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SCSL-03-01-PT
(4413 — 4465)

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THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty

Registrar: Mr. Lovemore G. Munlo SC

Date: 22 February 2007

Case No.: SCSL-2003-01-PT

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE RESPONSE TO PROSECUTION MOTION TO ALLOW WITNESSES TO GIVE TESTIMONY BY VIDEO-LINK

Office of the Prosecution
Mr. Stephen Rapp
Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Anne Althaus

Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

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I. Introduction

1. Counsel for Mr. Charles Ghankay Taylor (the "Defence") strongly oppose the Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link ("Video-Link Motion").[1] The Defence submit that, in its Video-Link Motion, the Prosecution has misstated and misinterpreted the law. The Prosecution invites the Trial Chamber to adopt an entirely unacceptable test for the allowance of testimony by video-link in lieu of oral testimony,[2] incorrectly argues that preference need not be given to live testimony with the witness physically present in court,[3] completely disregards or misunderstands the jurisprudence developed at the two sister tribunals – the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – ignores the importance of proceeding "in the interests of justice" irrespective of it being expressly stated in a particular rule, and seeks to reverse the burden of proof and place it on the party opposing the use of video-link testimony.[4] Accordingly, and for reasons further advanced in this Response, the Defence respectfully request that the Trial Chamber dismiss the Video-Link Motion.[5]

2. The Prosecution submits that "the plain language of Rule 85(D) imposes no limitations on the parties for the use of video-link," and thus the Trial Chamber may order the use of video-link technology purely as a matter of discretion.[6] Although Rule 85(D) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("SCSL Rules") uses the phrase "may order", and although it does not explicitly include the phrase "in the interests of justice" as the parallel ICTY Rule 71*bis* does,[7] the Prosecution cannot logically conclude that Rule 85(D) does not contain any conditions or limitations relevant for guiding the Trial Chamber's discretion. It is a general principal of criminal law that oral, *viva voce* testimony is the preferred method by which a witness should give evidence in a court, and thus this preference

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[1] *Prosecutor v. Charles Taylor,* SCSL-03-01-PT-178, Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link, 9 February 2007 ("Video-Link Motion").
[2] Video-Link Motion, para. 1(a).
[3] Video-Link Motion, paras. 13, 18.
[4] Video-Link Motion, paras. 1(a), 10.
[5] Consequently, the Defence will not address, at this time, the List of issues the Chamber may consider addressing in a Practice Direction, as submitted by the Prosecution in Annex A of the Video-Link Motion.
[6] Video-Link Motion, paras. 7, 9.
[7] Video-Link Motion, para. 9.

must be given consideration by the Trial Chamber. This preference is based both on the Trial Chamber's need to ensure and assess a witness's demeanour and credibility and on the Defendant's fundamental right to confront the witnesses against him pursuant to Article 17(4)(e) of the Statute of the Special Court for Sierra Leone ("SCSL Statute").[8] Testimony by video-link should thus only be authorized if in the interests of justice. Factors to be considered, in line with the jurisprudence developed at the ICTY and ICTR, include the importance of the testimony, the inability or unwillingness of the witness to be present at the court to testify *viva voce*, and whether good reasons have been given for that inability or unwillingness.[9]

II. Preference Should Be Given to Live Testimony

3. In the ICTY case of *Tadic*, the Trial Chamber could not stress "too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal."[10] Having stated its preference for having the physical presence of the witness at trial, the Trial Chamber further explained, "The evidentiary value of testimony provided by video-link, although weightier than that of testimony given by deposition, is not as weighty as testimony given in the courtroom. *Hearing of witnesses by video-link should therefore be avoided as far as possible*" (emphasis added).[11] The evidentiary value of testimony of a witness who is physically present is weightier than testimony given by video-link because,

> "the physical presence of a witness at the seat of the International Tribunal enables the judges to evaluate the credibility of a person giving evidence in the courtroom. Moreover, the physical presence of the witness...may help discourage the witness from giving false testimony."[12]

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[8] These two criteria were set out by the Trial Chamber in *Prosecutor v. Zigiranyirazo,* Case No. ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE: Rules 46, 66, 68, and 75 of the Rules of Procedure and Evidence, 31 January 2006, para. 32 ("Zigiranyirazo Trial Chamber Video-Link Decision").
[9] *Prosecutor v Simba*, No. ICTR-01-76-T, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005, para. 4 ("Simba Video-Link Decision"); *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Testimony of Witness Amadou Deme by Video-Link, 29 August 2006, para. 3 ("Bagosora Video-Link Decision - Deme"); *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Nseniyumva Motion for Witness Higaniro to Testify by Video-Conference, 29 August 2006, para. 2 ("Bagosora Video-Conference Decision - Higaniro"); *Prosecutor v. Tadic,* Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and On the Giving of Evidence By Video-Link, 25 June 1996, para. 19 ("Tadic Video-Link Decision").
[10] Tadic Video-Link Decision, para. 19.
[11] Tadic Video-Link Decision, para. 21.
[12] Tadic Video-Link Decision, para. 11.

4. Similarly, in the ICTR case of *Bagosora et al,* the Trial Chamber stressed "the general principle, and the Chamber's strong preference, that most witnesses should be heard in court".[13] Furthermore, in the ICTR case of *Zigiranyirazo,* the Trial Chamber expressed its concern as to "whether or not it is possible to effectively and accurately assess the testimony and demeanour of a witness who is testifying via video-link."[14]

5. Domestic criminal law jurisprudence shares the same preference for live testimony. In the United States, for example, the constitutional right "to be confronted with the witnesses against him"[15] has been interpreted to include the guarantee to have witnesses testify in the *personal presence* of the defendant. Any exception to the defendant's right to be present must be based on a *case-specific* showing that the witness is in need of special protection.[16]

6. Allowing video-link testimony also impacts the Defendant's fundamental right to confront the witnesses against him and thus should only be used when in the interests of justice.[17] The Prosecution takes note of the right of the Accused "to examine, or have examined, the witnesses against him", pursuant to Article 17(4)(e) of the SCSL Statute, and concedes that "the Rules must be interpreted in a way that *protects the rights of the Accused*".[18] However, the Prosecution wrongly opines that the rights of the accused are not impaired by its proposed broad use of video-link testimony.

7. The Prosecution further states that the recent Appeals Chamber Decision in the ICTR case of *Zigiranyirazo,* where the Appeals Chamber excluded the testimony given by a witness who

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[13] *Prosecutor v. Bagosora et al,* Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004, para. 15 ("Bagosora Video-Link Decision – BT"). *See also,* Simba Video-Link Decision, para. 7.

[14] Zigiranyirazo Trial Chamber Video-Link Decision, para. 32.

[15] This right has been incorporated in the Sixth Amendment of the U.S. Constitution, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (emphasis added).

[16] *Coy v. Iowa*, 487 U.S. 1012 (1988). (emphasis added) (Annex C).

[17] *See, inter alia*, Zigiranyirazo Trial Chamber Video-Link Decision, para. 32 (despite recognizing the increased security risk to the witness should he travel to the site of the trial, the Chamber bore in mind that "the Defence wishes to confront this witness in person and indeed has the right to confront his accuser").

[18] Video-Link Motion, para. 11.

was in the physical presence of the judges in the Hague, but only seen and heard by the accused in Arusha via video-link, does not stand in the way of the Prosecutor's proposition of a blanket admission policy of video-link testimony. The Prosecution contend that this is, because the issue in question in that case "was the participation of the *Accused* at the trial via video-link, as opposed to the participation of a *witness* at the trial via video-link, and the question was whether the Trial Chamber properly exercised its discretion in its restriction of the Appellant's (which is the Accused) right to be present at his trial".[19] The Defence submit that the purported distinction is without merit.

8. In *Zigiranyirazo*, the Appeals Chamber of the ICTR addressed the issue of the right of the Accused to be present at trial, as he was not only physically removed from the witness, but also from the bench. The *Zigiranyirazo* Appeals Chamber Decision is directly relevant to the instant proceedings as it deals with identical concerns as regards the use of video-link.[20] The Appeals Chamber considered that as

> "the Trial Chamber had misgivings about its ability to adequately follow the testimony of a key witness through the use of video-link then these same misgivings, if valid, must apply with equal force to the ability of the accused and his counsel to follow the evidence and proceedings."[21]

The Defence therefore submit that as live testimony is a critical aspect of an Accused's trial., Denying the Accused the opportunity to hear and cross-examine *viva voce* testimony in his presence, without cogent reasons to depart from the established practice, effectively undermines his right to "to examine, or have examined, the witnesses against him", pursuant to Article 17(4)(e) of the SCSL Statute.

9. Thus, for the Prosecution to propose a system where anyone can be a video-link witness unless the Defence demonstrates good cause for concern is an enormous jump from the normal standard developed at the ICTY and ICTR, according to which the party seeking to

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[19] Video-Link Motion, para. 17. (emphasis added).
[20] During the Status Conference of 26 January 2007, Judge Doherty referred to this Appeals Decision in relation to the Prosecutor's anticipated Motion for Video Conference. See *Prosecutor v. Charles Taylor,* SCSL-03-01-PT, Third Status Conference, Transcript, 26 January 2007, pg. 40, lns. 20-28.
[21] *Prosecutor v. Zigiranyirazo,* Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 19 ("Zigiranyirazo Video-Link Appeal").

hear testimony by video-link is required to demonstrate, on a case-to-case basis, that the requested order is in the interests of justice. The Prosecution proposed reversal of the normal standard does not sufficiently take into consideration the preference for *viva voce* testimony, nor the impact of video-link testimony on the rights of the Accused to confront the witnesses against him and to be physically present at trial. In sum, the Defence submit that the Prosecutor's submission on this issue is contrary to accepted international practice, established case law and is without any significant merit. Accordingly, the Motion should be dismissed.

III. Video-Link Testimony Should Only Be Authorized When in the Interests of Justice

10. The Prosecution submits that Rule 85(D) of the SCSL Rules gives the Trial Chamber free rein to "order the use of video link technology" and that had the drafters of Rule 85(D) intended to impose a condition or limitation on the Trial Chamber's discretion, it would have done so explicitly.[22]

11. The Defence is unable to accept the Prosecutor's argument on this issue. Rule 85(D) deals with the Presentation of Evidence. It primarily is intended to detail the order of evidence and some *modes* by which the testimony of a witness may be adduced, or a *locus in quo* or other evidence viewed. Admission of evidence is broadly subject to the general requirements of Rule 89, namely that "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consistent with the Spirit of the Statute and the general principles of law." In addition, as the Defence submit that Rule 85(D) deals with modes by which evidence can be adduced (rather than seeking to detail the principles that should inform the Trial Chamber in making such determinations) reference may also be had to Rule 71. Whilst that Rule may not be *lex specialis,* Rule 85 (as it deals with depositions before a Legal officer rather than video-link evidence before a judge), it is pertinent to note it *does* provide for cross examination by the parties and allows for depositions to be given by means of a video conference (Rule 71(D)). The Defence submit that by requiring

[22] Video-Link Motion, para. 9.

"exceptional circumstances, in the interests of justice" before such measures are adopted, the judges drafting the Rules sought to maintain the pre-eminence of live evidence, in the court room, in the physical presence of the Chamber and the parties and to deliberately limit the circumstances by which oral evidence could be otherwise adduced.

12. In any event, where a Special Court Rule is silent on an issue, the Court has often deemed jurisprudence from the ICTY and the ICTR instructive in interpreting the Rule. In *Fofana,* the Trial Chamber noted,

> "...the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridicial dynamics prevailing in the *locus* of the court. This is not to contend that sound and logically correct principles of law enunciated by the ICTR and ICTY cannot, with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court...so as to maintain logical consistency and uniformity in judicial rulings on interpretation and application of procedural and evidentiary rules of international criminal tribunals."[23]

The question of video-link testimony is an instance where consistency and uniformity in judicial rulings across international criminal tribunals is both beneficial and feasible.

