

Further copies of this report are available priced £5.00. Cheques should be made payable to The Stationery Office and addressed to:

The Stationery Office
71 Lothian Road
Edinburgh
EH3 9AZ

Order line and General Enquiries
0870 606 5566

The views expressed in this report are those of the researchers and do not necessarily represent those of the Department or Scottish Ministers.

© Crown Copyright 2000

Limited extracts from the text may be produced provided the source is acknowledged. For more extensive reproduction, please write to the Chief Research Officer at the Central Research Unit, Saughton House, Broomhouse Drive, Edinburgh EH11 3XA.

CONTENTS

CHAPTER 1	INTRODUCTION	1
	BACKGROUND TO THE PAPER	1
	PURPOSE OF THE BRIEFING PAPER	2
CHAPTER 2	RESEARCH ON WITNESSES' EXPERIENCES: SUMMARY OF FINDINGS	5
CHAPTER 3	DEFINITIONS AND LEGAL ISSUES	7
	DEFINITION OF WITNESS	7
	DEFINITION OF PROTECTION	8
	KEY ISSUES	11
CHAPTER 4	RIGHTS OF WITNESSES	15
CHAPTER 5	STAGE OF PROCEEDINGS	19
CHAPTER 6	PROTECTION FOR PARTICULAR TYPES OF WITNESSES	21
	SPECIFIC CATEGORIES OF VULNERABLE WITNESSES	21
CHAPTER 7	WITNESS'S RIGHTS v. ACCUSED'S RIGHTS	27
CHAPTER 8	RESOLUTION OF CONFLICT BETWEEN ACCUSED'S RIGHTS AND WITNESS'S RIGHTS	31
CHAPTER 9	RESOLUTION OF CONFLICT BETWEEN ACCUSED'S RIGHTS AND WITNESS'S RIGHTS IN OTHER JURISDICTIONS	33
CHAPTER 10	CONCLUSIONS	35
	IDENTIFICATION OF GAPS IN PROTECTION OF WITNESSES UNDER DOMESTIC LAW	35
	CONFORMITY WITH ARTICLE 6	35
CHAPTER 11	QUESTIONS ABOUT EXISTING DOMESTIC LAW	37
	BIBLIOGRAPHY	39
	TABLE OF STATUTES	41
	TABLE OF CASES	43

1 INTRODUCTION

Background to the Paper

The crucial part played by witnesses in bringing offenders to justice is central to any modern criminal justice system, since the successful conclusion of each stage in criminal proceedings, from the initial reporting of the crime to the trial itself, usually depends on the cooperation of witnesses. Their role at the trial is particularly important in adversarial systems, where the prosecution must prove its case by leading evidence, often in the form of oral examination of witnesses, which can then be challenged by the defence, at a public hearing. Psychological studies of evidence-giving (see, for instance, Memon *et al.*;1998; Dent and Flin;1992) suggest that court appearances can be highly stressful for witnesses, even in comparatively minor cases. The layout of the courtroom, designed to be imposing and even intimidating, can be a source of fear but even more daunting is the nature of the proceedings, which may be incomprehensible to lay witnesses (see Rock;1991). Examination and cross-examination must of necessity be searching and demanding but can leave witnesses feeling bruised and vulnerable, especially when judges do not intervene to prevent harassment of witnesses (see Ellison;1998). Yet it is also clear from studies on giving evidence at all stages of the criminal process, but more particularly in court, that witnesses who are relaxed and who feel secure are more likely to recall key events accurately and to give their evidence in a lucid and consistent way (see Memon *et al.*;1998).

A number of factors have led to increased attention on the role of witnesses in criminal proceedings, not only in Scotland but in other European jurisdictions and at international level. Perhaps the two most important have been the emergence of interest in the status of victims in criminal procedure and the significant rise in terrorist and organised crime.

Greater recognition is being given to complainers and victims in the criminal process and this has been extended in some jurisdictions to witnesses also. The importance of the witness has been acknowledged particularly in crimes such as terrorist offences, drug-trafficking and crimes committed by organised groups. The European Union, for instance, has adopted a Resolution (23 November 1995, 95/C 327/04) on the Protection of Witnesses in the Fight against International Organised Crime. The difficulties faced by witnesses in such cases include life-threatening intimidation against themselves and their families. Where such witnesses are police informers or police officers further investigations and crime prevention activities may be hampered because of inadequate witness protection. However, other witnesses can also face difficulties, including witnesses to crime within the family or close community, witnesses in sexual offence cases and other witnesses who are vulnerable for personal reasons. The Council of Europe has acknowledged the variety of different situations in which witnesses may need protection in a wide ranging Recommendation on the Intimidation of Witnesses and the Rights of the Defence (R (97) 13).

While the Scottish and British Crime Surveys suggest that only a small number of people decide not to report a crime because they fear intimidation (3% in the most recent British Crime Survey) the percentage is far higher for certain categories of crime, such as domestic violence, other kinds of assault and robbery (see Mirrlees-Black *et al.*;1998). (There is no equivalent figure given in the most recent Scottish Crime Survey). Other studies, such as the Scottish research by Stafford and Asquith (1992), suggest much higher levels of intimidation generally. This may be compounded by difficulties which witnesses experience during the trial itself. Thus the findings of recent research on witness support projects in England and Wales and in Scotland confirm earlier anecdotal evidence that witnesses may experience “anxiety associated with giving evidence, exacerbated by long periods of waiting, uncertainty about what would happen, and a sense of being intimidated by the accused or their associates” (Lobley and Smith;1998 p.5). A study of witnesses in an English Crown Court comes to the same conclusion: “[they] experience their attendance at court chiefly as a succession of lengthy and lonely periods of waiting in public space, periods which culminate in the pain of cross-examination.” (Rock;1991)

It is important, therefore, to acknowledge the insecurity and vulnerability of witnesses generally, while recognising that certain witnesses may be particularly in need of protective measures.

Purpose of the Briefing Paper

In Scotland issues about witness protection have assumed greater importance in recent years and this has led to some improvements in the position of children and some other vulnerable witnesses, which are considered later in this paper. In addition, Crown Office and the Scottish Court Service issued a *Joint Statement on Crown Witnesses* in 1998, committing both services to “providing proper and efficient service and care to witnesses who attend court”. (The implementation of this commitment is currently being evaluated.) A Consultative Document *Towards a Just Conclusion: Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases* was produced by The Scottish Office in 1998. Surprisingly the potential impact of the incorporation of the European Convention of Human Rights on the position of witnesses, particularly in criminal cases, was not considered in the Consultative Document. Groups working with victims of crime have expressed concern about the current situation regarding witness protection and the way in which witnesses are treated generally within the Scottish criminal justice system (Law Society of Scotland;1998). The aim of this paper is to contribute to the debate about possible changes by:

- providing a clear understanding of current legal provisions in domestic, European and International Law concerning witness protection
- analysing the key legal issues which arise in the criminal process regarding witness protection
- comparing and contrasting the protection of witnesses under domestic, European and International Law

- suggesting ways in which witnesses might be offered better protection through procedural changes while paying due attention to the rights of the accused.

The paper is not intended to be an exhaustive review of the position in other jurisdictions, given its short length and particular focus on the Scottish position. In addition, this area of law is still developing, at international, European and domestic level.

For instance, there are several cases pending before the European Court of Human Rights (*Quinn v. United Kingdom*, *Visser v. Netherlands*, *Lucà v. Italy*) concerning witness protection. It should also be noted that while consideration will be given in this paper to the accused and to complainers who are also witnesses such consideration will be confined to witness protection issues. Finally, this paper does not review practical provisions outwith criminal procedure which are in place to protect witnesses. A useful review of the position in Scotland concerning such provisions is given in Fyfe and McKay (1999) and more generally in *Speaking Up for Justice*, the Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (Home Office;1998).

2 RESEARCH ON WITNESSES' EXPERIENCES: SUMMARY OF FINDINGS

Although research on witnesses and their experience of the criminal justice process is relatively new in the United Kingdom (see *Justice*; 1986; Rock;1993, Stafford and Asquith;1992) studies carried out in the 1970s in North America provide a useful description of the main difficulties faced by witnesses in criminal cases (see, for instance, Cannavale and Falcon; 1976, Knudten *et al.*; 1977, OACC; 1980). While they concern different legal systems from our own the findings are, nevertheless, similar to those discovered by *Justice* (1986), by Rock (1993) and by Smith and Raine (1991). This body of research identified the following issues as pertinent to many witnesses, in spite of the fact that the majority of these witnesses were not regarded as particularly vulnerable either because of the nature of the offence, their personal characteristics or other circumstances specific to their case. The key issues were:

- lack of information

Witnesses noted the need for information in advance of the trial, during court proceedings and at the conclusion of the case. They criticised available information as difficult to understand, very limited and couched in threatening language. The absence or unsatisfactory nature of information for witnesses increased their fear and uncertainty, making it less likely that they would be able to give their evidence clearly.

- failure to consider witnesses' convenience

Witnesses were concerned that they were given very little notice of the date of the trial, that they were expected to wait, sometimes for hours at a time, for their case to be called and that cases were adjourned and recalled without any reference to their convenience. This could make them resentful and less willing to approach the police about criminal matters in the future.

