Anonymity as protective measure for victims and witnesses v. the rights of the accused

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<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
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<td>ICTY</td>
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Introduction

In International and national criminal proceedings victims are usually the main witnesses of crimes. Hence, they have a crucial role to play in bringing offenders to justice. In the adversarial systems, the victim’s role as a witness is even more important since the prosecution must prove the case by producing convincing evidence\(^1\). Victims and witnesses become the most important evidence, hence, examination and cross examination are essential\(^2\). However, victims are not only an “element” within the proceedings but also persons who have suffered physical or emotional damage. For that reason, the criminal system should treat them with respect and guarantee the right to protection when they participate as victims or witnesses.

In recent years, the victim concept has gained considerable legal importance. As a consequence, there have been changes in the status of victims, at the national and international levels. Victims have obtained rights step by step. Of particular significance are the right to have access to the trial, the right to receive information as well as to provide information, the right to receive legal advice, the right to participate in the procedure, and the right to obtain protection of their privacy, dignity and physical safety\(^3\).

Victims and witnesses need protection to testify in front of the court. The complex and violent situations in their countries often imply a constant risk for the security of the victims and witnesses. In that context there arises the importance of the right to protection and the great need for anonymity as a protective measure for victims and witnesses. Anonymity means to withhold the identity of the witness from the accused and his/her counsel. The defense will not have any opportunity to investigate the witness before his/her testimony\(^4\). In a first approach it seems to be an effective measure to protect victims and witnesses. However, it is not possible to forget the existence of the accused and his rights either.

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Just as the victims’ rights have received recognition, the rights of the accused have also to be recognized and respected. The rights of the accused are regulated not only in the statutes of the different tribunals, but also in international conventions of human rights such as the European Convention of Human Rights and the International Covenant on Civil and Political Rights. The right to have a public and fair trial and the right to examine witnesses are the principal rights that could be ensured along necessary with confidentiality measures.

One of the central features of the adversarial system is the right of the accused to examine his or her accuser. “The right of confrontation encompasses the right of an accused to know the true identity of his or her accuser.” This right has been considered as one of the most important rights of the accused, essential to a fair trial and is considered as a fundamental human right.

Anonymity, as a protective measure, pretends to protect witnesses withholding their identities from the accused and his/her counselor. As a consequence, two rights are in confrontation; the right of the victims to protection and the right of the accused to confrontation. The central question is whether anonymity can be granted as protective measure for witnesses without violates the right of the accused.

**Aim and structure of the thesis**

This thesis will focus on anonymity as a protective measure for witnesses. It will be analyzed whether anonymity could be granted to the witnesses and whether it means a violation of the right of the accused or not.

Anonymity has been granted for national tribunals, in countries such as the Netherlands, England, etc. The European Court of Human Rights also has taken a similar decision. However, in the international criminal law anonymity has been granted only once; the ICTY in the Tadic case allowed anonymity as a protective measure as an exceptional circumstance. However, its decision was not exempt from criticism.

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5 Id.
6 Ibid. Pp. 362
7 The resolutions will be analyzed in chapter III
To resolve the central question the thesis will consider three different perspectives. First, the right of the victims and their recognition at the international level and the necessity for protection as a victim’s right. Second, the perspective of the accused, having in minds the confidentiality measures. That will be analyzed, especially the right to have a public and fair trial and the right to examine or have examined witnesses. And finally, both rights will be put in a balance to determine whether anonymity affects the correct equilibrium in the criminal system.
CHAPTER 1

VICTIMS AND WITNESSES

1.1. Definition and legal issues

At the international level, on November 29 of 1985, the General Assembly in the 96th plenary meeting adopted The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Although the Victim’s Declaration is not a binding document, it has played an important role in the development of the victim’s rights. The Declaration gives a definition of the victim and also recognizes important rights such as access to justice, fair treatment, restitution, compensation, and assistance. As laid down in the Declaration:

“Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also includes, where

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appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.\textsuperscript{9}

According to this definition, it is possible to distinguish different elements in the victim’s concept. First, the definition refers to persons who have suffered harm. This harm could be physical or mental, but it is also considered as harm, the economic loss or substantial impairment of fundamental rights. From my point of view, this definition establishes a broad concept of harm. It is not limited only to physical damage; it also mentions the psychological harm, emotional harm and mental harm. The first type of victims are those who have suffered direct harm; for example, victims of rape or child soldiers. The second type are indirect victims; they have not suffered a personal harm, but are close to the people who have directly been affected. In those cases, it is not possible to find victims with physical damage, because they have not participated directly. Thus, in the same example of the child soldiers, the victims could be the parents, who have suffered emotional damage. The third kind of victims are persons who have suffered harm while they were assisting victims in distress or preventing victimization.