13. In this context, it is noteworthy that the ICTR Rules, and the ICTY Rules prior to the adoption of Rule 71*bis* on 15 July 1997, did not make any specific mention of "interests of justice" in relation to video-link testimony. Nonetheless, the case law on the issue of video-link testimony as developed by both the ICTY, preceding the adoption of ICTY Rule 71*bis*,[24] and by the ICTR (having never adopted such Rule but having applied by analogy the *Tadic* criteria later incorporated in ICTY Rule 71*bis*,)[25] indicates not only that *viva voce* testimony in court in the physical presence of the Chamber and the parties is the preferred option, but also that the use of video-link equipment to hear a witness is only justified when "in the interests of justice", irrespective of any explicit "interests of justice" requirement. Thus, the

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[23] *Prosecutor v. Fofana,* SCSL-03-11-PT-39, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 16 October 2003, para. 13. *See also Prosecutor v. Sesay*, SCSL-03-05-PT-38, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003, para. 11.

[24] The first ruling in *Tadic* on video-link testimony dating 25 June 1996 pre-dates the adoption of Rule 71*bis* with more than one year.

[25] At the ICTR, the criteria set out in *Tadic*, including the "interests of justice" requirement were incorporated. *See, inter alia*, Simba Video-Link Decision, para. 4; Bagosora Video-Link Decision - BT, paras. 5-8; Bagosora Video-Link Decision - Deme, 29 August 2006, para. 3; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Ntabakuze Motion under Article 28 and for Video-Conference Testimony Under Rule 54 of Colonel de St. Quentin, 11 September 2006, para. 6 ("Bagosora Video-Link Decision – Ntabakuze").

Prosecution's suggestion that the intention behind Rule 85(D) is not to impose the condition of "interests of justice" or any of the other conditions developed at the ICTY and ICTY, is erroneous and misstates the existing case law on the issue of video-link testimony. As a matter of common sense and for the purpose of maintaining *logical consistency and uniformity in judicial rulings on interpretation and application of procedural and evidentiary rules of international criminal tribunals* the requirement of "interests of justice" should apply equally to video-link testimony before the SCSL.

IV. Burden Must Be On the Moving Party, on a Witness by Witness Basis, to Prove that Video-Link is In the Interests of Justice

14. The test suggested by the Prosecution requiring the party opposing the use of video-link testimony to bear the burden of demonstrating, on a case by case basis, good cause why a specific witness should not be allowed to testify by video-link technology[26] is a complete reversal of the test set out in international criminal law jurisprudence on this issue. It is established case law that the burden is on the party seeking to use video-link testimony to satisfy the test.[27] It is not sufficient, as the Prosecution contend,[28] to simply give the opposing party the opportunity to object and show good cause why a particular witness should not be allowed to testify by video-link.

15. The Prosecution incorrectly interprets the statement in *Tadic* that "it is in the interests of justice for the Trial Chamber to be flexible and endeavour to provide the Parties with the opportunity to give evidence by video-link"[29] as a blank cheque to request permission to use video-link testimony for sweeping categories of witnesses. This is particularly true because the same case clearly states a preference for live testimony.[30] It is, therefore, incorrect for the Prosecution to conclude that because the Trial Chamber in *Tadic* allowed video-link testimony in limited instances, the Trial Chamber in the present case should "issue an order

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[26] Video-Link Motion, para. 10.
[27] *See, inter alia, Prosecutor v. Tadic*, No. ICTR-98-42-T, Decision on the Defence Motion to Protect Defence Witnesses, 16 August 1996, para. 12 ("Tadic Decision Defence Witnesses").
[28] Video-Link Motion, para. 20.
[29] Tadic Video-Link Decision,, para. 18
[30] Tadic Video-Link Decision, para. 11 ("the evidentiary value of testimony of a witness who is physically present is weightier than testimony given by video-link").

allowing the general use of video-link testimony...*without a showing of any conditions precedent*" (emphasis added).[31]

16. To determine whether using video-link testimony is "in the interests of justice", the analysis must be done on a case-by-case basis.[32] It is, with respect, entirely insufficient for the Prosecution to put forth five broad categories of witnesses[33] when requesting permission to use video-link testimony. In every instance where an ICTY or an ICTR Trial Chamber has authorized the use of video-link testimony, it has done so based on a factual analysis of the situation as it pertains to a specific witness.[34] It is respectfully submitted that this practice being based on sound legal principles, should similarly apply in the present case.

V. Factors to Consider When Determining What is In the Interests of Justice, on a Case By Case Basis, Include the Importance of the Testimony, the Inability or Unwillingness of a Witness to Testify in Person, and Whether Good Reason has Been Adduced for that Inability or Unwillingness

17. The Defence recognize that there may be instances where video-link testimony is necessary and in the interests of justice. The factors to be considered in making this determination are whether the witness is sufficiently important to make it unfair to proceed without it, whether the witness is unable or unwilling to come to the location of the trial, and whether a good reason has been adduced for the inability or unwillingness to attend.[35] There is extensive case law on how these factors have been interpreted, but it is premature to make an analysis of such case law or make further submissions in the abstract, without being appraised of a particular witness's factual situation or the specific reasons for which video-link evidence is sought.

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[31] Video-Link Motion, para. 13.
[32] For instance, in the Tadic Video-Link Decision, paras. 19 and 20, the Trial Chamber found that the "Defence has demonstrated the link between *each witness* and the time-frame in which the alleged crime took place thereby satisfying the Trial Chamber that the witnesses are sufficiently important to the accused's defense of alibi".
[33] Video-Link Motion, para. 19.
[34] *See, inter alia,* Tadic Video-Link Decision; Tadic Decision Defence Witnesses; Simba Video-Link Decision.
[35] Zigiranyirazo Trial Chamber Video-Link Decision, para. 31. *See also* Bagosora Video-Link Decision - BT; Tadic Video-Link Decision, para. 19.

VI. Conclusion

18. The Defence stress that issues of judicial economy and efficiency[36] can never be used to override the statutory and fundamental rights of the Accused. Mr. Taylor was transferred to The Hague against his will, and the monetary implications, or administrative difficulties that are a corollary to the change of venue, should not prejudice his rights at trial. The concerns raised by the Prosecutor only confirm, however, that the imposed change of venue has created an unfair and impractical situation for all parties concerned with Mr. Taylor's trial.

19. For the reasons detailed above, the Defence respectfully request that the Trial Chamber:

(i) Dismiss the Prosecution Video-Link Motion;

(ii) Make any consequential order deemed necessary, including a direction that any party wishing to use video-link testimony in the future bears the burden of showing, on a case by case basis, that resorting to video-link testimony is:

(a) in the interests of justice; and

(b) meets the criteria set out in international criminal law jurisprudence that such testimony is important, that the witness be unwilling or unable to testify in person, and that good reasons have been adduced for this unwillingness or inability.

Respectfully Submitted,

Karim A. A. Khan

Lead Counsel for Mr. Charles Taylor

Done in Freetown this 22nd Day of February 2007

[36] Video-Link Motion, para. 12.

List of Authorities

Taylor Proceedings

1. *Prosecutor v. Charles Taylor,* SCSL-03-01-PT-178, Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link, 9 February 2007.

2. *Prosecutor v. Charles Taylor,* SCSL-03-01-PT, Third Status Conference, Transcript, 26 January 2007.

Other SCSL Case Law

3. *Prosecutor v. Fofana,* SCSL-03-11-PT-39, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 16 October 2003. Online: http://scsl-server/sc-sl/new/Documents/SCSL-03-11-PT-039.pdf

4. *Prosecutor v. Sesay*, SCSL-03-05-PT-38, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003. Online: http://scsl-server/sc-sl/new/Documents/SCSL-03-05-PT-038.pdf

ICTY Case Law

5. *Prosecutor v. Tadic,* Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and On the Giving of Evidence By Video-Link, 25 June 1996. See Prosecution Video Link Motion, ANNEX B.

6. *Prosecutor v. Tadic*, No. ICTR-98-42-T, Decision on the Defence Motion to Protect Defence Witnesses, 16 August 1996. Attached as ANNEX A.

ICTR Case Law

7. *Prosecutor v. Zigiranyirazo,* Case No. ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE: Rules 46, 66, 68, and 75 of the Rules of Procedure and Evidence, 31 January 2006. Attached as ANNEX B.

8. *Prosecutor v. Zigiranyirazo,* Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006. Online: http://69.94.11.53/default.htm

9. *Prosecutor v Simba*, No. ICTR-01-76-T, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005. Online: http://69.94.11.53/default.htm

10. *Prosecutor v. Bagosora et al,* Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004. Online: http://69.94.11.53/default.htm

11. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Testimony of Witness Amadou Deme by Video-Link, 29 August 2006. Online: http://69.94.11.53/default.htm

12. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Nseniyumva Motion for Witness Higaniro to Testify by Video-Conference, 29 August 2006. Online: http://69.94.11.53/default.htm

13. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Ntabakuze Motion under Article 28 and for Video-Conference Testimony Under Rule 54 of Colonel de St. Quentin, 11 September 2006. Online: http://69.94.11.53/default.htm

US Case Law

14. *Coy v. Iowa*, 487 U.S. 1012 (1988). Attached as ANNEX C.

HHDS

Annex A

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UNITED
NATIONS

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-94-1-T

Date: 16 August 1996

Original: ENGLISH AND FRENCH

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Ninian Stephen
Judge Lal C. Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision: **16 August 1996**

PROSECUTOR

v.

DUŠKO TADIĆ A/K/A "DULE"

DECISION ON THE DEFENCE MOTION TO PROTECT DEFENCE WITNESSES

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Steven Kay

Mr. Alphons Orie

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I. INTRODUCTION

On 25 June 1995 this Trial Chamber issued its Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-link *Prosecutor v. Tadic*, No. IT-94-1-T, ICTY Tr.Ch. II ("*Decision on Protection of Defence Witnesses*"). This Decision granted leave to the Defence to file supplementary affidavits and to amend its Motion in order to request safe conduct instead of orders permitting testimony by video-link. Pending before the Trial Chamber is the Motion to Protect Defence Witnesses ("Motion") filed by the Defence on 30 July 1996 in which it did amend its request in respect of six witnesses and requests protective measures for nine additional Defence witnesses. On 6 August 1996 the Prosecutor filed a Response to the Motion ("Response") objecting in part to the requested relief.

Oral arguments on the motions were heard *in camera* on 14 August 1996 and the decision on the Motion was reserved to this day.

THE TRIAL CHAMBER HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

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A. Factual Background

1. The accused is charged with crimes arising out of a series of incidents which are alleged to have occurred in opština Prijedor between May and December 1992. These charges relate to events at the Omarska, Keraterm and Trnopolje camps, an incident arising out of the surrender of the Kozarac area in May 1992 and events in the villages of Jaskići and Sivci in June 1992. The charges involve the commission of serious violations of international humanitarian law including, *inter alia*, wilful killing, murder, wilfully causing grave suffering or serious injury, persecution, torture, cruel treatment and the commission of inhumane acts. These acts are alleged to constitute grave breaches of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("the Statute"), violations of the laws or customs of war as recognised by Article 3 of the Statute and crimes against humanity as recognised by Article 5 of the Statute.

2. According to the Defence the circumstances as stated in its Motion to Summon and Protect Defence Witnesses of 18 April 1996 still exist. Witnesses are said to be exposed to serious risk of reprisals and that the very fact of contact between potential witnesses and the Defence has resulted in threats to witnesses. Even when their testimony is innocuous, witnesses are often fearful of arrest by the Prosecutor. Consequently, witnesses are often unwilling or fearful to come to the seat of the International Tribunal to testify. Furthermore, there are allegations that co-operation by the authorities in opština Prijedor with the International Tribunal is lacking.