- accommodation for witnesses

Witnesses were critical of the facilities in courthouses generally-no catering, poor toilets, lack of phones, absence of clear notices and signposting within the court building and to direct witnesses to court. They also described the waiting rooms for witnesses as drab and offering no relief from the monotony of waiting, sometimes with prosecution and witnesses together, leading on occasion to intimidation and confrontations.

- giving evidence

The experience of giving evidence was frequently seen as a gruelling one, with witnesses being 'publicly attacked' (Rock; 1993; 85) and, through cross-examination being subjected to accusations, counter-denials and displays of disbelief which put their 'moral status in contention' (Rock; 1993; 86). While acknowledging the importance which the

adversarial system attaches to the conflict between prosecution and defence and the possibility that a witness might be mistaken or lying, the findings of the research on witnesses suggests that giving evidence can be an extremely stressful event.

These key issues have been taken on board in Scotland and efforts have been made to introduce an approach to the treatment of witnesses which is more considerate, transparent and open than was previously the case, as, for instance, by implementing the Joint Statement on Crown Witnesses issued by the Crown Office and Scottish Courts Service (1998). Research is currently ongoing to test the degree to which these changes have improved matters for witnesses.

3 DEFINITIONS AND LEGAL ISSUES

Definition of Witness

a) *In domestic law:*

No definition of witness is provided in domestic law, though the duties and obligations required of witnesses can be inferred from statute, for example ss.155 and 291 of the Criminal Procedure (Scotland) Act 1995, and from the common law, as, for instance in the case of *HMA v. Monson* (1893) 21 R(J) 5. A co-accused is a competent but not compellable witness for another co-accused. In terms of s.266(9) a co-accused may consent to be called as a witness for the accused or may when giving evidence be cross-examined by the accused. Co-accused become compellable witnesses for both the Crown and Defence if they enter a plea of guilty or have been acquitted or the case against them has been deserted (s.266(10)).

b) *In European Law:*

No definition of witness is provided in the Convention but case law gives the term a broad definition, describing it as an “autonomous concept” (see *Kostovski, Isgrò*). This interpretation by the European Court does not tie the definition to any specific form of words but allows for full ‘autonomy’ or broad scope in its application. Recommendation R (97) 13 also presents a very wide-ranging definition under which a witness is “any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings”. Therefore it covers those who do not give their evidence at a trial and even those who make a statement to the police only and not to any prosecution or judicial authority (*Unterpertinger*) or who have disappeared after making an initial statement (*Isgrò*). It encompasses witnesses for the prosecution (including complainers and co-accused who ‘turn Queen’s evidence’) and for the defence (including accused persons) although this is not expressly stated. While a co-accused is certainly a competent witness it is not clear whether he or she can be compelled to give evidence. A case is currently pending before the European Court of Human Rights on this issue (*Lucà*).

Most of the case law is concerned with prosecution witnesses. It expressly includes experts and interpreters (see Article 6 (3) (e); *Bönisch; Brandstetter*).

c) *In International Law:*

There is no definition of who constitutes a witness in international law. It can be inferred from treaties and case law that parties giving testimony in criminal proceedings are generally subject to some rules and guidelines. These parties include what we would commonly understand in domestic law as witnesses, particularly victims where they appear as witnesses in criminal proceedings and other vulnerable categories including children and those with mental conditions. Before the Yugoslav Tribunal both the suspect and accused

enjoy the right to silence. Under Article 21(g) of the Statute governing the Tribunal the accused cannot be compelled to testify or confess to guilt. Further guidance is given under the Rules of Procedure and Evidence which state that the suspect should be cautioned and informed of the right to silence before questioning (Rule 42 (A)(iii)). The co-accused cannot be compelled into testifying against a fellow accused. The position of the witness is slightly different. Under Rule 90(F), “a witness may object to making any statement which might tend to incriminate the witness.” However, if the witness does so object, the Tribunal may compel the witness to answer the question. Testimony compelled in this manner cannot subsequently be used as evidence in a prosecution against that witness except for perjury.

Definition of Protection

a) In domestic law:

No definition of protection is provided in domestic law, and while in practice protective measures are offered to vulnerable and intimidated witnesses these measures are variable and uncertain. While there is now a statutory definition of “vulnerable” in terms of s. 271 of the Criminal Procedure (Scotland) Act 1995, there is no such definition of “intimidated”, though the description proposed in the Consultative Document *Towards a Just Conclusion* seems appropriate, namely that an intimidated witness is “somebody who, as a result of actual intimidation, or threat of intimidation, or a perceived threat of intimidation, may be in genuine fear of going to court to give evidence” (pp.10-11). The Consultative Document also recognises that victims of rape and sexual assault represent a special category of intimidated witness, for whom specific supportive and protective measures may be required. Protective measures for vulnerable and intimidated witnesses range from practical assistance provided by statutory and voluntary organisations at the pre- and post-trial stage, to procedural matters during the trial itself. These procedural measures include statutory provisions, namely:

- giving evidence before a commissioner (under s. 271(1))
- giving evidence from behind a screen (under s. 271(6))
- giving evidence by means of a live television link (under s. 271(5))
- clearing the court in cases involving children (under s. 50(3))
- clearing the court in rape cases ‘or the like’ (under s. 92(3))

and also common law conventions, if justice cannot otherwise be done, such as:

- clearing the court
- withholding the names of certain witnesses
- withholding the addresses of certain witnesses.

Witnesses have no entitlement to demand any particular measure or level of support and it is unclear precisely which categories of witnesses are considered deserving of protection. In practice individuals who have witnessed serious crimes and have received specific

threats are likely to require organised and formal protection from the police working in conjunction with local and central government, whereas those witnesses at the lower end of the scale who are suffering harassment that is not life-threatening may be adequately protected in less demanding ways.

b) *In European Law:*

Protection is not defined but Recommendation R (97) 13 does define intimidation broadly to cover “any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever”. Case law makes it plain that there must be a clear and serious threat of intimidation before protection which limits the rights of the accused will be permitted. The European Court noted in one recent case, for instance, that there had not been “sufficient effort to assess the threat of reprisals” against witnesses (*van Mechelen* para.61). The nature and degree of protection afforded to witnesses will depend on the individual circumstances but the Court has accepted the following as permissible in certain circumstances:

- trial held without the public and/or the media being present
- statement read out at trial without witness being present
- witness giving evidence at trial wearing disguise
- witness giving evidence at trial is not identified/selected details only given
- witness’s voice at trial is distorted
- witness giving evidence at trial but in a separate room via a video link
- witness’s identity revealed at the latest possible stage of the proceedings.

Case law has established that it is not automatically a breach of the accused’s right to a fair trial under Article 6 to refuse to allow the accused or defence counsel the opportunity to cross-examine witnesses at trial proceedings (*Kostovski, Doorson*). However, such refusal has to be justified and alternative opportunities must be provided for questions to be put to the witness.

Recommendation R (97) 13 stipulates that practical measures should also be taken by Member States to protect intimidated witnesses, such as witness protection programmes and professional help, including legal, psychological, social and financial assistance.

c) *In International Law:*

There is no definition of the level of protective measures in international law that a witness should expect in criminal proceedings. Measures for witness protection are provided for within the Statutes for the Yugoslav and Rwandan Tribunals and recently in the newly agreed Statute for the International Criminal Court and arguably these institutions have a duty to provide appropriate protective measures. For example, Article 22 of the Statute for the Yugoslav Tribunal provides that the “Tribunal *shall* provide ... for the protection of victims and witnesses” (emphasis added).

Article 68 of the Rome Statute for the International Criminal Court is couched in similar terms. Additionally some special measures can be inferred from international agreements relating to children and juveniles.

The measures approved by the Yugoslav Trial Chamber include:

- delaying the disclosure of witness details to the defence
- allowing testimony to be given by one way closed circuit television
- closed session hearings
- the use of voice and image altering devices
- total non disclosure of information relating to the identity of the witness.

Article 68 of the Rome Statute, which established the International Criminal Court, sets out the relevant provisions in respect of witnesses. Article 68(1) places a duty on the ICC to protect witnesses both physically and psychologically. Factors such as age, gender and the nature of the offences should be taken into account and such measures can be applied during both the investigative and trial stages of proceedings. Article 68(1) also states that these measures should not prejudice the rights of the accused.

Article 68(2) stipulates that, as an exception to the general rule that hearings should be in public (Article 67), the ICC may hold *in camera* proceedings or allow the presentation of evidence via electronic link. These measures shall be implemented in cases of sexual violence or where the witness or victim is a child. In ordering the relevant measures, the ICC should have regard to all the circumstances and, significantly, the views of the victim or witness. Article 68(5) provides for the ICC to be able to withhold precise evidence and information and to provide a summary where such information may lead to the “grave endangerment of the security of the witness or their family”. Under Article 68(6), a state may make an application for “necessary” measures to be taken to protect its servants and to protect confidential information. The ambit of this protection is as yet unclear. One would expect the ICC to take a robust approach to resisting blanket claims that pertinent information relating to the commission of the gravest offences should remain confidential on the grounds of its sensitivity.

The Rome Statute provides for the creation of a Victims and Witnesses Unit within the Registry. Under Article 43(6) the Unit will consult with the Office of the Prosecutor to provide protective measures, security arrangements and counselling for victims, witnesses and “others who are at risk on account of testimony given by such witnesses”.

