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Tadić, the Anonymous Witness and the Sources of International Procedural Law

Natasha Affolder
Allard School of Law at the University of British Columbia, affolder@allard.ubc.ca

TADIĆ, THE ANONYMOUS WITNESS AND THE SOURCES OF INTERNATIONAL PROCEDURAL LAW

*Natasha A. Affolder**

INTRODUCTION

On May 7, 1997, Trial Chamber II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal) released its verdict in the first case to be heard by the International Tribunal. For the International Tribunal, this verdict represents "the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal."[1] For Duško Tadić, a Bosnian Serb accused of grave breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity,

* Doctoral Candidate, New College, Oxford. BCL., Oxford University (1997); LL.B., Alberta (1995). I am grateful to Professor Mark Janis for his helpful comments, to the Press and Information Office of the International Tribunal for the former Yugoslavia for the timely provision of materials, and to the Rhodes Trust for its ongoing support.

1. Opinion and Judgment, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 17687-17388, at 17682 (May 7, 1997).

this verdict represents something quite different—his conviction of eleven of the thirty-one charges against him.

While the proceedings of the International Tribunal have received favorable comment in terms of their fairness,[2] criticism has focused on the Trial Chamber's decision to allow anonymous testimony to be used in the *Tadić* trial. On August 10, 1995, the Trial Chamber ruled in a preliminary motion on protective measures to allow for the use of measures, including confidentiality and anonymity, to protect witnesses.[3] Although only one witness testified in a manner entirely anonymous and shielded from the view of the accused, the protective measures decision of the Trial Chamber has received significant criticism.[4] The limitations this decision imposes on Tadić's right to examine all witnesses testifying against him further forms one of the grounds upon which the defense is appealing the final judgment in the *Tadić* case.[5]

This article explores the Trial Chamber's decision to allow the use of anonymous testimony as a protective measure in the wake of the final judgment in the *Tadić* trial. This initial decision, granting the prosecutor's request for protective measures including the withholding of four witnesses' identities from the accused, formed a precedent upon which later rulings for protective measures relied, both throughout the *Tadić* case and in subsequent cases before the International Tribunal.[6]

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2. Professor Diane F. Orentlicher, Director of the War Crimes Research Project at the American University's Washington College of Law affirms "both the feasibility and the fairness of the tribunal process." Professor Michael P. Scharf labels the trial process "extremely fair, maybe agonizingly fair." *See* James Podgers, *A Victory for Process: Observers Say Tadić Conviction Enhances Credibility of International Criminal Tribunal*, 83 A.B.A. J. 30 (July 1997).

3. Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 5078-5037 (McDonald judgment), 5036-5013 (Stephen dissent) (Aug. 10, 1995) [hereinafter Protective Measures Decision].

4. *See* Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 AM. J. INT'L LAW 80 (1997); Michael P. Scharf, *The Prosecutor v. Duško Tadić: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 871 (1997).

5. See Press Release, Tadić Case Update: Defence Files Notice Of Appeal Against Judgment, UN Doc. CC/PIO/208-F (June 4, 1997). The Prosecutor has also appealed the Tribunal's decision. Press Release, Tadić Case: Prosecutor Files Notice of Appeal Against Judgment, UN Doc. CC/PIO/210-E (June 9, 1997). A decision on the appeals is expected in 1998.

6. *See, e.g.*, Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence via Video-link, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 9162-9148 (June 25, 1996). *See also* Decision on the Prosecutor's Motion Requesting Protective Measures for Witnesses and Victims, Prosecutor v. Blaskić, U.N. Doc. IT-95-14, 1917-1914 (June 17, 1996); Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 30 August in Respect of the Protection of Witnesses, Prosecutor v. Blaskić, U.N. Doc. IT-95-14-T, 2034-2024 (Oct. 3, 1996); Decision on the Application of the

A majority of the Trial Chamber concluded that the use of anonymous witnesses is consistent with the Statute of the International Criminal Tribunal for the Former Yugoslavia (Statute)[7] and the Rules of Procedure and Evidence (Rules).[8] Judge Stephen's dissenting opinion, which supports other protective measures, rejects the use of anonymous witnesses as contrary to the Statute, the Rules and "internationally recognized standards of the rights of the accused."[9] While the differences between the majority judgment (the McDonald judgment) and the dissent (the Stephen dissent) are a result of significantly different readings of the International Tribunal's Statute and Rules, these differences are also the product of divergent approaches to the question of the sources of law that the International Tribunal should apply in interpreting its Rules and Statute.

The McDonald judgment takes a narrow view regarding what sources should be considered in resolving procedural questions. In determining the sources of law that it should apply in interpreting its Rules and Statute, the majority rejects the application of international standards, as defined by other international judicial bodies, and insists, rather, that it is to determine the relevant procedural rules based on its own "unique requirements."[10] In contrast, the Stephen dissent considers internationally recognized standards and the decisions of other international, regional, and municipal courts where applicable in interpreting the Statute and Rules of the International Tribunal.

Commentary on this decision thus far focuses on the desirability of using anonymous testimony, and the consistency of anonymous testimony with due process standards.[11] This article examines the preliminary question of whether, and to what extent, the International Tribunal is bound to consider and apply international standards in making procedural rulings. In both the opinion of Judge McDonald and that of Judge Stephen, an uncertainty as to the sources of procedural law to

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Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Blaskić, U.N. Doc. IT-95-14-T, 2156-2142 (Nov. 6, 1996).

7. Statue of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of the Former Yugoslavia since 1991 art. 13(2)(c), U.N. Doc. 5/25704, annex (1993) [hereinafter Statute].

8. *Rules of Procedure and Evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 9th Sess., at 1, U.N. Doc. IT/32/Rev. 7 (1996) (as amended) [hereinafter *Rules of Procedure*].

9. Protective Measures Decision *supra* note 3, at 5026, 5022 (Stephen, J., dissenting).

10. *See id.* at 5068 (McDonald, J.).

11. *See* Christine Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L LAW 75 (1997); Leigh, *supra* note 4, at 80–81; Michael Scharf & Valerie Epps, *The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L LAW J. 635 (1996).

apply, and the weight to attribute to these sources, is discernable. This uncertainty reflects a lack of consistency found in international cases and doctrine as to the weight to apply to sources of procedural law.

Procedural rulings at the international level generally receive less attention than substantive ones. This may be the result of the flexibility of international procedure or due to the International Court's explicit statements that the same degree of importance need not attach to procedural questions at the international level as under municipal law.[12] The protective measures decision leaves as its legacy not only an acceptance of the use of anonymous witnesses in limited circumstances, but moreover it uncovers a deep uncertainty about the sources of international procedural law and the relevance of international standards in making procedural decisions.

I. BACKGROUND

A. *The International Tribunal*

In the first half of 1993, the Security Council of the United Nations established the International Tribunal as a measure to maintain and restore international peace and security pursuant to Chapter VII of the Charter of the United Nations.[13] This distinguishes the International Tribunal from other historical precedents. The International Military Tribunal at Nuremberg was established by the four major allies in the London Agreement, to which nineteen other States acceded and was imposed on Germany.[14] The International Military Tribunal for the Far East was unilaterally established through a general military order by U.S. General Douglas McArthur, acting as Supreme Commander for the

12. "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law." Mavrommatis Palestine Concessions Case, 1924 P.C.I.J. (ser. A) No. 2, 34, *quoted with approval in* Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, at 28 (Dec. 2).

13. The International Tribunal was proposed through S. C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993); *endorsed in* Resolution 827, U.N. SCOR, 48th Sess., 3217th meeting, at 1, U.N. Doc. S/RES/827 (1993)

14. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 Aug. 1945, 82 U.N.T.S. 279. The Charter for the International Military Tribunal was annexed to that Agreement. *See id.* at 284. For the Proceedings before the Tribunal, see I-XV NUREMBERG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949); John Mendelson, *Trial by Document: The Problem of Due Process for War Criminals at Nuremberg*, 7 PROLOGUE 227 (1975); Quincy Wright, *The Law of the Nuremberg Tribunal*, 41 AM. J. INT'L L. 38 (1947).

Allied Powers.[15] In addition to these tribunals, the four major allies occupying Germany established war crimes tribunals in their respective zones of occupation acting under Control Council Law No. 10.[16]

Members of the Security Council, in an attempt to distinguish the International Tribunal from its war crimes predecessors, made express efforts to underline that this was not a tribunal created by a military victor to judge the defeated parties, but rather an international effort to bring to justice all those in breach of international criminal law.[17] To emphasize the international origins of the International Tribunal, Security Council Resolution 808 requested that the Secretary General prepare a report on all aspects of the establishment of such a Tribunal "taking into account suggestions put forward in this regard by member states."[18]

The Report of the Secretary General was prepared by a team from the UN Office of Legal Affairs who relied on submissions made by Member States, inter-governmental organizations, and non-governmental organizations. It included a draft statute for the International Tribunal which recognized that "the Security Council would not be creating or purporting to "legislate" [the relevant] law. Rather, the International Tribunal would have the task of applying existing international humanitarian law."[19] The Security Council adopted, without change, the Secretary General's Report and Draft Statute for the International Tribunal as the Statute for the International Tribunal in Resolution 827.[20]

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15. *See* Proclamation by the Supreme Commander for the Allied Powers, Jan. 19, 1946, T.I.A.S. No. 1589. For a discussion of the proceedings see B.V.A. Röling, TOKYO TRIAL AND BEYOND 19-92 (1993).

16. Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10 art. 3, 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, 50, 52 (1946).

17. *See* Statements by Mr. Merimée (France) and Mr. Vorontsov (Russian Federation), Provisional Verbatim Record of the 3217th Meeting, May 25, 1993, S/PV. 3217, *reprinted in* VIRGINIA MORRIS & MICHAEL P. SCHARF, INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 179, at 184, 206–07 (1995).

18. S.C. Res. 808, *supra* note 13, ¶ 2, at 2.

19. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 29, U.N. Doc. S/25704 (1993) [hereinafter *Report of the Secretary General*].

20. S.C. Res. 827, U.N. SCOR (1993); United Nations: Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1203, 1204. [hereinafter Resolution]. *See also 1* MORRIS & SCHARF, *supra* note 17, at 40; M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 219–226 (1996) (discussing the debate in the Security Council surrounding the adoption of the Resolution).

After the adoption of Resolution 827, the Security Council unanimously adopted the Secretary General's list of twenty-three nominations for potential judges of the International Tribunal.[21] This list was then submitted to the General Assembly, who pursuant to Article 13 of the Statute, was to elect eleven of the nominees to a four year term. On September 15, 1993, the General Assembly elected eleven judges, "taking due account of the adequate representation of the principal legal systems of the world."[22] Acting pursuant to Article 15 of the Statute, which granted the newly elected judges the authority to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters,"[23] the International Tribunal adopted its Rules of Procedure and Evidence on February 11, 1994. These rules came into force on March 14, 1994 and have since been revised seven times.[24]

B. *The Tadić Case*

The International Tribunal obtained custody of its first defendant, Duško Tadić, following his transfer from Germany at the request of the International Tribunal.[25] Tadić is a citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of 'Bosnia and Herzegovina at the time of the alleged crimes. Tadić was charged with breaching the Geneva Conventions of 1949,[26] violating the laws of war, and committing crimes against humanity. These crimes included rape, murder, torture, cruel treatment and other inhumane acts, all of which violate the Statute of the International Tribunal.[27] These charges arose from incidents occurring in and outside the Bosnian Serb Camp at

21. S.C. Res. 857, U.N. SCOR, 48th Sess., 3265th mtg, U.N. Doc. S/RES/857 (1993).

22. Statute, *supra* note 7; 32 I.L.M. 1192, 1196 (1993).

23. *Id.* art. 15.

24. *Rules of Procedure*, *supra* note 8.

25. *See generally* L. Vierucci, *The First Steps of the International Criminal Tribunal for the Former Yugoslavia*, 6 EUR. J. INT'L L. 134, 136 (1995) (including in the annex the Tribunal's decision regarding the formal request for deferral).

26. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

27. Grave breaches of the Geneva Conventions of August 12, 1949 are recognized by Article 2 of the Statute, violations of the laws or customs of war are recognized by Article 3 of the Statute, and crimes against humanity are recognized by Article 5 of the Statute. Statute, *supra* note 7, arts. 2, 3, 5.

Omarska in northern Bosnia where large numbers of Bosnian Muslims and Croats were detained by Serb forces. Tadić made his initial appearance before the Trial Chamber on April 26, 1995 where he was formally charged and pleaded not guilty to all charges against him.[28]

On June 23, 1995, counsel for Tadić filed a preliminary motion, pursuant to Rule 73(A)(i) of the Rules which provides for objections based on lack of jurisdiction, seeking dismissal of all of the charges against the accused. This motion challenged the International Tribunal's jurisdiction to try the accused under three heads: (1) the illegal foundation of the International Tribunal; (2) the wrongful primacy of the International Tribunal over national courts; and (3) the lack of jurisdiction *ratione materiae*.[29] The Trial Chamber dismissed the motion and denied the relief sought in a decision released on August 10, 1995.[30] The International Tribunal's Appeals Chamber subsequently upheld the decision on October 2, 1995 in the context of an interlocutory appeal.[31]

The trial of Duško Tadić commenced on May 7, 1996. Exactly one year later, on May 7, 1997, the Trial Chamber rendered its Opinion and Judgment, finding Duško Tadić guilty of eleven of the thirty-one charges against him. Tadić was found guilty of crimes against humanity pursuant to Article 5 of the Statute, and of violations of the laws or customs of war pursuant to Article 3 of the Statute. The crimes consisted of killings, beatings and forced transfers by Tadić as a principal and as an accessory, and of his participation in the attack on the town of Kozarac in north-western Bosnia and Herzegovina.[32]

Tadić was acquitted on twenty counts. Eleven of these acquittals were based on the Trial Chamber's majority finding that the grave breaches provisions of the Geneva Conventions were inapplicable at the time.[33] Article 2 of the Geneva Conventions was found inapplicable because the majority determined that the victims of the Bosnian conflict were not civilians in the hands of a party to an armed conflict of which

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28. Opinion and Judgment, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 17687-17338 at 17679 (May 7, 1997). *See generally* Jose E. Alvarez, *Nuremberg Revisited: The Tadić Case*, 7 Eur. J. Int'l L. 245 (1996).

29. Decision on Jurisdiction, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 5011-4979 (Aug. 10, 1995).

30. *Id.* at 4979.

31. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, U.N. Doc. IT-94-1-AR72, 6491-6413 (Oct. 2, 1995). *See* Colin Warbrick, *The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadić Case*, 45 Int'l & Comp. L.Q. 691 (1996).

32. Opinion and Judgment, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 17687-17338 at 17400-17384 (May 7, 1997).

33. *Id.* at 17412 (McDonald J., dissenting).

they are not nationals.[34] The same Trial Chamber released its sentencing judgment on July 14, 1997, sentencing Tadić to a term of imprisonment not less than ten years from the date of the Sentencing Judgment or the final determination of any appeal.[35]

1. The Protective Measures Decision

On May 18, 1995, a full year before the trial of Duško Tadić began, the Prosecution filed a motion requesting a number of protective measures for seven witnesses.[36] The measures sought were intended to enable witnesses to testify without fearing retribution, and to protect certain victims from retraumatization when testifying. The measures included a request that the identity of four witnesses not be disclosed in anyway to Tadić and his counsel, and that three of those witnesses testify via voice and image altering devices.[37] The Trial Chamber hearing the motion consisted of three judges: Judge McDonald, a former U.S. district court judge, Judge Stephen, a former governor-general of Australia and judge of the Australian high court, and Judge Vohrah, a senior Malaysian high court judge. The judges granted leave for two amicus curiae briefs to be filed, one from Professor Christine Chinkin, the Dean and Professor of International Law, University of Southampton, and a joint brief by Rhonda Copelon, Felice Gaer, Jennifer Green and Sara Hossain on behalf of a number of human rights organizations in the United States.[38]

The Trial Chamber heard the motion in camera and considered the request for five different types of protective measures: (1) those seeking confidentiality, whereby the victims and witnesses would not be identified to the public and the media; (2) those seeking protection from retraumatization by avoiding confrontation with the accused; (3) those seeking anonymity, whereby victims and witnesses would not be identified to the accused or to his lawyers; (4) certain miscellaneous measures for individual witnesses; and (5) a general request to prevent witnesses who are victims of the conflict from being photographed, recorded or sketched while leaving the International Tribunal buildings.[39]

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34. *Id.* at 17456.

35. Sentencing Judgment, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 18012-17971 (July 14, 1997).

36. Motion and Supporting Brief Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, U.N. Doc. IT-94-1-I, 1755-1758 (May 18, 1995).

37. *Id.* at 1756.

38. Opinion and Judgment, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T 17687-17338 at 17678 (May 7, 1997). See Christine Chinkin, Amicus Curiae Brief on Protective Measures for Victims and Witnesses Submitted by Dean and Professor of Law Christine Chinkin, 7 CRIM. L. F. 179 (1996). The Trial Chamber's decision quoted both briefs. Protective Measures Decision, *supra* note 3, at 5060, 5058, & 5056.

39. *Id.* at 5073 (McDonald, J.).

The defense agreed to a number of these requests but objected, in particular, to any grant of anonymity which it asserted would violate the right of the accused to a fair and public trial. In ruling on this Motion, the Trial Chamber unanimously granted the requests for confidentiality and non-disclosure of names and identities to the public. The majority of the Court, Judge McDonald with Judge Vohrah concurring, granted the requests for anonymity and non-disclosure of such information to the accused, with respect to four witnesses, [40] with Judge Stephen dissenting in part.[41] An additional order on November 14, 1995 granted protective measures to a further prosecution witness, Witness L.[42] Several further orders granting protective measures to ensure confidentiality and safe conduct for both defense and prosecution witnesses were made leading up to and throughout the proceedings.[43]

In total, the testimony of seventeen witnesses, both for the prosecution and the defense, was heard in closed session in full view of the accused and counsel. Of the four witnesses granted anonymity, two were not called to give evidence and one testified in open session without any protective measures. Witness H was the sole witness to be heard in closed session in a manner shielded from the view of the accused but not from defense counsel.[44] On October 25, 1996, the prosecution invited the Trial Chamber to disregard the testimony of one of the witnesses which had been granted confidentiality, Witness L, and to revoke the protective measures granted him as a result of concerns about the truthfulness of his testimony.[45]

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40. *Id.* at 5060-5054.

41. *Id.* at 5014-5013 (Stephen, J., dissenting).

42. Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 7149-7136 (Nov. 14, 1995).

43. *See* Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence via Video-link, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 9162-9148 (June 25, 1996). *See also* Decision on the Defence Motion to Protect Defence Witnesses, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, D12006-D11994 (Aug. 16, 1996); Decision on the Third Confidential Motion to Protect Defence Witnesses, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T D13261-D13254 (Sept. 20, 1996); Decision on Fourth Confidential Motion to Protect Defence Witnesses, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T D13407-D13404 (Oct. 11, 1996); Decision on the Defence Motion Requesting Video-Link for Defence Witness Jelena Gagic, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, D14130-D14129 (Oct. 17, 1996); Decision on the Defence Motion Requesting Facial Distortion of Broadcast Image and Protective Measures for Defence Witness D, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, D14138-D14135 (Oct. 18, 1996).

44. Opinion and Judgment, Prosecutor v Tadić, U.N. Doc. IT-94-1-T, 17687-17338 at 17670 (May 7, 1997).

45. The circumstances surrounding this witness's testimony are now the subject of an investigation by the Prosecutor for false testimony under Rule 91. Order for the Prosecution to Investigate the False Testimony of Dragan Opacic, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, D16400-D16399 (Dec. 10, 1996).

The Trial Chamber's decision to allow these protective measures was not subject to interlocutory appeal because it was deemed to be a "procedural" decision under the Rules of the International Tribunal.[46] The question of whether Tadić's right to examine each witness against him was unfairly limited will re-emerge in the substantive appeal of the Trial Chamber's judgment which is expected to be released sometime in 1998.[47] This appeal will likely refocus attention on the many divergent points visible between the McDonald judgment and Stephen dissent regarding the sources of procedural law to apply, and the method of interpreting the Rules and Statute of the International Tribunal.

a. The McDonald Judgment

The first six pages of Judge McDonald's majority judgment consider the sources of law that the International Tribunal should apply in interpreting its Rules and Statute. Judge McDonald questions whether the "Trial Chamber is bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context."[48] She rejects the defense's submission that "the case law of other international judicial bodies interpreting the right of an accused to a fair trial establishes the minimum standard which must be preserved in all judicial proceedings, including those of the International Tribunal."[49] Instead, she establishes the International Tribunal's ability to tailor the application of the case law of other international bodies to its own "unique requirements."[50]

The McDonald judgment repeatedly stresses the International Tribunal's "unique character"[51] and the lack of precedent governing the International Tribunal. Judge McDonald distinguishes the Nuremberg and Tokyo precedents as "created in very different circumstances and . . . based on moral and juridical principles of a fundamentally different nature."[52] She distinguishes common law precedents by stating that the International Tribunal "deviates in several respects from the purely

46. Rule 72(B) of the Rules of Procedure provides: "the Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." *Rules of Procedure*, *supra* note 8.

47. *See* Press Releases, *supra* note 5; Under Article 25 of the Statute of the Tribunal, appellate proceedings are only available on: a) an error on a question of law invalidating the decision; or b) an error of fact which has occasioned a miscarriage of justice. Statute, *supra* note 7, art. 25.

48. Protective Measures Decision, *supra* note 3, at 5068 (McDonald, J.).

49. *Id.*

50. *Id.*

51. *Id.* at 5067.

52. *Id.*

adversarial model."[53] She distinguishes civil law precedents because "the Statute adopts a largely common law approach to its proceedings."[54] And finally, interpretations of Article 6 of the European Convention on Human Rights (ECHR) are distinguished on the basis that the ECHR is "meant to apply to the ordinary criminal and, for Article 6(1), civil adjudications."[55]

Judge McDonald distinguishes the practice of other tribunals, stating generally, that as an international tribunal, the International Tribunal is not bound by the procedural decisions of other international tribunals.[56] While the International Tribunal is seen as, "in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence,"[57] Judge McDonald affirms that "the International Tribunal must interpret its provisions within its own context" rather than relying on the decisions of other tribunals.[58] The unique context of the Statute of the International Tribunal, in the opinion of Judge McDonald, is indicated by the Report of the Secretary General of May 3, 1993.[59] Part of this unique context is the affirmative obligation stated in the Statute to provide protection to victims and witnesses.[60]

In considering the influence of the International Tribunal's context, Judge McDonald identifies as "relevant that the International Tribunal is operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses."[61] The exceptional circumstances under which the International Tribunal operates lead Judge McDonald to contemplate derogation from international standards and to affirm that "the rights of an accused guaranteed under the principle of the right to a fair trial are not wholly without qualification."[62] Judge McDonald draws attention to the derogation provisions in the International Covenant on Civil and Political Rights (ICCPR), the ECHR, and the American Convention on Human Rights (ACHR) as evidence of this.[63] While she recognizes

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53. *Id.* at 5066.

54. *Id.*

55. *Id.* at 5063. *See* Convention for the Protection of Human Rights, Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 222, 228 [hereinafter European Convention on Human Rights].

56. Protective Measures Decision, *supra* note 3, at 5060 (McDonald, J.).

57. *Id.* at 5063.

58. *Id.*

59. *Id.* at 5068.

60. *Id.* at 5064.

61. *Id.*

62. *Id.* at 5052.

63. *Id.* at 5053-52. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 9 I.L.M. 673, art. 27 (1970); European Convention on Human Rights,

provisions for derogation from these rights, Judge McDonald takes the approach that the use of anonymous testimony does not violate the right of examination or the right to a fair trial.[64]

Judge McDonald considers the categories of protective measures requested, dividing them into questions of confidentiality, anonymity and general and miscellaneous measures. Her consideration of confidentiality measures is straightforward because the Rules of Procedure expressly provide in Rule 79 for the exclusion of the press and public from proceedings for various reasons including the safety or non-disclosure of the identity of a victim or witness to the public.[65] Judge McDonald concludes that "measures to protect the confidentiality of victims and witnesses are also consistent with other human rights jurisprudence" and cites Article 14(1) of the ICCPR and Article 6(1) of the ECHR as evidence of this.[66]

Judge McDonald determines that "measures to prevent the disclosure of the identities of victims and witnesses to the public are also compatible with principles of criminal procedure in domestic courts" and indicates that "there is a growing acceptance in domestic jurisprudence of the need to protect the identity of victims and witnesses from the public when a special interest is involved."[67] The McDonald judgment refers to specific examples of municipal legislation permitting limits on public disclosure. These examples include the United Kingdom Sexual Offences (Amendment) Act 1976,[68] the Canadian Criminal Code,[69] the Evidence Act (Amendment) 1989 (Queensland),[70] and the Criminal Procedure Act of South Africa.[71] Judge McDonald further quotes from U.S. case law, citing the Supreme Court decision in *Florida Star v. BJF*,[72] and provides examples of civil law practice permitting

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supra note 55, art. 15; International Covenant on Civil and Political Rights, (1966) 6 I.L.M. 368 [hereinafter ICCPR].

64. "Anonymity of a witness does not necessarily violate this right [to examine witnesses], as long as the defence is given ample opportunity to question the anonymous witness." Protective Measures Decision, *supra* note 3, at 5050 (McDonald, J.).

65. Rule 79(A) on Closed Sessions provides that: "the Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of: i) public order or morality, ii) safety, security, or non-disclosure of the identity of a victim or witness as provided in Rule 75; or iii) the protection of the interests of justice." *Rules of Procedure*, *supra* note 8, at 47.

66. Protective Measures Decision, *supra* note 3, at 5061-5060 (McDonald, J.).

67. *Id.* at 5060-5059.

68. S.I. 1978, no. 485, at 1374 (U.K.).

69. R.S.C., ch. C-46, § 486 (1985) (Can.).

70. Amending the Evidence Act, 1977, no. 47, Queensl. Stat. at 448.

71. § 153(2)(b) of Criminal Procedure Act 51 of 1977, 9 BSRSA at 961.

72. *See* Protective Measures Decision, *supra* note 3, at 5059, in which Judge McDonald cites *Florida Star v. BJF*, 491 U.S. 524 (1989).

limits on the publicity of proceedings in Danish law, German law and Greek law.

The McDonald judgment treats the issue of anonymity with slightly more detail than the issue of confidentiality as there is no single rule in the Rules expressly permitting the use of anonymous testimony during the trial process. Judge McDonald approaches the anonymity issue by establishing general criteria that must be met to justify a grant of anonymity. She subsequently applies these criteria to each individual witness' situation, concluding that anonymity is justified and that such anonymity will not prejudice the accused's right to a fair trial.

The anonymity requests seek to keep the name, address, image, voice and other identifying data of certain witnesses from the Defense. Judge McDonald considers that a general rule exists to the effect that "in principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument."[73] She then qualifies this general rule stating, "however, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness . . . a fair trial means not only fair treatment to the defendant but also to the prosecution and witnesses."[74]

Judge McDonald states that the International Tribunal foresees anonymity as a protective measure under Rule 75(A) and (B)(iii),[75] and contemplates that Rule 75 permits a wide grant of power to order measures to protect victims and witnesses as long as these measures are consistent with the rights of the accused.[76] She briefly refers to Rule 69 which specifically permits anonymity at the pre-trial stage in exceptional circumstances,[77] but states that:

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73. *Id.* at 5053 (McDonald, J.) (quoting Kostovski v. The Netherlands, 166 Eur. Ct. H.R. (ser. A) at 16 (1989)).