B. The Pleadings

3. The Defence seeks five categories of relief. First, it requests that the Trial Chamber summon eight witnesses. Second, it requests that the Trial Chamber issue orders for the safe conduct of seven witnesses to travel to the seat of the International Tribunal and testify before the Trial Chamber. Third, it requests that the Trial Chamber order the giving of testimony by six witnesses by video-link. Fourth, the Trial Chamber is asked to protect the identity of five

witnesses from disclosure to the public and the media, *i.e.* confidentiality. Fifth, the Defence requests that its witnesses who will appear before the Trial Chamber on the bases of orders for safe conduct be granted general testimonial immunity under Rule 90 (E).

4. The Prosecutor acquiesces to the request of the Defence to summon certain witnesses but partly opposes the requests for safe conduct, confidentiality, the giving of testimony through video-link, and for general testimonial immunity.

1. Summons

5 Considering that the Prosecutor agrees to the request that Defence witnesses be summoned and, pursuant to Rule 54, the Trial Chamber will issue summonses for the witnesses identified in the Motion as witnesses 29, 30, 31, 32, 33, 34, 35 and 36.

2. Safe Conduct

6. Orders for safe conduct are not specifically provided for by either the Statute or the Rules but can be made under the general power of Rule 54. The Defence requests the Trial Chamber to provide for the safe conduct of seven of its witnesses in order to secure their attendance at the seat of the International Tribunal.

7. In the *Decision on Protection of Defence Witnesses* this Trial Chamber stated that

> [t]he evidentiary value of testimony of a witness who is physically present is weightier than testimony given by video-link. The physical presence of a witness at the seat of the International Tribunal enables the Judges to evaluate the credibility of a person giving evidence in the courtroom. Moreover, the physical presence of the witness at the seat of the International Tribunal may help discourage the witness from giving false testimony.

Decision on Protection of Defence Witnesses para. 11. For these reasons, the Trial Chamber granted leave to the Defence to amend its Motion to request, where appropriate, orders for safe conduct instead of orders permitting testimony by video-link. In accordance

with the Decision, the Defence asks that witnesses 4 and 5, who had previously been granted leave to give testimony through video-link, be granted safe conduct.

8. It must be borne in mind that an order for safe conduct grants only a very limited immunity from prosecution. Immunity is granted with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal and only for the time during which the witness is present at the seat of the International Tribunal for the purpose of giving testimony. The Trial Chamber regards this limited restriction on the powers of the Prosecutor reasonable in light of the importance for the administration of justice of having the witnesses physically present before this Trial Chamber. Moreover, witnesses who the Defence claims will provide evidence which is vital to its case, will not appear before the Trial Chamber unless granted safe conduct. In these circumstances, the Trial Chamber holds the view that granting the request for safe conduct is appropriate and in the interest of justice. *See, Decision on Protection of Defence Witnesses* para. 12.

9. In its Reply the Prosecutor requests that certain limits be put on the orders for safe conduct. The Prosecutor suggests that the freedom of movement of Defence witnesses be restricted while in the Netherlands to give testimony and that the time for which they are in the Netherlands be restricted to seven days before the witness is to appear in the case and three days after he has been excused. These measures the Prosecutor suggests would be necessary to prevent possible harassment of Prosecutor witnesses. The Prosecutor requests that the freedom of movement of the Defence witnesses is restricted to travelling between the port of entry or of exit and their lodging, and between their lodging and the International Tribunal. The Defence does not object to restricting the freedom of movement of its witnesses insofar as witnesses are allowed limited freedom of movement around the location of lodging. The Trial Chamber grants the request with the reservation made by the Defence. The Defence does object to restricting the time the witnesses spend in the Netherlands for the giving of testimony. The Defence bases its opposition *inter alia* on the practical restrictions on the capacity of the Victims and Witnesses Unit in managing to get the witnesses to the International Tribunal. For this reason, the Trial Chamber denies the request to restrict the time for which Defence witnesses are in the Netherlands,

however, if the Victims and Witnesses Unit is able to shorten the period witnesses are in the Netherlands to give testimony, without posing danger to the testimony, it is encouraged to do so. To prevent unnecessary harassment of witnesses, the Trial Chamber also orders, *proprio motu*, that, while in the Netherlands to give testimony, Defence witnesses must refrain from contacting Prosecutor witnesses or their relatives.

10. The Trial Chamber orders that, while in the Netherlands for the purpose of appearing before the International Tribunal to testify, witnesses 4, 5, 29, 30, 31, 32 and 35, shall not be prosecuted, detained or subjected to any other restriction of their personal liberty in respect of acts or convictions prior to their departure from their home country. This immunity shall commence fifteen (15) days before the witness is to appear before the International Tribunal and cease when the witness, having had for a period of fifteen (15) consecutive days from the date when his presence is no longer required by the International Tribunal an opportunity of leaving, has nevertheless remained in the Netherlands, or having left it, has returned. See European Convention Art. 12 (3).

3. Video-Link Testimony

11. The Defence requests that the Trial Chamber allow the giving of testimony by video-link in order to secure the evidence of witnesses who are unable to come to the seat of the International Tribunal. The Defence envisages the giving of evidence through a live television link with the courtroom which will enable all persons concerned to see, hear and communicate with the witness, even though he is not physically present.

12. It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal. The Trial Chamber will, therefore, only allow video-link testimony if certain criteria are met, namely that the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal. The Defence has demonstrated the link between each witness and the time-frame in which the alleged crimes took place thereby satisfying the Trial Chamber that the witnesses are sufficiently important to the accused's defence of alibi. In addition the Trial Chamber is

satisfied that in its affidavits and the oral representations the Defence made a sufficient showing that these witnesses are unable to come to the seat of the International Tribunal. Accordingly, the Trial Chamber will allow the giving of video-link testimony by each of these witnesses subject to the conditions set out in paragraph 22 of the *Decision on Protection of Defence Witnesses* and provided that the necessary equipment is made available to the Tribunal. *See, Decision on Protection of Defence Witnesses* para. 19.

4. Confidentiality

13. The power to provide appropriate protection for victims and witnesses during the proceedings is derived from provisions of Articles 20 and 22 of the Statute and Rules 69, 75 and 79. As is stated in the *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses of 10 August 1995, ICTY Tr.Ch. II (*"Protective Measures Decision"*), the Trial Chamber, in fulfilling its affirmative obligation to provide such protection, has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the right of the public to access to information and the protection of victims and witnesses. How the balance is struck will depend on the facts of each case. *See Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L of 14 Nov. 1995, ICTY Tr. Ch. II (*"Witness L Decision"*) para. 11.

14. As this Trial Chamber has pointed out previously, it has to ensure that the curtailment of the public nature of the hearing is justified by circumstances such as the giving of evidence by victims of sexual assault and genuine fear for the safety of the witness or members of his family. *See Protective Measures Decision* para. 42. The right to a public trial is not only a right of the accused. The world community has a right to be informed of the proceedings before the International Tribunal. Similarly, the Prosecutor has an interest in the trial being conducted in public. *See, Decision on Protection of Defence Witnesses* para. 25.

15. In his Response, the Prosecutor declares not to object to confidentiality for witnesses 7, 29, 32, 33 and 35 if they had not had media contacts which would make the granting of confidentiality inappropriate. During oral proceedings the Defence submitted that none of the witnesses had had media contacts.

16. The Trial Chamber must take into account the witnesses' fear of potentially serious consequences to them and to their family members if information which may lead to their identification is made known to the public or the media. In light of the submission by the Defence that none of the witnesses had had contacts with the media, and the general confirmation by the Prosecutor that the fear of reprisal entertained by witnesses who will testify before the International Tribunal is well founded, the Trial Chamber finds that the Defence's request is appropriate with respect to the witnesses who have indicated fear of reprisals upon their return home. See, *Decision on Protection of Defence Witnesses* para. 26. Witnesses 7, 29, 32, 33 and 35 have indicated such fear of reprisals, therefore, the Trial Chamber grants the measures protecting the identity of witnesses 7, 29, 32, 33 and 35 from disclosure to the public and the media.

17. If at any time, these measures are no longer required, they shall cease to apply or, if a less restrictive measure can secure the required protection, that measure shall be applied. The Trial Chamber prefers to have open sessions whenever possible so as not to restrict unduly the Prosecutor's right to a public hearing and the public's right to information and to ensure that closed sessions are utilised only when other measures will not provide the degree of protection required. During the oral proceedings the Defence indicated that it might not be needing closed sessions for all its witnesses. The Defence should submit the names of witnesses who are prepared to testify in open session before 10 September 1996.

18. The Prosecutor in its Response requests the Trial Chamber to specifically limit the confidentiality measures relating to Defence's witnesses to their involvement in the present proceedings as witnesses. According to the Prosecutor this restriction is necessary in order not to preclude any possible investigation. As the Trial Chamber has pointed out on several occasions, protective measures should be limited to what is strictly necessary. *See*, *Protective Measure Decision* para. 66, *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the

Prosecutor's Motion Requesting Protective Measures for Witness P of 15 May 1996, ICTY Tr.Ch. II para. 8, and *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R of 31 July 1996, ICTY Tr.Ch. II para. 7, 8. The Trial Chamber therefore confirms that confidentiality measures in respect of Defence witnesses must be interpreted as being restricted as to their status as witnesses in the present case.

5. General Testimonial Immunity

19. During oral argument the Defence requested that its witnesses who will appear before the court on the basis of a safe conduct be granted general testimonial immunity under Rule 90 (E). Rule 90(E) reads:

> A witness may object to making any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.

The wording of this Rule does not allow the Trial Chamber to grant blanket testimonial immunity for witnesses. When the witness appears before the Trial Chamber he can, however, ask for the protection of Rule 90(E) by refusing to testify on the ground that his testimony may incriminate him. For these reasons, the Trial Chamber denies this request of the Defence.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the motions filed by the Defence, **ORDERS AS FOLLOWS:**

PURSUANT TO RULE 54,

(1) witnesses 29, 30, 31, 32, 33, 34, 35 and 36 shall be summoned;

(2) witnesses 4, 5, 29, 30, 31, 32 and 35, while in the Netherlands for the purpose of appearing before the International Tribunal to testify, shall not be prosecuted, detained or subjected to any other restriction of their personal liberty in respect of acts or convictions prior to their departure from their home country. This immunity shall commence fifteen (15) days before the witness is to appear before the International Tribunal and cease when the witness, having had for a period of fifteen (15) consecutive days from the date when his presence is no longer required by the International Tribunal an opportunity of leaving, has nevertheless remained in the Netherlands, or having left it, has returned. When in the Netherlands, the freedom of movement of these Defence witnesses is restricted to the area around the location of their lodging and to travelling between the port of entry or of exit and their lodging, and between their lodging and the International Tribunal; and

(3) witnesses 9, 20, 22, 34, 36 and 37 may give testimony through video-link provided that the necessary equipment can be made available to the Tribunal and subject to the conditions set out in paragraph 22 of the *Decision on Protection of Defence Witnesses*.