Key Issues

The overarching consideration in domestic law, European Law and International Law is fairness to the accused and the need for justice to be done and to be seen to be done. The right to a fair trial is an integral part of each system although adversarial and inquisitorial

models of criminal procedure interpret the requirements of due process differently. For instance, the role of the judge in inquisitorial proceedings is a much more pro-active one and there is no jury to determine factual guilt or innocence.

In addition, witnesses are usually examined at the pre-trial stage by an examining magistrate and it has tended to be the exception rather than the rule for witnesses to give oral testimony at the trial proceedings.

Thus it is difficult to make direct comparisons between the position of witnesses in different legal systems. This can create problems and some uncertainty when Member States seek to apply the general principles of the European Court to their own specific criminal procedure. Nevertheless, domestic law, European law and International Law all stress the importance of securing the best evidence, of enabling each side to test out the veracity of witnesses' testimony, and of facilitating well-informed assessment by the arbiters of fact as to witnesses' credibility and the reliability of their testimony. To this end in all but exceptional circumstances:

- witnesses should be identified
- witnesses should give their evidence in open court
- the accused or his or her legal representative should have a right of cross-examination
- judges and juries should have the opportunity to hear witnesses give oral testimony.

Balanced against the rights of the accused is the interest of the State in prosecuting crime and securing best quality evidence from witnesses. To this end:

- Protective measures may require to be taken.

In addition, witnesses may be entitled to expect protection from intimidation, particularly witnesses for the the prosecution, where the State may be regarded as having a specific duty to protect them.

However, it is clear that the three legal systems differ in the status which they accord to witness protection. *European Law*, for instance, places great emphasis on the right of the accused to a fair trial at which "all of the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument" (*Barberà Messegue and Jabardo* p. 34). The principle of "equality of arms" requires that the defence be able to examine and cross-examine witnesses on the same basis as the prosecution (*Vidal*). Only in exceptional circumstances may this principle be departed from.

Some of the more recent European cases appear to have adopted a more liberal approach which offers some recognition of a duty owed by the criminal justice system toward the witness to ensure his or her security (*Baegen, Doorson*). Nevertheless, the procedures must seek to place the minimum restrictions on witness examination in open court which are consistent with protecting the witness (*van Mechelen*). In particular, no convictions must be based "solely or to a decisive extent" on anonymous statements (*Doorson*).

In addition, it is clear that the European Court has not yet produced the definitive judgment or concluded its consideration of witness protection, given that three cases are pending (*Visser, Quinn, Lucà*), including one Dutch case (*Visser*) which appears to bear marked similarities to earlier cases. It concerns a conviction which, the applicant claims, was based to a decisive extent on the testimony of an anonymous witness, the veracity and reliability of whose testimony could not be tested by the defence.

On the other hand, the extent to which the court's jurisprudence in this area has developed has been acknowledged in the refusal of the Screening Panel of the European Court to hear a case referred by the Commission on the grounds that "the case raises no serious question affecting the interpretation or application of the Convention, as the Court has already established case-law on the relevant requirements." (*Finkensieper* Finding 1(a))

In *International Law* protection appears to be given a higher status than in domestic law or in European Law. The primary reference point for international law relating to the protection of witnesses in criminal proceedings has stemmed from the Yugoslav Tribunal (ICTY). The Tribunal was established by the United Nations Security Council to try those responsible for "gross violations of humanitarian law" and is empowered to "apply rules of humanitarian law which are beyond any doubt part of customary law"(UN Doc. S/25704 (3 May 1993) para. 34).

Given that the rules of international criminal law have only begun to develop over recent years and that rules of international criminal procedure have hardly been considered at all, the Yugoslav Tribunal has been a vital source of international law in both areas. The Tribunal has reviewed domestic laws around the world and attempted to formulate a "best practice" solution that can be applied within the circumstances of the Tribunal and which is in accordance with human rights standards. The first fully contested case before the Yugoslav Tribunal, concerning the Bosnian-Serb Dusko Tadic, provided the Trial Chamber of the Tribunal with the opportunity to consider issues of witness protection. The Trial Chamber of the ICTY in *Tadic* explicitly set out the duties of the Court under five broad categories:

- preventing the identification of victims and witnesses to the public and media
- preventing retraumatisation caused by confronting the accused
- ensuring anonymity from the accused and defence counsel
- delaying the disclosure of witness identity prior to trial
- general measures concerning the protection of witnesses and victims in and around the premises of the Tribunal.

These duties have been specifically applied to each individual witness or victim for whom the prosecutor has claimed protective measures (see *Tadic* (1) pp 31-41). The Trial Chamber has emphasised that any protective measures ordered should not go beyond the level required to achieve the appropriate level of protection for that particular witness (for instance, *Tadic* (1) p.32, para.80).

It should be noted that the analysis of the Yugoslav Tribunal is equally applicable to the Rwandan Tribunal (ICTR). Aside from slightly different jurisdictional terms, the two Statutes for the two *ad hoc* tribunals are extremely similar and they share the Rules of Procedure and Evidence drawn up for the Yugoslav Tribunal.

In addition, when the Rome Statute of the International Criminal Court enters into force it will have jurisdiction to impose individual criminal responsibility for genocide, crimes against humanity and war crimes.

4 RIGHTS OF WITNESSES

In *domestic law* there is no articulation of witnesses' rights, though various duties and obligations can be inferred from statute. For example s.155 of the Criminal Procedure (Scotland) Act 1995 sets out the consequences for a witness who breaches duties such as failing to answer a citation, refusing to take the oath or to answer questions, or prevaricating in answering questions; while s. 291 of that Act provides that a witness may be cited to appear before a sheriff in chambers to be precognosced about any offence he or she may have witnessed. At common law judicial dicta have been expressed about the duty of a witness to provide information to the other side in any given case, for instance in *HMA v. Monson* where it was said that it was the duty of every witness to give information to both sides in any prosecution if called upon to do so ((1893) 21 R(J) 5 per Lord Justice Clerk at 11).

In *domestic law* witnesses have limited express rights, including:

- a right not to incriminate themselves under common law rules of privilege
- a statutory right as an accused not to self-incriminate (s. 266(4))
- where the witness is married to the accused, that witness has a right not to be compellable both at common law and in terms of statute, unless a victim of the accused spouse (s. 264(2)).

Witnesses have a range of limited implied rights, including:

- the right to refuse to be precognosced by the defence, though not if a subsequent application is granted to have the witness give a precognition on oath before a sheriff (s. 291)

Witnesses can expect, but cannot demand:

- the court to be cleared of unnecessary personnel and to sit in private if justice cannot otherwise be done (Macphail;1979, para. 7-02)
 - protection from the bench to prevent bullying, harassing or abusive cross-examination, whether by a solicitor or advocate, or by an accused representing himself. Any intervention from the bench must always be evaluated against fairness to the accused and three recent cases illustrate this conflict well.
1. *Re McKie*: the Sheriff comforted the child by offering his handkerchief and whispering to her. It was observed by the Appeal Court that while they had no doubt that the sheriff was actuated by the best of motives he should have gestured to the child's carer to intervene rather than involving himself.
 2. *Re Black v. Ruxton*: the Appeal Court rejected an appeal that the Sheriff had shown bias by giving a 15 year old girl a glass of water, advising her that he was there to protect her, and commenting on the defence agent's persistent and repetitive cross-

examination. The Appeal Court affirmed that it was “the duty of the court to protect witnesses against unduly harassing questioning while at the same time allowing the defence properly to develop any line of cross-examination which may be appropriate” (p.443).

3. William Austin was convicted on 15 February 1999 of indecent assault. He conducted his own defence. According to *The Scotsman*, despite numerous judicial interventions to halt irrelevant and abusive questions, his victim characterised her experience of being cross-examined by him as “like reliving the whole assault” and a “nightmarish experience” (*The Scotsman* 16/2/99).

In addition a recent case shows the potential for abuse of witnesses under the present system. *The Scotsman* reported on 24 March 1999 that the Crown had the previous day abandoned the trial of John Anderson due to insufficient evidence. Anderson was representing himself and apparently the Court had granted an earlier request from him to precognosce a witness in her home due to her illness.

In *European Law* witnesses have no express rights under the European Convention. The following rights may be implied:

- the right not to be subjected to inhuman or degrading treatment when giving evidence, under Article 3
- the right not to be detained without proper safeguards, under Article 5
- child witnesses and complainers have an implied right under the proviso to the requirement that the accused is entitled to a public hearing, under Article 6. The proviso permits the press and the public to be excluded from all or part of the trial where this is necessary “in the interests of juveniles or the protection of the private life of the parties”. Presumably the latter exception does not include witnesses unless they are complainers
- the right to respect for private and family life, under Article 8.

Some recent cases (notably *Baegen* and *Doorson*) appear to recognise that witnesses should be accorded rights.

It is true that Article 6 does not explicitly require the interests of the witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8....Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled (Doorson para.70).

However, Article 6 (3) (d), which gives the accused the right

to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

makes no reference to any countervailing rights of witnesses to protection and security and the case law remains somewhat ambivalent in its approach to witnesses.

