifying as minimally traumatic as possible.

However, witness protection can conflict with the rights of the defendant to a fair trial. The right to a fair trial includes the right of an accused to test his accuser through cross-examination in a public hearing. Where witnesses are granted anonymity or the public is removed to protect the witnesses, or documentary hearsay evidence is accepted in place of oral evidence from a witness, a fair trial can be compromised.

This article will focus on the use of protective measures in Bosnian war crimes trials at both the domestic War Crimes Chamber (WCC) in Sarajevo and at the International Criminal Tribunal for the Former Yugoslavia (ICTY) at The Hague The analysis will focus predominantly on the use of witness anonymity and the exclusion of the public from the trial chamber. Both

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[1] Joanna Pozen, *Justice Obscured: The Non-Disclosure of Witnesses Identities in ICTR Trials.* See *www.law.nyu.edu/ journals/jilp/issues/38/38_1_2_Pozen.pdf*

measures have been widely used in the Bosnian trials, rendering the fairness of the proceedings controversial.

In both courts, protective measures are provided for by law, just as due process and the rights of the defence are also fundamental requirements. Since the start of the Bosnian war crimes proceedings, both courts have struggled to strike a fair and appropriate balance between the interests of victims and the rights of the accused.

Arguments justifying the use of restrictive measures to protect victims and witnesses often follow a common theme: war crimes trials are unique, taking place in exceptional circumstances. As such, departure from ordinary standards of due process is necessary.

This article will look closely at the approach the courts have taken in balancing the interests of victims and the rights of the accused. Additionally it will examine whether anonymity and the removal of the public is consistent with the fundamental right of fair trial under the European Convention on Human Rights. Finally, the contention that war crimes trials in general take on a broader purpose than ordinary domestic criminal proceedings will be addressed by looking at the various aims which war crimes trials are said to have.

ESSENTIAL BACKGROUND

War broke out in Bosnia and Herzegovina (BiH) in the early 1990's following declarations of independence from Slovenia and Croatia and the subsequent break-up of Yugoslavia. In March 1992, Bosnia had its own referendum for independence. Bosnia has three main ethnic groups: Bosniaks (Bosnian Muslims), Croats and Serbs. Croats and Muslims both participated in the referendum, whilst the majority of the Serbian population boycotted the vote. In April 1992 the United Nations and the European Union officially recognised Bosnia as an independent state. Fighting broke out soon after. The conflict was long, widespread and brutal - and fought along ethnic lines. The scale and ferocity of the violence was something not seen in Europe since the Second World War. The siege of Sarajevo, Bosnia's capital, lasted for about four years, arguably making it the longest siege in modern military history.[2] The mass killing of Muslim men and boys in Srebrenica was the

[2] C S King, The Siege of Sarajevo, 1992-1995 (part of *Urban Operations: An Historical Casebook* available at: http://www.globalsecurity.org/military/library/report/2002/urbanoperationsintro.htm. See also *Study of the Battle and Siege of Sarajevo:* final report of the United Nations Commission of Experts established pursuant to security council resolution 780 (1992), S/1994/674/Add 2 (Vol II) 27 May 1994.

worst massacre and only genocide in Europe since 1945.[3] The conflict affected almost the entire population in every part of the country. It is estimated that between 150,000 and 250,000 people lost their lives.[4]

The conflict also saw the displacement of an estimated 2.2 million people. This was not a byproduct of war, but its very purpose.[5] It was part of the policy of "ethnic cleansing," the term used to describe "the elimination by the dominant ethnic group of a given territory of members of other ethnic groups within that territory."

This was achieved in Bosnia through a variety of methods, including harassment, beatings, torture, rape, summary executions, forced relocation, confiscation of property and destruction of homes and places of worship and cultural institutions.[6] Ultimately, "ninety percent of the pre-war Bosnian-Serb population left the area now called the Federation and over ninety-five percent of the pre-war Bosnian-Croat and Muslim inhabitants fled what would become the Republika Srpksa."[7]

The war ended in 1995 with the signing of the General Framework Agreement for Peace in BiH, commonly known as the Dayton Peace Agreement.[8] Following Dayton, Bosnia was and continues to be today an independent state, but under international administration. However Bosnia is not the same country it was before the outbreak of war. The war has left the Bosnian people with widespread fear and mistrust of one another.

Against this background, there was a clear need for a process of truth-telling, rebuilding trust and reconciliation. This would take many forms. It included a push to bring to justice those who had perpetrated the many horrific crimes that took place during the conflict.

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[3] J W Honig and N Both *Srebrenica: Record of a War Crime* (Harmondsworth: Penguin Books, 1997).

[4] Organisation for Security and Co-operation in Europe (OSCE), *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles* (March 2005) p 3. Bosnia currently has a population of approximately 3.8 million. *Source: United Nations Statistics Division: Population and Vital Statistics Report*. Series A Vol LIX No 2 1 July 2007 (http://unstats.un.org/unsd/demographic/products/vitstats/Sets/SeriesA_July2007_complete.pdf).

[5] C Dahlman and G O Tuathail "The Legacy of Ethnic Cleansing: The International Community and the Returns Process in post-Dayton Bosnia-Herzegovina" (2005) 24 *Political Geography* 569 at 573.

[6] UN Department of Public Information *The UN and the Situation in the Former Yugoslavia* (1995) at 65-66, in E Rosand "The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?" (1997-1998) 19 Mich J Int'l L 1091 at 1098.

[7] Ibid n 6 at 1100.

[8] Signed in Dayton, Ohio on 14 December 1995.

This was a process that in fact began even before the end of the war. On 25 May 1993, the United Nations Security Council unanimously adopted Resolution 827,[9] establishing the International Criminal Tribunal for the Former Yugoslavia.

The ICTY was given jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.[10] The Tribunal was given primacy over the jurisdiction of domestic courts to prosecute such offences[11] and the courts in Bosnia were obligated to provide unrestricted access to and cooperate with the Tribunal.[12]

The ICTY however, faced many difficulties in its early years and got off to a slow start. The first trial[13] did not commence until May 1996; a guilty verdict was returned on 7 May 1997.[14] The Tribunal was initially constrained in its ability to investigate crimes because it started operating (i) whilst the war was still ongoing and intensifying (ii) with limited resources and (iii) without a police force and a witness protection program.[15]

The ICTY has since made good progress.[16] As of 12 February 2008, the Tribunal had concluded 111 cases out of a total of 161 indicted accused.[17] As trials progressed at The Hague, and as more time elapsed since the end of the war, there was a push to conduct trials in Bosnia as well. As remarked by Human Rights Watch, "fair and effective trials of the remaining perpetrators at the *domestic level* are necessary to further combat impunity in the former

[9] Adopted under Chapter VII of the UN Charter. Available at http://www.un.org/icty/legaldoc-e/basic/statut/S-RES-827_93.htm.
[10] Ibid at para 2.
[11] ICTY Statute Article 9 (2).
[12] Article II (8) General Framework Agreement for Peace in BiH provides that; "All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law."
[13] *Dusko Tadić - Prosecutor v Tadić,* No IT-94-1-T.
[14] Opinion and Judgment", *Prosecutor v Dusko Tadić,* Case No: IT-94-1-T, T Ch II, 7 May 1997.
[15] *Prosecutor v Tadić*, Decision on Prosecution Motion for Protective Measures for Witnesses, IT-94-1-T, 10 August 1995 at paragraph 27.
[16] See Human Rights Watch, *Real Progress in The Hague*, 29 March 2005 available at http://www.hrw.org/english/docs/2005/03/29/serbia10386.htm
[17] ICTY website: http://www.un.org/icty/glance-e/index.htm

Yugoslavia and build respect for the rule of law."[18] The new War Crimes Chamber of Bosnia and Herzegovina, situated in the Bosnian State Court in Sarajevo, was formally established in January 2005.[19] The court has jurisdiction to try war crimes cases involving intermediary and lower-level accused[20] transferred from the ICTY,[21] and also holds territorial jurisdiction.[22]

The underlying principle of the WCC is that "accountability for the gross violations of human rights that took place during the conflict is of concern to all humanity but ultimately remains the responsibility of the people of Bosnia and Herzegovina themselves."[23] The court has a fully functioning Witness Protection Support Unit, offering witness support before, during and after hearings.[24] The court also operates under measures designed to ensure that defendants receive a fair trial. The defendant's rights and standards of due process are enshrined in the ECHR,[25] which has been adopted in the Bosnian Constitution.[26]

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[18] Human Rights Watch, Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber (Feb 2007); p 1; See also section IV. Witness Protection and Support.