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PURSUANT TO RULE 75,

(4) the name, address, whereabouts of, and other identifying data concerning witnesses 7, 29, 32, 33 and 35 shall not be disclosed to the public or to the media;

(5) all hearings to consider the issue of protective measures for witnesses 7, 29, 32, 33 and 35 shall be in closed session, however, edited recordings and transcripts of the session(s) shall, if possible, be released to the public and to the media after review by the Defence in consultation with the Victims and Witnesses Unit;

(6) the name, address, whereabouts of, and identifying data concerning witnesses 7, 29, 32, 33 and 35 shall be sealed and not included in any of the public records of the International Tribunal;

(7) to the extent the name, address, whereabouts of, or other identifying data concerning witnesses 7, 29, 32, 33 and 35 is contained in existing public documents of the International Tribunal, that information shall be expunged from those documents;

(8) documents of the International Tribunal identifying witnesses 7, 29, 32, 33 and 35 shall not be disclosed to the public or to the media;

(9) the testimony of witnesses 7, 29, 32, 33 and 35 shall be heard in closed session or, if the witnesses are willing to appear in open court, their testimony may be given using image-altering devices to the extent necessary to prevent their identity from becoming known to the public or to the media; if a witness' testimony is given in closed session, edited recordings and transcripts of the session(s) shall, if possible, be released to the public and to the media after review by the Defence in consultation with the Victims and Witnesses Unit;

(10) pseudonyms shall be used whenever referring to witnesses 7, 29, 32, 33 and 35 in proceedings before the International Tribunal and in discussions among parties to the trial;

(11) the names of witnesses 7, 29, 32, 33 and 35 shall be released to the Prosecutor immediately;

(12) the Prosecutor and his representatives who are acting pursuant to his instructions or requests shall not disclose the names of witnesses 7, 29, 32, 33 and 35, or any other identifying data concerning these witnesses, to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witness adequately. Any such disclosure shall be made in such a way as to minimise the risk of the witness's name being divulged to the public at large or to the media;

(13) the Prosecutor and his representatives who are acting pursuant to his instructions or requests shall notify the Defence of any requested contact with witnesses 7, 29, 32, 33 and 35 or the relatives of witnesses 7, 29, 32, 33 and 35, and the Defence shall make arrangements for such contact as may be determined necessary;

(14) the public and the media shall not photograph, video-record or sketch witnesses 7, 29, 32, 33 and 35 while they are in the precincts of the International Tribunal; and

(15) that while in the Netherlands to give testimony Defence witnesses must refrain from contacting Prosecutor witnesses or their relatives.

Done in both English and French, the English version being authoritative.

Gabrielle Kirk McDonald
Presiding Judge

Dated this sixteenth day of August 1996,
At The Hague
The Netherlands

[Seal of the Tribunal]

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Annex B

ICTR-2001-73-T
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Inés Mónica Weinberg de Roca, Presiding
Khalida Rachid Khan
Lee Gacuiga Muthoga

Registrar: Mr. Adama Dieng

Date: 31 January 2006

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

DECISION ON DEFENCE AND PROSECUTION MOTIONS RELATED TO WITNESS ADE

Rules 46, 66, 68, 73, and 75 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Stephen Rapp
Wallace Kapaya
Gina Butler
Charity Kagwi-Ndungu
Iskandar Ismail
Jane Mukangira

Defence Counsel:
John Philpot
Peter Zaduk

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the Defence "Requête pour la communication des éléments exculpatoires Re Témoin ADE et d'éléments visées par l'Article 66 (Déclarations d'un témoin du Procureur)" filed on 6 December 2005 ("Defence Motion for Disclosure"); and **CONSIDERING** the Prosecution Response filed as confidential and *inter partes* on 12 December 2005[1] and the Defence Reply filed on 20 December 2005;[2]

BEING FURTHER SEIZED of the "Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family" filed as confidential and *inter partes* on 12 December 2005 ("Rule 66(C) Motion") and the "Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family" filed as confidential and *inter partes* on 15 December 2005; and **CONSIDERING** the Defence Response filed on 20 December 2005[3] and the Prosecution Reply filed as confidential and *inter partes* on 22 December 2005;[4]

BEING FURTHER SEIZED of the "Prosecutor's Motion for Sanctions Against Defence Counsel" filed as confidential and *inter partes* on 12 December 2005 ("Motion for Sanctions"); and **CONSIDERING** the Defence Response filed on 20 December 2005;[5]

BEING FURTHER SEIZED of the Defence "Requête pour soustraire le témoin ADE des mesures de protection" filed on 20 December 2005 ("Motion for Withdrawal of Protection"); and **CONSIDERING** that the Prosecution has not responded to it;

BEING FURTHER SEIZED of the "Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony via Video-Link" filed on 21 December 2005 ("Video-Link Motion"); and **CONSIDERING** the Defence Response filed on 28 December 2005[6] and the Prosecution Reply filed on 13 January 2006;[7]

AND BEING FINALLY SEIZED of the "Defence Motion to the Chamber for Adjudication of Pending Motions" filed on 28 December 2005 ("Motion for Adjudication"); and **CONSIDERING** that the Prosecution has not responded to it;

RECALLING the Scheduling Order made on 19 January 2006 requesting the Prosecution to disclose to the Chamber, *in camera* and *ex parte* "all information and materials, including all

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1 "Prosecutor's Response to Defence Motion for Disclosure of Payments and Benefits to Witness ADE and His Family".

2 "Réplique à la réponse du procureur a la requête pour la communication des éléments exculpatoires re témoin ADE et d'éléments visées par l'article 66 (déclarations d'un témoin du procureur)".

3 "Réponse à la requête du Procureur 'to permit limited disclosure of information regarding payments en benefits provided to witness ADE en his family'".

4 "Prosecutor's Rejoinder to Defence Reply Regarding Disclosure of Information of Payments and Benefits Provided to Witness ADE and His Family and to Defence Reply to Allow Limited Disclosure of Information".

5 "Réponse à la requête du procureur pour sanctions contre le conseil de la défense".

6 "Defence Response to Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Videolink".

7 "Prosecutor's Reply to the Defence Response to the Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Videolink".

documents, related to the payments and benefits given to Witness ADE and his family, including the unredacted budget";[8]

RECALLING the Decision of 25 February 2003 granting protective measures for Prosecution Witnesses ("Protective Order");[9]

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules") particularly Rules 46, 66, 68(D), 73(F), 75(A) and 75(B);

NOW DECIDES the motions based solely on the written briefs of the Parties pursuant to Rule 73(A) of the Rules.

A. JOINDER OF THE MOTIONS

1. The Chamber is of the view that these motions are interrelated and should be decided together. The Chamber will rule on the motions in the following order: Motion for Withdrawal of Protection, Motion for Sanctions, Defence Motion for Disclosure and Rule 66(C) Motion, Video-Link Motion, and Motion for Adjudication.

B. MOTION FOR WITHDRAWAL OF PROTECTION

2. The Defence requests the Chamber to declare that its Protective Order is no longer applicable to Witness ADE. The Defence argues that although the Tribunal previously prohibited the disclosure of Witness ADE's identity to the public, his name has since been made public due to the negligence of either the Prosecutor, Witness ADE himself or his family, or other sources.

3. The Protective Order shall remain in force. The Chamber is not satisfied that the Defence has shown a change in circumstances which would justify lifting the Protective Order.

C. MOTION FOR SANCTIONS

4. The Prosecutor submits that the redacted statement taken from Witness ADE was disseminated to parties and posted on the Internet, in violation of the Protective Order. Further, the Defence Motion for Disclosure was filed by the Defence on 6 December 2005 as a public document when it should have been filed as confidential or strictly confidential, since the annexes contained information which identified Witness ADE.

5. The Prosecutor argues that these actions were unnecessary, and served only to identify Witness ADE to the public. The Prosecutor warns that these actions are likely to both compromise their efforts to obtain Witness ADE's testimony and to discourage the

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[8] Scheduling Order – In Camera Hearing on Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, (TC), 19 January 2006.

[9] Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 25 February 2003.

cooperation of future witnesses, thus creating the impression that the Tribunal is incapable of protecting witnesses and victims.

6. The Prosecutor requests that the Chamber directs the Defence to change the Defence Motion for Disclosure classification level from "public" to "confidential", to find the unnecessary appendage of the photographs to the Defence Motion for Disclosure an abuse of process, to order the non-payment of fees in relation to the thirty-one (31) pages of appendices, and to warn Defence Counsel that further such acts could result in sanctions as provided for under Rule 46.

7. The Defence replies that the Prosecutor's request for sanctions against it should be dismissed. The Defence argues that the Prosecutor has not identified Defence counsel as being responsible for disclosure of the information on Witness ADE, nor has counsel committed an error that warrants sanctions. The Defence did not ask for sanctions against the Prosecutor for his failure to properly redact some of the statements disclosed.

8. The Chamber deplores the dissemination of Witness ADE's redacted statement to parties in violation of the Protective Order, and the filing of the Defence Motion for Disclosure as a public document when it should have been filed as confidential or strictly confidential. In order to limit disclosure of the sensitive information, the Chamber will order the Registrar to reclassify the filing as confidential. The Chamber will not impose sanctions on Defence counsel, but wishes to remind both parties to exercise due care when filing documents that contain confidential information.

D. DEFENCE MOTION FOR DISCLOSURE AND RULE 66(C) MOTION

9. The Defence requests the Chamber to order the disclosure of all benefits obtained by Witness ADE since 1995, and all new information from Witness ADE that was obtained in November 2005.

10. The Defence submits Witness ADE has received various benefits from the Prosecutor. Two requests from the Defence to transmit information concerning these benefits remain unanswered. Given the latter could affect the credibility of Prosecution evidence as envisaged in Rule 68(A), the Defence requests the disclosure of all benefits and payments rendered to Witness ADE.[10]

11. The Prosecutor responds by referring to its arguments in the Rule 66(C) Motion filed after the Defence Motion for Disclosure, which requests the Chamber denies such motion. In his motion, the Prosecutor requests that the Chamber grants permission under Rules 66(C) and 68(D) not to disclose to the Defence certain information regarding the provision of payments and benefits that he acknowledges having provided for Witness ADE and his family. He is of the view that the aforementioned information does not fall under Rule 68 as being potentially exculpatory. While the Prosecutor agrees that information or material concerning benefits or promises made to witnesses and victims beyond that which is reasonably required should be disclosed as evidence possibly affecting the credibility of the witnesses, the Prosecutor cites case law to support his contention that certain expenditures,

[10] *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 16.

such as transportation connected to investigations and hearings, do not fall within Rule 68.[11] The Prosecutor submits that all such payments and benefits were reasonably required: (1) to make it possible to interview Witness ADE on a full-time basis for an extended period and to compensate him for foregoing income to support his family; (2) to provide the family with resources to permit their relocation, security, and societal re-insertion in a new country; and (3) to provide Witness ADE with credit to make telephone calls to assist in further investigations. In other words, all such benefits and payments were provided to Witness ADE and his family to put him in the position he would have been in had he not assisted the Office of the Prosecutor.

12. The Prosecutor further submits that ADE is an insider witness who assumes greater risks by cooperation as he can be viewed as a traitor and can be subject to retribution. This could lead to the witness refusing to testify or withdrawing his cooperation with the Prosecutor.

13. The Prosecutor asserts that, because of the improper filing referred to in the Motion for Sanctions, he is making disclosure to the Accused in a manner that complies with the standards as set forth in the *Karemera* Decision on Paid Witnesses: the Prosecutor has provided a sworn declaration of an investigator setting forth the subsistence payments, the telephone credits, and notes that funds were expended for one-way travel for members of his family, without including specific amounts or dates, made to Witness ADE. The Prosecutor puts forth that he has also provided the approved budget for the costs of relocation of Witness ADE's family, in conformity with another decision in the *Karemera* case, which held that the money value of the expenditures for the relocation of a witness and his family were not necessary for determining his credibility.[12] The Prosecutor is also concerned that the disclosure of the amounts could reveal the place of relocation as well. The Prosecutor states that he is ready to hand-deliver to the Judges the unredacted budget when so requested. The Prosecutor further undertakes to submit to the Judges *in camera* all the details not included in the disclosure to the Defence according to Rules 66(C) and 68(D) if the Chamber so directs.