Under *International Law* the following rights are established under the Statutes for the International Criminal Tribunals for the former Yugoslavia and Rwanda:

- Article 20 - “full respect for the rights of the accused” balanced with “due regard for the protection of victims and witnesses”
- Article 21 - rights of the accused to a “fair and public hearing”
- Article 22 - provision for the protection of victims and witnesses

Rules of Procedure and Evidence:

- Rule 69 - non disclosure of witness identity
- Rule 75 - procedure for establishing measures for witness protection
- Rule 79 - closed hearing
- Rule 89 - court’s wide discretion to admit evidence
- Rule 90 - testimony of witnesses
- Rule 96 - rules of evidence in cases of sexual assault

Rome Statute for the International Criminal Court:

- Article 68 - protection of the victims and witnesses and their participation in the proceedings
- Article 69 - rules of evidence

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states in Principle 4 that “[v]ictims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered.” It might be implied that such treatment would include their physical and psychological protection as witnesses in criminal proceedings.

Other international rules or guidance relating to witness protection are sparse. This perhaps reflects a view that the witness is at the periphery of criminal proceedings and is at the bottom of the ‘pecking order’ in having their ‘rights’ protected. In 1991, the United Nations established a Crime Prevention and Criminal Justice Programme. As part of the work of the Programme, codes of practice and guidelines relating to the administration of criminal justice and its related central personnel have been formulated and approved by the United Nations General Assembly (Clark;1994). Curiously, there is no code relating specifically to the conduct, use of or protection of witnesses.

5 STAGE OF PROCEEDINGS

In *domestic law* a few statutory provisions deal with the pre-trial stage (for example s. 291 of the 1995 Act concerning the precognosing on oath of defence witnesses) but most of the case law is concerned with the trial proceedings.

Under *European Law* all the cases directly concerned with witnesses focus on the trial, although some of these cases also deal with pre-trial proceedings where witnesses are examined by an examining magistrate, the taking of statements by police officers and the rights of the accused in such cases.

It may be possible to extrapolate from Article 5 cases (concerned mainly with police powers of arrest and detention) and apply them to witnesses but there are no cases directly in point at that early stage of criminal proceedings. It is, however, clear that Recommendation No.R. (97) 13 deals with every stage of the criminal process, from arrest to final disposal.

However, the principles derived from Article 6(3) which have been established in case law do not apply generally to pre-trial proceedings. Therefore the defence does not have a general right to be present when witnesses are given statements to the police, the prosecutor or the examining magistrate before a trial takes place (*Finkensieper*).

In *International Law* under the rules of the Yugoslav Tribunal, witnesses and victims can be granted protective measures both at the pre-trial and trial stages of proceedings (Rule 69(C) and Rule 75(A) and (B) (iii) and p.26).

6 PROTECTION FOR PARTICULAR TYPES OF WITNESSES

The kind of procedural measures regarding witness protection which have already been described are to be applied only in exceptional circumstances. To assist decision-making in this area most legal systems seek to define categories of witnesses for whom such measures may be appropriate. In *European Law*, for instance, Recommendation R (97) 13 devotes special attention to witnesses in respect of organised crime and crime in the family, since these are seen as two areas where witnesses' evidence "is often crucial to securing the conviction of offenders" (p. 1) and where such witnesses may be particularly vulnerable to intimidation, being "closely connected with the organisation, the gang, the group or the family" (p. 7).

However, there are dangers in this "categorisation" approach. On the one hand, it may result in the omission of certain witnesses who may indeed be in need of protection but who may not fall within the agreed categories. On the other hand, it may set up presumptions about problems in giving evidence which are automatically applied to everyone falling within a particular group, regardless of each witness's individual circumstances.

Such a blanket approach could be both counterproductive and discriminatory. For instance, research conducted in England and Wales suggests that witnesses with learning difficulties have been treated as a homogenous group by the criminal justice system although in fact the term "covers a range of disabilities and abilities" (Sanders *et al.*;1996 p. 2). The Report of the Working Group on the Treatment of Vulnerable or Intimidated Witnesses recommended that witnesses who are defined as vulnerable because of their personal characteristics should automatically attract the provision of special measures. In the case of witnesses whose vulnerability stems from the circumstances of the offence special measures should be at the discretion of the court.

The Group also considered that there should be a rebuttable presumption of vulnerability in relation to certain types of offences, covering specifically witnesses who are complainers in rape and other serious sexual offences (Home Office;1998). The Group apparently found it helpful to identify certain categories of witnesses regarded as requiring assistance or protection in giving their evidence.

Specific Categories of Vulnerable Witnesses

a) *Vulnerability arising from Personal Characteristics*

- Children

In *domestic law* children have for the last decade been recognised as vulnerable and deserving of special measures to enable them to give evidence. There is a considerable literature prior to the enactment of various special measures, including a Memorandum from the Lord Justice-General providing guidance to the judiciary, and some research has

been published evaluating the effectiveness of the measures (see Murray;1995 and 1997; Lord Advocate's Working Group on Child Witnesses;1999). Under the Criminal Procedure (Scotland) Act 1995, as amended, children can give evidence on commission (s.271 (1) - (4)), from behind a screen (s. 271 (6)), or by live TV link (s. 271(5)). Screens appear to be in quite frequent use and the Scottish Courts Administration statistics for 1998 also reveal that one application has been made, successfully, to permit evidence to be given on commission. However, it is not apparent from the figures whether that application was made in respect of a child or a vulnerable person.

The statistics available from the Scottish Courts Administration for 1998 for the Sheriff Court also indicate that 13 applications for live TV link were made, 11 from Glasgow, 1 from Haddington and 1 from Falkirk. The figures do not distinguish between the three sections under which applications can be brought. All but one of these applications was granted. No comparable figures are available for the High Court, as apparently no such statistics are kept. There are two reported cases on the use of live TV links: *HMA v. Birkett* 1993 and *Brotherston v. HMA* 1995. (Both cases concern the earlier provision under s. 56 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 concerning children's evidence.)

One of the factors which may be taken into account by the court in determining an application for a TV link on behalf of the child is the age and maturity of that child. This is the only factor which relates to the personal characteristics of the child witness. It has been noted that it can be inferred from *Birkett* that the mere narrative of a child's age and a reference to a "traumatic event" is not in itself sufficient to "show cause" for granting an application under s.271 (Gordon, ed. SCCR 1992 850 at p.854).

Indirectly there is protection for children (and arguably other "vulnerable" witnesses) in that s. 259 of the 1995 Act permits hearsay evidence of a witness to be led in court in circumstances where that witness has refused or is unable to give evidence. In *Macdonald v. HMA* 1999 SCCR 146, a case involving a child witness, it was held that a "refusal" can only occur after a judge has directed a child to answer and the child has then refused to do so. The court stated that a "refusal" was not just an inability or difficulty in giving evidence.

The issue has also been considered in several *European* cases (e.g. *X v. Austria*, 1972). Child witnesses are given explicit recognition in Article 6 in that "the press and public may be excluded from all or part of the trial...where the interests of juveniles...so require." The explanatory memorandum to Recommendation R. 97 (13) states that "the welfare of the child witness must, in general, be the paramount concern over other interests, even the interests of justice." (para.100)

Various measures applied by Member States specifically in relation to child witnesses are cited approvingly, including the provision of appropriate information and preparation for giving evidence, early examination by specially trained staff, the avoidance of repeat

examination, the use of audio-visual techniques to record statements made before the trial and live television links at the trial itself.

In *International Law* Article 40 of the United Nations Convention on the Rights of the Child and the generality of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') suggest that children and juveniles appearing as witnesses should receive protective treatment. In addition, Article 68 of the Rome Statute states that the age of the witness is to be taken into account in determining appropriate protective measures.

- Other Vulnerable Witnesses

Some witnesses (including children) in *domestic law* are defined in statute as "vulnerable". Section 271 was amended in 1997 to extend the category of vulnerable witness beyond children (under s.29 of the Crime and Punishment (Scotland) Act) 1997). Vulnerable adult witnesses are defined as people who are over 16, and who are either subject to a court order under the Mental Health Acts or are suffering from a "significant impairment of intelligence and social functioning". As with child witnesses, the application of protective measures is a matter entirely for judicial discretion. Witnesses cannot make an application for protective measures themselves although their views are "a factor to which the court should have regard" (s.271(7)). The terms of s.271 (as amended) stipulate certain personal characteristics of the "vulnerable" witness which may be taken into account in granting an application for protective measures. These are:

- the nature of the alleged offence
- the nature of the evidence to be given
- the relationship, if any, between the vulnerable person and the accused.

The alternative measures of commission, screens and CCTV, originally designed to facilitate the evidence of children, have been used as the model for other vulnerable persons. To date in the sheriff court the live TV link has never been used in cases other than those involving child witnesses.

As *Towards a Just Conclusion* observes, s. 271 focuses on certain personal characteristics of the witness rather than the circumstances of the offence and its consequences for the witness (para.3.5). The current statutory definition of "vulnerable" has merit, according to *Speaking Up for Justice*, in that it goes beyond witnesses suffering from an identifiable mental disorder and leaves scope for the other personal characteristics of witnesses to be taken into account (Home Office para.3.18). However, it is unclear how "significant impairment of intelligence and social functioning" is being interpreted by prosecution and defence in making applications under s.271 and by the court in considering such applications. There is the possibility that this definition of "vulnerable" could be interpreted very narrowly. On the other hand, it has been suggested that a very large pool of witnesses may be eligible under this definition and that the very flexibility of the statutory provision allows for uncertainty (*ibid.*).