[19] War Crimes Chamber Project: Project Implementation Plan Registry Progress Report available at http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf

[20] Security Council Briefed on Establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina. UN Press Release SC/7888 October 8 2003 available at http://www.un.org/News/Press/docs/2003/sc7888.doc.htm

[21] These will include cases under Rule 11 bis ICTY Rules of Procedure and Evidence which provides for the transfer of cases where an indictment has been confirmed. Additionally cases can be transferred by the Office of the Prosecutor at the ICTY where an indictment has not yet been confirmed.

[22] Chapter IV Bosnia & Herzegovina Criminal Procedure Code. For an in depth discussion of the territorial jurisdiction of the Bosnian State Court, which has been controversial, see OSCE Report: War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles. March 2005.

[23] Human Rights Watch, above n 18.

[24] Human Rights Watch, Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina (Feb 2006). See section V Witness Protection and Support.

[25] Article II of The Constitution of Bosnian & Herzegovina provides that: 'The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law. Bosnia signed the ECHR on 24/04/2002; it was ratified on 12/07/2002 with immediate effect. See http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=3&DF=2/19/2008&CL=ENG.

[26] The General Framework Agreement for Peace in Bosnia and Herzegovina was signed on December 14, 1995, Annex 4, The Constitution of Bosnia and Herzegovina, art. II(3)(e), http://www.ohr.int/dpa/default.asp?content_id=379

THE USE OF PROTECTIVE MEASURES AND THE BALANCE OF COMPETING INTERESTS TAKEN BY THE COURTS

> "In war crimes trials, as with any criminal case, the reliable and comprehensive testimony of witnesses is essential to a fair and effective procedure."[27]

The question is - are war crimes trials akin to just 'any criminal case'? Should victims and witnesses in such situations of conflict with extreme and widespread violations of human rights be afforded greater protections, even if potentially at the expense of the rights of the accused? Or do such cases have a broader purpose for post-conflict societies and the international community that they must be held to strict standards of fair trial and rights of the accused? At the same time there is a considerable body of opinion which holds the view that the reliability of witness testimony can only be properly tested under cross examination.[28] However, for witnesses' testimony to be 'comprehensive', witnesses need also to be willing and able to come forward and testify in safety and without fear.[29] This debate concerning the rights of the accused and the rights of the victims and witnesses has played out in trials concerning the war in Bosnia and Herzegovina - at the ICTY and more recently at the WCC of the Bosnian State Court.

(i) Anonymity

Article 21 of the Statute of the ICTY, on the "Rights of the Accused" was adopted almost verbatim from Article 14 of the International Covenant on

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[27] OSCE, *above* n 4 at 23.

[28] See Colin T McLaughlin "Victim and Witness Measures of the International Criminal Court: A Comparative Analysis" (2007) 6 *The Law and Practice of International Courts and Tribunals* 189 at 207; Monroe Leigh "Witness Anonymity is Inconsistent with Due Process" (1997) 91 *The American Journal of International Law* 80 at 80-81; Human Rights Watch, *above* n 18 at 31; Pozen, *above* n 1 at 291; Vincent M Creta "The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and the Rules of Evidence of the International Criminal Tribunal for the Former Yugoslavia" (1997-1998) 20 Hous J Int'l L 381 at 400.

[29] See Christine M Chinkin, "Due Process and Witness Anonymity*"* (1997) 91 *The American Journal of International Law* 75 at 76; Alex C Lakatos "Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights" (1994-1995) 46 *Hastings LJ* 909 at 920-921; Jonathan Doak "The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals" (2003) 23 *Legal Studies* 15 at 21.

Civil and Political Rights (ICCPR). It specifies a number of minimum guarantees to which the accused is entitled, including the right "to examine, or have examined, the witnesses against him."[30] Article 21(2) states, "the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute." Article 22 states that the Tribunal shall provide for protection of victims and witnesses with measures that "shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."[31] The Statute differs from the ICCPR by qualifying the accused's right. Rule 69(A) of the ICTY Rules of Procedure and Evidence explains further: "In exceptional circumstances, the Prosecutor may apply to a Judge or 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."

In *Prosecutor v Tadić*, the first case to be tried (whilst the war was ongoing) at the ICTY – the majority opinion in the Protective Measures Decision stated: "A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses."[32] Judge McDonald argued that by including an "affirmative obligation to protect victims and witnesses" the drafters of the Statute recognised the "unique" context of the ICTY. This context entailed operating during a continuing conflict and without a witness protection programme.[33]

The prosecution's main protective measures included anonymity, whereby victims and witnesses would not be identified to the accused or to his lawyers; and confidentiality, whereby victims and witnesses would not be identified to the public and the media.[34] The majority granted anonymity to four witnesses and confidentiality to many more.[35] In so doing, it emphasised the need to balance interests: "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."[36] The judgment provided five guidelines on how to balance these interests with respect to granting witness anonymity:

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[30] Article 21(4)(e), Statute of the International Criminal Tribunal for the Former Yugoslavia; see Antonio Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights" (1997) 2 *European Human Rights Law Review* 329 at 333.

[31] Article 22, Statute of the ICTY.

[32] *Tadić, above* n 15 at para 55.

[33] Ibid at paras 26-27.

[34] Natasha A Affolder "Tadić, the Anonymous Witness and the Sources of International Procedural Law" (1997-1998) 19 Mich. J Int'l L 445 at 452.

[35] *Tadić, above* n 15 at paras 84-85 and disposition.

[36] Ibid, at para 84.

> "First and foremost, there must be real fear for the safety of the witness or her or his family … Secondly, the testimony of the particular witness must be important to the Prosecutor's case … Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy … 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 … Finally, any measures taken should be strictly necessary."[37]

Applying these five factors, and considering the ongoing-armed conflict to be an "exceptional circumstance *par excellence,*" the majority opinion concluded that anonymous testimony is consistent with the ICTY's Statute and Rules of Procedure and Evidence.[38]

While agreeing with other majority protective measures granted, Judge Stephen was strongly opposed to anonymity. He stressed that the qualification in Article 21(2) must apply solely to "the public quality of the hearing and not its fairness."[39] In examining Article 22, he relied on the Secretary-General's Report, which when introducing the article, refers to the need for protection measures "especially in cases of rape and sexual assault."[40] In such cases, Judge Stephen stated that protection is needed not because witnesses in such cases have a greater fear of retaliation, but because of the potential negative social consequences of it being known in communities that one was raped; combined with retraumatisation from facing one's attacker in court. He noted that the customary measures for these are in camera proceedings and careful control of cross-examination. As such, he concludes that it is such measures, and "not any wholesale anonymity of witnesses," that Article 22 addresses.[41] Wholesale anonymity, he asserted, would violate the accused's right to examine witnesses – and ultimately, the right of the accused to a fair hearing. The accuser, he stressed, "would appear as no more than a disembodied and distorted voice transmitted by electronic means" – yet his or her testimony could be used as evidence to convict the accused on very serious charges.[42]

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[37] Ibid, at para 62-66.
[38] Ibid, at para 61 and 57-59.
[39] *Prosecutor v Tadić*, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995).
[40] Ibid; see Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (S/25704) at para 108.
[41] Ibid Judge Stephen.
[42] Ibid; see also Affolder, above n 34, at 461.

