The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals

Sangkul Kim

The ad hoc international criminal tribunals addressing the mass atrocities involving such extraordinary crimes like genocide, crimes against humanity and war crimes have developed a delicate and intricate judicial scheme of ‘delayed disclosure.’ Against the backdrop of the unique gravity of egregious atrocities, ‘delayed disclosure’ aims at respecting the fundamental interests of both the accused and the witnesses, which has turned out to be an exceptionally challenging judicial exercise. Striking a balance between the rights of the accused to have adequate time to prepare his defence on the one hand, the protection of identifying information of witnesses who may be subject to serious danger or threat requires highly disciplined judicial vigilance on the other. For the purpose of elucidating the demanding challenges involving the practice of ‘delayed disclosure,’ this paper explores the relevant rules and case law of the ICTY and the ICTR.

Keywords
I. Introduction

While dealing with core international crimes such as genocide, crimes against humanity and war crimes, the international criminal tribunals would grant the accused a right to examine the witnesses against him.¹ In order to exercise this right effectively, the names and identifying information of the prosecution witnesses need to be disclosed to the accused so that he can prepare his defence adequately. The international criminal tribunals thus do not permit non-disclosure of the identity of a witness (witness anonymity) at the trial stage.² On the other hand, there are considerable number of witnesses or potential witnesses who are very reluctant to testify fearing for their safety.³ Against this background, we can see that the balancing exercise between the rights of the accused and the interests of witnesses becomes crucial at the international criminal tribunals.

The primary purpose of this research is to address the ‘delayed disclosure,’ one

¹ See, e.g., Statute of the International Criminal Court (“ICC”), art. 67(1)(e); Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), art. 21(4)(e); Statute of the International Criminal Tribunal for Rwanda (“ICTR”), art. 20(4)(e). They all provide, almost verbatim in language, the accused’s right to “examine, or have examined, the witnesses against him or her […].” For details on this right, see R. May & M. WieRda, International Criminal Evidence 284-8 (2002).

² Tadić, the first trial of the ICTY is the only exception. In this case, the Trial Chamber granted witness anonymity. See Prosecutor v. Tadić, IT-94-1-T, Decision on the Prosecutor’s Motion requesting Protective Measures for Victims and Witnesses, Aug. 10, 1995 (hereinafter Tadić Decision), available at https://www.legal-tools.org/uploads/tx_ltpdb/TadicD_ICYTCDecisiononProsecutorsMotionRequestingProtectiveMeasures_10-08-1995_E_04.htm (last visited on May 8, 2016). The Trial Chamber specified the two main reasons for permitting witness anonymity in this case: (1) the fear of reprisal during an ongoing conflict; and (2) the absence of a fully-funded and operational witness protection program in the ICTY. See id. at ¶ 42. This decision sparked intense scholarly debate. Even the senior prosecutor of the ICTY Office of the Prosecutor later acknowledged that he was “personally very uncomfortable with the notion of going forward with witnesses whose identity are not disclosed to the accused.” See M. Scharf, Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg 108 (1997). Subsequently, however, the ICTY Trial Chambers did not follow the Tadić precedent of granting anonymity. In addition to concern for the rights of the accused, the development of the witness protection program at the ICTY also explains the judicial practice of not granting anonymity after Tadić. For details, see G. Acquaviva & M. Heikilä, Protective and Special Measures for Witnesses, in International Criminal Procedure: Principles and Rules 838 (G. Sluiter et al. eds., 2013); G. Boas et al., International Criminal Law Practitioner Library, Volume III: International Criminal Procedure 268-70 (2011); M. Kurth, Anonymous Witnesses before the International Criminal Court: Due Process in Dire Straits, in The Emerging Practice of the International Criminal Court 621-26 (C. Stahn & G. Sluiter eds., 2009); J. Pozen, Justice Obscured: The Non-Disclosure of Witnesses’ Identities in ICTR Trials, 38 N.Y.U. J. Int’l L. & Pol. 287-94 (2005-2006), available at http://nyuijlp.org/wp-content/uploads/2013/02/38.1_2-Pozen.pdf (last visited on May 8, 2016); P. Chifflet, The Role and Status of the Victim, in International Criminal Law Developments in the Case Law of the ICTY 83-7 (G. Boas & W. Schabas eds., 2003).

³ Scharf, supra note 2, at 68. Judge Cassese once said that the judges at the ICTY were “very much aware that there may be considerable reluctance on the part of witnesses to come to the Tribunal to testify. One of our overriding concerns has been how to encourage witnesses to do this.”