

BALANCING THE NEED FOR THE PROTECTION OF THE WITNESS AGAINST THE RIGHT OF THE ACCUSED

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Abstract

International criminal justice has an obligation to respect, ensure respect for, and to enforce international human rights. In accordance with these norms, the security of the witness has become of great importance for the international tribunals. Considering their crucial role to establish justice and to indict the alleged perpetrators, witnesses has been intimidated, threatened and sometimes killed because of their testification for or against the accused in the court. In order to make a fair balance to the rights of the accused and the witness, it is important to adhere to the highest standards of international criminal justice. If it were not for the witnesses to testify, international criminals in ICTY, ICTR, ICC and so forth would have never been prosecuted. It is in the interest of justice, both rights – the defendant's right to a fair trial and the witness' right of protection – have to be safeguarded. This paper explores the framework of witness protection and the rights of the accused in international tribunals, witness intimidation and the challenge to establish effective witness programs, the need to a fair trial towards the safeguard of the rights of the accused in compliance with the witness' right of protection. This paper also argues on the current witness protective schemes, failures and solutions.

Keywords: International criminal justice, fair trial, witness protection, the rights of the accused, protective measures.

1. Introduction

The protection of witnesses is identified as a priority¹ for the international tribunals in the recent years. The issue has become an important task for assessing the efficiency of the criminal proceedings in the national and international level. The security of witnesses is of great importance considering the continuity of the intimidation of individuals who propose to testify for or against an accused.² It is not only dangerous on a human level for witnesses and their families, it also undermines the integrity of the trial and the quality of justice delivered for the victims-witness of the gravest crimes.³

The publicity of the hearings in the international tribunals such as in the International Criminal Tribunals for the former Yugoslavia (ICTY), Rwanda (ICTR) and the International Criminal Court (ICC) is a *trend* to expose the perpetrators who have committed serious crimes in armed conflicts but this risk derive the expose of the witnesses to greater threats than might ordinarily be experienced in domestic jurisdictions.⁴ Both domestic and international legislation aim to protect the *high interest* of the parties in the criminal proceeding, yet the witnesses are considered not to be a party in the trial but *an instrument* to produce evidence.

The *purpose* of this paper is to provide the current position of the witnesses in the statutory framework of the international tribunals, especially of International Criminal Court, the rights of the accused in the trial towards the protection of the witnesses conserving a fair trial and the jurisprudence developed recently. *What are the practical and technical problems arised by the Court and which is the role of the Judges to enhance an effective criminal proceeding by defending the both rights?* As the main objective of these tribunals is to establish justice for large populations that have suffered extensively, the process requires that victims participate as witnesses, and it is counterproductive if prosecuting those perpetrators perpetuates risks of danger or creates new risks to them.⁵

Since the establishment of the ICTs, a major innovation started with the ICTY and ICTR on the protection of witnesses, concluding with the ICC as a crucial institutionally and normatively guarantee: *first* in establishing of the Victim and Witnesses Unit (VWU) and *second* in providing several protective measures for the witness in case they are in darger of intimidation. Although the efforts made by the ICC to establish an effective witness protection, the lack of clarity in grating the protective measures in the cases of the Democratic Republic of Congo (*The Prosecutor v. Thomas Lubanga Dyilo; The Prosecutor v. Bosco Ntaganda; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*), the situation in Darfur, Kenya, Libya and so forth, are a real threat of danger for the witnesses due to the lack of stability in the stateless countries.

In order to make a *fair balance* to the rights of the accused and the witness, it is important to adhere to the highest standards of international criminal justice, particularly to the fair trial

¹ Eikel, M. (2012) Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice. *Criminal Law Forum*, 23:97–133, p. 97.

² Trotter, A. (2012). Witness intimidation in international trials: Balancing the need for protection against the rights of the accused. *George Washington International Law Review*, 44(3), 521-537.p. 521

³ Trotter p. 522

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⁵ Trotter p. 521

rights provided in the human rights treaties such as ICCPR and ECHR.⁶ The balance of rights has to be interpreted carefully as long as there is no general privilege to protect fundamental human rights of the witness.⁷ While the right to a fair trial should be guaranteed, war criminals would never be tried before the international tribunals such as (ICTY, ICTR, ICC) and before national courts if it was not for the witnesses to testify.