Above all, the statutory provision does not appear to recognise that personal circumstances, such as the nature of the offence or the witness's relationship to the accused, may render an otherwise capable adult vulnerable when giving evidence. Such personal circumstances only come into play after the witness has met the statutory definition of "vulnerable". Therefore s.271 does not address the issue of intimidated witnesses.

There are no *European cases* dealing with adults whose personal characteristics may make them vulnerable and the main thrust of the Recommendation is directed towards witnesses who fear intimidation. The position is the same in *International Law*.

- Spouses

In *domestic law* a spouse, unless the complainant in a crime (frequently domestic violence) is not compellable against his or her spouse (s. 264 (2) Criminal Procedure (Scotland) Act 1995).

The issue has arisen in several *European cases* (*Asch* 1991; *Unterpertinger* 1986). The court has applied Article 6 (3) (d) in such cases so as to permit a spouse not to give evidence where that spouse's written statement was corroborated by other evidence before the trial court and the accused had the opportunity of contesting effectively that spouse's statement at an earlier stage in the proceedings (*Asch* 1991).

- Communication Difficulties

Witnesses may have difficulties because they do not speak the language which is used in the proceedings or have a physical disability such as deafness. In *domestic law* an interpreter must be in attendance (*Geo. Howison* 1871 2 Couper 153) and this is also a requirement under *European Law* (*Kamasinski*) at all stages of the proceedings. Witnesses who have communication difficulties arising from other personal characteristics, such as learning disabilities, may be treated as "vulnerable" witnesses under s.271. However, those who may experience problems giving evidence for other reasons, such as fear of intimidation, are not currently included within the ambit of s.271.

- Undercover Agents

In *domestic law* there are no specific statutory provisions regarding such persons, although the issue can be raised through an incidental application under the preliminary diet procedure (ss 72-3). It is then competent for a judge to allow a witness not to be identified where this could seriously prejudice crime prevention or detection. In England and Wales such protection is regulated by means of a Code of Practice under the Criminal Procedure and Investigation Act 1996.

European law has considered this category of witnesses in several cases. In *Lüdi*, for instance, the witness was an undercover agent in a drugs case who was not called to give evidence at the trial in order that police work in infiltrating drug-dealing circles could continue and to protect the identity of informers. The Court accepted that the police authority had a “legitimate interest” in preserving its agent’s anonymity while nevertheless finding that there had been a breach of Article 6 (3) (d) because the accused had not been able to cross-examine key prosecution witnesses. However, in *van Mechelen* the Court was unwilling to accord police witnesses anonymity and noted that they stand in a different position from civilian witnesses. “They owe a general duty of obedience to the State’s executive authorities”, are used to giving evidence in court and should therefore only be allowed to remain anonymous “in exceptional circumstances” (para. 56). The Court noted that a civilian witness in the same case had not been offered the protection of anonymity.

b) *Specific Types of Crime*

- Sexual Offences

The difficulties which may be experienced by *complainers* in sexual assault cases are given some recognition in *domestic law*. As has already been noted, it is the usual practice in such cases to take the complainer’s evidence *in camera* although this is a matter for judicial discretion under common law and statutory provision.

The statutory provision governing the exclusion of the public from such trials is framed more widely and permits the judge to clear the court from “the commencement of the leading of evidence”(s. 92(3) Criminal Procedure (Scotland) Act 1995). It may be possible for a witness support person or persons to remain in the court when the public has been excluded. However, the defence can lodge an objection where such requests are made by the Crown. In addition, examination and cross-examination concerning sexual character evidence are regulated by statute under ss.274-5 of the 1995 Act, though the effectiveness of these provisions has been criticised. (Brown *et al.*;1992).

The difficulties experienced by this type of witness have also been considered in *European Law*, for example in *Baegen* and most recently in *Finkensieper*. In the latter case a complainer was unwilling to give evidence at the trial of the accused on charges of indecent assault and rape against several minors with mental problems who had been his patients. The Court appeared to accept that the psychological and emotional problems which expert testimony suggested the complainer would suffer were she to give evidence should be taken into account.

c) *Organised Crime*

No particular attention is given to this type of crime in *domestic law* and the current definition of “vulnerable witnesses” does not include witnesses *per se* in such cases.

In *European Law*, on the other hand, this is a particularly important category of witness. Several of the leading cases have been concerned with organised crime and the fear which witnesses may have for their safety if their identity becomes known to the accused. The case of *Kostovski*, for instance, concerned an applicant who was alleged to be a key figure in a systematic, planned series of robberies in the Netherlands. The Court acknowledged the need to combat organised crime although the Netherlands was held to be in breach of Article 6 since the accused had not been able to examine key witnesses. However, in *Saidi* the Court said that the particular difficulties associated with the fight against drug-trafficking could not justify a failure to give the applicant a fair trial.

d) *Terrorist Crime*

In *domestic law* the provisions made for undercover agents may also be applied to terrorist offences.

There have been several cases in *European Law* including a number relating to terrorist offences arising out of the Northern Ireland conflict. In *X v. UK*, for instance, members of the security forces had been permitted to give evidence from behind screens. This was considered by the European Court not to be a breach of Article 6. The case of *Quinn v. UK*, which is pending, also concerns proceedings in the “Diplock” courts and the evidence of anonymous witnesses.

In relation to *International Law* the Trial Chamber of the ICTY has stressed that the protective measures awarded to victims and witnesses under the Statute and Rules of Procedure and Evidence are necessary because of the nature of the conflict in which the offences are alleged to have been committed. The Trial Chamber differentiates between the requirements of fair trial and protections afforded witnesses in ordinary criminal and civil adjudications and the proceedings of the Tribunal which is “adjudicating crimes which are considered so horrific as to warrant universal jurisdiction”(Rules of Procedure and Evidence p.15, para.28.)

7 WITNESS'S RIGHTS v. ACCUSED'S RIGHTS

There is little explicit acknowledgement in *domestic law* of the potential conflict between the rights of the accused and the position of witnesses. It is doubtless assumed that the latter, as part of the criminal justice process, are afforded adequate protection by the police pre- and post-trial, and by the bench (and possibly the Crown) during the trial. However where such protection is forthcoming it is at the discretion of one or more of those agencies. The lack of guidelines, whether in statutory form or as a code of practice, leads to a variable and necessarily uncertain level of protection which is unsatisfactory.

In *European Law* all of the case law involves accused persons as applicants and the focus is on their rights under Article 6 generally and Article 6 (3) (d) in particular, which requires “equality of arms” between the prosecution and the defence in relation to the attendance and examination of witnesses. Witnesses are given no rights under Article 6 and neither are complainers, whether witnesses or not. Article 6 is concerned only with persons accused of crimes. However, as already indicated above, some attempts have been made in the case law to acknowledge the vulnerability of particular witnesses and their need for protection in particular kinds of crime.

Case law illustrates the overriding general principle that the accused should have “the right of confrontation” but also that such right is subject to some modification in certain circumstances. In particular, certain categories of witness, as outlined in the European cases already noted, may attract anonymity or other protective legal measures.

There does seem to be an acknowledged tension in some of the cases, made particularly explicit in *Doorson* and in *van Mechelen*, between accused and witness. The interests of the defence are to be balanced “against those of witnesses or victims called to testify” (*Doorson* para. 70).

This requires that any protective measures meet the following criteria:

- That the defence has the opportunity to test the witness’s reliability.

This can be done in inquisitorial procedure by permitting the defence to ask questions when the witness is being examined by an examining magistrate and enabling the defence to directly assess the witness’s credibility at the pre-trial stage (*Isgrò*). This generally requires that the defence either be present when the witness is being examined or that there be a live TV link in place. In *van Mechelen*, for instance, the fact that the defence could not see the witness and that all communication was via a sound link alone meant that the defence “was not only unaware of the identity of the police witnesses but were also prevented from observing their demeanour under direct questioning, and thus from testing their reliability” (para. 59).

It has also been noted that the nature and scope of the questions which the defence can put must not be unduly restricted, neither can the witness refuse to answer them although

clearly they cannot be such as to identify the witness (*Windisch*). In such cases “if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable...testimony or other declarations inculcating an accused may well be designedly untruthful or erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author’s reliability or cast doubt on his credibility” (*Kostovski* para. 42). Such pre-trial procedures are, of course, not part of the common law tradition but the case law certainly upholds the provisions in domestic law concerning the use of live TV links in contested trials.

- That the triers of fact have the opportunity to assess the witness’s credibility.

The fact that statements of anonymous witnesses were taken by the police only (*Unterpertinger*, *Windisch*) or by an examining magistrate who did not know the identity of the witness (*Kostovski*) have been regarded as unfair and a breach of Article 6. Procedures introduced by the Netherlands after *Kostovski* were specifically designed to introduce proper verification procedures, including an assessment by the examining magistrate as to an anonymous witness’s reliability and credibility, with full knowledge of that witness’s identity (see also *Baegen*). Verification procedures in domestic law (under s.271) take a rather different form but analogies can, nevertheless, be drawn.

- That protective measures are only used when “strictly necessary” (*van Mechelen* para. 58).