14. In response, the Defence refers to the conditions set out in Rule 68(D), which, have not been fulfilled in the present case. Specifically, the Prosecutor has not provided the Chamber, sitting *in camera*, with all the relevant information, as should have been done. Therefore, the Defence submits that the Motion is without legal foundation and should be dismissed.

15. The Prosecutor replies that he has undertaken a thorough search of his records and has provided the Defence with all documents in his possession regarding payments to Witness ADE. The Prosecutor insists that there are no new statements or additional information, nor does it have in its possession any records of phone calls made by Witness ADE. The only exception to this is a record regarding the purchase of phone cards, which should be available to the Judges only.

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[11] *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7 ("*Karemera* Decision on Paid Witnesses").

[12] *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, paras. 4-10.

16. The Prosecutor warns that the recent death of Juvénal Uwilingiyimana, a former senior public official in Rwanda, who was being interviewed by the Prosecutor, underlines the risks faced by cooperating insiders. The Prosecutor alleges that members of Witness ADE's family have been contacted in a manner designed to discourage Witness ADE's testimony.

17. In its reply, the Defence alleges that the information given in the "Prosecutor's Supplemental Information"[13] filed as confidential and *inter partes* on 15 December 2005 is incomplete. The Defence provides some examples as to what other information it seeks from the Prosecutor.[14] The Defence is of the view that the enormous benefits received by Witness ADE constitute, in and of themselves, a reason to lie and that it is therefore important to determine the payments and benefits in their entirety.

18. The Chamber recalls that, pursuant to Rules 66(C) and 68(D), the Prosecutor can be relieved from disclosing such information and materials if its disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State."

19. The Defence requests the disclosure of two main categories of information. First, the Defence asks that the Prosecutor divulges all information on payments and benefits that Witness ADE has received since 1995. Second, the Defence asks for more detail including all documents, all information on the transfer of the witness's family, all records of telephone calls made by the witness, and other information.

20. The Chamber is of the view that the disclosure of the payments and benefits should be made in the interests of justice. However, the Chamber is also aware that Witness ADE is an insider witness, and thus assumes greater risks by cooperation.

21. The Prosecutor claims that the redacted budget was submitted in conformity with a decision in the aforementioned *Karemera* case.[15] The Prosecution has provided the Chamber, *in camera* and *ex parte*, with an unredacted and comprehensive budget pertaining to Witness ADE.

22. The Chamber wishes to distinguish the circumstances at issue surrounding the payment of benefits from the above *Karemera* decision. In *Karemera*, the witness was not receiving payments directly from the Tribunal, but through a witness protection program of a specific State. In other words, the benefits were funded by the Tribunal but paid out and monitored by national authorities.

23. Taking into account all of the information available to it, the Chamber is of the view that the total cost of payments and benefits ought to be disclosed to the Defence in the interests of transparency and justice, because of its quantum, even though "the money value, in any given currency, of the expenditures of the respective government depends on the cost of living in the respective country, on exchange rates and various other external economic

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13 "Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family" filed as confidential and inter partes on 15 December 2005.

14 "Requête pour la communication des éléments exculpatoires Re Témoin ADE et d'éléments visées par l'Article 66 (Déclarations d'un témoin du Procureur)" filed on 6 December 2005, para. 12

15 *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, paras. 9-10.

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factors."[16] Without revealing the location of Witness ADE's family, and without stating the individual costs of services and goods provided and further details, which might undermine the protective measures currently in effect, the Chamber has been made aware that the total cost of all payments and benefits over a two-year period is budgeted at approximately Two Hundred Thousand Dollars ($200,000). Consequently, the Prosecutor has to certify this figure considering the amount which has been spent and is expected to be spent. The Chamber highlights, however, that it is the sum total of monies expended and to be expended which needs to be verified and confirmed by the Prosecutor. This verification should not comprise a list of inventory of expenses pertaining to the witness.

24. The Chamber now turns to the remaining issues, such as disclosure of all documents, all information on the transfer of the witness's family, and all records of telephone calls made by the witness. The Chamber recalls that the Defence bears the onus of proof as the party alleging that a violation of Rule 68 has occurred.[17] As stipulated in paragraph 23 above, the Chamber does not consider it necessary for any further documents pertaining to benefits and payments to be disclosed to the Defence.

E. VIDEO-LINK MOTION

25. The Prosecutor requests that the testimony of Witness ADE be given via video-link. The second Trial session started on 23 January 2006, and Witness ADE is expected to give evidence from 27 February 2006 to 3 March 2006. Relying on Rules 75(A) and 75(B), the Prosecutor asserts that hearing the testimony via video-link is necessary to guarantee the safety of Witness ADE.

26. Relying on the jurisprudence of the Tribunal,[18] the Prosecutor submits that Witness ADE's circumstances satisfy the criteria established to allow testimony via video-link. First, the expected testimony is sufficiently important in that Witness ADE will be adducing evidence on all five counts of the Indictment. Second, taking the testimony via video-link is in the interests of justice, as Witness ADE is the only witness able to provide evidence on both the alleged *Akazu* conspiracy, and on the Accused's actions before and after 6 April 1994. Third, the Prosecutor states that Witness ADE is unwilling to travel to Arusha due to fears for his safety stemming from his position as an *Akazu* insider witness. Recent events, including the publishing of one of his statements on the Internet, the probable murder of Juvénal Uwilingiyimana, and threats received by his family, have all contributed to his sense of vulnerability. To this end, Witness ADE has signed an agreement with the Prosecutor that he will only testify in ICTR trials on the condition that he will not be required to appear in Arusha. Lastly, the Prosecutor submits that the Accused's right to a fair trial will

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16 *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, 19 April 2005, para. 9.

17 "*Karemera* Decision on Paid Witnesses", paras. 7-8.

18 See the "Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Video-Link", filed on 21 December 2005, footnote 2.

not be compromised should the request be granted, in that the Prosecutor will undertake to fulfil the criteria established for testimony via video-link.[19]

27. The Defence responds with a different interpretation of the law regarding granting video-link testimony. The Defence sets forth three primary considerations for determining whether a request for testimony to be given via video-link should be granted: the importance of the testimony, the inability or unwillingness of the witness to attend, and whether good reason has been adduced for that inability or unwillingness. Moreover, whether granting the video-link would be in the interests of justice is to be evaluated in the context of the above criteria.

28. The Defence nonetheless provides arguments on each of the Prosecutor's four listed criteria. First, the Defence submits that Witness ADE's testimony will not prove to be important as it is mostly hearsay evidence and that much of his evidence will be inadmissible. Second, regarding the unwillingness of Witness ADE to travel to Arusha, the Defence submits that the agreement made between Witness ADE and the Prosecutor is irregular in that it usurps the role of the Chamber when it purports to assure Witness ADE that his testimony will be taken via video-link. The Defence states that this has the potential to bring the administration of justice into disrepute. The Defence denies that Witness ADE's statement was posted on the Internet, and notes that in any event, Prosecution witnesses who have travelled to Arusha have never been harmed. Third, Defence submits that the right to confront an accuser is a fundamental principle of law, and that the Accused will suffer considerable prejudice if he is unable to confront the witness in open court. Lastly, the Defence characterises the interests of justice as relating to Rwandans' need to heal, a process which requires open debate through testimony in person.

29. The Defence strongly contests the Prosecutor's interpretation of the circumstances surrounding the death of Juvénal Uwilingiyimana, suggesting that the death of this potential witness was not a murder to prevent testimony, but may have been a suicide. The Defence submits that Juvénal Uwilingiyimana was pressured by the Prosecutor to lie and further accuses the Prosecutor of fabricating evidence.

30. In reply, the Prosecutor maintains that the death of Juvénal Uwilingiyimana supports the Prosecutor's request by highlighting the risk faced by insiders who agree to testify. The Prosecutor adds that testimony via video-link would not prevent the Accused from confronting the accuser, but would merely change the medium of communication.

31. The standard for authorizing testimony by video-link was extensively discussed in the *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link*.[20] Video-link testimony should be ordered when it is in the interests of justice, as elaborated in the jurisprudence of this Tribunal. In particular, the Chamber will consider the importance of the testimony; the inability or unwillingness of the witness to attend; and whether a good reason has been adduced for the inability or unwillingness to attend.[21]

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[19] The Prosecutor refers to the criteria established in *Prosecutor v. Duško Tadić* (IT-94-1-T), Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link ("*Tadić* Decision re Video-Link"), 25 June 1996, para. 22, which has been approved in subsequent cases including *Prosecutor v. Delalić et al.*, Decision to allow Witnesses K, L and M to give their testimony by means of video-link conference, 28 May 1997.

[20] *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC) ("*Bagosora* Decision re Video-Link"), 8 October 2004.

[21] See also *The Prosecutor v. Aloys Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; Decision Authorizing the Taking of the Evidence of

32. The Chamber appreciates the potential importance of Witness ADE's testimony to the Prosecution's case. The Chamber is also satisfied with the Prosecution's arguments that there may be an increased risk to this witness should he travel to Arusha to give his testimony. However, the Chamber also bears in mind that the Defence wishes to confront this witness in person and indeed has the right to confront his accuser. For its part, the Chamber is also concerned as to whether or not it is possible to effectively and accurately assess the testimony and demeanour of a witness who is testifying via video-link. In light of the stated importance of this witness to the Prosecution's case, the Chamber wishes to hear this witness uninterrupted and in person.

33. The Chamber emphasizes that it is a general principle, articulated in Rule 90(A), that "witnesses shall, in principle, be heard directly by the Chambers". As stated in the *Tadić* Decision re Video-Link, "the evidentiary value of testimony provided by video-link ... is not as weighty as testimony given in the courtroom. Hearing of witnesses by video-link should therefore be avoided as far as possible."[22] The Chamber also notes that, as articulated in the *Bagosora* Decision re Video-Link, "the testimony of witnesses heard through electronic media runs the risk of being less weighty than that of in-court testimony if the quality of the transmission impairs the Chamber's assessment of the witness."[23] Given the Chamber's desire to prevent poor transmission impairing the testimony of such an important witness, the Chamber is of the opinion that it will benefit from the physical presence of the witness at trial.

34. Consequently, the Chamber finds that it is in the interests of justice to order that all the necessary arrangements to be made for the testimony of Witness ADE to be heard in The Hague, with all parties present, at a date to be determined by the Tribunal, pursuant to Rule 4.

F. MOTION FOR ADJUDICATION

35. The Defence, in its Motion for Adjudication, asks the Chamber to rule on all pending motions before it. As the Chamber has addressed all outstanding motions regarding Witness ADE, there is no need to address this motion.

FOR THE ABOVE REASONS, THE CHAMBER

I. **DENIES** the Motion for Withdrawal of Protection;

II. **DENIES** the Motion for Sanctions and **DIRECTS** the Registrar to reclassify the Defence Motion for Disclosure as confidential;

Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2004, para. 4; *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Testimony by Video-Conference (TC), 20 December 2004. Video-conference testimony may also be authorized for witness protection purposes: see *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003; Decision on the Prosecution Motion for Special Protective Measures for Witness "A" Pursuant to Rules 66(C), 69 (A) and 75 of the Rules of Procedure and Evidence (TC), 5 June 2002; *The Prosecutor v. Ferdinand Nahimana et al.*, Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures (TC), 14 September 2001.

[22] *Tadić* Decision re Video-Link, para. 21.

[23] *Bagosora* Decision re Video-Link, para.15.

III. **GRANTS** in part the Defence Motion for Disclosure, and **ORDERS** the Prosecutor to disclose to the Defence the total amount of all payments and benefits referred to above, in a certified form;

IV. **DENIES** the Prosecutor's Video-Link Motion;

V. **REQUESTS** pursuant to Rule 4 the President of the Tribunal to authorize the Chamber to sit in The Hague, at a date to be determined in consultation with the Parties and the Registry, in order to hear the testimony of Witness ADE.