In the *interest of justice*, both rights – the defendant’s right to a fair trial and the witness’ right of protection – have to be safeguarded. The Statute and Rules of ICC have developed the notion of a fair trial and have also enforced the fair trial rights in the international area in comparison with the Special *ad hoc* Tribunals. Due to the need to protect witnesses, ICC and Special Tribunals are allowed by their Statutes to restrict the accused’s right to a public trial and the right to the accused to examine or have examined witnesses against him.

2. The right to a fair trial

The general right to a ‘fair trial’ is enshrined in the Universal Declaration of Human Rights,⁸ and the regional human rights conventions,⁹ as well as in humanitarian law instruments. A fair balance between rights means a full respect to the rights of the accused and due regard for the protection of witnesses.

2.1 Rome Statute - Article 68 ‘Protection of the victims and witnesses and their participation in the proceedings’

The Rome Statute provides the obligation to protect witnesses in all proceedings: investigation stage, trial and appeal. Judges have the power to take all “necessary steps “ to protect. Article 68(1) of the Statute provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The Court shall have regard to all relevant factors, including age, gender, health, and the nature of the crime. Protective measures can be taken by the Prosecutor particularly during the investigation and prosecution of serious crimes. Article 54(3)(f) provides further that the Prosecutor shall take necessary measures, or request that necessary measures be taken, in order to ensure the protection of any person. Moreover, Victims and Witnesses Unit (VWU) has the statutory mandate dedicated to protecting, supporting and providing other appropriate assistance to victims and witnesses.¹⁰ These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

⁶ Beqiri, R. Witness Protection in International Criminal Court, *Lund University Publications*, 2011. (Master Thesis JAMM04 2011 Sweden) (available online at: <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2167029&fileOId=2171585>> p. 34.

⁷ Chile Eboe-Osuji, *Protecting humanity : essays in international law and policy in honour of Navanethem Pillay*, article of Segun Jegede “*The right to a fair trial in International Criminal Law*” Martinus Nijhoff, 2010, p. 547.

⁸ General Assembly resolution 217 A (III), UN Doc. A/810 (1948)

⁹ American Convention of Human Rights, (1978) 1144 UNTS 123, Article 8; ECHR (1955), 213 UNTS 221, Article 6; African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev.5, Article 7; Convention on the Rights of the Child, GA Res. 44/25, Article 40, para. 2.

¹⁰ ICC Regulations of the Registry 79-92.

As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Article 57(c) of the Rome Statute requires the Pre-Trial Chamber to provide the ‘*protection and privacy of victims and witnesses*’ while Article 64(7) like similar provision in the Statute of the ICTY balances the right of the accused to confront witnesses against him with regard for the protection of victims and witnesses.

On the application of a party or of its own motion a Trial Chamber could, *inter alia* require the attendance and testimony of witnesses, require the production of documentary and other evidentiary materials, relevance of evidence and protect confidential information. The Statute provides that the accused is entitled to *fair and public hearing* and lists the *minimum guarantees of fair trial*, generally following the provisions of Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14 of the ICCPR is the standard in terms of codification of the right to fair trial in international human rights law¹¹ and is one of the principal human rights treaties¹² which has similar provision in the Statutes of the three tribunals.¹³

ICC seems to have the same difficulties like ICTY regarding to the contestation of anonymity of witness. It was interpreted as an infringement of the right of the accused for a fair trial in order to provide the relevant information about the identity of the witnesses. The Justification for anonymity requires the Court to verify whether the reasons invoked for witness’s fear have to be convincing. The anonymous witnesses have to be in a real danger, and the threat must be real¹⁴ in order to grant them protective measures. *Must a real threat be established or is it sufficient that the witness is afraid of reprisals if he or she testifies?*

Nevertheless, we have to keep in mind that ‘protection from the public identification deviates from the principle of a public trial’¹⁵

Above this, more criticised measure was the withholding of the witnesses’ identity from the accused. Rights such as having adequate time and facilities for the preparation of the defence and examining witnesses must be analysed and respected. The use of anonymous witnesses is a particularly controversial measure, which means: witnesses whose identity is not known to both parties. An early ICTY decision allowed this practice, said to influence the Tribunals’ impotence concerning physical protection, but it was also very criticized, especially by proponents of adversarial procedures,¹⁶ and the practice has not been repeated.¹⁷

¹¹ International Covenant on Civil and Political Rights, (1966) 999 UNTS 171

¹² Schabas, W.A. (2007). *An introduction to the international criminal court*. (3. ed.) London: Cambridge University Press. p. 206.