A contrast was drawn between the cases of *van Mechelen* and *Doorson* in relation to this criterion. The court decided that less restrictive measures than those applied in *van Mechelen* should have been taken, mainly because it had not been demonstrated to the Court’s satisfaction that the witnesses were in fact in real danger. *Doorson* was distinguished on the grounds that the case file contained information to warrant anonymity, namely that the civilian witnesses both knew the accused personally and that they had “sufficient reason to believe that he might resort to violence”(para. 64). This suggests that the use of judicial discretion in determining the type of protective measures which should be taken is in line with European Law.

- That the accused should not be convicted *solely or to a decisive extent* on the evidence of an anonymous witness.

The Court has stated that the accused cannot be convicted *solely* on the basis of evidence provided by an anonymous witness (*Windisch* para. 31, *Saidi* para.2). This seems to be the case regardless of the efforts made by the judicial authorities to counterbalance the handicaps arising out of such anonymity (*Doorson*). Given the requirement of corroboration in Scots law this would not appear to present a problem here. However, in several cases the Court has gone further and stated that the conviction of an accused cannot be based on such anonymous statements *to a decisive extent* (*Kostovski* para. 44)

or mainly (*Unterpertinger* para. 33) or where such statements are the *main evidence* (*Isgrò*) or even where *they played a part* in securing a conviction (*Lüdi*).

In a UK application, *Trivedi*, the Court found that there was sufficient other evidence on which to convict and the issue did not therefore arise. There remains some ambiguity about this test which may be resolved by cases pending before the Court (see *Visser*, *Quinn*, *Lucà* noted above).

In *International Law* the Statute and Rules for the Yugoslav Tribunal are unique amongst criminal courts in that they place an obligation on the Tribunal to balance “full respect for the rights of the accused and due regard for the protection of victims and witnesses”(Article 20(1)). Furthermore, Article 21 of the Statute, providing for the accused to be “entitled to a fair and public hearing”, is subject to Article 22 which obliges the Tribunal to provide for the protection of victims and witnesses in the Rules of Procedure and Evidence. Other human rights provisions enshrining the right to a fair trial, such as Article 14 of the International Covenant on Civil and Political Rights, do not make reference to the interests of witnesses or victims.

In the pre-trial hearing in *Tadic*, the majority in the Trial Chamber, when considering protective measures for witnesses, decided that the accused is entitled to a fair trial only to the extent that it is consistent with appropriate measures for the protection of vulnerable witnesses (*Tadic* (1) p.30 para.73). The Trial Chamber commented that placing limits on the ability of the accused to confront and cross-examine witnesses “would seem to be permissible in the light of circumstances” (*ibid.* p.30 para.72).

Such circumstances appear to include the particularly horrific nature of war crimes, which require the Tribunal to “interpret provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies”(*ibid.* p.14 para.28). The Trial Chamber goes on to make the somewhat surprising comparison between the Tribunal and “a military tribunal which often has limited rights of due process and more lenient rules of evidence” (*ibid.* p.15 para.28).

The essential requirement for evidence to be admitted before the Yugoslav Tribunal is that it should be relevant and of probative value. Rule 89(D) states that evidence should be excluded where its probative value is substantially outweighed by the need to ensure a fair trial. Having decided that the use of protective measures for victims and witnesses giving evidence do not violate the accused’s right to a fair trial, it therefore follows that relevant and probative evidence given under these circumstances will be admissible into proceedings. In reaching this view, the Trial Chamber drew support from the decision of the European Court on Human Rights in the *Kostovski* case.

In a separate opinion and drawing on a wide-ranging review of mainly common law jurisdictions, Judge Stephen took a more restrictive view. He noted particularly that Article 20(1) of the Statute sets out that *full respect* should be paid to the rights of the accused whilst paying *due regard* for the protection of victims and witnesses (emphasis

added). This implies that the requirements of fair trial of the accused should take precedence over protective measures for victims and witnesses.

Thus in his view anonymity for prosecution witnesses cannot validly be ordered by the Tribunal where it is likely to substantially disadvantage the accused (*Tadic* (1) JS p.10) and that the Rules of Procedure “give no support for anonymity of witnesses at the expense of fairness of trial and the rights of the accused spelt out in Article 21” (*ibid.* JS p.14). He concluded that the awarding of anonymity to witnesses whose identity is significant to the accused will affect both the appearance of justice and the likely actual process of justice. He therefore approved witness anonymity only where those witnesses were mere bystanders and were wholly unknown to the accused but went on to approve a raft of other measures from those set out by the majority of the Trial Chamber (JS pp19-21).

A serious challenge to the philosophy of the ICTY in applying protective measures for witnesses came during trial proceedings in the *Tadic* case. Following the discovery that Witness L (Dragan Opacic), whose identity had not been disclosed during the proceedings, had lied, his evidence was excluded, and he was subject to proceedings before the ICTY for perjury under Rule 91 of the Rules of Procedure and Evidence. This incident gave rise to doubts as to whether the veracity of witnesses granted extensive protective measures could be relied upon during trial and to what extent the fairness of trial had been affected. The defence contended that the witness L incident was representative “of a quite general failure by the prosecution to test adequately the truthfulness of the evidence to be presented against the accused” (*Tadic* (3) p.199).

8 RESOLUTION OF CONFLICT BETWEEN ACCUSED'S RIGHTS AND WITNESS'S RIGHTS

In *domestic law* as there is little explicit recognition of witnesses' rights there have been no attempts to articulate the conflict with the accused's rights or propose a resolution, beyond limited judicial dicta to the effect that the court has a duty to protect witnesses whilst allowing the defence to mount a proper defence. The case law (referred to earlier) confirms that where such conflict arises in court proceedings a witness must rely on intervention from the bench for protection/assertion of rights, and that even minimal intervention may lead to an appeal. Applications for protective measures must be made in terms of the R. 22 (1) of the Criminal Procedural Rules - SI 1996/513 - by petition presented to the court no later than 14 days before the start of the trial. Petitions refused can be re-submitted if circumstances change.

There does not as yet appear to be a resolution of this conflict in *European Law* although the most recent cases appear to acknowledge witnesses' and victims' rights more readily. In addition, there are several cases which are due to be heard by the Court concerning witnesses (see *Visser, Quinn, Lucà* noted above). Recommendation No.R. (97) 13, which was adopted by the Committee of Ministers on 10 September 1997, does provide comprehensive guidance on what member states should do to protect witnesses. In particular, guidelines are provided on appropriate verification procedures which should be implemented by the "competent judicial authority" (para. 75). Any request for witness anonymity should be made to the judicial authority, either by the prosecution or defence, and questioning as to the personal history of the witness should be permitted.

In inquisitorial proceedings an examining magistrate should investigate the personal history of the witness and record the results of this investigation, together with views as to the witness's reliability and genuineness. The defence should have the right to object to anonymity and anonymity should only be granted when the competent judicial authority is satisfied that it is necessary because "the life or freedom of the witness must be seriously threatened" (para.76). In addition, the evidence must be "likely to be significant and the witness appears to be credible" (*ibid.*). In some respects this procedure appears to go beyond what the current case law suggests but it is an attempt to reconcile some of the ambiguities inherent in European law on witness protection.

In *International Law* the evidential rules of the Tribunal do not stipulate any particular standards of verification. The rules of evidence allow for the admission "of any relevant evidence which it deems to have probative value" (Rule 89(C)). The only exception to this is set down in Rule 89(E) which states that the Tribunal "may request verification of the authenticity of evidence obtained out of court". In practical terms, this allows the Tribunal to make a free evaluation of evidence given by witnesses who have been awarded protective measures and to attach the appropriate weight to that evidence in the light of its perceived accuracy and reliability. The 'bottom line' to the admission of evidence is set out under Rule 95 which forbids the admission of evidence where there are "substantial

doubts” as to its reliability and such evidence would seriously damage the integrity of proceedings.

Concern has been expressed about the failure to ensure “equality of arms” between the prosecution and the defence. In their judgement in the *Tadic* case, the Trial Chamber of the Yugoslav Tribunal stated that “it did not consider that what occurred with Dragan Opacic, or what emerged in the case of other witnesses, demonstrated any relevant or blameworthy lack of diligence on the part of the prosecution such as should, of itself, lead the trial chamber to discount the reliability of any particular testimony, other, of course, than that of Dragan Opacic.”(*Tadic* (3) p.199)

Also of relevance is Rule 77 of the Rules of Procedure and Evidence which provides for circumstances amounting to contempt of the Tribunal. Thus where (a) a witness “contumaciously refuses or fails to answer a question” (b) discloses information in violation of an order by the Tribunal or (c) fails to appear or produce documents without excuse, that person will be in contempt of court. Penalties vary according to the severity of the contempt. This conflict of interests is therefore being addressed through the case law of the ICTY and ICTR, and policy for the application of the rules on witness protection is gradually emerging. A point of interest will be to review how the Rules of Procedure and Evidence for the new International Criminal Court will draw on the experience of the *ad hoc* Tribunals.