Human rights commentators and NGOs have also critiqued the use of anonymity.[43] They assert that non-disclosure of the identity of accusing witnesses prevents the accused from conducting background searches of the witness; and prevents the accused from properly preparing for and effectively conducting cross-examination.[44] Further, anonymity precludes the accused from challenging the reliability of the witness' testimony based on the accused's personal knowledge of the situation and the person involved; and based on monitoring the witness in court.[45] As such, critics consider anonymity to be a violation of the right of the accused to a fair trial.

Since *Tadić*, the ICTY has moved in the direction of Judge Stephen's dissent – and has not granted any further complete witness anonymity measures. Although the Trial Chamber adopted the five guidelines laid out in *Tadić* in a subsequent case, *Prosecutor v Blaškić,* it applied a more restrictive interpretation of them. Its approach was more favourable to the accused:

> "[T]he victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media."[46]

By distinguishing between the periods before and after the commencement of a trial, the Chamber acknowledged the need for the accused to know the identities of witnesses in sufficient time in order to prepare for cross-examination.[47] This progression in ICTY jurisprudence is logical given the development of the Tribunal's witness protection programme, which had been absent at the time of *Tadić*.[48] The Chamber also found that the "fundamental exceptional circumstance" - an ongoing-armed conflict in central Bosnia, which could justify the granting of anonymity to one or more witnesses, no longer existed.[49] As a result of these findings, the Chamber denied the non-disclosure request by the Prosecution and ordered the prosecutor to give the defence, unredacted copies of the statements of

[43] Leigh, above n 28 at 80-81; Human Rights Watch, above n 24 at 31.
[44] Ibid; see also McLaughlin, *above* n 28 at 207.
[45] McLaughlin, ibid; and Doak, *above* n 29 at 17.
[46] *Prosecutor v Blaškić*, Case; Decision on the Application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses, Case no. IT-95-14-PT, 5 November 1996, paragraph 24; cited in 3 March 2000 Judgment, IT-95-14-PT, paragraph 50.
[47] Pozen, *above* n 1 at 294.
[48] Ibid.
[49] *Prosecutor v Blaškić*, above n 46.

witnesses.[50] It did, however, order that the defense must not disclose the information publicly[51] and granted special protection to some of the witnesses.[52]

The Trial Chamber in *Prosecutor v Brđanin and Talić* also disallowed the Prosecution's redaction of names in all the statements of witnesses. It concluded that:

> "[T]he prevailing circumstances within the former Yugoslavia cannot by themselves amount to exceptional circumstances. This Tribunal has always been concerned solely with the former Yugoslavia, and Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand … [T]o be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established."[53]

The Chamber was not satisfied that there had been any such significant change, which would allow for these anonymity measures. It also emphasised that there can be no blanket anonymity, as this would presume that *every* witness is "in danger or at risk" (as Rule 69(A) describes them), or "vulnerable."[54] The Chamber set out three criteria for deciding whether delayed disclosure requests under Rule 69(A) should be granted. These criteria were cited with approval in *Prosecutor v Stanišić and Simatović*; and again in *Prosecutor v Perišić*:

> a)"the likelihood that Prosecution witness will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not to the public,
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> b) the distinction which must be drawn between measures to protect individual victims and witnesses in the particular trial, which are

[50] *Prosecutor v Blaškić* Case No IT-94-1, Decision of Trial Chamber I on the Applications of the Prosecutor, 24 June and 30 August 1996 in Respect of the Protection of Witnesses, 2 October 1996.
[51] *Prosecutor v Blaškić* Case No IT-94-1, 19 September 1996, 2 October 1996.
[52] *Prosecutor v Blaškić* Case No IT-94-1, 5 November 1996, 6 May 1998.
[53] *Prosecutor v Brdanin and Talić* Case No: IT-99-36, Decision on Motion by Prosecution for Protective Measures (ICTY Trial Chamber 3 July 2000) paragraph 11.
[54] Ibid at paras 11, 16-17. The Chamber rejected the prosecution's argument that the "exceptional circumstances" was an inherent feature of the post-war landscape, justifying non-disclosure (paragraph 20); see also Cristian DeFrancia "Due Process in International Criminal Courts: Why Procedure Matters" (2001) 87 *Virginia Law Review* 1381 at 1419.

> permissible under the Rules, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future, which are not, and
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> c) the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused."[55]

In *Perišić,* the Chamber concluded that the Prosecutor must give the defence a reasonable time to properly prepare for cross-examination. It confirmed that this requires full disclosure of the identities and statements of witnesses to be given no later than 30 days before the trial – consistent with the general practice of the Chamber.[56]

The ICTY has made a marked move in its jurisprudence away from total anonymity from the accused. However, this does not necessarily mean that this remedy is a "dead letter."[57] Rather, the prospect of anonymity continues with every war crimes prosecution, given the "unusual dangers" faced by witnesses in such cases and the "limited ability" to protect them.[58]

In addition, many war crimes prosecutions involve cases of rape and sexual assault – for which special protections of witnesses are imperative. As discussed, the Secretary General's report – cited in *Tadić,* stressed that protection should be granted especially in such cases. The Chamber in *Tadić* also noted that rape and sexual assault could have a permanent detrimental impact on the victim.[59] As such, decisions on protective measures cannot be based on a continuum focusing on the absence or presence of an armed conflict or on the degree of stability in the former Yugoslavia. Protections advocated for victims of rape and sexual assault usually centre upon excluding the public;[60] however, it is also recognised that victims of sexual violence in particular can be retraumatised through confrontation with the

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[55] *Prosecutor v Perišić*, Case No: IT-04-81, Decision on Prosecution Motion for Protective Measures for Witnesses (ICTY Trial Chamber 27 May 2005) citing *Prosecutor v Stanisic and Simatovic*, "Decision on Confidential Prosecution Motions for Protective Measures", Case No IT-03-69-PT, 26 October 2004 citing *Prosecutor v Brdjanin & Talic*, "Decision on Motion by Prosecution for Protective Measures", Case No IT-99-36-PT, 3 July 2000, para 26-38.

[56] Ibid, *Perišić.*

[57] See Gregory S Gordon "Toward an International Criminal Procedure: Due Process Aspirations and Limitations*"* (2007) *Columbia Journal of Transnational Law* 635 at 695 and DeFrancia, above n 54 at 1420.

[58] Ibid, Gordon.

[59] *Tadić,* above n 15 at para 46. See also Doak, above n 29 at 21.

[60] It has been noted that testifying about rape and sexual assault is particularly difficult in public, and can result in rejection by the victim's family and community. See *Tadić,* above n 15 at para 46.

accused in trial. As such, they may refuse to testify unless granted anonymity.[61]

Further, although anonymity has not yet been a key issue in the War Crimes Chamber of the Court of Bosnia and Herzegovina, there may be greater potential for it to arise at the WCC and at other war crimes trials in the country.[62] As will be discussed below, it could be argued that the "unusual dangers" and "limited ability to protect" are more pronounced in war crimes trials in Bosnia. As such, two of the determining factors in the majority judgment in *Tadić* - "exceptional circumstances" and the absence of a witness protection programme could re-emerge in these trials.

The application and interpretation of "exceptional circumstances" by the ICTY has been outlined above; however, there are additional factors that require consideration in present day Bosnia. An OSCE report from 2005 describes the way in which the situation has changed for many witnesses in the context of refugee and displaced person return:

> "Many witnesses now live in an environment different to the one in which they originally gave evidence to the police or prosecutors. Many gave statements to judges, police and prosecutors of their own ethnicity shortly after the event or after the war. In may cases, the same people then moved abroad or to a community in BiH dominated by members of their own ethnic group. They did not foresee the time when the suspect or the suspect's family would become their neighbour once more or that they would be living in neighbouring communities with full and unchecked freedom of movement … Feedback from OSCE trial monitors indicates that, especially in cases where defendants are powerful political figures or businessmen, ordinary citizens feel intimidated to act as witnesses."[63]

The report notes further the difficulties that prosecutors' offices face in getting witnesses to come to court, particularly returnees whose families are

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[61] See McLaughlin, above n 28 at 206; and Lakatos, above n 29 at 920.