¹³ Schabas, W, (2007), *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone*” (1st ed.) Cambridge University Press; p. 502

¹⁴ Kostovski v. Netherlands, Application No. 11454/85, 20 November 1989, para. 19.

¹⁵ Willem-Jan F.M. van der Wolf, The rights of parties and international criminal law, International criminal law series, vol. 5, The Hague ICA, International Courts Association, 2011, p.75

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¹⁷ ECHR, Article 6(1). also see Natasha Affolder, “In the determination Sources of International Procedural Law’ (1998) 19 Michigan Journal of International Law , p. 445.

At the ICC it is clear that the identity of witnesses maybe withheld from the disclosure to the defence, and different interpretations analyse whether witnesses may remain anonymous at trial. The better view, however, is that the identity may be withheld only '*prior to the commencement of the trial.*'¹⁸

For example during the confirmation process, identities, although on an exception, may be withheld only on the bases of Article 67 and 68 of Rome Statute. This proves that a trial can still be fair with anonymous witnesses testifying, as long as the defendant and his counsel's right to reveal the identity to the Court and prosecutor which provides the possibility of ensuring their reliability.¹⁹

2.2 The rights of the accused

The fundamental rights of an accused in a criminal trial have attained near universal status through the adoption of the international human rights instruments such as ICCPR, ECHR, IACHR and so forth in the past half century.²⁰ The "*fair trial*" guarantees in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) have been adopted almost as a *verbatim* in Article 21 of the ICTY Statute (Tadic Jurisdiction Appeal Decision, para.46) and Article 67 of the Rome Statute (ICC).

Article 14(5) of the ICCPR guarantees every convicted of a crime the right to have his conviction and the sentence reviewed by a higher tribunal. Hence Article 14 of the ICCPR represents an "*imperative norm of international law to which the Tribunal must adhere.*"²¹ In the Appeal Chamber in the Vujin Case held:

That it is the duty of the international Tribunal to guarantee and protect the rights of those who appeared accused before it.

The need to balance the right of the accused against the protection of witnesses is justified by the '*extreme danger*'²² to which they are exposed in the situation of armed conflict that existed and endures in the communities where the alleged crimes were committed. The Tribunals don't provide guidelines in how to balance these rights but a lot is left to the discretion of judges.²³ This will continue to challenge existing Tribunals and ICC.

2.3 Does the witness have rights?

Whether we talk about the accused rights and balance of rights to have a fair trial the question arises: Do the witnesses have rights? The ECHR does not directly express whether witnesses have rights under the European Convention even though some ECHR cases claim in that

¹⁸ Art. 68 (5) of the ICC Statute and Rule 81 (4) of the ICC RPE

¹⁹ Arifi, Besa, "Human Rights Aspects of Witness Protection and its importance for the ICTY", pp. 237-8.

²⁰ Jones, J. & Powles, S. (2003). *International criminal practice*. (3. ed.) Oxford: Oxford University Press., p.

²¹ Vujin Appeal Judgement on allegations of contempt against prior counsel, 27 February 2001, Appel Chamber interpretation on Article 14 of ICCPR in relation to Rule 77 of the ICTY Statute.

²² Ibid note 112 , Segun Jedge, p. 548.