Arusha, 31 January 2006, done in English.

Inés Mónica Weinberg de Roca
Presiding Judge

Khalida Rachid Khan
Judge

Lee Gacuiga Muthoga
Judge

[Seal of the Tribunal]

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From:	☒ ChamberTC3 **Christopher Rassi** (names)	☐ Defence (names)	☐ Prosecutor's Office (names)	☐ Other: (names)
Case Name:	The Prosecutor vs. **Protais Zigiranyirazo**		**Case Number:** ICTR-2001-73	
Dates:	Transmitted: **31/01/06**		Document's date: **31/01/06**	
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Annex C

Briefs and Other Related Documents

Coy v. IowaU.S.Iowa,1988.

Supreme Court of the United States
John Avery **COY**, Appellant
v.
IOWA.
No. 86-6757.

Argued Jan. 13, 1988.
Decided June 29, 1988.

Defendant was convicted of two counts of engaging in lascivious acts with child by the District Court, Clinton County, Iowa L.D. Carstensen, J., and defendant appealed. The Supreme Court of Iowa, 397 N.W.2d 730, affirmed. On appeal, the Supreme Court of the United States, Justice Scalia, held that: (1) confrontation clause provides criminal defendant right to "confront" face-to-face witnesses giving evidence against him at trial, and (2) placement of screen between defendant and child sexual assault victims during testimony against defendant violated defendant's confrontation clause rights.

Reversed and remanded.

Justice O'Connor filed concurring opinion in which Justice White joined.

Justice Blackmun filed dissenting opinion in which Chief Justice Rehnquist joined.

Justice Kennedy took no part in consideration or decision of case.

Opinion on remand, 433 N.W.2d 714.

West Headnotes

[1] **Criminal Law 110 ⚿662.1**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

Confrontation clause provides criminal defendant right to "confront" face-to-face witnesses giving evidence against him at trial; such confrontation helps to insure integrity of fact-finding process by making it more difficult for witnesses to fabricate testimony. U.S.C.A. Const.Amend. 6.

[2] **Criminal Law 110 ⚿662.1**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

Criminal Law 110 ⚿667(1)

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k667 Taking Oral Testimony in General
110k667(1) k. In General. Most Cited Cases

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of Testifying in General. Most Cited Cases

Placement of screen between defendant and child sexual assault victims during their testimony at trial violated defendant's right to face-to-face confrontation under confrontation clause. U.S.C.A. Const.Amend. 6.

****2798 *1012** Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellant was charged with sexually assaulting two 13-year-old girls. At appellant's jury trial, the court granted the State's motion, pursuant to a 1985 state statute intended to protect child victims of sexual abuse, to place a screen between appellant and the girls during their testimony, which blocked him from their sight but allowed him to see them dimly and to hear them. The court rejected appellant's argument that this procedure violated the Confrontation Clause of the Sixth Amendment, which gives a defendant the right "to be ****2799** confronted with the witnesses against him." Appellant was convicted of two counts of lascivious acts with a child, and the Iowa Supreme Court affirmed.

Held:

1. The Confrontation Clause by its words provides a criminal defendant the right to "confront" face-to-face the witnesses giving evidence against him at trial. That core guarantee serves the general perception that confrontation is essential to fairness, and helps to ensure the integrity of the factfinding process by making it more difficult for witnesses to lie. Pp. 2800-2802.

2. Appellant's right to face-to-face confrontation was violated since the screen at issue enabled the complaining witnesses to avoid viewing appellant as they gave their testimony. There is no merit to the State's assertion that its statute creates a presumption of trauma to victims of sexual abuse that outweighs appellant's right to confrontation. Even if an exception to this core right can be made, it would have to be based on something more than the type of generalized finding asserted here, unless it were "firmly ... rooted in our jurisprudence." *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S.Ct. 2775, 2783, 97 L.Ed.2d 144. An exception created by a 1985 statute can hardly be viewed as "firmly rooted," and there have been no individualized findings that these particular witnesses needed special protection. Pp. 2802-2803.

3. Since the State Supreme Court did not address the question whether the Confrontation Clause error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, the case must be remanded. P. 2803.

397 N.W.2d 730 (Iowa 1986) reversed and remanded.

***1013** SCALIA, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which WHITE, J., joined, *post,* p. ---. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, *post,* p. ---. KENNEDY, J., took no part in the consideration or decision of the case.

Paul Papak, by appointment of the Court, 484 U.S. 810, argued the cause and filed briefs for appellant.
Gordon E. Allen, Deputy Attorney General of Iowa, argued the cause for appellee. With him on the brief were *Thomas J. Miller,* Attorney General, and *Roxann M. Ryan,* Assistant Attorney General.*
* *John L. Walker* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.
Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *John J. Kelly,* Chief State's Attorney of Connecticut and *John M. Massameno,* Senior Appellate Attorney, and by the Attorneys General for their respective States as follows: *John Van de Kamp* of California, *Charles M. Oberly III* of Delaware, *Linley E. Pearson* of Indiana, *Stephen E. Merrill* of New Hampshire, *Hal Stratton* of New Mexico, *David Frohnmayer* of Oregon, *T. Travis Medlock* of South Carolina, and *W.J. Michael Cody* of Tennessee; and for the State of Kentucky et al. by *David L. Armstrong,* Attorney General of Kentucky, *Penny R. Warren* and *John S. Gillig,* Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Don Siegelman* of Alabama, *Grace Berg Schaible* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *Duane Woodard* of Colorado, *Charles M. Oberly III* of Delaware, *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.,* of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota,

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Edwin L. Pittman of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Brian McKay* of Nevada, *W. Cary Edwards* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Robert Henry* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Roger A. Tellinghuisen* of South Dakota, *W.J. Michael Cody* of Tennessee, *David L. Wilkinson* of Utah, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Godfrey R. de Castro* of the Virgin Islands, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, and *Joseph B. Meyer* of Wyoming.

Briefs of *amici curiae* were filed for the American Bar Association by *Robert MacCrate;* and for Judge Schudson by *Charles B. Schudson, pro se,* and *Martha L. Minow.*

***1014** Justice SCALIA delivered the opinion of the Court.

Appellant was convicted of two counts of lascivious acts with a child after a jury trial in which a screen placed between him and the two complaining witnesses blocked him from their sight. Appellant contends that this procedure, authorized by state statute, violated his Sixth Amendment right to confront the witnesses against him.

I

In August 1985, appellant was arrested and charged with sexually assaulting two 13-year-old girls earlier that month while they were camping out in the backyard of the house next door to him. According to the girls, the assailant entered their tent after they were asleep wearing a stocking over his head, shined a flashlight in their eyes, and warned them not to look at him; neither was able to describe his face. In November 1985, at the beginning of appellant's trial, the State made a motion pursuant to a recently enacted statute, Act of May 23, 1985, § 6, 1985 Iowa Acts 338, now codified at Iowa Code § 910A.14 (1987),[FN1] to ****2800** allow the complaining witnesses to testify either via closed-circuit television or behind a screen. See App. 4-5. The trial court approved the use of a large screen to be placed between appellant and the witness stand during the girls' testimony. After certain lighting adjustments***1015** in the courtroom, the screen would enable appellant dimly to perceive the witnesses, but the witnesses to see him not at all.

> FN1. Section 910A.14 provides in part as follows:
> "The court may require a party be confined *[sic]* to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony."

Appellant objected strenuously to use of the screen, based first of all on his Sixth Amendment confrontation right. He argued that, although the device might succeed in its apparent aim of making the complaining witnesses feel less uneasy in giving their testimony, the Confrontation Clause directly addressed this issue by giving criminal defendants a right to face-to-face confrontation. He also argued that his right to due process was violated, since the procedure would make him appear guilty and thus erode the presumption of innocence. The trial court rejected both constitutional claims, though it instructed the jury to draw no inference of guilty from the screen.

The Iowa Supreme Court affirmed appellant's conviction, 397 N.W.2d 730 (1986). It rejected appellant's confrontation argument on the ground that, since the ability to cross-examine the witnesses was not impaired by the screen, there was no violation of the Confrontation Clause. It also rejected the due process argument, on the ground that the screening procedure was not inherently prejudicial. We noted probable jurisdiction, 483 U.S. 1019, 107 S.Ct. 3260, 97 L.Ed.2d 760 (1987).

II

The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," *California v. Green,* 399 U.S. 149, 174, 90 S.Ct. 1930, 1943, 26 L.Ed.2d 489 (1970) (Harlan, J.,

concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the ***1016** charges." Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J.Pub.L. 381, 384-387 (1959).

Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, see, *e.g., Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), or restrictions on the scope of cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Cf. *Delaware v. Fensterer*, 474 U.S. 15, 18-19, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*) (noting these two categories and finding neither applicable). The reason for that is not, as the State suggests, that these elements are the essence of the Clause's protection-but rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, as Justice Harlan put it, "[s]imply as a matter of English" it confers at least "a right to meet face to face all those who appear and give evidence at trial." *California v. Green*, *supra*, at 175, 90 S.Ct., at 1943-1944. Simply as a matter of Latin as well, since the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead). Shakespeare was thus describing the root meaning of ****2801** confrontation when he had Richard the Second say: "Then call them to our presence-face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak...." Richard II, Act 1, sc. 1.

We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. See *Kentucky v. Stincer*, 482 U.S. 730, 748, 749-750, 107 S.Ct. 2658, 2668, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting). For example, in *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899), which concerned the admissibility of prior convictions of codefendants to prove an element of the offense***1017** of receiving stolen Government property, we described the operation of the Clause as follows: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused ... except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." Similarly, in *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." More recently, we have described the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *California v. Green*, *supra*, at 157, 90 S.Ct., at 1934-1935. Last Term, the plurality opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987), stated that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."

The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential

to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you ***1018** disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry.... In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." Press release of remarks given to the B'nai B'rith Anti-Defamation League, November 23, 1953, quoted in Pollitt, *supra,* at 381. The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness,[FN2] the right of ****2802** confrontation***1019** "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986).

FN2. The dissent finds Dean Wigmore more persuasive than President Eisenhower or even William Shakespeare. *Post,* at 2807. Surely that must depend upon the proposition that they are cited for. We have cited the latter two merely to illustrate the meaning of "confrontation," and both the antiquity and currency of the human feeling that a criminal trial is not just unless one can confront his accusers. The dissent cites Wigmore for the proposition that confrontation "was not a part of the common law's view of the confrontation requirement." *Ibid.* To begin with, Wigmore said no such thing. What he said, precisely, was:

"There was never at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names." 5 J. Wigmore, Evidence § 1397, p. 158 (J. Chadbourn rev. 1974) (emphasis in original).

He was saying, in other words, not that the right of confrontation (as we are using the term, *i.e.,* in its natural sense) did not exist, but that its purpose was to enable cross-examination. He then continued:

"It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution." *Ibid.*

Of course, that does not follow at all, any more than it follows that the right to a jury trial can be dispensed with so long as the accused is justly convicted and publicly known to be justly convicted-the purposes of the right to jury trial. Moreover, contrary to what the dissent asserts, Wigmore did mention (inconsistently with his thesis, it would seem), that a secondary purpose of confrontation is to produce "a certain subjective moral effect ... upon the witness." *Id.,* § 1395, p. 153. Wigmore grudgingly acknowledged that, in what he called "earlier and more emotional periods," this effect "was supposed (more often than it now is) to be able to unstring the nerves of a false witness," *id.,* § 1395, p. 153, n. 2; but he asserted, without support, that this effect "does not arise from the confrontation of the *opponent* and the witness," but from "the witness' presence before the *tribunal,*" *id.,* § 1395, p. 154 (emphasis in original).