74. *Id.*

75. Rule 75(A) provides that: "A Judge or Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused." *Rules of Procedure*, *supra* note 8, at 43. Rule 75(B)(iii) specifies that a Chamber may hold an in camera proceeding to determine whether to order: appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. *Id.*

76. Protective Measures Decision, *supra* note 3, at 5047 (McDonald, J.).

77. Rule 69, as amended in June 1995, provides for protective measures at the pre-trial stage as follows:

> a) in exceptional circumstances, the Prosecutor may apply to a 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; b) in the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit; c) subject to Rule 75, the

> in Rule 69(c) the right of the accused to learn the identities of the witnesses against him in sufficient time prior to trial is made subject to a decision under Rule 75, thereby extending the power of the Trial Chamber to grant anonymity to a witness at the trial stage to the pre-trial stage.[78]

Rule 69 limits the use of anonymous testimony to exceptional circumstances. Judge McDonald notes that the situation in which the Trials are taking place is "an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees."[79] She also notes that "the fact that some derogation is allowed in cases of national emergency shows that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification."[80]

For guidance as to the factors to apply when balancing the competing interests with respect to granting anonymity, Judge McDonald considers examples of domestic law. She relies principally on the 1994 decision of the English Court of Appeal in *R. v. Taylor*[81] and the decision of the Supreme Court of Victoria in *Jarvie and Another v. The Magistrates' Court of Victoria at Brunswick and Others.*[82] The factors identified are: (1) a real fear for the safety of the witness or her or his family; (2) the importance of the testimony to the Prosecutor's case; (3) the absence of any prima facie evidence that the witness is untrustworthy; and (4) the ineffectiveness or non-existence of a witness protection program.[83] Judge McDonald asserts that witness anonymity does not violate the accused's right to examine, or have examined, the witnesses against him as laid down in Article 21(4) of the Statute.[84] She

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> identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rules of Procedure, *supra* note 8, at 38-39.

78. Protective Measures Decision, *supra* note 3, at 5052 (McDonald, J.).

79. *Id.*

80. *Id.*

81. [1995] Crim. App. 253, per Lord Justice Evans. In *Taylor*, counsel, but not the defendants, had been permitted to see a witness, whose name and address was not revealed, give her evidence in person and be cross-examined. The defendants were permitted to see the witnesses give evidence on a video screen. The Court of Appeal determined that the issue was one for the discretion of the trial judge.

82. *Jarvie v. Magistrates' Court of Victoria at Brunswick*, [1995] 1 V.R. 84, 88 (Vict. 1995) per Justice Brooking. The *Jarvie* case concerned the anonymity of undercover police officers, where the accused knew the identity of the officers but under false names. The court held that the true names of the officers could be withheld from the accused.

83. Protective Measures Decision, *supra* note 3, at 5051 (McDonald, J.).

84. *Id.* at 5050.

outlines guidelines for judges to follow where anonymous testimony is admitted in order to give the defense opportunity to examine witnesses.

The guidelines are taken from the European Court of Human Rights' decision in *Kostovski v. Netherlands*[85] which Judge McDonald states "is not directly on point" but which indicates safeguards that can be taken to "redress any diminution of the right to a fair trial" due to anonymous testimony.[86] These guidelines demand that the judges be able to observe the demeanor of the witness, be aware of the identity of the witness, and that the defense must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts. Furthermore, the witness' identity must be released when there are no longer reasons to fear for the security of the witness.[87] Although Judge McDonald borrows these guidelines from the *Kostovski* case, she affirms that "these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognising its mandate to protect victims and witnesses."[88]

In the *Tadić* case, the defense does not object to the anonymity of Witnesses J and K because "neither their identity nor their image is needed for an effective cross-examination." The defense asserts that it needs only to examine neighbors.[89] Judge McDonald thus states that since "the Defence has indicated that it does not need to observe the images of these witnesses while testifying, the accused is not denied his right of cross-examination if the images of Witnesses J and K are distorted or otherwise withheld from the accused."[90] Judge McDonald also grants the anonymity request for Witness H, and orders that the witness' voice and image be altered to the extent necessary to prevent his identity from becoming known to the accused.[91]

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85. Kostovski v. The Netherlands, 166 Eur. Ct. H.R. (ser. A) at 19-21 (1989). In *Kostovski*, the European Court of Human Rights found there to be a breach of Articles 6(1) and 6(3) of the European Convention on Human Rights where the accused's conviction was based to a decisive extent on statements before the court that had been made earlier by one witness to the police and by another to an examining magistrate. These two witnesses were allowed to remain anonymous because of fear of reprisals by organized crime. The Court stated that anonymous informants could be used in investigating an offence, but when their statements become evidence before a trial court, the defence is entitled to question them either during the investigation or at trial in order to test the credibility of the witness and the reliability of the evidence.

86. Protective Measures Decision, *supra* note 3, at 5050-5049 (McDonald, J.).

87. *Id.* at 5048.

88. *Id.*

89. *Id.* at 5045.

90. *Id.* at 5045-5044.

91. *Id.* at 5043. The Trial Chamber also granted "anonymity to witness G (of present identity only)." *Id.* at 5044.

b. The Stephen Dissent

Judge Stephen's dissent diverges from the majority's judgment on the issue of anonymity and on the sources to apply in interpreting the Statute and Rules. These issues therefore comprise the majority of his dissent. Judge Stephen begins by examining the relevant rules set out in the Statute and Rules, and by exploring the context of the case as set out in the Secretary General's Report. The Secretary General's Report describes the Trial Chamber's obligations when considering the case. It requires them to "fully respect internationally recognized standards regarding the rights of the accused"[92] and to "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence and with full respect for the rights of the accused."[93]

Judge Stephen identifies the need to reconcile the "tension between what the Secretary General calls the 'axiomatic' need fully to respect '*unconditionally* recognized standards regarding the rights of the accused' and the quite distinct need 'to ensure the protection of victims and witnesses.' "[94] He notes that there is marked contrast in the language of Article 20(1) of the Statute between ensuring that proceedings are conducted with full respect for the rights of the accused and with due regard for the protection of victims and witnesses.[95] He further notes that the deviation from the "fair and public trial" guaranteed in Article 21, due to the needs of victims and witnesses guaranteed in Article 22, can only be a deviation from the public quality of the hearing, as Article 22 "certainly does not contemplate unfair hearings."[96]

Judge Stephen repeatedly refers to the Secretary General's Report when interpreting the Statute.[97] The Secretary General's Report indicates that the protective measures contemplated in the Statute are intended "especially in cases of rape or sexual assault."[98] From this, Judge

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92. *Report of the Secretary General*, *supra* note 19, ¶ 106.

93. *Id.* ¶ 99.

94. Protective Measures Decision, *supra* note 3, at 5028 (Stephen, J.). Judge Stephen quotes the Secretary General as referring to "unconditionally" recognized standards, while the Secretary General's Report uses the phrase "internationally" recognized standards. This distinction serves to underline the difference between the majority and dissent opinions as the majority contemplates deviation from international standards being possible, while Judge Stephen sees such standards as being *unconditionally* applicable (emphasis added).

95. *Id.* at 5027.

96. *Id.*

97. Judge Stephen refers to the special considerations made for victims of rape and sexual assault as evidenced in the Secretary General's Report and looks to the degree that the ICCPR inspired the wording of the Statute based on considerations in the Secretary General's Report. *See id.* at 5026, 5019.

98. *Report of the Secretary General*, *supra* note 19, ¶ 108.

Stephen asserts that such witnesses need to be protected for two reasons: (1) the possible social consequences of it becoming generally known in their communities that they are rape victims; and (2) to be protected from the acute trauma of facing one's attacker in court. He suggests that the customary protection measures contemplated in such circumstances are in camera proceedings and careful control of cross-examination, and that it is, thus, these measures, "and not any wholesale anonymity of witnesses, that Article 22 primarily contemplates."[99]

From the wording of the Statute and the legislative history provided by the Secretary General's Report, Judge Stephen concludes that "the Statute does not authorize anonymity of witnesses where this would in a real sense affect the right of the accused specified in Article 21 and in particular the 'minimum guarantee' in (4)."[100] Judge Stephen suggests that the type of anonymity contemplated by the majority would violate the right to examine witnesses where "to the defence the accuser would appear as no more than a disembodied and distorted voice transmitted by electronic means."[101] That this "could be the means of bringing before the Chamber evidence which the prosecution has described as either very important or important, evidence which could lead to the accused's conviction on very serious charges,"[102] would "not only adversely affect the appearance of justice being done, but is likely actually to interfere with the doing of justice."[103]

Judge Stephen notes that not disclosing a witness' identity is only contemplated in Rule 69 as a pre-trial measure until the witness is within the International Tribunal's protection, and only as an "exceptional measure" even then.[104] He concludes that Rule 75 can be limited to preventing the disclosure of identity to the public or the media, and that if the reference to facilitating the testimony of vulnerable victims and witnesses in Rule 75(B)(iii) was to include the use of anonymous witnesses it would not introduce so radical a concept by indirect and ambiguous wording, especially after specific and elaborate provisions for full disclosure have been made. The fact that Rule 75(A) is made expressly subject to the "rights of the accused" also leads Judge Stephen to conclude that the use of anonymous witnesses is inconsistent with the Rules of Procedure and Evidence.[105]

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99. Protective Measures Decision, *supra* note 3, at 5026 (Stephen, J.).
100. *Id.* at 5025.
101. *Id.*
102. *Id.*
103. *Id.* at 5016.
104. *Id.* at 5024.
105. *Id.*

Support for these interpretations of the Rules comes from Judge Stephen's consideration of the principles enunciated in domestic cases and the case law of the ECHR. He finds it "noteworthy that it was very much part of the prosecution case that it is the Statute and Rules that are determinative and that little is to be gained from case law because of the unique nature of this Tribunal," but finds the principles quoted in domestic cases informative nevertheless.[106] Judge Stephen finds the statement of Lord Simon of Glaisdale in *D. v. National Society for the Prevention of Cruelty to Children* an appropriate starting point for considering witness anonymity. Lord Simon states that, "the public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged."[107]

The specific treatment of anonymous witnesses by the European Court of Human Rights receives considerable attention in Judge Stephen's judgment. Judge Stephen considers the case of *Kostovski v. The Netherlands* to be "the leading case" in the area and "emphasizes its particular relevance."[108] He notes the striking similarity between the right to examine witnesses as guaranteed in Article 6, paragraphs 1 and 3(d) of the ECHR and the same right as enunciated in Article 21(4)(e) of the Statute of the International Tribunal. This similarity is not surprising, he notes, as the Statute was inspired by the ICCPR and the ICCPR was based on ECHR.[109]

The European Court of Human Rights in *Kostovski* found that the use of anonymous testimony "involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6."[110] The *Kostovksi* decision relied upon the earlier case of *Unterpertinger v. Austria*, where the Court held that because the accused could not confront the witnesses, his defense rights were appreciably restricted in violation of Article 6 of the Convention.[111] Judge Stephen also quotes a number of recent court decisions which specifically cite approval of the *Kostovski* decision.[112]

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106. *Id.* at 5028.

107. 1978 App. Cas. 232.

108. Protective Measures Decision, *supra* note 3, at 5022 (Stephen, J.). *See also* Kostovski v. The Netherlands, 166 Eur. Ct. H.R. (ser. A) at 4 (1989).

109. Protective Measures Decision, *supra* note 3, at 5019 (Stephen, J.).

110. Kostovski v. The Netherlands, 166 Eur. Ct. H.R., (ser. A) at 21 (1989).

111. Unterpertinger v. Austria, 110 Eur. Ct. H.R. (ser. A) at 11 (1986).

112. Windisch v. Austria, 186 Eur. Ct. H.R. (ser. A) at 6, ¶ 23 (1990); Delta v. France, 191 Eur. Ct. H.R. (ser.A) at 12, ¶ 36 (1990); Lüdi v. Switzerland, 238 Eur. Ct. H.R. (ser. A) at 20, ¶ 49 (1992).

Judge Stephen also considers the special situation of the United States, where under the Sixth Amendment to the Constitution, the right of confrontation is constitutionally protected. In the 1989 case of *Delaware v. Van Arsdall,* the U.S. Supreme Court stated that the confrontation right guarantees "an opportunity for effective cross-examination" and by cutting off all questioning about a particular event that might have given a witness a motive for favoring the prosecution, the trial court had violated the accused's constitutional right of confrontation.[113] Judge Stephen distinguishes the two cases relied upon in the McDonald judgment, *Jarvie* and *Taylor.* In *Jarvie,* the witnesses involved were undercover police officers and their identity was known to the defendant, but not their true names. Judge Stephen distinguishes *Taylor* on the grounds that counsel for the defense was permitted to see the witness and cross-examine her, and the defendant could watch the witness testifying through a video screen.[114]

After considering these cases, Judge Stephen concludes that the authorities "are, quite generally and in a variety of jurisdictions, in favour of allowing an accused and his counsel to see and hear the witnesses as they give their evidence and are cross-examined."[115] He states that such cases provide "clear guidance as to what are internationally recognized standards regarding the rights of an accused,"[116] and from these cases concludes that the "essential purpose of confrontation" is "to secure for the opponent the opportunity of cross examination."[117] The authorities in his opinion "provide strong support for the view that in this case to permit anonymity of witnesses whose identity is of significance to the defendant will not only adversely affect the appearance of justice being done, but is likely actually to interfere with the doing of justice."[118]

Based on his examination of the Statute, the Rules, and the cited cases, Judge Stephen disposes of the Prosecutor's motion by "granting most of the relief sought by the prosecution, much of which is assented to by the defence, but stopping short of denying to the defence, including the accused, the right to see and hear witnesses give evidence before the Tribunal and know their identity."[119] Judge Stephen does not extend this disclosure requirement to Witnesses J and K, who were mere bystanders, "since knowledge of their identity would not add to the

113. Delaware v. Van Arsdall, 475 U.S. 673, 683 (1986).
114. Protective Measures Decision, *supra* note 3, at 5017-5016 (Stephen, J.).
115. *Id.* at 5022.
116. *Id.* at 5018.
117. *Id., quoting* Deleware v. Van Arsdall, 475 U.S. 673, 683 (1986).
118. *Id.* at 5016.
119. *Id.* at 5015.

information which the defence needs to cross examine them about the events to which they testify."[120]

II. THE SOURCES OF PROCEDURAL LAW

From what source or sources are the procedural powers of an international tribunal to be derived? Both the McDonald judgment and the Stephen dissent reveal an uncertainty as to the answer to this question. In looking at different sources of procedural rules the judges are unclear about the weight and authority to attribute to each source. Judge Stephen looks to the decided cases of European and national courts "for whatever assistance they may provide."[121] He then turns to the Secretary-General's Report stating "[p]erhaps it is permissible to seek further guidance from the Secretary-General's Report."[122] The McDonald judgment is also unclear as to which sources to consider, noting that the Secretary General's Report "gives little guidance regarding the applicable sources of law in construing and applying the Statute and Rules of the International Tribunal."[123]

The sources considered in both the McDonald judgment and the Stephen dissent are deceptively similar, yet opposite interpretations of each source is made. The McDonald judgment considers the Statute, the Rules, and domestic and regional case law and determines that all three sources allow for the use of anonymous witnesses. Judge Stephen considers the Statute, the Rules, and the domestic and regional case law and determines that all of these sources reject the use of anonymous witnesses.