²³ ibid

witnesses should be accorded rights.²⁴ As an example, in *Doorson case*, the Court stated that ‘article 6 does not explicitly require the interests of the witnesses in general... to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8.’²⁵

In essence of ECHR, the witnesses enjoy the following rights:

- the right not to be subjected to inhuman or degrading treatment when giving evidence (Article 3)
- the right not to be detained without proper safeguards (Article 5)
- child witnesses and complainers have an implied right under the proviso to the requirement that the accused is entitled to a public hearing (Article 6)
- the right to respect for private and family life (Article 8).²⁶

Article 6(3) (d) of ECHR, obviously it grants a number of rights in the respect of defence witnesses, for example: to secure their attendance and to examine their evidence on the same basis as the witnesses against the accused. Even though it is the right of the accused to the principle for a fair trial, it does not give the accused or any parties in a trial to call witnesses without restrictions.²⁷ Hence, paragraph 3 does not grant to the accused an ‘unlimited right to secure the appearance of witnesses in the court.’²⁸

The ICTY and ICTR are empowered, in evaluating the facts of the case, to set limitations to the accused’s fair rights in respect to protect other persons in risk of intimidation or threat. This was illustrated in *Prosecutor v. Delalic et al.*²⁹ in its interpretation of Article 21 (4) (e) of the ICTY Statute. In the Delalic case, it reemphasizes the general rule requiring the physical presence of the witness. This intended to ensure confrontation between the witness and the accused, and to enable the judges to observe the demeanor of the witness when giving evidence. But what is important to underline, in this decision, the Trial Chamber, acknowledged expectations to the general rule requiring the physical appearance of the accused, saying that “... there are expectations to this general rule where the right of the accused under Article 21(4) (e) is not prejudicially affected,” including videoconferences:

“.. It is, however, well known that video-conferences not only allow the Chambers to hear the testimony of a witness who is unable or willing to present their evidence before the Trial Chamber at the Hague, but also allows the Judges to observe the demeanour of the witness whilst giving evidence. Furthermore, and importantly, counsel for the accused can cross-examine the witness and the Judges can put questions to clarify evidence given testimony. Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that the testimony given by video-link conferencing is a

²⁴ Vermeulen, Gert, *EU standards in witness protection and collaboration with justice*, Antwerpen ; Apeldoorn: Maklu, 2005, p. 48.

²⁵ *Doorson v. The Netherlands*, judgement of 26 March 1996, Application No. 20524/92, Reports 1996-II, para. 70.

²⁶ Vermulen, p. 48

²⁷ *Thomas v. United Kingdom*, (App. 19354/02).

²⁸ Dijk, Pieter van (red.), *Theory and practice of the European Convention on Human Rights*, 4. ed., Intersentia, Antwerpen, 2006, p.644.

²⁹ *Prosecutor v. Delali* , ICTY Case No. IT-96-21-A

violation of the right of the accused to confront the witness. Article 21(4)(e) is in no sense violated”³⁰

3. The Fair Hearing

The notion of ‘*fair hearing*’ derives from Article 10 of UDHR and it is also repeated in Article 14 of the ICCPR and ECHR. In the Rome Statute, the term ‘*fair hearing*’ gives the right to the Court to exceed the precise terms of Article 67 in appropriate circumstances is confirmed by the reference within the chapeau to ‘*minimum guarantees*’.

As Judge Steiner cited in *Lubanga Case* that ‘in reference to ‘minimum guarantees’ in Article 67(1), the Court will need to go beyond the terms of Article 67 itself, beyond the rights of the accused. And then she cited the case law of European Court of Human Rights in support to her argument.³¹ Article 6(1) of ECHR states: “*in the determination of his civil rights and obligations or of any criminal charge against the accused, he is entitled to a fair and public hearing. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society... in special circumstances where publicity would prejudice the interests of justice.*”

It is the interest of justice to protect witness in order to prosecute the individuals allegedly responsible for the most serious crimes of international concern as genocide, crimes against humanity and war crimes. Procedural equality, adversarial process and disclosure of evidence, thus the ‘equality of arms’ (égalité des armes) requires a fair balance between the parties. The right to have an adversarial trial means ‘the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.’³²

3.1 Equality of arms

The international case law has developed the notion of “equality of arms” within the concept of the right to a fair trial.³³ The concept of “equality of arms” has been invoked in some decisions of the ICC. For example, according to the Pre-Trial II fairness is closely linked to the concept of ‘equality of arms’, or of balance between the parties during the proceedings.³⁴ It concerns the ability of the party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.

³⁰ Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, IT-96-21-T, 28 May 1997, para. 15.

³¹ Lubanga (ICC-01/04-01/06), Décision relative au système définitif de divulgation et à l'établissement d'un échancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97

³² Ruiz-Mateos v. Spain, (App. 12952/87), 23 June 1993, Series A No 262, (1993) 16 EHRR 505, para. 63.