9 RESOLUTION OF CONFLICT BETWEEN ACCUSED'S RIGHTS AND WITNESS'S RIGHTS IN OTHER JURISDICTIONS

In Anglo-American jurisdictions with a written constitution, such as Australia, Canada and the United States of America, recent increasing recognition of the rights of witnesses has revealed the inherent difficulties of reconciling the conflict between such rights and the rights of the accused. It is evident that any move to strengthen witnesses' rights in these jurisdictions is seen as a direct threat to the traditional rights of an accused (Fenley; 1998; Henderson; 1985; Shapiro; 1997). Recent legislative changes in both Australia (e.g. Protected Disclosures Act 1994, for New South Wales) and the USA (e.g. Victim and Witness Protection 1982; Victims' Rights and Restitution Act 1990) and proposed changes in the USA (Victims' Rights Constitutional Amendment 1997) have highlighted the difficulties of satisfactorily reconciling these oppositional rights.

In the US there is a continuing debate about whether the legislation that has already been passed to advance and protect witnesses has undermined the historical protections granted to defendants (Kappelhoff; 1997). Although nearly every state has some statutory provision for increased witness rights, and 29 states have amended their state constitutions to provide specific protection for witnesses who are victims of crime (Kappelhoff; 1997), pressure remains to improve the position for witnesses.

The caselaw also reveals increasing judicial recognition of the conflict between the rights of the witness and those of the accused. For example, as recently as 1991 in *Payne v. Tennessee*, the Supreme Court overruled the 1987 decision of *Booth v. Maryland* regarding the admissibility of victim impact statements. Witnesses who are victims now have the right to be present and to testify at the sentencing stage of a trial.

In Canada, considerable attention regarding the rights of witnesses is being focused on the outcome of the case of *R. v. Mills* (currently on appeal) concerning the entitlement of the defendant to call for disclosure of a sexual assault victim's medical, psychological and related records (Gotell, forthcoming, 2000). The issues in that case, namely the balancing of the rights of the accused to a fair trial against the privacy expectations of the witness, were the subject of prospective legislation (Bill C-46), which itself was in response to caselaw that threatened victims' rights (*R. v. O'Connor* (1995)).

10 CONCLUSIONS

Identification of Gaps in Protection of Witnesses under Domestic Law

The following key gaps in the legal protection of witnesses have been identified:

1. No express duty on any agency to consider the needs of witnesses for protective measures under the law.
2. The protection that is currently offered is discretionary and may therefore appear arbitrary and unpredictable.
3. The statutory definition of vulnerable witnesses assumes an intrinsic vulnerability relating to the personal characteristics of the witness, and does not take into account vulnerability arising from the criminal incident itself, such as intimidation, the trauma associated with particular offences or the relationship between the accused and the witness.

Conformity with Article 6

The present arrangements in domestic law appear to meet the requirements of a fair trial under Article 6, in particular Article 6 (3) (d). Legal protection of witnesses is governed by s.271, which incorporates verification procedures which meet the current criteria set down in the case law of the European Court. The protective measures do not include any which preclude the defence from testing out the credibility and reliability of the witness. In addition, trial judges, and juries where relevant, have the opportunity to make their own assessment of the witness's credibility and reliability. However, were there to be further developments in the position of witnesses, perhaps through applications to the Court from witnesses themselves under Article 8, it could be that domestic law might be considered as not offering sufficient protection to intimidated witnesses, who are not currently included within the definition of potentially "vulnerable" witnesses.

11 QUESTIONS ABOUT EXISTING DOMESTIC LAW

- Should the Crown have a general duty to protect Crown witnesses who are involved in criminal proceedings?

At present Crown witnesses have no particular legal status, no standing to apply to the court for protection and no standing to apply for legal aid to instruct a solicitor to apply on their behalf. It is the prosecutor who makes application for protective measures to be used, (under s. 271 of the 1995 Act), subject to detailed guidance which is not in the public domain. Witnesses cannot question the exercise of this discretion by making application themselves. In such circumstances it may be appropriate to consider either giving witnesses a right to apply under s.271 or placing the Crown under a duty to protect Crown witnesses. In addition, while the protections afforded by ss. 50(3) and 92(3) are also matters for the court alone to decide, the prosecutor may have an important role to play in drawing to the court's attention situations in which such protections may be appropriate, given that the statutory provisions are rather broadly defined. Alternatively the witness could have a right to apply to the court for proceedings to be held in camera.

- Should a similar duty apply to the Defence in relation to Defence witnesses?

Since the Defence can also apply for protective measures under s. 271 it may be that a similar duty to protect witnesses should apply to the Defence. The Code of Conduct for Criminal Work could be amended to include such an obligation.

- Should there be a broader definition of "vulnerable witness"?

The present statutory definition of "vulnerable witness" places two serious limitations on eligibility for protective measures under the law.

(1) Section 271 (12) imposes a two-stage process on applications for special measures to protect witnesses in giving evidence. Only certain narrowly defined persons can be classed as vulnerable under the current statutory provisions. Even if so classified the defence or the prosecution must then persuade the court that there is sufficient cause for protective measures to be applied.

(2) The current provisions exclude intimidated witnesses.

The definition of vulnerability could be extended beyond its current focus on the personal characteristics of the victim to one which includes in its definition vulnerability arising out of the circumstances of the offence.

- Should guidelines be prepared to assist the exercise of judicial discretion in relation to applications under s. 50(3) and s. 92(3) of the Criminal Procedure (Scotland) Act 1995?

At present such decisions are entirely a matter for the court or the judge and no guidance has been given by the Lord Justice General (unlike the Memorandum on the Treatment of Child Witnesses by the Courts). Given the broad sweep of these provisions and the absence of precise definitions of the circumstances they cover, it may be useful for the defence and the prosecution to know when it is likely that a witness will qualify for the protection afforded by the provisions.

- Should there be a requirement to collect data on the applications made and granted in the High Court and more coherent data collection in the sheriff courts in relation to statutory protective measures, under ss 50(3), 92(3) and 271 of the Criminal Procedure (Scotland) Act 1995?

At present there is no systematic monitoring of the implementation of these provisions but anecdotal evidence suggests that practice varies considerably across the country. Detailed guidance is given to prosecutors in relation to s. 271 but the judiciary receives no comparable guidance. Agencies working with victims and witnesses continue to be concerned about the implementation of the legislation and the degree to which such implementation offers satisfactory protection to witnesses. While it would be inappropriate to expect absolute uniformity it may not be unreasonable for witnesses to anticipate that the same general approach will be taken to the use of protective measures throughout Scotland. The absence of published statistics on these matters encourages uncertainty about their use and may help to fuel concerns about the satisfactory implementation of these measures.

BIBLIOGRAPHY

- Ashworth, A., 'Article 6 and the Fairness of Trials' [1999] *Criminal Law Review* 261-272
- Beddard, R., *Human Rights and Europe*, 3rd edition (1993) Cambridge: Grotius Publications Ltd
- Brown, B., Burman, M. and Jamieson, L. *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials - A Study of Scottish Court Procedure*, (1992) Central Research Unit Report, Edinburgh: Scottish Office
- Cannavale, F. and Falcon, W. *Witness Cooperation* (1976) Lexington, Mass.: D.C.Heath
- Clark, S., *The United Nations Crime Prevention and Criminal Justice Programme* (1994) United States: University of Pennsylvania Press
- Crown Office and Procurator Fiscal Service, Scottish Court Service, *Joint Statement on Crown Witnesses* (1998) Edinburgh
- Dent, H. and Flin, R., *Children as Witnesses* (1992) Chichester: John Wiley & Sons Ltd
- Dickson, B. (editor), *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (1997) London: Sweet & Maxwell
- Ellison, L., 'Cross-Examination in Rape Trials' [1998] *Criminal Law Review* 605-615
- Fenley, J., *Witness Protection Schemes - Pitfalls & Best Practice & Covert Investigations* (1998) Lima: Paper presented at the 8th International Anti-Corruption Conference
- Fyfe, N. and McKay, H., *Making it Safe to Speak? A Study of Witness Intimidation and Protection in Strathclyde* (1999) Central Research Unit Report, Edinburgh: The Scottish Office
- Gearty, C.A. (editor), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (1997) London: Martinus Nijhoff Publishers
- Gotell, L., 'Colonization through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law' (forthcoming 2000) *Social and Legal Studies*
- Harris, D.J., O'Boyle, M. and Warbrick, C., *Law of the European Convention on Human Rights* (1995) London: Butterworths
- Hatchard, J., Huber, B and Vogler, R. (editors), *Comparative Criminal Procedure* (1996) London: British Institute of International and Comparative Law
- Henderson, L., 'The Wrongs of Victims' Rights' (1985) 37 *Stanford Law Review* 937
- Jacobs, F.G. and White, R.C.A., *The European Convention on Human Rights*, 2nd edition (1996) Oxford: Clarendon Press
- Justice Witnesses in the Criminal Courts: Report by Justice* (1986) London: Justice
- Kappelhoff, M., *Memorandum re The American Civil Liberties Union Analysis of the Proposed Victims' Rights Constitutional Amendment* (1997) New York: The American Civil Liberties Union
- Knudten, R. *et al. Victims and Witnesses: their Experiences with Crime and the Criminal Justice System* (1977) Washington DC: Law Enforcement Assistance Administration, US Dept of Justice
- Law Society of Scotland, *Code of Conduct for Criminal Work* (1996 with 1998 amendments) Edinburgh: Law Society of Scotland
- Law Society of Scotland, *Vulnerable Witnesses Conference Proceedings* (1998) Edinburgh: Law Society of Scotland