While the McDonald judgment and the Stephen dissent rely on virtually identical sources of procedural law, the similarity ends there due to the vastly different weight given to these sources. The McDonald judgment, for example, considers whether the decisions of other tribunals are relevant, but ultimately concludes that any relevance is trumped by the unique context of the International Tribunal. In contrast, Judge Stephen interprets the Statute and Rules in the light of "internationally recognized standards" affirmed in municipal and international case law.

Where the Statute and Rules, considered in light of their drafting history, are not determinative on the question of the use of anonymous witnesses, both the McDonald judgment and the Stephen dissent consider the relevance of general principles of law. The judges use general

120. *Id.* at 5023-5022.
121. *Id.* at 5028.
122. *Id.* at 5026.
123. *Id.* at 5068.

principles as both a source of treaty interpretation and as a gap-filling device. The degree to which the Statute and Rules must comply with general principles plagues both the McDonald judgment and the Stephen dissent, and again contrasts an approach viewing the Statute and Rules as definitive with one that looks to external sources to clarify the meaning of these international instruments.

A. *The Statute of the International Tribunal*

1. The Authority to Make Procedural Rules

a. Article 15 of the Statute

Article 15 of the Statute of the International Tribunal delegates authority to the judges to make rules of procedure.[124] The McDonald judgment considers that an "indication of the uniqueness of the International Tribunal is that . . . the International Tribunal was able to mold its Rules and procedures to fit the task at hand."[125] However, a tribunal's power to determine its own rules of procedure is not unusual. It is expressly provided for in the statutes of tribunals, such as the International Court of Justice (ICJ) which in Article 30 provides that "the Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."[126] A tribunal's power to promulgate rules of procedure is further affirmed in conventions and model rules,[127] as well as in the writings of numerous textwriters.[128]

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124. Statute, *supra* note 7, art. 15.

125. Protective Measures Decision, *supra* note 3, at 5066 (McDonald, J.).

126. Statute of the International Court of Justice, June 26, 1945, 1946 Gr. Brit. T.S. 67, Stat. 59, 1055, art. 30 [hereinafter ICJ Statute]. Similar wording can be found in Article 30 of the Statute of the PCIJ, Dec. 16, 1920, 6 L.N.T.S 390, 1923 Gr. Brit. T.S. 23 [hereinafter PCIJ Statute]; Article 26 of the Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, 3 Martens Nouveau Recueil 94; Article 10(1) of the International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352; Article 60 of the American Convention on Human Rights, *supra* note 63; Article 188 of the Treaty Establishing the European Economic Community, March 25, 1957, 295 U.N.T.S. 2, 1958 J.O. 1188; Article 16 of Statute of the International Law of the Sea, UNCLOS, Annexe VI., UN Doc. A/CONF.62/122, 21 I.L.M. 1245 (1982).

127. This power is codified in Article 12 of the Model Rules on Arbitral Procedure, adopted by the International Law Commission, June 27, 1958, Y.B. Int'l L. Comm'n ii, at 81; and in Article 74 of the Hague Convention of 1907, Hague Ct. Rep. (Scott) xxxii (1916).

128. *See* MANLEY HUDSON, INTERNATIONAL TRIBUNALS, PAST AND PRESENT 86 (1941); MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 3 (1996); JACKSON RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 197 (rev. ed. 1926); DUWARD SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 41 (rev. ed. 1975); J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 150 (1959).

The Nuremberg Charter granted the Nuremberg Tribunal a broad power to "draw up rules for its procedure . . . not . . . inconsistent with the provisions of the Charter."[129] The Tokyo Charter's Article 7 provided that "the tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter."[130] Article 15 of the Statute of the International Tribunal requires the judges to draft and adopt the necessary rules of procedure and evidence that will govern every phase of a criminal proceeding.[131]

One difference between the wording of the Statute of the International Tribunal and the Tokyo and Nuremberg Charters is that these latter Charters expressly provide that the Rules must "be consistent" or "not . . . inconsistent" with the provisions of the Charter. No such qualification is expressed in Article 15 of the Statute of the International Tribunal. The absence of this qualification does not mean however, that the Rules formulated by the International Tribunal can be inconsistent with the Statute, the constitutive instrument of the International Tribunal. It is clear from the jurisprudence of the ICJ that an international tribunal's rules of procedure are to be interpreted in conformity with the governing charter or statute of that tribunal which provides the basis for those rules.[132] The statutes of other international tribunals further confirm that procedural rulings must not contravene the enabling statute of the tribunal.[133] Virginia Morris, who participated in the drafting of the Statute as a member of the UN Office of Legal Affairs, further states that such a rule was assumed to be evident by the drafters and not considered necessary in drafting the Statute.[134]

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129. Charter of the International Military Tribunal, *supra* note 14, art. 13.

130. Charter of the International Military Tribunal for the Far East, Apr. 2, 1946, art. 7 [hereinafter Tokyo Charter] *reprinted in* RICHARD MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMINAL TRIAL 185 (1975).

131. Statute, *supra* note 7, art. 15.

132. In making procedural rulings based on interpreting its Rules of Procedure, the Permanent Court of International Court notes that the decision of the Court "must be in accordance with its Statute." Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 1935 P.C.I.J. (ser. A/B) No. 65, at 70-71 (Oct. 31). *See also* Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 3, at 27 (Jan. 26); Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Preliminary Objections) (Belg. v. Spain), 1964 I.C.J. 3, at 78 (July 24).

133. The Arbitral Agreement on the Gut Dam Claims, March 25, 1965 provides in Article VI that the Tribunal "shall, with the concurrence of the two Agents, adopt such rules for its proceedings as deemed expedient and necessary, but no such rules shall contravene any part of the provisions of this Agreement." 52 DEP'T ST. BULL., Apr. 26, 1965, 643, 645. *See also* the French-Mexican Claims Commission, Sept. 25, 1924, art. IV, *reprinted in* A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 412 (1935); Settlement & Claims, July 28, 1926, U.S.-Pan., 10 U.S.T. 723.

134. 1 MORRIS & SCHARF, *supra* note 17, at 178.

Article 15 should thus be read as granting the International Tribunal the authority to make rules of procedure consistent with the Statute as the constituent instrument of the International Tribunal and as the exclusive basis for its competence and authority. While it is clear that the Rules must comply with the express language and intent of the Statute, the degree to which they may address other matters is not expressly provided for in the Statute. The extent to which a Trial Chamber may address matters not dealt with by the Statute or Rules raises a question as to the authority of the judges in making procedural rulings.

b. The Authority of the Judges

The second important point that arises from Article 15's wording is that it authorizes the judges as a whole to make procedural rules. The Article itself states that "the judges of the International Tribunal shall adopt rules of procedure and evidence . . . ." The Report of the Secretary General also indicates that the Article's legislative history interprets this to mean that "the judges of the International Tribunal *as a whole* should draft and adopt the rules of procedure and evidence of the International Tribunal."[135] Following this process, the judges have drafted, revised, and amended rules of procedure for the operation of the Tribunal.

The McDonald judgment in the *Tadić* case challenges this rule-making process by its decision to permit the use of anonymous witnesses that is not authorized by either the Statute or the Rules. In effect, the Trial Chamber creates a new rule of procedure which arguably goes beyond the scope of the Statute and the Rules. Article 22 of the Statute permits protective measures to be taken by a Trial Chamber as provided for in the Rules. The Rules authorize the withholding of the names of victims and witnesses only as a pre-trial measure in exceptional circumstances, and then specify that the identity of each witness "shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence."[136]

Elaborating a rule that provides for the use of anonymous witnesses is rightly a matter for the International Tribunal comprising all eleven judges rather than an issue for a Trial Chamber's two judge majority.[137] The fact that the Rules do not contemplate the use of anonymous testimony during the trials is implied by the contrast with the Rules on confidentiality. Regarding confidentiality, explicit rules authorize and govern the exclusion of the press and public in certain specified situations.[138] No similar

135. *Report of the Secretary General*, *supra* note 19, ¶ 83 (emphasis added).
136. *Rules of Procedure*, *supra* note 8, Rule 69(C).
137. *See* Leigh, *supra* note 4, at 80.
138. *See Rules of Procedure*, *supra* note 8, Rule 79.

specific rule exists on anonymous testimony. The fact that the authorization of the use of anonymous witnesses goes beyond the Rules is also evident from the fact that such extreme measures were not even contemplated by the prosecutor, who in his motion requested anonymity of witnesses only as a pre-trial measure and stated that "the Prosecutor shall disclose the names and the unredacted statements of the protected witnesses to the defence in sufficient time to allow the defence to prepare for trial, but no earlier than one month in advance of the firm trial date."[139]

Although the Trial Chamber may have exceeded its authority in a procedural ruling under the Statute and Rules, this does not give rise to an immediate remedy while the trial is on-going. The right to appeal a preliminary motion is limited under Rule 72(B) to exclude interlocutory appeal based on procedural deficiencies. Under Rule 72(B), interlocutory appeal is only available on objections based on "lack of jurisdiction" of the International Tribunal. The Appeal Chamber interpreted this Rule in its decision on jurisdiction to include challenges based on the International Tribunal's illegal foundation, the wrongful primacy of the International Tribunal over national courts, and lack of jurisdiction *ratione materiae*.[140] At the conclusion of the trial however the provisions for appeal are more generous, including appeal for an error on a question of law invalidating the decision, or based on an error of fact occasioning a miscarriage of justice.[141]

Failure to comply with the limits laid down on the Court's rule-making competence has not gone unnoticed in the ICJ. In a ruling on a 1990 Order on the intervention of Nicaragua in the *Land, Island, and Maritime Frontier Dispute* between El Salvador and Honduras, Judge Shahabuddeen determined there to be an inconsistency between the revised 1978 Rules of Procedure and the Statute of the Court and that because "the existing procedural arrangements for forming *ad hoc* chambers are not valid" the Chamber in question "has been constituted not in accordance with the Statute, but in accordance with an unauthorized arrangement."[142] Judge Shahabuddeen's dissenting opinion indicates he would deny the Order and states:

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139. Motion and Supporting Brief Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, U.N. Doc. IT-94-1-T, 1755-1758 at 1757 (May 18, 1995).

140. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, U.N. Doc. IT-94-1-AR72, 6491-6413 at 6488 (Oct. 2, 1995).

141. Statute, *supra* note 7, art. 25.

142. 1990 I.C.J. 18, 55 (D.O. Shahabuddeen). On the issue of the composition of Chambers and the compliance of the 1978 Rules with the Statute see Stephen M. Schwebel, *Chambers of the International Court of Justice Formed For Particular Case, in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 739 (Yaram Dinstein & Mala Tabory eds., 1989); *see also* H.W.A. Thirlway, *Procedural Law and the International Court of Justice, in* FIFTY YEARS OF THE INTERNATIONAL COURT OF

> To sum up, the field of operation of the rule-making power of the Court, as defined by Article 30 of the Statute, is wide but not unlimited. The Court, it may be said, has a certain autonomy in the exercise of its rule-making competence; but autonomy is not omnipotence, and that competence is not unbounded. Rules of Court could only be made in exercise of powers granted by the Statute, whether expressly or impliedly.[143]

The Rules of the International Tribunal were devised by the judges without review by the Security Council or any other entity.[144] The judges, acting as a whole, thus have the ability to amend the rules to either permit or preclude the use of anonymous witnesses during the trial process.[145] Such an approach would be in keeping with the delegation in Article 15 which requires not only the judges as a whole to make procedural rules, but for the rules to be definitively matters of procedure.

c. To Make Rules of Procedure

A further jurisdictional argument arises as Article 15 authorizes the judges to make rules of procedure and evidence. It does not authorize the judges to make substantive rules of law. If a matter is determined to be one of substance, the International Tribunal cannot create law to determine the case, but must apply the law as determined by the Statute.[146]

JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 389 (Vaughan Lowe & Malgozia Fitzmaurice eds., 1996).

143. 1990 I.C.J. 18, 47.

144. A significantly different procedure for adopting rules is contained in Article 19 of the International Law Commission's Draft Statute for an International Criminal Court. That procedure requires the court's initial rules to be approved by a conference of state parties and subsequent changes in the rules allow the presidency to adopt rules if the majority of States have not communicated objections to the proposed amendments. *See Report of the International Law Commission*, U.N. GAOR, 49th Sess., Supp. No. 10, at 64-65, U.N. Doc. A/49/10 (1994).

145. Rule 6 on the amendment of the Rules provides that:

> A) proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than seven Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges; B) an amendment to the Rules may otherwise be adopted, provided it is unanimously approved by the Judges.

Rules of Procedure, *supra* note 8, Rule 6.

146. This includes the part of conventional international humanitarian law which has beyond doubt become part of international customary law, namely "the Geneva Conventions of 12 Aug 1949 for the Protection of War Victims, the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 Oct 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and the Charter of the International Military Tribunal of 8 August 1945." *Report of the Secretary General*, *supra* note 19, ¶ 35.

On procedural matters, however, the International Tribunal has much more discretion, and under Article 15 is given the power to set out rules of procedure. The general power of an international judge or arbitrator to determine the applicable procedure is well acknowledged. International tribunals are thus generally guided by few written rules of procedure but have the authority to supplement these rules as needed.[147]

If the matter of protective measures is defined as substantive, then a potential jurisdictional problem arises with the Rules in relation to the Security Council's powers. The Security Council has the power to legislate the organizational and administrative structure for the proper functioning of the International Tribunal.[148] It does not have power to legislate in respect to substantive powers[149] and the International Tribunal's enabling statute is expressly an effort in codifying existing law rather than a legislative effort. The Report of the Secretary General provides that:

> in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[150]

With regard to the Security Council's delegation of power to the International Tribunal under Article 15 to establish rules of procedure and evidence, the Security Council may delegate power in relation to the internal workings of the International Tribunal within the scope of the

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147. This is either by an express power to make procedural rules such as that under Article 30 of the ICJ Statute, *supra* note 126, or by the power to make individual decisions on procedural matters. *See Conventions Concluded at the First International Peace Conference, Held at the Hague 1899*, (Convention for the Pacific Settlement of International Disputes), *reprinted in* 2 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776-1909 2016, at 2062, art. 49 (compiled by William M. Malloy, 1910); The Hague Convention of 1907, *supra* note 127, art. 74, at IXXXV. *See generally* J.C. Witenberg, *La Théorie des Preuves Devant les Jurisdictions Internationales*, 56 HAGUE RECUEIL 5, 12 (1936 II).