³³ For recognition of the principle of “equality of arms” by the ICTY, see: Prosecutor v. Tadic, case NO. IT-94-1-T, Separate opinion of Judge Vohrah on Prosecution motion for Production of Defence Witness Statements, 27 November 1996, pp. 4-7.

³⁴ See generally Salvatore Zappalà, The Rights of the Accused, in Cassese-Gaeta-Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary, Vol. 2 (Oxford, 2000), 1319, at 1328.

The principle of 'equality of arms' is closely connected to the right to adversarial proceeding.³⁵ The requirement of equality of arms in ECtHR case law, in the sense of a 'fair balance' between the parties, applies in principle, to criminal cases.

'Equality of arms' implies that each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.³⁶ Thus, fairness is a concept directly related to equality of arms and this can be fulfilled only by a fair balance between parties. The equality of arms can be paraphrased as the ability of a party to influence the outcome of the proceedings in its favour. The Defence in *Tadic Appeal Judgment* cited:

“... paragraph 530 of the Judgement to show that the Trial Chamber was aware that both parties suffered from limited access to evidence in the territory of the former Yugoslavia. The Defence acknowledges that the Trial Chamber, recognising the difficulties faced by both parties in gaining access to evidence, exercised its powers under the Statute and Rules to alleviate the difficulties through a variety of means. However, it contends that the Trial Chamber recognised that its assistance did not resolve these difficulties but merely “alleviated” them. The Defence alleges that the inequality of arms persisted despite the assistance of the Trial Chamber and the exercise of due diligence by trial counsel, as the latter were unable to identify and trace relevant and material Defence witnesses, and potential witnesses that had been identified refused to testify out of fear. It submits that the lack of fault attributable to the Trial Chamber or the Prosecution did not serve to correct the inequality in arms, and that under these circumstances, a fair trial was impossible.”³⁷

Even though the witnesses are not considered party to the proceedings, I fully support the argument that they should be a third party and have the same rights.

In both the ECtHR cases, *Doorson v. Netherlands* and *van Mechelen v. Netherlands*, the Court took into account the importance of intimidated witnesses as an important category. It noted the following:

"It is true that Article 6 does not explicitly require the interests of witnesses to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."³⁸

The use of special measures to assist intimidated witnesses in giving their testimony but no exceptional measure is a positive development and one that can be successfully implemented without compromising the rights of an accused to a fair trial.³⁹ It has considerable advantages for the witness and for the criminal process. However, successful implementation requires a commitment on the part of all the parties of the proceedings.

³⁵ Dijk, Pieter van (red.), *Theory and practice of the European Convention on Human Rights*, 4. ed., Intersentia, Antwerpen, 2006, p. 580.

³⁶ *Dombo Beheer BV v The Netherlands*, Judgment of 27 October 1993, Series A, No. 274, para. 33 (ECtHR)

³⁷ *Prosecutor v. Tadic* Case No.: IT-94-1-A, Judgment 15 July 1999, para. 32 in “Appellant’s Amended Brief on Judgement, paras. 1.4-1.6; T. 29-31, 40, 45-48 (19 April 1999)”.

³⁸ *Doorson v. Netherlands*, para. 70, mentioned also in *van Mechelen v. Netherlands*, para. 53.

³⁹ Moody, Sue. “Vulnerable witnesses rights and responsibilities”, International Society for the reform of criminal law, 19th International Conference, June 2005, Edinburgh, p. 10.

3.2 Public Hearings in International Criminal Tribunals

There has not been a lot of jurisprudence at the International Criminal Tribunals (ICTs) regarding the meaning of the accused being “*equal before*” the tribunals.⁴⁰ Conversely, there has been much discussion of the principle of “*equality of arms*” between the parties. The issue of equality deals with the position of victims and witnesses in the prosecution for protective measures under Rule 69(A) in which the rights of the accused come first and those of victims and witnesses come second (*Brdanin and Tadic Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para 30*).⁴¹