We doubt it. In any case, Wigmore was not reciting as a fact that there was no right of confrontation at common law, but was setting forth his thesis that the only essential interest preserved by the right was cross-examination-with the purpose, of course, of vindicating against constitutional attack sensible and traditional exceptions to the hearsay rule (which can be otherwise vindicated). The thesis is on its face implausible, if only because the phrase "be confronted with the witnesses against him" is an exceedingly strange way to express a guarantee of nothing more than cross-examination.

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> As for the dissent's contention that the importance of the confrontation right is "belied by the simple observation" that "blind witnesses [might have] testified against appellant," *post,* at 2808, that seems to us no more true than that the importance of the right to live, oral cross-examination is belied by the possibility that speech- and hearing-impaired witnesses might have testified.

[1] The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in *Jay v. Boyd,* 351 U.S. 345, 375-376, 76 S.Ct. 919, 935-936, 100 L.Ed. 1242 (1956) (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss ***1020** the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process." *Kentucky v. Stincer, supra,* 482 U.S., at 736, 107 S.Ct., at 2662. The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

III

[2] The remaining question is whether the right to confrontation was in fact violated****2803** in this case. The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. App. 10-11. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit-namely, the right to cross-examine, see *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-1046, 35 L.Ed.2d 297 (1973); the right to exclude out-of-court statements, see *Ohio v. Roberts,* 448 U.S., at 63-65, 100 S.Ct., at 2537-2539; and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself, *Kentucky v. Stincer, supra.* To hold that our determination of what ***1021** implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: "a right to *meet face to face* all those who appear and give evidence *at trial.*" *California v. Green,* 399 U.S., at 175, 90 S.Ct., at 1943-1944 (Harlan, J., concurring) (emphasis added). We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy. Cf *Ohio v. Roberts, supra,* 448 U.S., at 64, 100 S.Ct., at 2538; *Chambers v. Mississippi, supra,* at 295, 93 S.Ct., at 1045-1046. The State maintains that such necessity is established here by the statute, which creates a legislatively imposed presumption of trauma. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying

such a statute is needed when the exception is not "firmly ... rooted in our jurisprudence." *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987) (citing *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)). The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception.

The State also briefly suggests that any Confrontation Clause error was harmless beyond a reasonable doubt under the standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We have recognized that other types of violations of the Confrontation Clause are subject to that harmless-error analysis, see *e.g., Delaware v. Van Arsdall*, 475 U.S., at 679, 684, 106 S.Ct., at 1436, 1438, and see no reason why denial of face-to-face confrontation should not be treated the same. An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the ***1022** jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence. The Iowa Supreme Court had no occasion to address the harmlessness issue, since it found no constitutional violation. In the circumstances of this case, rather than decide whether the error was harmless beyond a reasonable doubt, we leave the issue for the court below.

We find it unnecessary to reach appellant's due process claim. Since his constitutional right to face-to-face confrontation was violated, we reverse the judgment of ****2804** the Iowa Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.Justice O'CONNOR, with whom Justice WHITE joins, concurring.

I agree with the Court that appellant's rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.

Child abuse is a problem of disturbing proportions in today's society. Just last Term, we recognized that "[c]hild abuse is one of the most difficult problems to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987). Once an instance of abuse is identified and prosecution undertaken, new difficulties arise. Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ***1023** ameliorative measures. We deal today with the constitutional ramifications of only one such measure, but we do so against a broader backdrop. Iowa appears to be the only State authorizing the type of screen used in this case. See generally App. to Brief for American Bar Association as *Amicus Curiae* 1a-9a (collecting statutes). A full half of the States, however, have authorized the use of one- or two-way closed-circuit television. Statutes sanctioning one-way systems generally permit the child to testify in a separate room in which only the judge, counsel, technicians, and in some cases the defendant, are present. The child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor. In addition to such closed-circuit television procedures, 33 States (including 19 of the 25 authorizing closed-circuit television) permit the use of videotaped testimony, which typically is taken in the defendant's presence. See generally *id.*, at 9a-18a (collecting statutes).

While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they

involve testimony in the presence of the defendant. See, *e.g.*, Ala.Code § 15-25-3 (Supp.1987) (one-way closed-circuit television; defendant must be in same room as witness); Ga.Code Ann. § 17-8-55 (Supp.1987) (same); N.Y.Crim.Proc.Law §§ 65.00-65.30 (McKinney Supp.1988) (two-way closed-circuit television); Cal.Penal Code Ann. § 1347 (West Supp.1988) (same). Indeed, part of the statute involved here seems to fall into this category since in addition to authorizing a screen, Iowa Code § 910A.14 (1987) permits the use of one-way closed-circuit television with "parties" in the same room as the child witness.

***1024** Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an exception that permits its use. There is nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant. We have expressly said as much, as long ago as 1899, *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890, and as recently as last Term, *Pennsylvania v. Ritchie*, 480 U.S., at 51, 107 S.Ct., at 998. But it is also not novel to recognize that a defendant's "right physically to face those who testify against him," *ibid.*, even if located at the "core" of the Confrontation Clause, is not absolute, and I reject any suggestion to the contrary in the Court's opinion. See *ante*, at 2802. ****2805** Rather, the Court has time and again stated that the Clause "reflects a *preference* for face-to-face confrontation at trial," and expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants. *Ohio v. Roberts*, 448 U.S. 56, 63-64, 100 S.Ct. 2531, 2537-2538, 65 L.Ed.2d 597 (1980) (emphasis added). See also *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-1046, 35 L.Ed.2d 297 (1973) ("Of course, the right to confront ... is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). That a particular procedure impacts the "irreducible literal meaning of the Clause," *ante*, at 2803, does not alter this conclusion. Indeed, virtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-1935, 26 L.Ed.2d 489 (1970), and yet have fallen within an exception to the general requirement of face-to-face confrontation. See, *e.g.*, *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Indeed, we expressly recognized in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), that "a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable," ***1025** but we also acknowledged that "this Court has rejected that view as 'unintended and too extreme.' " *Id.*, at 182, 107 S.Ct., at 2782 (quoting *Ohio v. Roberts*, *supra*, at 63, 100 S.Ct., at 2537-2538). In short, our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute. I see no reason to do so now and would recognize exceptions here as we have elsewhere.

Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. See *ante*, at 2802-2803 (citing *Ohio v. Roberts, supra; Chambers v. Mississippi, supra*). The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, see, *e.g.*, Cal.Penal Code Ann. § 1347(d)(1) (West Supp.1988); Fla.Stat. § 92.54(4) (1987); Mass.Gen.Laws § 278:16D(b)(1) (1986); N.J.Stat.Ann. § 2A:84A-32.4(b) (Supp.1988), our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it.

Justice BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

Appellant was convicted by an Iowa jury on two counts of engaging in lascivious acts with a child.

Because, in my view, the procedures employed at appellant's trial did not offend either the Confrontation Clause or the Due Process Clause, I would affirm his conviction. Accordingly, I respectfully dissent.

***1026** I

A

The Sixth Amendment provides that a defendant in a criminal trial "shall enjoy the right ... to be confronted with the witnesses against him." In accordance with that language, this Court just recently has recognized once again that the essence of the right protected is the right to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact:

" 'The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the ****2806** witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' " *Kentucky v. Stincer*, 482 U.S. 730, 736-737, 107 S.Ct. 2658, 2662-2663, 96 L.Ed.2d 631 (1987), quoting *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895).

Two witnesses against appellant in this case were the 13-year-old girls he was accused of sexually assaulting. During their testimony, as permitted by a state statute, a one-way screening device was placed between the girls and appellant, blocking the man accused of sexually assaulting them from the girls' line of vision.[FN1] This procedure did not interfere ***1027** with what this Court previously has recognized as the "purposes of confrontation." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). Specifically, the girls' testimony was given under oath, was subject to unrestricted cross-examination, and "the jury that [was] to decide the defendant's fate [could] observe the demeanor of the witness[es] in making [their] statement[s], thus aiding the jury in assessing [their] credibility." *Ibid.* See also *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986). In addition, the screen did not prevent appellant from seeing and hearing the girls and conferring with counsel during their testimony, did not prevent the girls from seeing and being seen by the judge and counsel, as well as by the jury, and did not prevent the jury from seeing the demeanor of the defendant while the girls testified. Finally, the girls were informed that appellant could see and hear them while they were on the stand.[FN2] Thus, appellant's *sole* complaint is the very narrow objection that the girls could not see him while they testified about the sexual assault they endured.

> FN1. Apparently the girls were unable to identify appellant as their attacker. Their ability to observe their attacker had been limited by the facts that it was dark, that he shined a flashlight in their eyes, and that he told them not to look at him. The attacker also appeared to be wearing a stocking over his head. Thus, the State made no effort to have the girls try to identify appellant at trial, which could not have been done, of course, without moving the screen. Neither did appellant attempt to demonstrate that the girls could not identify him. This case therefore does not present the question of the constitutionality of the restriction on cross-examination that would have been imposed by a refusal to allow appellant to show that the girls could not identify him.

> FN2. Iowa law requires that the court "inform the child that the party can see and hear the child during testimony." Iowa Code § 910A.14(1) (1987). Although the record in this case does not contain a transcript of the court's so advising the girls, the Iowa Supreme Court noted that appellant "makes no assertion [that the] trial court failed to comply with" this or other terms of the statute. 397 N.W.2d 730, 733 (1986). Appellant concedes this point "[f]or purposes of this appeal." Brief for Appellant 5, n. 9.

The Court describes appellant's interest in ensuring

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that the girls could see him while they testified as "the irreducible literal meaning of the Clause." *Ante,* at 2803. Whatever may be the significance of this characterization, in my view it is not borne out by logic or precedent. While I agree with the concurrence that "[t]here is nothing novel" in the proposition that the Confrontation Clause " 'reflects a *preference* ' " for the witness to be able to see the defendant, *ante,* at 2804, quoting *Ohio v. Roberts,* 448 U.S. 56, 63-64, 100 S.Ct. 2531, 2537-2538, 65 L.Ed.2d 597 (1980) (emphasis added in concurrence), I find it necessary to discuss***1028** my disagreement with the Court as to the place of this "preference" in the constellation of rights provided by the Confrontation Clause for two reasons. First, the minimal extent of the infringement on appellant's Confrontation Clause interests is relevant in considering whether competing public policies justify the procedures employed in this case. Second, I fear that the Court's apparent fascination with the witness' ability to see the defendant will lead the States that are attempting to adopt innovations to facilitate ****2807** the testimony of child victims of sex abuse to sacrifice other, more central, confrontation interests, such as the right to cross-examination or to have the trier of fact observe the testifying witness.

The weakness of the Court's support for its characterization of appellant's claim as involving "the irreducible literal meaning of the Clause" is reflected in its reliance on literature, anecdote, and dicta from opinions that a majority of this Court did not join. The majority cites only one opinion of the Court that, in my view, possibly could be understood as ascribing substantial weight to a defendant's right to ensure that witnesses against him are able to see him while they are testifying: "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *California v. Green,* 399 U.S., at 157, 90 S.Ct., at 1934. Even that characterization, however, was immediately explained in *Green* by the quotation from *Mattox v. United States,* 156 U.S., at 242-243, 15 S.Ct., at 339-340, set forth above in this opinion to the effect that the Confrontation Clause was designed to prevent the use of *ex parte* affidavits, to provide the opportunity for cross-examination, and to compel the defendant " 'to stand face to face *with the jury.*' " *California v. Green,* 399 U.S., at 158, 90 S.Ct., at 1935 (emphasis added).