[62] *Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, "Official Gazette" of Bosnia and Herzegovina*, No 3/03: Article 12: Limitation of the right of an accused and his defense attorney to inspect files and documentation, (1) In exceptional circumstances, if revealing some or all of the personal details of a witness or other details would contribute to identifying a witness, and would seriously endanger the witness under threat, the preliminary proceedings judge may, upon the motion of the Prosecutor, decide that some or all of the personal details of a witness, may continue to be kept confidential after the indictment is issued.

[63] OSCE, above n 4 at 23-24. The report notes that during the *Konjic 7* proceedings at the Mostar Cantonal Court, a number of prosecution witnesses reneged on their original statements.

living in the entity, canton or village in which they are now a minority. They note that retaliatory measures may go beyond social exclusion and social stigma to more violent actions.[64]

Regarding witness protection programmes, although the War Crimes Chamber has a solid programme in place,[65] challenges remain. These stem from the general concerns related to conducting trials in the location where the crimes occurred; and difficulties with concealing the identity of witnesses in a small country.[66] Of much concern as well is the safety of witnesses giving testimony at war crimes trials at entity and cantonal courts. While protection systems may be sufficient at the state court level, witness protection measures at the sub-state level remain minimal and weak.[67]

Thus, while more recent jurisprudence of war crimes trials concerning Bosnia and Herzegovina has not granted witness anonymity, there is still the potential for such measures to become an issue again in future trials.

(ii) Exclusion of the Public

Article 20(4) of the ICTY Statute states that "hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence." In *Tadić,* the Chamber recognised this preference for a public hearing; and the benefits of press and public access in helping to ensure a fair trial. However, it added that this requirement had to be "balanced with other mandated interests, such as the duty to protect victims and witnesses."[68] Rule 75 provides for various measures to shield a witness from the view of the public and/or the accused, including expunging identifying information from public records; image- or voice-altering devices or closed circuit television; or closed sessions. Closed sessions, which exclude the press and public, can be ordered by the Chamber for reasons of safety, security or non-disclosure of the identity of a victim or witness; public order or morality; and the protection of the interests of justice.[69] They are often used in cases involving rape and sexual assault in order to make it easier for victims to speak about these sensitive and distressing matters; and to protect victims from rejection by their family and community.

In addition to protecting victims and witnesses from the public and media, such measures can be further beneficial in that they are much less intrusive to

[64] Ibid, at 26.
[65] Human Rights Watch discusses favourably the Witness Protection Unit and the Witness Support Office of the State Court in promoting the safety and well-being of witnesses; see Human Rights Watch, above n 24 at 29)
[66] Ibid.
[67] See OSCE, above n 4 at 26-28.
[68] *Tadić*, above n 15, para 32-33.
[69] Rule 79, ICTY Rules of Procedure and Evidence.

the right of the accused to a fair trial than anonymity. They allow for the accused to know the identity of the witness and to fully prepare cross-examination.[70]

Under Bosnian law, there is also a presumption that trials will be public – as specified in Article 234(1) of the Criminal Procedure Code (CPC) of BiH.[71] The CPC also allows for exceptions under Article 235. The public can be excluded at any time during the main trial "if it is to protect the public peace and order, to preserve morality in the democratic society, to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness."[72] The Court has allowed a number of closed sessions, under this provision, which has been criticised.[73]

In *Prosecutor v Samardžić,* the Court recognised that a "public hearing is an essential feature of the right to a fair trial." However, it decided to allow the Prosecutor's motion to close the main trial to the general public and press in order to protect the interests of the victims and witnesses.[74] Many of the witnesses were women who were to testify about rapes and other humiliating treatment, some of who were minors and children at the time of the offence or the hearing. The Court found that testifying about such matters in public is a risk to the personal and intimate life of witnesses; their identity could be deduced from the subject matter of their testimony, even if protective measures such as screen and voice distortion were used. In addition, the Court considered that such testimony in public could be a risk to other victims should the witnesses mention their names during the proceedings.[75]

In *Prosecutor v Stanković,* the Court decided pursuant to Article 235 to close the entire main trial to the public as a rule. Ultimately, some exceptions were made during the Prosecutor's presentation of evidence; and after hearing the witnesses for the Prosecution, the continuation of the main trial was

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[70] McLaughlin, above n 28 at 199.

[71] "Official Gazette" of Bosnia and Herzegovina, No 3/03; Criminal Procedure Code (CPC) Bosnia and Herzegovina.

[72] Article 235 of the CPC also allows for exclusion of the public if "in the interest of the national security, or if it is necessary to preserve a national, military, official or important business secret."

[73] Human Rights Watch, *above* n 18 at 31.

[74] *Prosecutor v Samardžić,* Case No. X-KR-05/49, Decision of First Instance of 7 April 2006, pp 8-9. The main trial was closed to the public from 6 March 2006 and reopened on 30 March 2006. Another reason given by the Court for closing the trials was that the witnesses could give the names of other alleged perpetrators linked to the crimes of rape and sexual slavery.

[75] Ibid, at 9; The ICTY in *Tadić* had also recognised that the special concerns of victims of sexual assault must be considered in deciding whether to allow for closed sessions.

public, except for when discussing protected witnesses.[76] The witnesses in *Stanković* also testified about a large number of rapes and other humiliating treatment. The decision to close the trial was based on the need to preserve morality and, as in *Samardžić,* to protect the personal and intimate life of injured parties; and other victims and witnesses.[77] In addition, there were concerns that *Stanković* would disclose to the public the identities and addresses of the witnesses for the Prosecution, which he had threatened to do before the ICTY.[78]

In both these cases, the Court allowed for representatives of the OSCE and other international institutions to attend the closed sessions, pursuant to Article 236 of the CPC.[79] Still, the broad use of closed sessions has been a concern. A report by Human Rights Watch emphasises that the right to a public trial is one of the fundamental safeguards of criminal procedure[80] and questions the need to exclude the public.

Other human rights commentators and NGOs have also critiqued the exclusion of the public and its potential to result in a violation of the rights of the accused. While closed sessions and non-disclosure of witness identities to the public does not threaten the right of the accused to cross-examination, the absence of public scrutiny could allow for witnesses to give false or misleading testimony.[81] The importance of public scrutiny of trial testimony in deterring such false or misleading testimony is a key reason why the accused's right to a public trial is considered a fundamental safeguard of criminal procedure and fairness.[82] Further, the right to a public hearing is expressly provided for by Article 6 of the European Convention on Human Rights (ECHR), as discussed in the following section.

ECHR COMPATIBILITY

To what extent then are the rules and procedure of the WCC compatible with the rules of criminal procedure as laid down in the ECHR which Bosnia has signed and ratified?

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[76] *Prosecutor v Stanković*, Case No X-KR-05/70, Decision of First Instance of 14 November 2006, pp 12-13.

[77] Ibid. The Court also cited as a reason for closing the trials that the witnesses could give the names of other alleged perpetrators linked to the crimes of rape and sexual slavery.

[78] Ibid.

[79] Article 236 of the CPC provides for "Persons to Whom Exclusion of the Public Is Not Applicable".

[80] See ICCPR, art 14(1); ECHR, art 6(1); Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, GA Res. 217A(III), UN Doc A/810 at 71 (1948), art 11), cited in Human Rights Watch, *above* n 17 at 32.

[81] Pozen, above n 1 at 291; Human Rights Watch, above n 18 at 31.

[82] Pozen, ibid; Creta, above n 28 at 400.

(i) Anonymity

Article 6 ECHR provides that:

> "Everyone charged with a criminal offence has the following minimum rights: to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him…"[83]

This provision has been subject to the Strasbourg Court's interpretation on a number of occasions,[84] however the court has not always been consistent in its interpretation. The Law Commission of England and Wales observed that the Strasbourg jurisprudence in this area of the law is "difficult to predict with confidence"[85] and another commentator described the cases as "impossible to reconcile with each other."[86] While this may be true to a degree there are nevertheless principles that can be extracted from the court's rulings when taken as a whole. Further these principles are applicable to the use of anonymous witnesses in criminal trials. To date however there are no Strasbourg cases on Article 6 (3) that address the use of witness anonymity in war crimes trials.