The benefits of a public hearing are part of the establishment of the truth. The principal advantage of press and public access is that it helps to ensure that a trial is fair.⁴² As the European Court of Human Rights noted: “*By rendering the administration of justice visible, publicity contributes to the achievement of the aim of . . . a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . .*” (*Sutter v. Switzerland*, decision of 22 February 1984, Series A, no. 74, para. 26.) In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal. As such, the Judges of this Trial Chamber are, in general, in favour of an open and public trial. This preference for public hearings is evident in Article 20 (4) of the Statute, which requires that: “*The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.*” Also relevant is Rule 78, which states that: “*All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.*”⁴³ Hence, the Trial Chamber may derogate from the principle of public hearings.⁴⁴

Nevertheless, this preference for public hearings must be balanced with other mandated interests, such as the duty to protect victims and witnesses. The Statutes of the ICTs, for the application of the *Rules*, do provide that the application of victims and witnesses is an acceptable reason to limit the accused’s rights to a public trial. The protection of witnesses provides justification for limiting the *public* nature of a hearing. This means that this measure justifies only the public nature but not the fairness of the trial.⁴⁵ As a consequence, non-public hearing does not threaten the fairness of a trial, it *does not mean unfair hearings*⁴⁶.

Hearings in the ICC may be held in one of three ways:

a. open session - that means that the hearing is open to the public and there is an audiovisual stream broadcast outside the Court with a 30 minute delay (Regulation 21(2) of the Regulations of the Court). This is the default unless the Statute, Rules, Regulations or an order of the Chamber provides otherwise (Regulation 20(1) of the Regulations of the Court);

⁴⁰ Jones, J. & Powles, S. (2003). *International criminal practice*. (3. ed.) Oxford: Oxford University Press., p. 579.

⁴¹ Ibid.

⁴² See Tadic Case, Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor, 10 August 2005. <http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm>

⁴³ See Tadic Case Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor, 10 August 2005 .

⁴⁴ See Rome Statute Articles 68(2) and Article 69(1).

⁴⁵ See Judge Stephan Separate Opinion, Tadic Case, Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor, 10 August 2005 .

⁴⁶ On this argument, Article 22 ICTY suggest that kind of protection for witnesses essentially the measures effect the public nature of the trial, rather than its fairness.

b. private session – hearing is not open to the public and there is no audiovisual stream broadcast outside the Court (Regulation 94(d) of the Regulations of the Registry); or
c. closed session - hearing is held in camera (Regulation 94(e) of the Regulations of the Registry).⁴⁷

As an exceptional provision, the Court may hold proceedings *in camera* or permit evidence to be presented by electronic means. This refers to testimony where the witness testifies by video and cannot see the perpetrator, this is a practice that is widely used in national justice systems involving children. The views of the witnesses are taken into consideration by the Court in making such determination.

In the *Lubanga Case* of the ICC, the actual record of the Court confirmed that in fact the majority of the proceedings (over 84 per cent) have been conducted in open session. On the other hand, a significant portion of the documents were filed confidentially.⁴⁸ Considering *disclosure of information*, the Rule 69 of the ICTY and ICTR, states that "in exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal."

Measures to prevent the disclosure of the identities of victims and witnesses to the public are also compatible with principles of *criminal procedure in domestic courts*. There is a growing acceptance in domestic jurisprudence of the need to protect the identity of victims and witnesses from the public when a special interest is involved. Several common law countries allow for the non-disclosure to the public of identifying information relating to certain victims and witnesses.⁴⁹

3.3 Outline: Balance of the accused's rights and protection of witnesses

The *human rights jurisprudence* recognise the protection of the *confidentiality* of victims and witnesses. The ICTY Statutes⁵⁰ states that the accused shall be entitled to a fair and public hearing subject to Article 22 (the protection of victims and witnesses, including *in camera* proceedings and protection of the victim's identity). The limitation to a fair and public hearing has been interpreted by the defence in the *Tadic case* as an exception which is not

⁴⁷ Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, (ICC-01/04-01/07) Transcript, 7 June 2010, p 2 lines 1, 21 and 24, p. 3 line 3. available at <http://www.icc-cpi.int/iccdocs/doc/doc902904.pdf>. (accessed May 2013.)

⁴⁸ International Bar Association Human Rights Report supported by the John D and Catherine T MacArthur Foundation: "Enhancing efficiency and effectiveness of ICC proceedings: a work in progress" January 2011, p. 27.