148. *See* Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (stating that the UN is deemed to have those powers necessary to the essential performance of its duties as a necessary implication arising from the Charter).

149. The law-declaring efforts of the Security Council are limited to serving as evidence of conventional and customary international law and general principles of law as evidenced in conventions, the practice of state's national legislation and the norms, standards and practice of the UN. *See* Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Preliminary Objections), 1964 I.C.J. 3, 302-303, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 699-700 (4th ed. 1990); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 5–6 (1974–75).

150. *Report of the Secretary General, supra* note 19, ¶ 29.

enabling Resolution, but it is less clear that it can delegate a quasi-legislative power to a subsidiary organ when that power leads to the enactment of substantive rules even under the heading of procedural rules. M. Cherif Bassiouni has expressed concern that the judges will attempt to make substantive law, disguised as procedural rules, which will be ultra vires to the Statute.[151]

Is the question of protective measures then a question of procedure or one of substance? An early academic commentary on the two motions in the *Tadić* case labeled the first motion on jurisdiction a substantive ruling, and the second ruling on protective measures a procedural ruling.[152] Aside from this commentator's authority, there has been no similar classification of these decisions by the International Tribunal or otherwise. An implicit assertion that this ruling is procedural, and the ruling on jurisdiction substantive can be implied from the nature of the sources looked at by the International Tribunal. In the jurisdiction case, the International Tribunal looked to customary international law and to the international conventions that evidence international humanitarian norms, which are sources of substantive law. In the protective measures case, the International Tribunal largely restricted itself to the Statute and the Rules, and did not consider relevant customary international law, thus suggesting a procedural ruling.

The question of whether a matter is one of substance or procedure is not easily answered, and differs significantly between domestic legal systems,[153] between international and domestic law,[154] and even within international cases.[155] The fact that the protective measures motion was introduced as a preliminary motion does not clarify its procedural or substantive status. Some preliminary objections are viewed merely as

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151. BASSIOUNI & MANIKAS, *supra* note 20, at 270.

152. Theodor Meron, Editorial Comments, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against the Accused*, 90 AM. J. INT'L L. 235 (1996).

153. For example, there is no consensus in municipal systems on the question of whether limitation periods are substantive or procedural. Even within English law, statutes of limitation can be considered alternatively substantive or procedural depending on whether they concern rights or remedies. A.V. DICEY & J. H. C. MORRIS, THE CONFLICT OF LAWS 184 (12th ed. 1993).

154. Preliminary objections are generally classified as procedural under domestic law, but can be procedural or substantive under international law. *See* Gaetano Arangio-Ruiz, *The Plea of Domestic Jurisdiction before the International Court of Justice: Substance or Procedure?, in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 440, 455–56 (Vaughan Lowe & Malgozia Fitzmaurice eds., 1996).

155. The line between procedure and substance in the context of voting procedures was recognised by the ICJ to be elastic rather than fixed, and depended on the purpose of looking at the question. *See* Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67, at 75 (June 7).

matters of form,[156] while others are recognized as involving substantial issues pertaining to the merits.[157]

The general distinction made between substance and procedure is that between "right and remedy" or "the mode of proceedings by which a legal right is enforced, as distinguished from the law which gives or defines the right."[158] Applying this distinction to protective measures, the right to a fair trial, including the right to confront the case against one, is arguably a substantive right. The procedure of enforcing these rights, including the use of anonymous witnesses or publication bans, would then fall into the realm of the procedural.

Alternatively, the distinction between procedure and substance advanced in the *Losinger* case, involving Article 40 of the Permanent Court of International Justice (PCIJ) Rules on the submission of written pleadings, states that procedural issues concern the "organization and internal administration of the Court, rather than the rights of the parties."[159] This definition is not particularly useful as many procedural matters can be said to concern the rights of the parties. Such a definition would include many matters contemplated as procedure by the Rules of the International Tribunal, including the rules on corroboration in cases of sexual assault, on the use of consent as a defense, and on the admissibility of the prior sexual conduct of the victim. These same matters may be deemed substantive under municipal and regional regimes.[160]

Traditional categories have emerged which are considered generally procedural or substantive. If protective measures are classified as a matter of evidence, a strong presumption is introduced that they involve a procedural issue. A.V. Dicey defines procedural issues to include "remedies and process, evidence, limitation of an action or other proceeding, set off or counterclaim."[161] Not all evidentiary matters are uniquely procedural however. Sir Jocelyn Simon, in *Mahadervan v. Mahadervan*, qualified that "it is not everything that appears in a treatise on

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156. Questions of the validity of the application or its presentation, the indication of a plausible jurisdictional link, or the question of whether the applicant is a State are considered to be of a purely formal or procedural nature. *See* Arangio-Ruiz, *supra* note 154, at 455.

157. See Nottebohm Case (Liechtenstein v. Guatemala), 1953 I.C.J. 111, at 117 (Nov. 18) where the objection was seen as a substantive matter as it concerned the substantive rights of the parties.

158. Poyser v. Minors, (1881) 7 QBD 329, 333; adopted in Re Shoesmith [1938] 2 KBD 637, [1938] 3 All ER 186.

159. Losinger Case, 1936 P.C.I.J (ser. A/B) No. 67, at 22.

160. The consent and corroboration requirements in sexual assault cases are considered to be substantive issues of criminal law. *See, e.g.* § 273.2 on consent and § 274 on corroboration of the Criminal Code of Canada, R.S.C., ch. C-46 (1985), and R. v. Park [1995] 2 S.C.R. 836, 99 C.C.C. (3d) 1.

161. J.H.C. MORRIS & OTHERS, DICEY'S CONFLICT OF LAWS 859 (6th ed. 1949).

the law of evidence that is to be classified internationally as adjective law, but only provisions of a technical or procedural character."[162] The question of the burden of proof, for example, may be considered as a procedural presumption or as an instance of substantive law.[163]

Protective measures for witnesses are arguably a matter of evidence because they concern witness testimony. Evidence, as it is understood in international procedure, generally encompasses "real evidence, documentary proofs, and the testimony of witnesses and experts."[164] V.S. Mani and J.C. Witenberg both assert that the law regarding the presentation of evidence in international procedure is essentially a part of procedural law.[165]

Professor Witenberg supports his conclusion that evidentiary questions are matters of procedure in international adjudication with the fact that the substantive law set out in international instruments rarely contains evidence rules.[166] Arbitral treaties and the statutes of preconstituted tribunals often are silent on questions of evidence, and if they do mention evidence they evoke only general guiding principles. The only positive rule of evidence in the Hague Convention of 1907 is the rule that documentary proof must be presented during the written phase of proceedings. The authority for making determinations of evidence is otherwise left to the deciding judge.[167] This same delegation to the Court to make "all arrangements concerned with the taking of evidence" is to be found in Article 48 of the Statute of the ICJ,[168] and in the Washington Treaty establishing the Inter-American Court.[169] The articles on the rights of the accused and the protection of victims in the Statute of the International Tribunal fall under the heading "trial and post-trial proceedings." The only other mention of an evidentiary power in the Statute is the power given to the Tribunal under Article 15 to make its own rules of procedure and evidence.

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162. [1964] P 233 at 243, [1962] 3 All ER 1108 at 1115.

163. Allan Philip, *Description in the Award of the Standard of Proof Sought and Satisfied*, 10 ARB. INT'L 361, 363 (1994).

164. MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1942 565 (1943).

165. V.S. MANI, INTERNATIONAL ADJUDICATION PROCEDURE ASPECTS 192 (1980); Witenberg, *supra* note 147, at 13.

166. Witenberg, *supra* note 147, at 13.

167. Hague Convention of 1907, *supra* note 127, art. 74.

168. Article 48 states that "the Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence." ICJ Statute, *supra* note 126, art. 48.

169. *Convention for the Establishement of an International Central American Tribunal*, 17 AM. J. INT'L L. Supp. 83 (1923).

The above arguments all support classifying protective measures as a matter of procedural law. The approach in private international law, as well as public international law, has traditionally been to apply an expansive definition to the meaning of procedure.[170] The flexibility and wide powers given to international tribunals in procedural matters suggest that tribunals should be allowed to define for themselves what matters are procedural.[171] The absence of any appeal on preliminary motions, outside the area of jurisdictional appeals, further confirms that the International Tribunal is entitled to make such determinations on its own and to proceed on the basis that protective measures are indeed matters of procedural law over which the International Tribunal has discretion. The judges have not overstepped their jurisdiction in making procedural rulings that are really substantive in nature, and therefore outside the jurisdiction afforded them by Article 15 of the Statute.

2. Sources of Interpretation of the Statute

While Article 15 of the Statute delegates to the judges the power to make rules of procedure, other provisions of the Statute circumscribe the judges' discretion in rule making through provisions on the rights of the accused and the protection of victims and witnesses.[172] Where the meaning of these articles is ambiguous, or capable of multiple interpretations, the question arises as to what sources of interpretation the International Tribunal's judges will consider.

a. Principles of Treaty Interpretation

While Judge McDonald states that the Statute of the International Tribunal is "not a treaty,"[173] and while the Chapter VII, the basis of the Security Council's authority in establishing the International Tribunal is used to distinguish the International Tribunal from the "treaty-like nature" of the Nuremberg Charter,[174] principles of treaty interpretation remain relevant to the Statute.

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170. This allows domestic courts to apply their own law, as procedural matters are generally determined by the law of the *lex fori.* For expansive definitions of procedural law stating that the mode and manner of proof as well as the admissibility of evidence is a matter for the *lex fori. See* A.E. ANTON, PRIVATE INTERNATIONAL LAW 742 (2nd ed. 1990); DICEY & MORRIS, *supra* note 153, at 174; CLIFF SCHMITHOFF, THE ENGLISH CONFLICT OF LAWS 400 (3rd ed. 1954).

171. This flexibility is noted by Judge Jessup in his dissenting opinion in the South-West Africa Cases stating that "an international court . . . is not bound by any technical rules of procedure or evidence." South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), 2nd Phase 1966 I.C.J. 4, 430 (1966).

172. *See* Statute, *supra* note 7, arts. 20, 21, 22.

173. Protective Measures Decision, *supra* note 3, at 5068 (McDonald, J.).

174. BASSIOUNI & MANIKAS, *supra* note 20, at 263.

This relevance flows from the fact that the Vienna Convention on the Law of Treaties incorporates treaty interpretation provisions that are both widely used and are representative of customary international law.[175] Furthermore, the definition of a treaty in Article 2(I)(A) of the Vienna Convention is an expansive definition and analogies can easily be drawn between the type of instruments included in this definition and the Statute of the International Tribunal.[176] The statutes of other international tribunals, such as the Statute of the International Court of Justice and the Rules of Court, are interpreted based on the principles of treaty interpretation codified in the Vienna Convention.[177]

Treaty interpretation is also relevant because the Statute of the International Tribunal incorporates specific treaty sources such as the ICCPR and ECHR. The Convention thus provides a relevant means of interpreting articles such as Article 21 which is virtually identical to Article 14 of the ICCPR and is acknowledged by the Tribunal as such.[178]

Further evidence of the relevance of treaty interpretation principles comes from the judgment of Judge Sidhwa in the appeal on the International Tribunal's Jurisdiction. Judge Sidhwa there sets out "Rules as to Interpretation of Constitution of an International Body:"

> In the field of international law, any organisation or body created by a treaty or some form of enactment must examine its own constitution to appraise or assess what the whole or any

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175. The Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 at 691, 1155 U.N.T.S. 331; Fisheries Jurisdiction (U.K. of Gr. Brit. & N. Ir. v. Ice.), 1974 I.C.J. 3 at 118 (July 25) (separate opinion of Judge Waldock); Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 3, at 47 (Jan. 26).

176. The legislative history of this Article reveals from the comments of the Special Rapporteur that an expressly wide meaning was given to the term "treaty" after extensive debate. See the comments of the Special Rapporteur in Art. 76 of the Waldock Report IV, *quoted in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PREPARATORIES 486 (Ralf Günter Wetzel Compiler & Dietrich Rauschning eds., 1978).

177. In determining whether a right of re-submission could be implied from the Rules of Court, Judge Armand-Ugon in the *Barcelona Traction* case, followed principles of treaty interpretation to examine the preparatory work of the articles of the Rules and the circumstances of their drafting and adoption to conclude that such a right could not be inferred from the Rules. Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1964 I.C.J. 6 at 115 (July 24) (dissenting opinion of Armand-Ugon). Professor Thirlway attributes the small amount of discussion of the procedural rules of the ICJ to the fact that the majority of procedural problems resolve themselves into questions of interpretation of the Statute, and are thus governed by the law of the interpretation of treaties. Thirlway, *supra* note 142, at 389.

178. The Commentary on Article 21 of the Secretary General's Report indicates that the Article was based on internationally recognized standards which "are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights." *Report of the Secretary General, supra* note 19, ¶ 106 at 1185.

> part thereof means ... The constitution or its relevant part should be examined in good faith in accordance with the ordinary meaning in the context in which it appears and in the light of its objects and purposes. If there appears some confusion, any prior agreement or instruments between the parties, or, as in this particular case, the report of the Secretary-General and the debate of the members of the Security Council, thereon, can be examined ... If any serious ambiguity still remains, reference to rules relating to interpretation of international statutes or other material can be resorted to.[179]

Following principles of treaty interpretation, it is possible to ascertain the meaning of certain provisions of the Statute by going beyond the face of the Statute to examine "the ordinary meaning to be given to the terms ... in their context [of the Statute] and in the light of its object and purpose."[180] The resolutions of the Security Council set out the International Tribunal's object and purpose, establishing it: to do justice; to deter future crimes; and to contribute to the restoration and maintenance of peace.[181] The context of the Statute is set out in the Report of the Secretary General which contains the Statute and a short commentary on each article.

The McDonald judgment embraces an approach of context-based treaty interpretation and asserts that all international standards and analogies must be qualified by the "unique context" of the International Tribunal. In the McDonald judgment, it is Article 20's requirement mandating "due regard for the protection of victims and witnesses" that indicates the special context of the International Tribunal. Also relying on Article 20, Judge Stephen indicates that the context of the Tribunal is revealed in the assertion that trials must be conducted with "full respect for the rights of the accused."