The arguments both for and against the use of anonymous witnesses in cases involving serious breaches of international human rights law are often of a greater intensity than is normally the case in domestic legal proceedings. This can complicate any prediction as to how the Strasbourg authorities would approach or rule in a case involving war crimes, particularly given the inconsistency in its jurisprudence to date. Nevertheless the basic legal framework of course remains the same.

The Strasbourg court has ruled in a number of cases that the constituent rights in Article 6 are not in themselves absolute and its interpretation is primarily a matter for the national authorities.[87] In *Luca v Italy*[88] the court

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[83] Article 6 (3) (d) European Convention on Human Rights.

[84] The word witness has been interpreted to included a person who has made a formal statement to the police, which the prosecution has then put in evidence at trial; *Kostovski v The Netherlands* (1990) 12 EHRR 434, para 40; *Delta v France* (1993) 16 EHRR 574, para 34; *Artner v Austria* (1992) Series A No 242, para 19; and *Windisch v Austria* (1991) 13 EHRR 281, para 23.

[85] Law Commission No 245, Hearsay and Related Matters 1997 (Report No 245); available at http://www.lawcom.gov.uk/docs/lc245.pdf at para 5.1.

[86] W O'Brian "The Right of Confrontation: US and European Perspectives" (2005) 121 *Law Quarterly Review* 481.

[87] See for example *Edwards v United Kingdom* (1992) 15 EHRR 417, paras 33-34; *Miailhe v France* (No 2) (1996) 23 EHRR 491, para 43; *Rowe and Davis v United*

held that "The admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair."[89]

Article 6 (3) (d) is expressly focused on the right of the defence to ask questions or confront witnesses. Witness anonymity will prevent or restrict the defence from challenging a witness's evidence sufficiently, but a number of Strasbourg cases indicate that it is the confrontation rather than the anonymity with which the court is primarily concerned.

In *Kostovski v Netherlands*[90] the applicant was convicted on the basis of evidence provided by anonymous witnesses and was additionally denied the opportunity to put questions in cross examination. The court held that the rights of the defence to confrontation under Article 6 had been restricted and the anonymity issue had "compounded the difficulties faced by the applicant".[91] Significantly the court observed:

> "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. The dangers inherent in such a situation are obvious"[92]

However the court also made clear that this is not absolute and there can be exceptions even where there has been confrontation:

> "These rights require, as a rule, that an accused be given, at some stage in the proceedings, an adequate and proper opportunity to challenge and question a witness against him."[93]

Kingdom (2000) 30 EHRR 1, para 59. *Adolf v Austria* (1982) 4 EHRR 313, 324-325, para 36, where the Court, citing *Guzzardi v Italy* (1980) 3 EHRR 333, 361, para 88, and *X v United Kingdom* (1981) 4 EHRR 188, 202, para 41; *Salabiaku v France* (1988) 13 EHRR 379.

[88] *Luca v Italy* (2003) 36 EHRR 46.

[89] Ibid, at H 6 (b).

[90] *Kostovski v Netherlands* (1990) 12 EHRR 434.

[91] Ibid.

[92] Ibid, at para 42.

[93] Ibid, at para 41.

It is questionable however that, even where there is an opportunity to challenge an anonymous witness, it can be considered 'adequate and proper' given the difficulties outlined in *Kostovski,*[94] with which the defence are faced.

The Strasbourg court will also evaluate the weight attached to evidence from anonymous witnesses and the extent to which a conviction is based on such evidence in determining whether the defendant's rights under Article 6 (3) are restricted. In *Windsch v Austria*[95] the court found a violation of Article 6 where the applicant's conviction was based "to a large extent"[96] on statements made by anonymous witnesses to the police. Here the court observed that "the right to a fair administration of justice hold so prominent in democratic society that it cannot be sacrificed."[97]

In *Unterpertinger v Austria*[98] the court found a violation of Article 6 (3) where the applicant was convicted 'mainly' on statements of witnesses who did not attend court. This decision is difficult to reconcile with the later ruling in *Artner v Austria*.[99] In both cases there were absent witnesses with corroborating medical evidence, but in *Artner* no violation was found. Three dissenting judges in *Artner* viewed the cases as indistinguishable.[100]

In *Luca v Italy*[101] the court held that:

> "where a conviction is based *solely or to a decisive degree* [emphasis added] on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Art 6."[102]

While the words "to a large extent" and "mainly" were used in *Windsch*[103] and *Unterpertinger,*[104] *Luca*[105] uses 'solely or to a decisive degree'. However,

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[94] Ibid, at 90.
[95] *Windisch v Austria* (1991) 13 EHRR 281.
[96] Ibid, at para 31.
[97] Ibid, at para 30.
[98] *Unterpertinger v Austria* (1991) 13 EHRR 175.
[99] *Artner v Austria* (1992) Series A No 342.
[100] Ibid. The decision was based on a five to four vote and provoked a strong dissent. See Joint Dissenting Opinion of Judges Walsh, Macdonald and Palm who held that without the use of the statements no conviction could have been obtained.
[101] *Luca v Italy* (2003) 36 EHRR 46.
[102] *Luca v Italy* (2003) 36 EHRR 46 at H 8 (d).
[103] *Windisch v Austria* (1991) 13 EHRR 281.
[104] *Unterpertinger v Austria* (1991) 13 EHRR 175.

in *Ludi v Switzerland*[106] it was enough that the evidence "played a part" in the conviction.[107] In the more recent case of *Krasniki v Czech Republic*[108] a conviction based solely on the evidence of anonymous witnesses was not considered unsafe, but the court held the need for anonymity must be clearly established. These cases are slightly confusing, leaving the correct position difficult to predict with certainty. What is clear it that the court has made a significant departure from the language used in the text of Article 6 itself, which states very clearly the "minimum rights" to which the defendant is entitled.

The Strasbourg court has, however, emphasised that for restrictive measures to be applied, they must be "strictly necessary" to be permissible under Article 6.[109] The court will look to strike a balance between competing interests, and in a number of cases has held that where the defendant's rights are limited, this must be strictly necessary and done by the least restrictive means possible to achieve a given aim.

In *Ludi v Switzerland,*[110] the court found that the applicant's conviction, based on unchallenged evidence given by anonymous police agents, was disproportionate. It was not their anonymity per se which the court found impermissible, but that the defence had not been given the opportunity to put questions to the witnesses. The court held that "it would have been possible to do this in a way which took into account the legitimate interest of the police authorities in a drug trafficking case in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future."[111]

In *Saidi v France*[112] the applicant was denied requests to confront anonymous police officers and was convicted under dangerous drugs legislation. The Respondent argued that "the protection of witnesses takes priority and their legitimate interest in remaining anonymous must be protected, so as to strengthen measures to combat drug trafficking."[113] This argument, clearly having little regard for due process and 'minimum rights alike, was rightly rejected by the court which held it was "fully aware of the undeniable difficulties of the fight against drug-trafficking particular with regard to obtaining and producing evidence and of the ravages caused to

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[105] *Luca v Italy* (2003) 36 EHRR 46.
[106] *Ludi v Switzerland* (1993) 15 EHRR 173
[107] W O'Brian "The Right of Confrontation: US and European Perspectives" (2005) 121 *Law Quarterly Review* 481.
[108] *Krasniki v Czech Republic* (Application No 51277/99).
[109] *PS v Germany* (2003) 36 EHRR 61; [2002] Crim LR 312.
[110] Above n 107.
[111] *Ludi v Switzerland* (1993) 15 EHRR 173 at paragraph 49.
[112] *Saidi v France* (1994) 17 EHRR 251.
[113] Ibid, at para 33.

society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of "everyone charged with a criminal offence"[114]

Nevertheless in the later case of *Van Mechelen v Netherlands*[115] the court recognised that there can be special categories of witnesses and that the "balancing of the interests of the defence against arguments in favour of maintaining the anonymity of the witnesses raises special problems if the witnesses in question are members of the police force of the state."[116] Such witnesses' interest in remaining anonymous is, the court held, "to some extent different from that of disinterested witnesses or victims."[117] Particular regard was given to the preservation of undercover agents and the protection of their families.[118]

The court did however reiterate the importance of the right to a fair administration of justice in a democratic society, and that any measures restricting the rights of the defence should be strictly necessary – "if a less restrictive measure can suffice then that measure should be applied." Here the defence was unaware of the identity of the police witnesses and was also prevented from direct questioning. The court viewed this as disproportionate and held that "it has not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered."[119] A violation of Article 6 was thus found.