⁴⁹ See *Tadic Case*, para. 39 : The United Kingdom prohibits disclosure to the public of identifying information of a complainant in a sexual assault case, including any still or moving pictures, except at the discretion of the court. (The Sexual Offences (Amendment) Act 1976 s. 4.) Canadian legislation guarantees anonymity from the public upon application to the court. (Canadian Criminal Code s. 442(3).) In Queensland, Australia, the Evidence Act (Amendment) 1989 (Queensland) allows additional protection during the testimony of a "special witness" including the exclusion of the public and or the defendant or other named persons from court. (Brief of Professor Chinkin at 4 - 6.) South African law also provides for the non-disclosure for a certain period of time of the identity of a witness in a criminal proceeding if it appears likely that harm will result from the testimony (Criminal Procedure Act of South Africa 51/1977, sec. 153(2)(b)) and has provisions for closing the courtroom during the testimony of victims in cases of sexual assault.

⁵⁰ ICTY and ICTY Article 21 and 22

relevant. In the perception of the ICCPR and the ECHR, the protection of victims and witnesses is not sufficient to set aside the right of the accused to a fair and public hearing.⁵¹

Within the human right's perspective, the protection of victims and witnesses is an acceptable reason to limit the accused's right to a public trial and *grant anonymity* when:

1. There is a real fear for the safety of the witness and his or her family
2. The testimony of the witness is very important for the Prosecutor's case and have to be guarantee to the maximum protection
3. The lack of an effective or non-existence witness protection programme should be considered to grant anonymity.

Moreover, the granting of protective measures have to be interpreted on the bases of the provisions of the Statute and Rules within the context of each case and situation. Therefore, just as the ICCPR and ECHR provide for the limitation of the right to a public trial to protect public morals, the Statute authorizes limits to the right to a public trial to protect victims and witnesses.⁵²

The Rome Statute and the Human Rights documents tend to balance the interests of the victims and witnesses with the rights of the accused without the affirmative duty to do so. Article 14 (1) of the ICCPR and Article 6 (1) of the ECHR⁵³ state that *everyone is entitled to a fair and public hearing*. Nevertheless, both articles provide that the press and public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice. In all the cases it has to be the absence of certain public hearings is justified.⁵⁴

The Court has also held that the right to publicity may not necessarily be violated if both parties to a proceeding consent to it being held *in camera*. (*Le Compte, Van Leuven and De Meyere v. Belgium*, decision of 23 June 1981, Series A no. 43, para. 59.) In general, the Commission and the Court consider whether one of the specific conditions listed on Article 6 (1) prevails before accepting that a given *in camera* proceeding has not been conducted in violation of that article. In a similar vein, this Trial Chamber must determine if one of the specific interests it has an obligation to consider, such as the protection of victims and witnesses, mandates a limitation on public access to information.

⁵¹ See Tadic Case, Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor, 10 August 2005. <http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm>

⁵² Ibid, See also Rule 75 ICTY.

⁵³ *Axen v. Federal Republic of Germany*, ECtHR, decision of 8 December 1983, Series A, no. 72.

⁵⁴ Ibid p. 28.

4. CONCLUSIONS:

The protection of witnesses as a cornerstone for justice and reconciliation in post-conflict countries.⁵⁵ With respect to the globalisation and cross border movement, witness protection should not be a "populist" policy but *global proactive solution* is needed by criminal justice system. Sometimes recalled "the forgotten souls", the domestic and international legal instruments should guarantee the most effective protection by grating protective measures such as non-disclosure of identity, anonymity, relocation and so forth, to secure their lives from intimidation, threats and killing because of their testimony against perpetrators. This requires a rational interpretation of the existing legislations and where it lacks clarification, further measures have to be taken in the future by establishing new rules in order to establish justice towards the rights of the accused and the responsibility to protect witnesses.

The considered attention on the rights of the accused must not endanger the safety of witnesses because their role in searching the truth is the highest interest in delivering justice.

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⁵⁵ Jean-Charles GARDETTO, Report on Witness Protection - Committee on Legal Affairs and Human Rights, Parliamentary Assembly Provisional version – as adopted by the Committee on 21.06.2010