The Statute is capable of multiple interpretations as its provisions can be read to support both an approach favoring protection of victims and witnesses and one mandating strict compliance with the rights of the accused. In the face of such multiple interpretations, the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the preparatory work of a treaty and the circumstances of

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179. Appeal on Jurisdiction, Prosecutor v. Tadić, U.N. Doc. IT-94-1-AR72, 6491-6413 at 6333 (Oct. 2, 1995) (S.O. Judge Sidhwa).

180. Vienna Convention, *supra* note 175, art. 31.

181. *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 11 at 11, U.N. Doc. A/49/342, 5/1007 (1994).

its conclusion, in order to: confirm its meaning; to determine its meaning when a reading based on "its object and purpose" leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.[182]

Limited supplementary means of interpretation are available, such as drafting histories because the drafting process was done in secret by the UN Office of Legal Affairs. The State submissions to the drafters are potential sources of legislative intent, especially those clarifications related to the Statute made by Security Council members in voting on the Statute.[183] The main source of legislative history of the Statute is the Secretary General's Report and it is in light of this Report that interpretations of the Statute are made.

b. Legislative Intent—The Report of the Secretary General

The Secretary General's Report containing the Statute and commentary can be regarded as an authoritative source of law for the interpretation of the Statute. The Appeal Chamber in the jurisdiction case considered the Secretary General's Report "as part of the preparatory works of the Statute of the International Tribunal."[184] It presents what the Secretary General represented to the members of the Security Council, who on the basis of that representation adopted the draft Statute. Both the McDonald judgment and Stephen dissent consider the Secretary General's Report as relevant in setting out the Statute's context and spirit.

Judge McDonald finds support in the Secretary General's Report for her assertion that the "unique context" of the International Tribunal is indicated in the "affirmative obligation to protect victims and witnesses."[185] The Tribunal's context is thus used to justify derogation from "internationally recognized standards" regarding the rights of the accused which are also protected in the Statute and affirmed in the Secretary General's Report.[186] Judge McDonald suggests that derogation from the standards articulated in Article 14 of the ICCPR is justified

182. Vienna Convention, *supra* note 175, art. 32.

183. *See* Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, S/PV.3217, May 25, 1993, *reprinted in* MORRIS & SCHARF, *supra* note 17 at 179.

184. Appeal on Jurisdiction, Prosecutor v. Tadić, U.N. Doc. IT-94-1-AR72, 6491-6413 at 6443 (Oct. 2, 1995) (President Cassese).

185. Protective Measures Decision, *supra* note 3, at 5064 (McDonald, J.). *See Report of the Secretary General, supra* note 19, ¶ 99 ("the Trial Chamber should also provide appropriate protection for victims and witnesses during the proceedings.").

186. *Report of the Secretary General, supra* note 19, ¶ 106; *see* Statute, *supra* note 7, art. 21.

because the ICCPR does not expressly contemplate victim and witness protection as one of its goals, and because the International Tribunal is operating in an "emergency context."[187]

The Secretary General's Report was made with full knowledge of the emergency conditions in which the International Tribunal would operate, and if derogation from the rights espoused in the Report, Statute, and Rules of the Tribunal was considered appropriate based on this context, express provision for such derogation would be made in these instruments of the Tribunal. No provision exists in the Statute on the possibility of derogation from the rights included in it. The McDonald judgment's argument is unconvincing as there is little reason to believe that something as radical as a derogation provision from "minimum guarantees" stated in the Statute should be inferred with no proof of legislative intent for such an inference.

The Statute's legislative history indicates that an opposite approach is mandated, one that interprets the Statute in a manner consistent with "internationally recognized standards." The Secretary General's Report makes it clear that "the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused."[188] Virtually every state submission to the Secretary General on the drafting of the Statute indicates that basic human rights guarantees, including those articulated in Article 14 of the ICCPR, must be applied.[189] None of these submissions contemplate derogation from the standards set out in Article 14. The unanimity of these submissions in asserting that the International

187. *See* Protective Measures Decision, *supra* note 3, at 5052 (McDonald J.).

188. *Report of the Secretary General*, *supra* note 19, ¶ 106.

189. *See* Proposal for an International War Crimes Tribunal for the Former Yugoslavia by rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, art. 31, U.N. Doc. S/25307 (18 Feb. 1993), *in* 2 MORRIS & SCHARF 211, *supra* note 17 at 287; Letter Dated 10 Feb 1993 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General, U.N. Doc. S/25266, ¶s 115, 117 (Feb. 10, 1993) *in* 2 MORRIS & SCHARF 327, *supra* note 17 at 348–49; Letter Dated 16 Feb 1993 From the Permanent Representative of Italy to the UN Addressed to the Secretary-General, U.N. Doc. S/25300 , art. II (Feb. 17, 1993), *in* 2 MORRIS & SCHARF 375, *supra* note 17 at 384; Letter Dated 6 April 1993 From the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General, U.N. Doc. S/25540, ¶ 18, (Apr. 6, 1993), *in* 2 MORRIS & SCHARF 435, *supra* note 17 at 437; Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, U.N. Doc. S/25537, art. 17(h), (Apr. 6, 1993), *in* 2 MORRIS & SCHARF 439, *supra* note 17, at 443; Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/25575, art. 20(f) (Apr. 12, 1993), *in* 2 MORRIS & SCHARF 451, *supra* note 17 at 456 [hereinafter U.S. Submission]; Letter Dated 13 April 1993 from the Permanent Representative of Canada to the UN Addressed to the Secretary-General, U.N. Doc. S/25594, ¶ 13 (Apr. 14, 1993), *in* 2 MORRIS & SCHARF 459, *supra* note 17 at 461.

Tribunal is bound to apply the guarantees in Article 14 of the ICCPR contrasts sharply with the derogation contemplated by the McDonald judgment.

A jurisdictional argument can also be made against a reading of the Statute and Rules which would allow derogation from "internationally recognized standards," including those in Article 14 of the ICCPR. In determining the Tribunal's jurisdiction, the Appeal Chamber, in the jurisdiction phase of the *Tadić* case, ruled that the Tribunal was "established by law."[190] The Appeal Chamber stated that:

> [t]he important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness. . . . While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights.[191]

The Appeal Chamber's conclusion that the International Tribunal was established by law depends in part on the fact that the Statute and Rules of the International Tribunal adopted the guarantee of a fair trial from Article 14 of the ICCPR.[192] A refusal to accept these rights or an acknowledgment that derogation from these rights is possible might threaten the conclusion that the International Tribunal is "established by law," and justify a questioning of the International Tribunal's jurisdiction.

The approach taken in the Stephen dissent, interpreting the Statute and Rules in a manner consistent with "internationally recognized standards," is the most compatible with the legislative history of these instruments and the jurisdictional limits posed by the Statute of the Tribunal. A problem that arises in speaking of "internationally recognized standards" generally is the absence of detailed description of what these standards involve. Judge Stephen relies exclusively on Article 14 of the

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190. Appeal on Jurisdiction, Prosecutor v. Tadić, U.N. Doc. IT-94-1-AR72, 6491-6413 at 6469-6465 (Oct. 2, 1995).

191. *Id.* at 6466.

192. *Id.* at 6465.

ICCPR and Article 6 of the ECHR to evidence the fact that the "right to examine witnesses" falls within the scope of "internationally recognized standards." A wider examination of the meaning of this right beyond the scope of these two instruments is not undertaken.[193]

B. *The Rules of Evidence and Procedure*

The non-disclosure of a witness' identity to the accused and his or her counsel is contemplated in the Rules only as a pre-trial measure. As a result, the majority must consider the anonymity issue under the general provision of Rule 75(A). According to that Rule, a Judge or a Trial Chamber may order protective measures "provided that the measures are consistent with the rights of the accused." The Rule's concern for the "rights of the accused" reintroduces the debate on the sources of interpretation with which to approach the Rules. The tension visible in the judges' consideration of the Statute between an approach viewing the Rules as determinative and one that looks at the meaning of the Rules in a wider international context also marks the judges' consideration of Rule 75.

Judge McDonald infers from the "affirmative obligation in the Statute" to protect victims and witnesses that consideration of the accused's rights in Rule 75 must be balanced against protection of victims and witnesses. The Stephen dissent argues that the rights of the accused are "unconditionally" guaranteed and that the Rules give no support for witness anonymity at the expense of the fairness of the trial and the rights of the accused.[194] This approach is the most consistent with the wording of the Rule which does not advocate a balancing of the rights of the accused with the needs of victims and witnesses, but rather asserts that any measures must be "consistent with the rights of the accused."

Where the accused's rights, including the "right to examine witnesses," are defined in international instruments, they are not qualified by the requirements of victim and witness protection. If a requirement of the principle of legality, and the Appeal Chamber's determination that the International Tribunal is "established by law," is that the Tribunal must observe the requirements of procedural fairness, then the fair

193. The right of an accused to "examine, or have examined, the witnesses against him" is also specifically recognised in American Convention of Human Rights, *supra* note 63, art. 8(2)(f) and European Convention on Human Rights, *supra* note 55, art. 6(3)(d); First Protocol to the Geneva Convention on the Protection of Victims of Armed Conflicts, Aug. 15, 1977, U.N. Doc. A/32/144 (1977); Tokyo Charter *supra* note 130, art. 9; Charter for International Military Tribunal, *supra* note 14, art. 16(e); Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII(9), 199 U.N.T.S. 67, T.I.A.S. No. 2846.

194. Protective Measures Decision, *supra* note 3 at 5022 (Stephen, J., dissenting).

trial requirements articulated in other international instruments must be relevant. The procedural fairness standards set out in international instruments do not subject the accused's right to a fair trial to any "discount and balancing" in order to permit the anonymity of victims and witnesses.[195]

An exception from the McDonald judgment's usual position, that the wording of the Rules is determinative and external sources are of little relevance, can be found in the consideration of confidentiality measures under Rule 79. In ordering that the press and public may be excluded from the trial proceedings, the majority interprets Rule 79 in a manner consistent with "principles of criminal procedure in domestic courts."[196] This departure from the usual approach of rejecting international standards is likely due to the fact that in the area of confidentiality measures considerable support exists for the majority position in numerous countries' legislation and court practice.[197] Similar support from international instruments and domestic law is not so conclusive in the area of non-disclosure of a witness' identity from the accused.[198]

The interpretations of the Rules in the McDonald judgment and Stephen dissent are generally irreconcilable because of their contrasting approaches to the question of the sources with which to interpret these Rules. Where the Rules are considered "unclear or silent on a question of evidence" a specific interpretation or gap-filling Article has been included to denote the supplementary sources of interpretation to be considered. As with the Statute, where multiple interpretations of the Rules are plausible, it is to these supplementary sources that one turns for guidance. Rules 89 on "General Provisions" sets out the supplementary sources of interpretation that govern the Rules of Procedure:

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195. *See* ICCPR, *supra* note 63, art. 6; American Convention on Human Rights, *supra* note 61, art. 8; European Convention on Human Rights, *supra* note 55, art. 6. Monroe Leigh suggests that "international law has not yet accepted a position that the accused's right to a fair trial is subject to 'discount and balancing' in order to provide for the anonymity of witnesses." Leigh, *supra* note 4, at 83.

196. Protective Measures Decision, *supra* note 3, at 5060 (McDonald, J.).

197. The McDonald judgment cites examples from Canada, Australia, South Africa, the United Kingdom, Germany, Switzerland, Greece, Denmark and the United States. *See supra* notes 68-73.

198. Some international instruments go so far as expressly prohibiting the use of anonymous witnesses as inconsistent with the right to a fair trial. *See, e.g.*, The Draft Declaration on the Right to a Fair Trial and a Remedy, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Commission on Human Rights, UN Doc.E/CN.4/Sub.2/1993/24/ Add.1 (specifying, at Article 60(j) that "the use of testimony of anonymous witnesses during a trial is a violation of the defendant's right to examine witnesses against him or her").

> in cases otherwise not provided for in this Section, a Chamber shall apply rules of evidence which will best favor a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.[199]

The reference to "the spirit of the statute," although vague, likely refers to the Statute's object and purpose as evidenced by the Secretary General's Report setting out the Statute. General principles of law provide further guidance outside the scope of the Statute and its legislative history.

C. General Principles of Law

Rule 89 specifically foresees a role for general principles of law in interpreting and supplementing the Rules of Procedure. While neither the McDonald judgment nor the Stephen dissent expressly refers to general principles of law, both place significant reliance on municipal examples. These municipal examples are used both in interpreting the Statute and Rules and in supplementing perceived gaps in the Rules.

1. The Relevance of General Principles

A general principle of law is defined as "some proposition of law so fundamental that it will be found in virtually every legal system."[200] General principles include "elements of legal reasoning and private law analogies,"[201] including the well-recognized principles underlying rules of evidence.[202] In settling international disputes, general principles may be applied by the ICJ pursuant to Article 38(1)(c) of the ICJ Statute but their application is not restricted to ICJ cases,[203] and general principles are applied in international dispute settlement by arbitral tribunals and claims commissions.[204]

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199. *See Rules of Procedure*, *supra* note 8, at Rule 89(B).

200. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 55 (2d. ed. 1993).

201. BROWNLIE, *supra* note 149, at 16.

202. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 308 (1953).

203. *See, e.g.*, Aegean Sea Continental Shelf Case (Greece v. Turk.), 1976 I.C.J. 3, 39 (Sept. 11) (dissenting opinion of Judge Stassinopoulis); Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1964 I.C.J. 4 133–134 (July 24); North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 4, 134 (Feb. 20) (separate opinion by Judge Ammoun); International Status of South-West Africa Case, 1950 I.C.J. 128, 148 (July 11) (separate opinion by Sir Arnold McNair).

204. *See* Mixed Claims Commission Italy-Venezuela Constituted Under the Protocols of 13 February and 7 May 1903, X R.I.A.A., 477, 522 (opinions of a general nature—Sambiaggio Case). In the Russian Indemnity Case the Permanent Court of Arbitration cited general principles of law as establishing in part obligation and state responsibility for non-payment of pecuniary debts. Russian Indemnity Case (Russ. V. Turk.), Hague Ct. Rep.