(ii) The Rights of Witnesses

Another important issue for which the Strasbourg authorities will have regard when assessing the permissibility of witness anonymity, is the Convention rights of the witnesses themselves.[120]

In *Doorson v Netherlands,*[121] the court found there was sufficient reason to maintain the anonymity of drug addicts giving evidence against drug dealers and concluded that "drug dealers frequently resorted to threats and

[114] Ibid, at para 44.
[115] *Van Mechelen v Netherlands* (1998) 25 EHRR 647.
[116] Ibid, at para 2.
[117] Ibid, at para 56.
[118] Ibid, at para 56.
[119] Ibid, at para 60.
[120] Article 2 ECHR provides 'Everyone's right to life shall be protected by law. No one shall be deprived of his life…' and Article 8 ECHR provides 'Everyone has the right to respect for his private and family life, his home and his correspondence.'
[121] *Doorson v Netherlands* (1996) 22 EHRR 330.

actual violence against persons who gave evidence against them."[122] Significantly the court observed that:

> "It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."[123]

Although the court accepted that the anonymity of the witnesses "presented the defence with difficulties which criminal proceedings should not normally involve…" it held that "nevertheless, no violation of Article 6 (1) taken together with Article 6 (3) (d) of the Convention can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities."[124] Here the court found that the questioning of the anonymous witnesses "at the appeals stage in the presence of counsel by an investigating judge who was aware of their identity"[125] was a sufficient counterbalancing procedure.[126] Of course these cases cited in the Strasbourg jurisprudence relate to domestic violence, drug dealing and other ordinary domestic offences and not to war crimes.

However, the test for compatibility of witness anonymity with Convention rights as established by the ECHR was adopted by the ICTY in *Prosecutor v Tadić*.[127] The Tribunal in *Tadić* evaluated and distinguished the *Kostovski*[128] decision which the Tribunal viewed as "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."[129]

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[122] Ibid, at para 71.
[123] Ibid, at para 70.
[124] Ibid, at para 73.
[125] Ibid, at para 73.
[126] Ibid, at para 73.
[127] *Prosecutor v Tadić*. No IT-94-1-T.
[128] *Kostovski v Netherlands* (1990) 12 EHRR 434.
[129] *Tadić*, *above* n 14 at para 68.

The Tribunal also found that *Kostovski*[130] does provide 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."[131] The following guidelines were stated by the Tribunal to achieve this purpose:

> "Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony. Secondly, the Judges must be aware of the identity of the witness, in order to test the reliability of the witness. 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."[132]

The Tribunal also attempted to distinguish trials in a war crimes context:

> "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."[133]

Dissenting Judge Stephen disagreed strongly[134] and could not so distinguish Kostovski[135] which he regarded as "clear guidance as to what are internationally recognised standards regarding the rights of the accused."[136] It may perhaps be seen as some-what odd that the majority in *Tadić* clearly felt

[130] *Kostovski v Netherlands* (1990) 12 EHRR 434.
[131] Ibid *above* n 130 para 69.
[132] Ibid, at para 71.
[133] Ibid, at para 28.
[134] Separate opinion of Judge Stephen, *above* n 39.
[135] *Kostovski v Netherlands* (1990) 12 EHRR 434.
[136] Ibid, see n 136.

that "internationally recognised standards" do not apply to their international tribunal.[137]

It was however the *Kostovski*[138] case which clearly spelled out the danger of allowing witnesses anonymity when it stated that "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."[139] The ICTY in *Tadić* would have been well advised to have noted this more carefully. The dangers in granting anonymity were, as Geoffrey Robertson QC points out, "dramatically illustrated from the *Tadić* trial itself by the perjury of Witness L."[140]

Witness L had been employed as a guard at Trnepolje camp,[141] in which capacity he committed serious crimes for which he had been convicted by a court in Bosnia and Herzegovina.[142] He was made available by the Bosnian authorities to give evidence for the prosecution in *Tadić* and was afforded anonymity and the pseudonym Witness L.[143] He gave evidence of *Tadić*'s involvement in 12 rapes and 30 murders, including the murder of Witness L's own father, whom -he saw murdered with his own eyes. In cross-examination, the defence asked "but isn't your father still alive?" and then proceeded to produce an old man who "rushed in and embraced" the witness. The prosecution "sheepishly" asked the court to disregard Witness L's evidence in its entirety.[144] The lessons to be learned from this are clear.

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[137] The majority however clearly recognised these as being international standards of due process: "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, *above* n 40, 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."

[138] *Kostovski v Netherlands* (1990) 12 EHRR 434.

[139] Ibid, at para 42.

[140] G Robertson *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin Books, 3rd edn, 2006) p 398.

[141] Internment Camp in Bosnia & Herzegovina during the early 1990s.

[142] *Prosecutor v Tadić*, No IT-94-1-T Decision on Prosecution Motion to Withdraw Protective Measures for Witness L 5 December 1996 available at http://www.un.org/icty/Tadić/trialc2/decision-e/61205pm2.htm.

[143] Ibid.

[144] Ibid, pp 398 – 399.

(iii) Exclusion of the Public

Article 6 (1) ECHR provides that "in determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing…"[145]

The Strasbourg court has held this aspect as a "fundamental guarantee"[146] the purpose of which was made clear in *Werner v Austria*[147] where the court said this:

> "…the public character of proceedings before judicial bodies referred to in Article 6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."[148]

The publicity requirement will apply to both civil and criminal proceedings, at trial court level.[149] The Strasbourg authorities have also held that the right to a public hearing will apply to any phase in the proceedings;[150] however "in applying the publicity requirement…account must be taken of the entirety of the proceedings in the domestic legal order."[151]

There are however extensive limitations on the right to a public hearing provided by the text of Article 6 itself where it is stated:

> "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[152]

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[145] Article 6 (1) European Convention on Human Rights.
[146] *Sculer-Zgraggen v Switzerland* (1993) 16 EHRR 405 at para 58.
[147] *Werner v Austria* Application No 21835/93 (1998) 26 EHRR 310.
[148] Ibid, at para 62. See also *Diennet v France* (1995) 21 EHRR 554 at para 33 and *Pretto v Italy* (1984) 6 EHRR 182 at para 21.
[149] *Fredin v Sweden* (no. 2) Series A, No 283-A (1994) (1991) 13 EHRR 784.
[150] *Axen v Federal Republic of Germany* ECtHR Series A, 72 (1983).
[151] Ibid, at para 2.
[152] Article 6 (1) European Convention on Human Rights.