Lobley, D. and Smith, D., *Victim Witness Support in Scotland: An evaluation of three pilot projects* (1998) Central Research Unit Report, Edinburgh: The Scottish Office

Lord Advocate, *Working Group on Child Witnesses* (1999) Edinburgh: Crown Office

Lord Justice General, *Memorandum on Child Witnesses* reproduced in Dent, H. and Flin, R., *Children as Witnesses* 148- 150 (1992) Chichester: John Wiley & Sons Ltd

MVA, *Main Findings from the 1996 Scottish Crime Survey* (1998) Central Research Unit Report, Edinburgh: Scottish Office

Macphail, I.D. and The Scottish Law Commission, *Research Paper on the Law of Evidence of Scotland* (1979) Edinburgh: Scottish Law Commission

Memon, A, Vrij, A and Bull, R., *Psychology and the Law: truthfulness, accuracy and credibility* (1998) London: McGraw-Hill

Mirrlees-Black, C., Budd, T., Partridge, S. and Mayhew, P., *The 1998 British Crime Survey: England and Wales* (1998) London: The Home Office

Murray, K., *Live Television Link - An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (1995) Central Research Unit Report, Edinburgh: Scottish Office

Murray, K., *Preparing Child Witnesses for Court* (1997) Central Research Unit Report, Edinburgh: Scottish Office

Ontario Association of Corrections and Criminology *Report of the Workshop on Victim/Witness Programs and Services* (1980) Ottawa: OACC

Raine, J. and Smith, R. *The Victim/Witness in Court Project: Report of the Research Programme* (1991) Birmingham: Birmingham University

Rock, P., 'Witnesses and Space in a Crown Court' (1991) 31(3) *British Journal of Criminology* 266-279

Rock, P. *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green* (1993) Oxford: Clarendon Press

Sanders, A., Creaton, J, Bird, S. and Webster L., *Witnesses with Learning Disabilities* (1996) London: Home Office Research and Statistics Directorate

Shapiro, B., 'Victims & Vengeance: Why the Victims Rights Amendment is a Bad Idea', 10 February 1997, *The Nation*

Stafford, A. and Asquith, S., *The Witness in the Scottish Criminal Justice System* (1992) Central Research Unit Report, Edinburgh: Scottish Office

The Home Office, *Rights brought home: the Human Rights Bill* (24 Oct. 1997) Cm 3782 London: Stationery Office

The Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) London: The Home Office

The Scottish Office, *Towards a Just Conclusion: Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases* (1998) Edinburgh: Scottish Office

The Scottish Office, *Firm and Fair: Improving the Delivery of Justice in Scotland* (1994) Cm 2600, Edinburgh: The Scottish Office

The Scottish Office, *The Justice Charter for Scotland* (1991) Edinburgh: The Scottish Office

van Dijk, P. and van Hoof, G.J.H., *Theory and Practice of the European Convention on Human Rights*, 3rd edition (1998) London: Kluwer Law International

TABLE OF STATUTES

Domestic Statutes

Crime and Punishment (Scotland) Act 1997
Criminal Procedure (Scotland) Act 1995 (as amended)
Criminal Procedure and Investigation Act 1996
Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

European Statutes

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950
Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure
Recommendation No. R (87) 21 on Assistance to Victims and the Prevention of Victimisation
Recommendation No. R (97) 13 on Intimidation of Witnesses and Rights of the Defence (Council of Europe)
Resolution on the Protection of Witnesses in the Fight Against International Organised Crime 95/C 327/04 EU 23 Nov. 1995

International Statutes

Creation of an effective United Nations Crime Prevention and Criminal Justice Programme G.A. Resolution 46/152 UN G.A. O.R. 46th Session, Supp. No. 49 UN Document A/46/49 1992
International Covenant on Civil and Political Rights G.A. Resolution 2200 A (XXI) 1966
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 UN Document S/25704 1993
Rules of Procedure and Evidence for the International Criminal Tribunal in the Former Yugoslavia UN Document IT/32 1994 (14th Revision)
Statute of the International Criminal Tribunal for Rwanda 1994
Statute of the International Criminal Tribunal for the Former Yugoslavia 1993
United Nations: Convention on the Rights of the Child UN G.A. Resolution 44/25 1989
United Nations: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power UN G.A. Resolution 40/34 1985
United Nations: Rome Statute of the International Criminal Court A/CONF. 183/9 1998
United Nations: Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') UN G.A. Resolution 40/33 1985

North American Statutes

Victim and Witness Protection Act 1982
Victims' Rights and Restitution Act 1990
(Canadian) Bill C-46 1997

Australian Statute

Protected Disclosures Act 1994 (New South Wales)

TABLE OF CASES

Domestic Case Law

Black v. Ruxton 1998 SCCR 440
Brotherston v. HMA 1995 SCCR 613
Edwards v. DPP 1996 QBD (Transcript reference CO/293/96)
Geo. Howison 1871 2 Couper 153
HMA v. Birkett 1992 SCCR 850; 1993 SLT 395
HMA v. Monson (1893) 21 R (J) 5
MacDonald v. HMA 1999 SCCR 146
McKie v. HMA 1997 SCCR 30
John Anderson (High Court, Glasgow) 24 March 1999, *The Scotsman*
William Austin (Edinburgh Sheriff Court) 16 Feb. 1999, *The Scotsman*

European Case Law

Asch v. Austria Judgement of 26 Apr. 1991, Series A, No. 203 (Applic. No. 12398/86) (1993) 15 EHRR 597
Baegon v. Netherlands Judgement of 26 Oct. 1995, Series A, No. 327-B (Applic. No. 16696/90)
Barberà, Messegué & Jarbardo v. Spain Judgement of 6 Dec. 1988, Series A, No. 146 (Applic. No. 10588/83, 10589/83, 10590/83) (1988) 11 EHRR 360
Bönisch v. Austria Judgement of 6 May 1995, Series A, No. 92 (Applic. No. 8658/79) (1987) 9 EHRR 191
Brandstetter v. Austria Judgement of 28 Aug. 1991, Series A, No. 211 (Applic. No. 11170/84, 12876/87, 13468/87) (1993) 15 EHRR 378
Doorson v. Netherlands Judgement of 26 Mar. 1996 (Applic. No. 20524/92) (1996) 23 EHRR 330
Finkensieper v. Netherlands 8 June 1994 (Applic. No. 19525/92)
Isgrò v. Italy Judgement of 19 Feb. 1991, Series A, No. 194-A (Applic. No. 11339/85)
Kamasinski v. Austria Judgement of 19 Dec. 1989, Series A, No. 168 (Applic. No. 9783/82) (1989) 13 EHRR 391
Kostovski v. Netherlands Judgement of 20 Nov. 1989, Series A, No. 166 (Applic. No. 11454/85) (1990) 12 EHRR 434
Lucà v. Italy (Applic. No. 33354/96)
Lüdi v. Switzerland Judgement of 15 June 1992, Series A, No. 238 (Applic. No. 12433/86) (1993) 15 EHRR 173
Quinn v. United Kingdom 21 Oct. 1996 (Applic. No. 23496/94)
Saidi v. France Judgement of 20 Sept. 1993, Series A, No. 261-C, (Applic. No. 14647/89) (1994) 17 EHRR 251
Trivedi v. United Kingdom Judgement of 27 May 1997 (Applic. No. 31700/96) (1997) 89A ECommHR 136
Unterpertinger v. Austria Judgement of 24 Nov. 1986, Series A, No. 238 (Applic. No. 9120/80) (1991) 13 EHRR 175

van Mechelen v. Netherlands Judgement of 23 Apr. 1997 (Applic. No. 21363/93, 21427/93, 22056/93) (1998) 25 EHRR 647
Vidal v. Belgium Judgement of 22 Apr. 1992, (1992) 35 Yearbook 431
Visser v. Netherlands Judgement of 18 Jan. 1998 (Applic. No. 26668/95)
Windisch v. Austria Judgement of 27 Sept. 1990, Series A, No. 186 (Applic. No. 12489/86) (1991) 13 EHRR 281
X v. Austria Judgement of 1 June 1972 (Applic. No. 1128/70) (1972) 15 Yearbook 264
X v. United Kingdom (Applic. No. 20657/92) (1993) 15 EHRR CD113

International Case Law

Prosecutor v. Dusko Tadic, Case No. IT-94-1-T. Decision on the Prosecutor's motion requesting Protective Measures for Victims and Witnesses. Trial Chamber 10 Aug. 1995
Prosecutor v. Dusko Tadic, Case No. IT-94-1-T. Decisions related to Dragan Opacic. 5 Dec. 1996, 10 Dec. 1996, 27 May 1997
Prosecutor v. Dusko Tadic, Case No. IT-94-1-T. Judgement of 7 Oct. 1997
Prosecutor v. Dusko Tadic, Case No. IT-94-1-T. Opinion and Judgement of the Trial Chamber 7 May 1997

North American Case Law

Booth v. Maryland, 482 U.S. 496 (1987)
Payne v. Tennessee, 501 U.S. 808 (1991)
R v. Mills [1997] A.J. No. 891; [1997] A.J. No. 1036
R v. O'Connor [1995] 4 SCR 411