Consideration of general principles of law has particularly occurred in the field of evidence and procedural law. Reference has been made by international tribunals to municipal analogies in determining the applicability of res judicata,[205] the effect of circumstantial evidence,[206] the burden of proof on the claimant,[207] as well as the principles governing the judicial process.[208] Even where international tribunals exercise considerable freedom in admitting and evaluating evidence, they find support for their decisions in the principles underlying rules of evidence in domestic law.[209]

In the context of the International Tribunal, Rule 89 provides that a Chamber shall apply rules of evidence that "are consonant with the spirit of the Statute and general principles of law."[210] Rule 89's legislative history reveals that other sources were explicitly rejected in favor of general principles and underlines the deliberate inclusion of general principles as a source of procedural law in the Rules. Two of the proposals on the content of the Rules, which have been noted to be among

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(Scott) 297 (Perm. Ct. Arb. 1912). General principles of law are also included as a source of law in arbitration treaties, *see* Treaty of Arbitration and Conciliation between the Swiss Confederation and the German Reich, Signed at Berne, Dec. 3, 1921, 12 L.N.T.S 280, 283; in concession agreements, *see* Lord McNair, Q.C., *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1, 8–9 (1957); and in purely private agreements involving transnational business affairs, *see* Final Award No. 3572 (I.C.C. 1982) *reprinted in* 144 YB Com. Arb. 111 (1989); Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 173 (Arbitral Award 1963).

205. *See* Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, 1954 I.C.J. 47, 53 (July 13).

206. *See* The Corfu Channel Case, 1949 I.C.J. 4, 18 (Apr. 19) (merits) (holding that "[t]his indirect evidence is admitted in all systems of law, and its use is recognised by international decisions.").

207. De Le Pradelle & N. Politis, *Affaire du Queen*, II RECUEIL DES ARBITRAGES INTERNATIONAUX 706, 708 (1923).

208. Application for Review of Judgment No. 158, 1973 I.C.J. 166, at 177; Application for Review of Judgment No. 273, 1982 I.C.J. 325, at 338–40 & 356. *See also* BROWNLIE, *supra* note 149, at 18; Rudolf Schlesinger, *Research on General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 736–77 (1957).

209. Commissioner Jones, relying on an earlier ruling of the United-States Mexican Claims Commission of 1923 in the *Parker Case*, supported an evidentiary ruling in the *Cameron Case* before the British-Mexican Claims Commission stating: "I am not overlooking the fact that the decision of one international tribunal is not binding upon another. It is no less true, however, that the general principles relating to evidence and procedure which should guide them ought to be the same." Decisions and Opinions of Commissioners (Gr. Brit. & Mex.), 37, 38 (1929).

210. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, U.N. Doc IT/32(1994), amended by U.N. doc IT/32/Rev. 1 (1994), U.N. Doc. IT/32/Rev. 2 (1994), and containing the most recent changes in U.N. Doc. IT/32/Rev. 3 (1995), reprinted in 2 MORRIS & SCHARF, *supra* note 17, at 177.

the most influential proposals in their drafting,[211] proposed a more comprehensive consideration of the sources enumerated in Article 38 of the Statute of the ICJ in this Rule.

The proposal by the U.S. government on supplementary sources reads as follows:

> 25.2 Secondary Sources—Insofar as not contrary to the Statute or these Rules, a Chamber shall have the power to rely on the following sources of international law in interpreting or supplementing Rule 25:
>
> (A) international conventions, whether general or particular;
>
> (B) international custom, as evidence of general practice accepted as law;
>
> (C) general principles of the law of nations; and
>
> (D) judicial decisions and the teachings of other international tribunals and States.[212]

The American Bar Association also supported the inclusion of such a provision but suggested that its wording in Sections (C) and (D) be changed to resemble more accurately the wording of Article 38 of the ICJ Statute. The revised provisions would read as follows:

> (C) general principles of law recognized by civilized nations; and
>
> (D) decisions of other international tribunals and of national courts, and the teachings of the most highly qualified publicists of the various nations.[213]

In the Rule's final draft, these two approaches were rejected and only general principles were included as supplementary sources. The reasoning

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211. Virginia Morris who participated in the drafting of the Statute as a member of the UN Office of Legal Affairs comments that the Proposal of the United States "was particularly influential" and "many of the proposals contained in the United States draft ultimately found their way into the Rules adopted by the International Tribunal." MORRIS & SCHARF, *supra* note 17, at 177. Professor Bassiouni notes that the drafting process for the rules adopted by the Secretary General ensured that "the more interested Permanent Members, at that time, France, the UK, and the US, could have greater influence on the outcome of the report." BASSIOUNI & MANIKAS, *supra* note 20, at 221.

212. *Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*, Suggestions Made by the Government of the United States, IT/14 (1993), *reprinted in* 2 MORRIS & SCHARF, *supra* note 17, at 543.

213. *Commenting on the United States' Draft Rules of Procedure and Evidence for the International Tribunal*, Report of the American Bar Association Task Force on War Crimes in the Former Yugoslavia, IT/ INF.6/Rev.2, (1994), *reprinted in* 2 MORRIS & SCHARF, *supra* note 17 at 601.

behind this is unclear because the drafting process under the UN Office of Legal Affairs was done in secret so that a history of the Statute's drafting is not available. This deliberate inclusion of general principles, and not customary law and treaties, as a secondary source of procedural rules indicates an express choice that these sources be considered as supplementary sources.[214]

The concrete and express mention of general principles as a supplementary source of procedural rules in Rule 89 can also be contrasted with the relative silence of the rules of other international tribunals on interpretative sources. Both the Nuremberg and Tokyo rules are silent on the question of supplementary sources of rules as are virtually all other rules of procedure governing international tribunals.[215] This silence contrasts with the direct and unequivocal reference to general principles in Rule 89, indicating a clear intent that general principles be considered as an interpretative source of the Rules.

It is unclear from Rule 89 what circumstances warrant a consideration of general principles. The Rule does not clarify whether they be used solely as a gap-filling device or also as a principle of treaty interpretation. It can be inferred from the Rule's legislative history that both of these functions are contemplated by the Rule as the submissions on the Rules suggested that such a Rule be available "in interpreting or

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214. This choice is supported by the submissions of many States who submitted draft rules and recommendations to the Secretary-General for guidance in the drafting of the Statute and Rules. The French Government suggested that Rules should be "in keeping with the provisions of the Statute itself and the *general principles* governing the law of criminal procedure." Letter Dated 10 Feb. 1993 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General, U.N. Doc. S/25266, ¶ 121 (1993) (emphasis added). The Mexican government submitted that "the judicial proceedings carried out by the tribunal will have to adhere strictly to the *general principles of law*, such as the need to guarantee the right of due process and the protection of the individual rights of the accused." Note Verbale Dated 12 March 1993 From the Permanent Mission of Mexico to the United Nations Addressed to the Secretary-General, U.N. Doc. S/25417, ¶ 15 (1993) (emphasis added). The Russian Federation submission stated that all individuals accused with a crime under the Statute shall be entitled to "guarantees under the generally accepted rules of international law and the *general principles of law*." Letter Dated 5 Apr. 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, U.N. Doc. S/25537, art. 17 (1993) (emphasis added).

215. No mention at all of supplementary sources of interpretation can be found in the Rules of the International Court of Justice of April 14, 1978. *See* Acts and Documents Concerning the Organisation of the Court, No. 4, Charter of the United Nations, Statute and Rules of the Court and Other Documents, 1978, I.C.J. Acts and Docs. *See also* Final Tribunal Rules of Procedure, May 3, 1983, 2 Iran-U.S. Trib. Rep. 405 (1983) (supplanted by the UNCITRAL Rules); ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Doc. ICSID/4/Rev.1; UN Human Rights Committee, Rules of Procedure of the Committee of Feb 2, 1978, U.N. Doc. CCPR/C/3/Rev.1 (1979).

supplementing" the Rules.[216] The use of general principles both to interpret and supplement the Rules is consistent with the fact that in drafting the Rules, the judges relied on general principles underlying procedural and evidentiary rules in the major legal systems of the world.[217]

2. As a Source of Treaty Interpretation

General principles have been used by international tribunals in treaty interpretation, especially in the context of rulings on procedure and evidence. In the *Iraq Border* Case, for example, the provision of the League Covenant requiring unanimity yielded to the general principle of law that no one may be judge in his or her own case.[218] The ICJ also used general principles as an aid in interpreting a treaty provision in the *Reparations* case, when the Court pointed out that it was "faced with a new situation. The questions to which it gives rise can only be solved by realising that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law."[219]

The practice of the European Court of Justice (ECJ) also reflects an attempt to interpret the treaties establishing the European Communities in conformity with general principles of law.[220] In *Defrenne v. Sabena* , the Court held that Article 119 of the European Economic Community Treaty (EEC), granting equal pay for men and women, had direct effect, but that this was limited by the general principle of law of *Rechtssicherheit*, legal certainty.[221] The Court further held that the requirement in Article 3(b) of the European Coal and Steel Community Treaty (ECSC) requiring Community institutions to ensure consumers have "equal access to the sources of production" must be interpreted in light of principles "generally accepted in the legal systems of the Member States."[222]

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216. *See, e.g.*, U.S. Submission, *supra* note 189, at Rule 25.2. *But see* MORRIS & SCHARF, *supra* note 17 at 259 (suggesting that Rule 89 contains the "residual rule for deciding evidentiary questions that are not specifically addressed in the Rules").

217. For a discussion of the consideration of general principles prevailing in the major legal systems of the world in the drafting of the Rules, see MORRIS & SCHARF, *supra* note 17, at 175–77.

218. *See* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 159–61 (1958) (analyzing the interpretation of the Treaty of Lausanne).

219. *See* Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, at 182 (Apr. 11).

220. *See* Michael Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities*, BRIT. Y.B. INT'L L. 29, 29–30 (1981).

221. *See* Case 43/75 Defrenne v. Societé Anonyme Belge de Navigation Aerinne Sabena 1976 E.C.R. 455, 480–81.

222. Wirtschaftsvereinigung Eisen-und Stahlindustrie v. High Auth. of the European Coal and Steel Community, 1957–8 E.C.R. 265, 281.

A strong case can be made for the consideration of general principles as principles of treaty interpretation in the context of the European Community. Community law resembles municipal law in its structure and content. The ECJ also has a legal obligation to consider national traditions based on the principle of solidarity laid down in Article 5 of the EEC Treaty and based on the fact that European integration can only become a reality in a comparative atmosphere.[223] Charles de Visscher extends the relevance of general principles as principles of treaty interpretation to the international sphere in setting out the judge's function in interpreting treaties:

> He must set himself first to defining the relation between the clause under discussion and the treaty as a whole, then consider it in the light of the purposes and general spirit of this instrument; finally, he will invoke one after the other general international law and "the general principles of law recognized by civilized nations."[224]

The treaty interpretation process is consistent with the Statute and Rules of the International Tribunal, with the exception that there is no consideration made of "general international law" in either the Statute or the Rules. Following such an approach, Judge McDonald, in ordering that the press and public may be excluded from the trial proceedings, interprets Rule 79 in a manner consistent with "principles of criminal procedure in domestic courts."[225] The comparative approach adopted in the McDonald judgment entails an examination of legislation from Canada, Australia, South Africa, the United Kingdom, Germany, Switzerland, Greece and Denmark as well as the case law of the United States to evidence the acceptance in "domestic jurisprudence of the need to protect the identity of victims and witnesses from the public when a special interest is involved."[226]

Principles of domestic law are also used by Judge Stephen to interpret the "right to examine witnesses" included in the Statute. He explores the meaning of this right in municipal jurisprudence and attempts to identify the principles underlying these domestic cases. In considering the U.S. jurisprudence on confrontation of accusers, Judge

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223. C.N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 PACE INT'L L. REV. 267, 273 (1994).

224. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 264 (P.E. Corbett trans., 1957). *See also* Frances Jalet, *The Quest for the General Principles of Law Recognised by Civilized Nations—A Study*, 10 UCLA L. REV. 1041, 1062 (1963).

225. Protective Measures Decision, *supra* note 3, at 5058 (McDonald, J.).

226. *Id.* at 5058–5057. The legislation considered from these jurisdictions is cited *supra* notes 68–73.

Stephen does not merely set out the case law and the trends in it but attempts to define the "essential purpose of confrontation" from these cases, which is "to secure for the opponent the opportunity of cross examination."[227]

This analysis is consistent with the approach taken in identifying general principles. Bin Cheng affirms this by stating that whether general principles "are sought in one legal system, or in different legal systems, they cannot be found by stopping short at mere positive rules. It is necessary to go further and fathom their underlying theoretical basis."[228] The hurdles involved in identifying general principles of law, however, are extensive. There is a tendency for parties and judges to "make sweeping claims that a principle is common to all or most States in the world, but to only support that claim by either citing no authority or by citing the law of only a few states."[229] Some writers have suggested that the right to examine witnesses and related procedural rights guaranteed in Article 14 of the ICCPR lack the status of general principles due to their absence in several written constitutions.[230] Such analysis ignores the fact that general principles can be found outside constitutions in statutes and common law.

Judge Stephen deduces from an examination of seven recent European Court of Human Rights cases, and a number of U.S. and Commonwealth decisions that the right to examine witnesses means "allowing an accused and his counsel to see and hear the witnesses as they give their evidence and are cross-examined."[231] Interpretation of the "right to examine witnesses" by reference to decisions in other jurisdictions is consistent with the approach taken in the Statute and Secretary General's Report.[232] This interpretation of the meaning of the "right to

227. Protective Measures Decision, *supra* note 3 at 5058 (Stephen, J.).

228. CHENG, *supra* note 202, at 377. The distinction between technical national law and the principles at its base is well expressed by Verdross: "On doit ainsi distinguer nettement *la technique* du droit interne et les *principes généraux* qui se trouvent à sa base." Alfred Von Verdross, *Les Principes Généraux du Droit Dans la Jurisprudence Internationale*, 52 HAGUE RECUEIL 191, 205 (1935).

229. Akehurst, *supra* note 220, at 31. For further criticism of this lack of evidentiary support for general principles see Schlesinger, *supra* note 208, at 734.

230. *See* Natalie Hevener and Steven Mosher, *General Principles of Law and the UN Covenant on Civil and Political Rights*, 27 INT'L & COMP. L. Q. 596, 610 (1987). Alex Lakatos also concludes that there is no general principle of law guaranteeing a right of confrontation based on his study of 180 written constitutions. He acknowledges that a conclusion contrary to his finding could be found if the search for general principles extended beyond written constitutions. *See* Alex Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights*, 46 HASTINGS L. J. 909, 930 (1995).