Any limitation of the right to a public hearing under Article 6 must be made on one of the grounds set out above.[153] The provision also provides the need for a balance or test of proportionality. However unlike some other Convention articles,[154] the words 'necessary in a democratic society' are absent. This is significant because it is these words which have been often cited by the Strasbourg court in leaving to Contracting States a "margin of appreciation"[155] when interpreting Convention rights restrictively.[156]

There are no cases in which the court has adopted the margin of appreciation doctrine in respect of the right to a public hearing under Article 6 (1).[157] However it has been noted[158] that a similar concept nevertheless applies and "the wording of the interests of justice restriction, in the opinion of the court clearly involves a margin of appreciation approach."[159] To that end the restrictions on the right to a public hearing exist not only in the text of Article 6, but the court's jurisprudence also restricts the right and has further "diluted the Convention guarantee."[160]

The exclusion of the public was considered permissible on the grounds of "public order" and the court had regard to the issue of proportionality, in *Campbell and Fell v UK.*[161] Here the Respondent argued that there was a necessity to hold prison disciplinary hearings in camera due to security problems in either allowing the public access to, or transporting prisoner from, the prison precincts. The court held that the imposition of public hearings "would impose a disproportionate burden on the authorities of the State"[162] and proceedings in camera were thus justified "for reasons of public order and security."[163]

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[153] *Gautrin and Others v France* (1999) 28 EHRR 196 (38/1997/822/1025-1028).
[154] Articles 8-11 all contain the words "necessary in a democratic society".
[155] The margin of appreciation allows "a degree of latitude to States as to how they protect the individual rights set out in the Convention. The margin has been held to be especially important in areas where there is said to be an absence of consensus or common practice across Europe…" (Lewis T "What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation" (2007) 56 *International and Comparative Law Quarterly* 395).
[156] For example see *Leyla Şahin v Turkey (application no 44774/98*) or the discussion in G Letsas "Two Concepts of the Margin of Appreciation" (2006) 26 *Oxford Journal of Legal Studies* 705.
[157] See Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights* (London: Butterworths, 1995).
[158] Ibid.
[159] Ibid p 218.
[160] Ibid.
[161] *Campbell and Fell v UK* [1985] 7 EHRR 165, Series A No 48.
[162] Ibid.
[163] Ibid.

In *X v UK*[164] the Irish applicant was convicted of the terrorist murder of two British soldiers in Belfast. The screening of witnesses from the public was held permissible on 'public order' grounds and the court observed that "the interference with the right to publicity was kept to a minimum by the fact that the public was not excluded from the proceedings and could hear all the questions put to and answers given by the witnesses…The screening was in the interests of public order or national security and to the extent strictly required in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[165]

In a number of cases, the Strasbourg authorities have upheld restrictions on the right to a public hearing on the basis of protecting "the interests of the parties." Trials in camera have been upheld in medical disciplinary proceedings in order to protect the "private life of the parties," which presumably means the medical professionals and the patients, although in *Diennett v France*[166] the court held that "such an occurrence must be strictly required by the circumstances."[167]

In *B v UK*[168] the court held that the exclusion of the public was justified in divorce proceedings "in the interests of justice and to ensure that the privacy of children is protected."[169] It may of course be argued that in criminal proceedings a higher threshold should be applied. However the court made clear that "even in a criminal law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice."[170] Such an occasion arose in *X v Austria*[171] where the exclusion of the public in criminal proceedings involving sexual offences against minors was permitted under Article 6 (1). Presumably this

[164] *X v United Kingdom* App No 20657/92 (1993) 15 EHRR CD113.
[165] Ibid, at para 1.
[166] *Diennet v France* (1996) 21 EHRR 554.
[167] Ibid at para 34. See also *L v Finland* (25651/94) [2000] 1 FLR 118; *Jurisic v Austria* (App no 62539/00) 2006 ECHR. The court in Diennet found that 'while the need to protect professional confidentiality and the private lives of patients may justify holding proceedings in camera, such an occurrence must be strictly required by the circumstances. No such justification existed in the instant case and accordingly there had been a breach of Art 6 (1).
[168] *B v United Kingdom*. *P v United Kingdom* Application Nos 36337/97 and 35974/97 (2002) 34 EHRR 19.
[169] Ibid.
[170] Ibid at para H7 (c).
[171] *X v Austria*, No 1913/63, 2 Digest 438 (1965).

was done on the Article 6 (1) grounds of in the "interests of juveniles" although the court did not specify as to which restriction it was applying.[172]

It has been argued that the importance of a public hearing is even more pronounced in the context of war crimes and violations of human rights law,[173] although as with anonymity it is not an issue that the Strasbourg court has addressed. Further, the Strasbourg authorities are concerned not so much by the seriousness of a given crime, but look more to the grounds on which a restriction is made, and to that end whether Article 6 (1) applies. The court in *Gautrin*[174] held that where none of the restrictions apply, no violation will be found.[175]

ECHR compatibility with the exclusion of the public in a war crimes context has however been considered on a number of occasions by the Bosnian State Court. Bosnia & Herzegovina has signed, ratified and is bound by the ECHR.[176]As discussed above, the Bosnian court has adopted a broad use of exclusion of the public and media from trial proceedings. In *Samardžić*[177] and *Stanković*,[178] proceedings were held "almost entirely in closed session."[179]

The court in *Stanković* excluded the public on the grounds of "the protection of the private life of the parties", which is of course one of the restrictions under Article 6 (1). The court of First Instance said this:

> "in the opinion of the Panel [exclusion of the public] was necessary to preserve morality and protect the personal and intimate life of the injured parties and the interests of the witnesses, given that these are witnesses who should testify in respect to a great number of rapes and other humiliating proceedings, which might appear to tarnish their reputation and damage family life, that majority of them were very young at the time of the commission of the criminal offence who, in the meantime founded their families and have now personal and family life. Testifying in public about such delicate and sensitive matters, even with certain measures of protection, in the opinion of the

[172] Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights*, (London: Butterworths, 1995).
[173] See R Dicker and B Adams "Letter to the Secretariat of the Rules and Procedure Committee" Extraordinary Chambers of the Courts of Cambodia, Human Rights Watch November 17, 2006. Available at http://www.hrw.org/backgrounder/ij/cambodia1106/#_ftn43.
[174] *Gautrin and Others v France* (38/1997/822/1025-1028).
[175] Ibid, at paras 42-43.
[176] Ibid n 25.
[177] *Prosecutor v Samardzic*. Case No X-KR-05/49.
[178] *Prosecutor v Stankovic* Case No X-KR-05/70.
[179] Human Rights Watch, above n 17, IV. Witness Protection and Support.

> court, always presents a risk for private and personal lives of the witnesses – victims, because in a small community a not controlled small detail of the story might be enough to reveal the identity of the protected witnesses."[180]

On appeal the Appellate Panel found the First Instance Panel "took into account the need to strike a balance between the rights of the accused to a public trial and the protection of morality and interests of the witnesses…"[181] On that basis the court found the test had been "correctly and fully applied."[182]

Although applying a restriction expressly provided by the text of Article 6 (1), in neither ruling did the court give any detailed assessment of the Strasbourg authorities discussed above. Instead it appeared to be relying on the text in Article 6 (1) itself. This is not wrong and does not in itself render the decisions in any way unreliable; however many of the Strasbourg cases include powerful statements as to the high level of importance to which the right to a public hearing is held.

It may be argued that such consideration was missed by the Bosnian court and it has been pointed out that the necessity of applying such restrictive measures is questionable.[183] In *Janković*;[184] - a case decided less than a year after *Stanković* and also involving serious breaches of human rights law,[185] the proceedings were conducted "almost entirely in open session".[186] Significantly some of the witnesses giving evidence also testified in the *Samardžić* and *Stanković* cases, under protective status.[187] This raises the question as to how necessary it could really have been to exclude the public from the entire proceedings "as a rule" in *Stanković*, [188] if it was not strictly necessary less than a year later in *Janković*.

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[180] Stanković, above n 76.
[181] *Prosecutor v Stanković* Case No X-KR-05/70 Appellate Decision of 28 March 2007 p 7.
[182] Ibid.
[183] Human Rights Watch, *above* n 18, IV. Witness Protection and Support.
[184] *Prosecutor v Janković* Case No X-KR-05/161.
[185] Gojko Janković was charged on indictment dated 27.06.2006 with Crimes against Humanity contrary to Article 172.
[186] Human Rights Watch, *above* n 18, IV. Witness Protection and Support.
[187] Ibid: "There were seven overlapping witnesses between the *Janković* and *Stanković* cases, and at least five overlapping witnesses with the *Samardžić* case. Human Rights Watch interview with Special Department for War Crimes staff, Sarajevo, September 27, 2006; Human Rights Watch telephone interview with Special Department for War Crimes staff, Sarajevo, November 30, 2006.
[188] Above n 76.