Whether or not "there is something deep in human nature," *ante,* at 2801, that considers critical the ability of a witness to see the defendant while the witness is testifying, ***1029** that was not a part of the common law's view of the confrontation requirement. "There never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination* " (emphasis in original). 5 J. Wigmore, Evidence § 1397, p. 158 (J. Chadbourn rev. 1974). I find Dean Wigmore's statement infinitely more persuasive than President Eisenhower's recollection of Kansas justice, see *ante,* at 2801, or the words Shakespeare placed in the mouth of his Richard II concerning the best means of ascertaining the truth, see *ante,* at 2800. [FN3] In fact, Wigmore considered it clear "from the beginning of the hearsay rule [in the early 1700's] to the present day" that the right of confrontation is provided "not for the idle purpose of gazing upon the witness, or *of being gazed upon by him,*" but, rather, to allow for cross-examination (emphasis added). 5 Wigmore § 1395, p. 150. See also *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974).

> FN3. Interestingly, the precise quotation from Richard II the majority uses to explain the "root meaning of confrontation," *ante,* at 2800 is discussed in 5 J. Wigmore, Evidence § 1395, p. 153, n. 2 (J. Chadbourn rev. 1974). That renowned and accepted authority describes the view of confrontation expressed by the words of Richard II as an "earlier conception, still current in [Shakespeare's] day" which, by the time the Bill of Rights was ratified, had merged "with the principle of cross-examination." *Ibid.*

Similarly, in discussing the constitutional confrontation requirement, Wigmore notes that, in addition to cross-examination-"the essential purpose of confrontation"-there is a "secondary and dispensable element [of the right:] ... the presence of the witness before

the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom.... [This principle] is satisfied if the *witness,* throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed." (Emphasis in original.) 5 Wigmore, § 1399, p. 199. The "right" to have the witness view the defendant did not warrant mention even as part of the "secondary***1030** and dispensable" part of the Confrontation Clause protection.

That the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause is also demonstrated by the exceptions to the rule against hearsay, which allow the admission of out-of-court statements against a defendant. For example, ****2808** in *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the Court held that the admission of an out-of-court statement of a co-conspirator did not violate the Confrontation Clause. In reaching that conclusion, the Court did not consider even worthy of mention the fact that the declarant could not see the defendant at the time he made his accusatory statement. Instead, the plurality opinion concentrated on the reliability of the statement and the effect cross-examination might have had. See *id.,* at 88-89, 91 S.Ct., at 219-220. See also *Mattox v. United States,* 146 U.S. 140, 151-152, 13 S.Ct. 50, 53-54, 36 L.Ed. 917 (1892) (dying declarations admissible). In fact, many hearsay statements are made outside the presence of the defendant, and thus implicate the confrontation right asserted here. Yet, as the majority seems to recognize, *ante,* at 2800, this interest has not been the focus of this Court's decisions considering the admissibility of such statements. See, *e.g., California v. Green,* 399 U.S., at 158, 90 S.Ct., at 1935.

Finally, the importance of this interest to the Confrontation Clause is belied by the simple observation that, had blind witnesses testified against appellant, he could raise no serious objection to their testimony, notwithstanding the identity of that restriction on confrontation and the one here presented.[FN4]

> FN4. The Court answers that this is "no more true than that the importance of the right to live, oral cross-examination is belied by the possibility that speech- and hearing-impaired witnesses might have testified." *Ante,* at 2802, n. 2. The Court's comparison obviously is flawed. To begin with, a deaf or mute witness who was physically incapable of being cross-examined presumably also would be unable to offer any direct testimony. More importantly, if a deaf or mute witness were completely incapable of being cross-examined (as blind witnesses are completely incapable of seeing a defendant about whom they testify), I should think a successful Confrontation Clause challenge might be brought against whatever direct testimony they did offer.

***1031** B

While I therefore strongly disagree with the Court's insinuation, *ante,* at 2800, 2802, that the Confrontation Clause difficulties presented by this case are more severe than others this Court has examined, I do find that the use of the screening device at issue here implicates "a preference for face-to-face confrontation at trial," embodied in the Confrontation Clause. *Ohio v. Roberts,* 448 U.S., at 63, 100 S.Ct., at 2537. This "preference," however, like all Confrontation Clause rights, " 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.,* at 64, 100 S.Ct., at 2538, quoting *Mattox v. United States,* 156 U.S., at 243, 15 S.Ct., at 340. See also *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973). The limited departure in this case from the type of "confrontation" that would normally be afforded at a criminal trial therefore is proper if it is justified by a sufficiently significant state interest.

Indisputably, the state interests behind the Iowa statute are of considerable importance. Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from 0.67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse. See American Association for Protecting Children, Highlights of Official Child Neglect and Abuse Reporting 1985, pp. 3, 18 (1987). The

prosecution of these child sex-abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must testify about the sexual assaults they have suffered. "[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming." ***1032** D. Whitcomb, E. Shapiro, & L. Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors 17-18 (1985). Although research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is "associated with increased behavioural disturbance in children." G. Goodman, et al., The Emotional Effects of Criminal Court Testimony on ****2809** Child Sexual Assault Victims, in The Child Witness: Do the Courts Abuse Children?, Issues in Criminalogical and Legal Psychology, No. 13, pp. 46, 52 (British Psychological Assn. 1988). See also Avery, The Child Abuse Witness: Potential for Secondary Victimization, 7 Crim.Just.J. 1, 3-4 (1983); S. Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse 133-134 (1982).

Thus, the fear and trauma associated with a child's testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.[FN5] Because of these effects, I agree with the concurring opinion, *ante,* at 2805, that a State properly may consider the protection of child witnesses to be an important public policy. In my view, this important public policy, embodied in the Iowa statute that authorized the use of the screening device, outweighs the narrow Confrontation Clause right at issue here-the "preference" for having the defendant within the witness' sight while the witness testifies.

> FN5. Indeed, some experts and commentators have concluded that the reliability of the testimony of child sex-abuse victims actually is enhanced by the use of protective procedures. See *State v. Sheppard,* 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Note, Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim, 15 U.Mich.J. L. Ref. 131 (1981).

Appellant argues, and the Court concludes, *ante,* at 2802, that even if a societal interest can justify a restriction on a ***1033** child witness' ability to see the defendant while the child testifies, the State must show in each case that such a procedure is essential to protect the child's welfare. I disagree. As the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace.[FN6] I would not impose a different rule here by requiring the State to make a predicate showing in each case.

> FN6. For example, statements of a coconspirator, excited utterances, and business records are all generally admissible under the Federal Rules of Evidence without case-specific inquiry into the applicability of the rationale supporting the rule that allows their admission. See Fed.Rules Evid. 801(d)(2), 803(2), 803(6). As to the first of these, and the propriety of their admission under the Confrontation Clause without any special showing, see *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), and *Bourjaily v. United States,* 483 U.S. 171, 181-184, 107 S.Ct. 2775, 2781-2783, 97 L.Ed.2d 144 (1987).

In concluding that the legislature may not allow a court to authorize the procedure used in this case when a 13-year-old victim of sexual abuse testifies, without first making a specific finding of necessity, the Court relies on the fact that the Iowa procedure is not " 'firmly ... rooted in our jurisprudence.' " *Ante,* at ----, quoting *Bourjaily v. United States,* 483 U.S. 171, 183, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987). Reliance on the cases employing that rationale is misplaced. The requirement that an exception to the Confrontation Clause be firmly rooted in our jurisprudence has been imposed only when the prosecution seeks to introduce an out-of-court statement, and there is a question as to the statement's *reliability.* In these circumstances, we have held: "Reliability can be inferred without more in a case

where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S., at 66, 100 S.Ct., at 2539. See also *Bourjaily v. United States*, 483 U.S., at 182-183, 107 S.Ct., at 2782-2783. Clearly, no such case-by-case inquiry into reliability is needed here. Because the girls testified under oath, in full view of the jury, and were subjected to unrestricted cross-examination,***1034** there can be no argument that their testimony lacked sufficient indicia of reliability.

For these reasons, I do not believe that the procedures used in this case violated ****2810** appellant's rights under the Confrontation Clause.

II

Appellant also argues that the use of the screening device was "inherently prejudicial" and therefore violated his right to due process of law. The Court does not reach this question, and my discussion of the issue will be correspondingly brief.

Questions of inherent prejudice arise when it is contended that "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U.S. 532, 542-543, 85 S.Ct. 1628, 1632-1633, 14 L.Ed.2d 543 (1965). When a courtroom arrangement is challenged as inherently prejudicial, the first question is whether "an unacceptable risk is presented of impermissible factors coming into play," which might erode the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 505, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976). If a procedure is found to be inherently prejudicial, a guilty verdict will not be upheld if the procedure was not necessary to further an essential state interest. *Holbrook v. Flynn*, 475 U.S. 560, 568-569, 106 S.Ct. 1340, 1345-1346, 89 L.Ed.2d 525 (1986).

During the girls' testimony, the screening device was placed in front of the defendant. In order for the device to function properly, it was necessary to dim the normal courtroom lights and focus a panel of bright lights directly on the screen, creating, in the trial judge's words, "sort of a dramatic emphasis" and a potentially "eerie" effect. App. 11, 14. Appellant argues that the use of the device was inherently prejudicial because it indicated to the jury that appellant was guilty. I am unpersuaded by this argument.

Unlike clothing the defendant in prison garb, *Estelle v. Williams, supra,* or having the defendant shackled and gagged, *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), using ***1035** the screening device did not "brand [appellant] ... 'with an unmistakable mark of guilt.' " See *Holbrook v. Flynn*, 475 U.S. at 571, 106 S.Ct., at 1347, quoting *Estelle v. Williams*, 425 U.S., at 518, 96 S.Ct., at 1699 (BRENNAN, J., dissenting). A screen is not the sort of trapping that generally is associated with those who have been convicted. It is therefore unlikely that the use of the screen had a subconscious effect on the jury's attitude toward appellant. See 475 U.S., at 570, 106 S.Ct., at 1346.

In addition, the trial court instructed the jury to draw no inference from the device:
"It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing." App. 17.

Given this helpful instruction, I doubt that the jury-which we must assume to have been intelligent and capable of following instructions-drew an improper inference from the screen, and I do not see that its use was inherently prejudicial. After all, "every practice tending to single out the accused from everyone else in the courtroom [need not] be struck down." *Holbrook v. Flynn*, 475 U.S., at 567, 106 S.Ct., at 1345 (placement throughout trial of four uniformed state troopers in first row of spectators' section, behind defendant, not inherently prejudicial).

I would affirm the judgment of conviction.

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Briefs and Other Related Documents (Back to top)

- 1987 WL 881352 (Appellate Brief) Reply Brief for the Appellant (Dec. 23, 1987)
- 1987 WL 881351 (Appellate Brief) Brief for the Appellee (Nov. 23, 1987)
- 1987 WL 881354 (Appellate Brief) Brief for the State of Connecticut and The States of California, Delaware, Indiana, New Hampshire, New Mexico, Oregon, South Carolina, Tennessee, Amici Curiae, Supporting Affirmance (Nov. 17, 1987)
- 1987 WL 881353 (Appellate Brief) Brief of Amicus Curiae Judge Charles B. Schudson (Nov. 15, 1987)
- 1987 WL 881350 (Appellate Brief) On Appeal from the Supreme Court of Iowa Brief for the Appellant (Sep. 08, 1987)
- 1987 WL 881356 (Appellate Brief) Brief of the National Association of Criminal Defense Lawyers As Amicus Curiae in Support of Appellant (Sep. 08, 1987)
- 1987 WL 881355 (Appellate Brief) Brief of Amicus Curiae the American Bar Association (Sep. 04, 1987)
- 1987 WL 881349 (Appellate Brief) Appellant's Reply to Motion to Dismiss (May. 28, 1987)
- 1986 WL 728358 (Appellate Brief) Brief for Amici Curiae in Support of Iowa by the Attorney General of Kentucky and the Thirty-Five States that Appear on the Inside Cover (Oct. Term 1986)

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