231. Protective Measures Decision, *supra* note 3, at 5022 (Stephen, J.).

232. The obligation to conform to "internationally recognised standards" asserted in the Report of the Secretary General can be interpreted to support a consideration of general

examine witnesses" is also consistent with the practice of international tribunals which may also evidence general principles.[233]

The practice of many international tribunals includes the cross-examination of witnesses as an integral part of the procedure of the tribunal and their rules of procedure specifically provide for such cross-examination.[234] Publicists in international procedure have gone so far as to assert that where witness testimony is permitted in international tribunals, the adverse party has the right to cross-examine the witness.[235] While the context of these tribunals differs significantly from the International Tribunal and rules drawn from the general practice of these tribunals can therefore only be generalized with caution, the common practice of these tribunals in providing for cross-examination of witnesses may evidence an underlying general principle affirming the right to examine witnesses.

The practice of international tribunals reflects a reliance on general principles in formulating, interpreting, and supplementing rules of procedure, but strong affirmations that international tribunals are bound to apply general principles of law are lacking. Duward Sandifer states that "it might be going too far to say that a tribunal is bound, in the absence of provisions in the arbitral agreement, to follow these rules [general principles]."[236] He nevertheless suggests that parties would have a solid basis for objections if the basic procedural rules followed by almost all tribunals were rejected:

> [I]n theory no ruling on a point of practice by one tribunal is binding as a precedent on another. This does not mean, however, that a cumulation of precedents may not be invoked by a tribunal as indicating the existence of a settled principle of law

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principles of law which may underlie these standards. *Report of the Secretary General*, *supra* note 19, ¶ 106.

233. Cheng suggests that general principles of law may be inferred not only from domestic practice but also from the practice of international tribunals. *See* CHENG, *supra* note 202, at 309.

234. Article 65(1) of the ICJ's Rules of the Court provides that "witnesses and experts shall be examined by the agents, counsel, or advocates of the parties under the control of the President. Questions may be put to them by the President and by the Judges." 1978 I.C.J. Acts & Docs 133–35, No. 4. Cross-examination was expressly provided for in the Charter for the International Military Tribunal, *supra* note 14, art. 16; and in the Tokyo Charter, *supra* note 130, art. 9.

235. J. C. WITENBERG, L'ORGANISATION JUDICIAIRE, LA PROCEDURE ET LA SENTENCE INTERNATIONALES 251 (A. Pedone, ed., 1937). Witenberg refers to the rules of procedure of different Mixed Commissions providing for the right to cross-examine witnesses, and the codification of this right in Articles 25–26 of the 1907 Hague Convention.

236. SANDIFER, *supra* note 128, at 44.

> entitled to great weight, so long as its application would not result in a departure from the terms of the arbitral agreement.[237]

Where general principles are seen to overlap with fundamental procedural norms, several publicists suggest that international tribunals must apply these principles.[238] V.S. Mani asserts that:

> Express provisions are usually made in rules of procedure with a view to safeguarding fundamental procedural rights . . . While observing the provisions of the instrument—which is the basic law for the tribunal—the tribunal is also expected to conform its operations to the basic procedural norms. Accordingly, the fundamental procedural norms, whether or not expressly provided for, comprise (1) "certain fundamental rules of procedure" (2) which are "inherent in the judicial process," and (3) generally recognized in all procedure.[239]

If the "right to examine witnesses" can be established as a fundamental procedural norm, an argument can be made that it must be applied by the International Tribunal regardless of the concern expressed in the Statute for protective measures for witnesses and victims. This argument raises the problem of defining whether this right is indeed a fundamental procedural norm.[240] It also raises the question of whether general principles of law can override the discretion of an international tribunal in procedural matters.

Angelo Piero Sereni argues that in questions of procedure and evidence there exist no general principles of law recognized by civilized nations, and that if such do exist, their application in international litigation cannot be justified.[241] Speaking in the context of the PCIJ, Mario

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237. *Id.* at 45.

238. *See* CHENG, *supra* note 202, at 291; C. WILFRED JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 282, 311 (1964).

239. MANI, *supra* note 165, at 12, *quoting* KENNETH S. CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION 34 (1946).

240. There is little consensus on whether the right "to examine witnesses" forms a procedural norm. Theodor Meron includes this right among his list of customary procedural norms, but it is excluded in Mani's list of fundamental procedural norms. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 96–7 (1989); MANI, *supra* note 165, at 12.

241. ANGELO PIERO SERENI, PRINCIPI GENERALI DI DIRITTO E PROCESSO INTERNAZIONALE (1955). Sereni argues that the structure of international tribunals and the small number of cases before them excludes the need for domestic rules of procedure and evidence. He further argues that rules of procedure and evidence are formalities, without material content and that there is therefore no need to transfer such domestic rules to the international plane. *See Angelo Piero Seneni Generali di Dirotto e Proceso Internazionalé (1955) cited in* K. Lipstein, *Principi Geralia di Dirotto e Proceso Internazionalé* 31 BRIT. Y. B. INT'L L. 522 (1954).

Scerni also argues that in the area of procedure, general principles do not operate as a source of law as the Court is free to choose or to create rules of procedure.[242]

These arguments reflect a slightly dated approach to procedural matters, likely relevant at the time of the *Mavrommatis Palestine Concessions* case where the PCIJ concluded that the Court "was not bound to attach to matters of form the same degree of importance which they might possess in municipal law."[243] The recent practice of the ICJ suggests that the Court is not omnipotent in its power to choose or create rules of procedure. Greater attention to questions of procedure is reflected in the practice of the ICJ where in the *Corfu Channel* case, the Albanian request for an extension was rejected largely on procedural grounds,[244] and in the *Land, Island and Maritime Frontier Dispute,* where Judge Shahabuddeen refused an order of intervention based on a procedural irregularity in the composition of the Chamber.[245]

The Court also acknowledged in the *Northern Cameroons* case that it "cannot be indifferent to any failure . . . to comply with its Rules."[246] In the opinion of Judge Koretsky, "[o]ne cannot regard rules of procedure as being simply technical . . . their strict observance in the [ICJ], one might say, is even more important than in national courts. The Court may not change them *en passant* in deciding a given case."[247]

Professor Sereni's suggestion that no general principles of law exist in the area of procedure and evidence ignores the many references by international tribunals, especially the ICJ, to municipal examples precisely in the area of evidence and procedure.[248] It is thus not unusual for general principles of procedure and evidence to be applied in international litigation. In the Rules of Procedure of the International Tribunal,

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242. Mario Scerni, *La Procédure de la Cour Permanente de Justice Internationale*, 65 HAGUE RECUEIL 56, 589 (1938 III).

243. Mavrommatis Palestine Concessions Case, 1924 P.C.I.J. (ser. A/B) No. 2, 34 (1924).

244. *See* The Corfu Channel Case, 1949 I.C.J. 244, 247–48 (Dec. 15) (assessing the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland).

245. Land, Island, and Maritime Frontier Dispute (El Sal. v. Hond.), 1990 I.C.J. 92 (Sept. 13) (Application by Nicaragua for Permission to Intervene).

246. Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 3, 27 (Dec. 2) (Preliminary Objection).

247. *Id.* at 40.

248. For a discussion of the International Court's use of municipal analogy in determining the applicability of *res judicata*, the effect of circumstantial evidence, the burden of proof on the claimant, and the application of "principles governing the judicial process" see text accompanying notes 205–208.

it is expressly foreseen that general principles will fill the gaps left open by the rapid process of drafting Rules.[249]

3. The Gap-Filling Function

General principles of law are referred to by international tribunals not only as principles of interpretation but also in addressing the silence in international instruments on certain areas of evidence and procedure. The gap-filling function of general principles seems to be contemplated in the drafting of Article 38 of the ICJ Statute where general principles were presented as a particularly helpful source in the absence of a clear customary or conventional rule applicable to the facts under consideration.[250] The purpose of the inclusion of general principles was expressed by the Advisory Committee of Jurists addressing the problems of drafting the International Statute as to avoid *non-liquet*, a refusal by the Court to decide on the ground that the law on the subject is unclear, obscure or nonexistent.[251]

The gap-filling function of general principles is contemplated by Hersch Lauterpacht who notes that where gaps appear in the law "as laid down by custom or treaty, international practice recognises, and the very existence of the international community necessitates, a residuary source of law on which States are entitled to act and by reference to which international courts are bound to render decisions."[252] That these gaps appear specifically in the area of international procedure and evidence is acknowledged by Rudolf Schlesinger:

> Many questions of procedure and evidence . . . which necessarily arise in treaty and non-treaty cases alike, are not regulated by specific provisions of treaty or charter; in filling the gap, an international court will expressly or silently resort to procedural

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249. The majority of the drafting of the Rules took place in less than one month, in the second session of the International Tribunal held from January 17 to February 11, 1994. The revised draft of the Rules was provisionally adopted by the International Tribunal on the last day of the session, February 11, 1994. *See Statement of the President of the International Tribunal concerning the Adoption of the Rules*, U.N. Doc. IT/29, (1994), *reprinted in* 2 MORRIS & SCHARF, *supra* note 17, at 649.

250. The gap-filling function was more explicit in Article 7 of the 1907 Hague Convention, *supra* note 127, upon which Article 38 of the ICJ statute was based which provided: ". . . the Court shall apply the rules of International Law. *If no generally recognized rule exists*, the Court shall give judgment in accordance with the general principles of justice and equity." *Id.* art. 7.

251. See CHENG, *supra* note 202, at 14–18 (describing the positions taken by the drafters of the statute).

252. HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS OF H. LAUTERPACHT, 68 (1970).

> and evidentiary principles which are felt to be inherent in all civilized legal systems.[253]

General principles are used by the ECJ in a gap-filling function. In *Algera v. Common Assembly,* the question arose as to whether the Assembly was capable of revoking its earlier decision to appoint the plaintiffs to permanent posts on its staff. The Court, in acknowledging that the matter could not be solved in reference to the Treaty, determined that "unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the member countries."[254]

In the context of the International Tribunal, the absence of any express authority for the use of anonymous witnesses during the trial stage in either the Statute or Rules implies that supplementary or gap-filling sources are needed to provide the authority for the decision in the McDonald judgment. The absence of any provision in the Statute leads Judge McDonald to seek guidance in the principles set out in domestic law. Judge McDonald bases the parameters for such an exercise of judicial discretion on factors adopted from municipal procedure, in the English Court of Appeal case of *Taylor* and in the Supreme Court of Victoria case of *Jarvie.* A further set of procedural safeguards to apply in the use of anonymous witnesses is taken from the *Kostovski* case.

This reference to only three cases does not deny the existence of a general principle, although it does contrast with the treatment of confidentiality measures in the McDonald judgment where general principles are elucidated through a consideration of legislation and case law in nine different countries. If general principles are viewed as forming the theoretical basis of all positive rules, this sort of analysis is valid as such principles can be sought through a process of induction from even a single example. Cheng notes that there is value in the comparative method of approaching different legal systems, but acknowledges that general principles of law can be induced from a single system.[255]

The problem with the analysis in the McDonald judgment lies not in the fact that the principles relied upon can only be found in three municipal cases, but with the conflict between these principles and the wording of the Statute and Rules. The use of municipal examples in a gap-filling function assumes there to be a gap in the Rules or Statute. In the case of the Rules of Procedure, the judges have made provisions for the use of anonymous witnesses, but have limited the provisions to the

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253. Schlesinger, *supra* note 208, at 736.

254. Joined Cases 7/56 and 3 to 7/57 Algera v. Common Assembly, 1957–8 E.C.R. 39, 55. *See generally* Akehurst, *supra* note 220, at 30.

255. CHENG, *supra* note 202, at 376.

pre-trial stage through Rule 69. It is thus arguable that there is no gap in the Rules for the McDonald judgment to fill with a supplementary rule on the use of anonymous witnesses during the trial. The fact that Rule 69 expressly states that the identity of the witness must be released to the defense in sufficient time to prepare for cross-examination strongly suggests that the McDonald judgment is not filling a gap in the Rules, but rather is circumventing both the letter and the spirit of a pre-existing Rule.

CONCLUSION

The attention that the Protective Measures Decision in the *Tadić* case has received is based on its final result of permitting the trial to proceed on the basis of anonymous testimony. While the final result of the ruling is of considerable significance, the enduring importance of this decision also lies in its approach to the question of the relevance and weight to attribute to international standards and sources of procedural law.

This article's examination of the different sources considered in the McDonald judgment and Stephen dissent and the weight attributed to these sources reveals the influence of sources on the end result of a decision. The McDonald judgment's conclusion that the Statute and Rules permit the use of anonymous witnesses relies on a reading of the Rules where the unique context of the Tribunal is all-important and the interpretation of similar rules by other international tribunals is considered virtually irrelevant. In contrast, the Stephen dissent interprets the Statute and Rules in the wider context of "internationally recognized standards," and concludes that the use of anonymous witnesses is inconsistent with the meaning and intent of these same instruments.

The reliance in both the McDonald judgment and the Stephen dissent on the Statute and Rules of the International Tribunal affirms the primacy of these instruments in determining procedural issues. The contradictory interpretations of the provisions of these instruments in the majority judgment and dissent further underlines the importance of principles of interpretation of these international instruments. Where textual interpretation of these instruments results in ambiguity, a case can be made for consideration of the drafting history and context of these instruments. The Report of the Secretary General setting out the context of the Tribunal and the drafting history of the Statute and Rules both clearly advocate a consideration of general principles to be found outside the wording of these texts.

The use of general principles in the McDonald judgment and the Stephen dissent affirms the relevance of general principles both as a source of interpretation of the Statute and Rules and in a gap-filling function. The difficult question that arises in considering general principles is whether general principles, especially those evidencing fundamental procedural norms, can override the discretion of the judges in making procedural rules. On this question, as on the question of the consideration to be given to the Report of the Secretary General and to the decided cases, the judges expressly indicate their uncertainty as to the weight and authority of various sources of international procedural law.

The Decision on Protective Measures does not provide any definitive answers to these questions of what sources of international procedural law to apply, but it does bring such questions to the forefront: In interpreting its constituent instruments must an international tribunal apply international standards of procedural fairness or may it modify these standards based on its context? What are the relevant standards of procedural fairness to be applied by an international tribunal? Can general principles of law be used both as a gap-filling device and as an interpretative device on procedural questions? The Decision on Protective Measures in effect underlines the absence of clear authority on the question of the sources of international procedural law and emphasizes the need for clarification and development of international standards with regard to rules of procedure and evidence.