The court in *Stanković* did appear to consider the application of less restrictive measures, but concluded that the risk to the witnesses would remain "even with certain measures of protection."[189] The court did not state what measures it had in mind.

To the court's credit, as noted above, measures to protect the accused when the public was excluded were put in place - trial monitors and representatives from the OSCE[190] were present throughout.[191] Nevertheless the removal of the public from the entire proceedings in a serious criminal trial is an extreme measure. The Strasbourg court has upheld restrictions where the risk to the witnesses on the face of it appears less than to those giving evidence in *Stanković*, and where the restriction specified under Article 6 (1) has been the same.[192] However for the removal of the public to be permitted under Article 6 (1) it is likely the Strasbourg court would require the highest levels of necessity given the extensive restrictions applied.

THE BROADER PURPOSE OF WAR CRIMES TRIALS

The use of anonymity and closed sessions at the ICTY and the War Crimes Chamber have been controversial because of their impact on the rights of the accused. However, in the case of war crimes trials and the prosecution of extreme violations of human rights, the debate takes on broader dimensions. The debate concerns not only the rights of the accused, but also special considerations for victims and the impact of such trials on the wider community in post-conflict societies. It raises the question of what the predominant purpose of such trials is.

If the purpose is determining the guilt or innocence of those accused of war crimes, crimes against humanity and or genocide, then the same arguments made concerning the rights of the accused are valid. The ability of the accused to effectively cross-examine witnesses and put forth an informed

[189] Ibid above n 190.

[190] The Organization for Security and Cooperation in Europe has monitored a great many of the trials at the Bosnian State Court. For their most recent report see OSCE Report: *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina*: Progress and Obstacles. March 2005.

[191] See *Stanković*, above n 76.

[192] For example in divorce or medical disciplinary proceedings see *Diennet v France* (1995) 21 EHRR 554; *B v United Kingdom*, *P v United Kingdom* Application Nos 36337/97 and 35974/97 (2002) 34 EHRR 19; *Guenon v France* No 13652/88 66 DR 181 (1990) and *Imberechts v Belgium* No 15561/89 69 DR 312 (1991).

defence; and public scrutiny of testimony, contribute to ascertaining the truth and assessing innocence or guilt to the required level of certainty.[193]

If the purpose is to ameliorate suffering and to contribute to the healing process for victims and witnesses, efforts must be made to minimise any trauma and insecurity associated with testifying. There is a great deal of literature which discusses the retraumatisation of a victim from having to confront her alleged rapist in trial, describe what he did to her and face hostile defence questioning. Further, many rape victims feel guilt and shame as well as fear of rejection by their husband or family and fear of reprisals against themselves and their families.[194]

In *Tadić,* the Trial Chamber emphasised that standards designed to apply to "ordinary criminal and … civil adjudications" were not appropriate for adjudicating crimes "so horrific as to warrant universal jurisdiction."[195] As discussed above, the drafters of the ICTY Statute also seem to have recognised the unique nature of such crimes by imposing a positive obligation to provide protection to victims and witnesses in Article 21(2) and Article 22.[196] Failure to protect witnesses from trauma and to ensure their safety through appropriate protective measures would undercut the purpose identified here. Such measures could arguably involve non-disclosure of their identity to the public, and in extreme cases, to the accused. Failure to protect witnesses could also result in the unwillingness of witnesses to testify, which in turn, could prevent the prosecution of those accused. This would undercut the purpose of determining the guilt or innocence of alleged perpetrators.[197]

If the purpose is to establish a historical record of the war and to educate, the unwillingness of witnesses to tell their experiences due to insufficient protection would also undercut this purpose. However, some witness protective measures could also undermine the establishment of such a record. Non-disclosure of witness identities to the accused and lack of public scrutiny of witness testimony, as discussed, can impede truth gathering and the development of an accurate historical record. In addition, closed sessions impede the development of public knowledge, education and understanding.[198] Furthermore, trial transcripts and judgments filled with

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[193] See Pozen, above n 1 at 291 and 320; McLaughlin, *above* n 28 at 207; Leigh, *above* n 28 at 80-81; Human Rights Watch, *above* n 18 at 31 and *above* n 24 at 31; Creta, *above* n 28 at 400.

[194] See Chinkin, above n 29 at 75 and 78; Lakatos, *above* n 29 at 919.

[195] *Tadić*, above n 15 at para 28.

[196] Ibid; see also Affolder, above n 34 at 455.

[197] Chinkin, above n 29 at 76; Lakatos, *above* n 29 at 920-921; Doak, *above* n 29 at 21.

[198] See Human Rights Watch, above n 18 at 31; Creta, above n 28 at 400.

redactions and pseudonyms create an unclear and incomplete record of events.[199]

If the purpose is to establish rule of law and confidence in the judicial system, then the trials and the institutions in which they are conducted must be deemed legitimate. Anonymity and concerns about the rights of the accused undermine confidence in the system and the belief that justice is being done.[200] In addition, the broad use of closed sessions can negatively impact public perception and confidence. Public and transparent proceedings contribute to confidence in the system and allow the public to assess whether the trial is in fact objective and fair;[201] and knowledge of a witness' identity gives more legitimacy to the specific trial.[202] For example the trial of General Blaškić was of great public interest in Croatia and was reported throughout the country. The use of anonymous witnesses would have raised public criticism of the trial.[203] Public confidence in the criminal justice system and the legitimacy of justice institutions is especially important in post-conflict societies, such as Bosnia and Herzegovina, because of the acknowledged deficiencies in the justice system during the war and immediately thereafter. The War Crimes Chamber was created in part to address these deficiencies and contribute to rule of law in BiH.[204]

Ultimately, to be considered legitimate, war crimes trials must comply with international law. The various aims of such trials and the particular contexts in which they are conducted must be given necessary attention, but within the framework of established international standards.

CONCLUSION

The balance between the interests of victims and the rights of the accused is a difficult one to strike. The arguments in favour of applying restrictive measures to protect victims and witnesses are strong and often compelling. This is compounded by the issues that arose in the Bosnian war crimes trials. The ferocity of the conflict and brutality of the acts committed has made the situation particularly difficult. Many of the crimes have been of a sexual nature. The size of the country and close proximity of its communities makes the need to protect the victims an especially sensitive and particularly important task.

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[199] Pozen, above n 1, at 319-320.
[200] Doak, above n 29 at 17.
[201] Human Rights Watch, above n 18, at 31-32; Pozen, above n 1, at 313.
[202] Human Rights Watch, above n 18, at 31-32.
[203] DeFrancia, above n 54, at 1418.
[204] Human Rights Watch, above n 18, at 31-32.

However, the defendant's right to a fair trial is one of the corner stones of justice in a democratic society. It is an historic right that should not be subordinated to the issue of protecting witnesses. As the Strasbourg court has made clear "the right to a fair administration of justice holds so prominent in democratic society that it cannot be sacrificed."[205]

For a fair balance to be found due weight must be given to each side, without compromising the other. The ICTY and WCC have not always struck this balance. Arguably both courts have overly compensated in protecting the interests of victims and have adversely impacted the rights of the accused. A common theme where the courts have failed to strike an appropriate balance is that significant weight is placed on protecting the victims and witnesses whilst insufficient regard is placed on the rights of the accused. Arguments that war crimes are unique and exceptional situations are relied on heavily in justifying departure from internationally accepted standards of due process. War crimes trials *are* unique and exceptional, but just as this is an argument that special consideration should be given to victims and witnesses, so it requires that standards of due process and the right to a fair trial are heightened in their importance also. Where this is forgotten a fair balance will not be found.

The Strasbourg court has principally held that although the rights of the defence may be limited in certain situations this must be *strictly necessary* and done by the *least restrictive means* possible. These principles are not easily detected in the rulings discussed above in *Tadić* and *Stanković*. Although both the ICTY and WCC have shown a shift towards a more proportionate approach to the competing rights of victims and defendants, there is a clear potential for further conflict to arise. The words 'strictly necessary' and by the 'least restrictive means' possible' should be evaluated with great care and narrowly applied.

[205] Above n 90, at para 30.