As noted above, victims’ rights and their participation in the criminal proceedings as victims or witnesses have evolved. The international Tribunals of Nuremberg and Tokyo were mainly focused on the international necessity of justice to obtain a punishment for the horrors committed during the war. In those days victims’ rights and participation were not the main concern\textsuperscript{10}.

In the 1990’s, following the genocide in Rwanda and the war in Yugoslavia, United Nations reconsidered the idea of International Criminal Courts. In that sense, by means of Security Council resolutions, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created\textsuperscript{11}. In that stage of the International Criminal law, the victim’s rights started to be considered and recognized as an important element, the right to protection becoming one of the most important rights. The ICTY in the Tadic case expressed its concern for the victim’s rights, for example, in relation to the balancing of the rights of the accused and the victims as follows:

“This balancing of interests shows that, on the one hand, there is some constraint to cross-examination, which can be substantially obviated by the procedural safeguards. **On the other hand, the Trial Chamber has to protect witnesses who are genuinely frightened.**”

The Rules of Procedure and Evidence of the ICTY and the ICTR mention a definition of victims as well as a catalogue of rights (I will focus on victim’s rights later on). However, the concept is much narrower than the UN Victim Declaration. Both the Rules of Procedure and Evidence of the ICTY and ICTR stipulate that a victim is: “A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.”

This definition has been criticized for not conforming to the UN Victim Declaration. As Donat-Cantin observes: “The ad-hoc tribunals’ definition – strictly limited to ‘direct’ victims – has been considered as insufficient by many observers and has generated interesting criticism about the ad-hoc tribunals’ procedure by experts and non-governmental organizations, especially those based in the so-called civil law countries.”

It is important to mention that the definition seems to recognize a person as a victim, from “the moment the guilt of the accused has been established.” This is an important difference from the definition mentioned in the Rules of Procedure of the ICC, where the victims are recognized as victims “from the moment he or she reports the crime.”

Following the International Criminal Court, Rule 85 of the Rules of Procedure and Evidence of the ICC gives a more complete definition of victims:

**Rule 85**

**Definition of victims**

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes,
and to their historic monuments, hospitals and other places and objects for humanitarian purposes."}^{17}

The Rule 85 differentiates between two types of victims: natural persons and organizations and institutions. This distinction is present in part a) and b) of the article. Part a) refers only to natural persons while part b) refers to organizations and institutions.\textsuperscript{18} The Appeal Chamber, analyzing the scope and interpretation of this norm, in its decision of 18 January of 2008 about victim's participation, argued:

"The Trial Chamber in its analysis of the link between "the harm allegedly suffered and the crime" juxtaposed rule 85 (a) and rule 85 (b) of the Rules, finding significance in the omission of the word "direct" in rule 85 (a) and concluding that on a purposive interpretation of rule 85 (a), "people can be the direct or indirect victims of a crime within the jurisdiction of the Court."

The Appeals Chamber notes that rule 85 (b) of the Rules limits the definition of organizational or institutional victims to those that have sustained "direct harm to any of their property." The type of "harm" referred to relates to organizations or institutions rather than natural persons. It is, therefore, different from the type of harm set out in rule 85 (a) of the Rules, which is harm to natural persons."

"The word "harm" in its ordinary meaning denotes hurt, injury and damage. It carries the same meaning in legal texts, denoting injury, loss, or damage and is the meaning of "harm" in rule 85 (a) of the Rules."\textsuperscript{19}

The Appeal Chamber distinguishes between natural persons and organizations. Natural persons can suffer a direct or indirect harm, which means that the damage could be material, physical or psychological (emotional or mental). But the damage can also be suffered by other persons, called the indirect victims, who are close to the direct victims, The Appeal Chamber gives an example:

"This is evident, for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child."\textsuperscript{20}

\textsuperscript{18} Calvo-Goller, K. "The trial proceedings of the International Criminal Court. ICTY and ICTR Precedents." (Martinus Nijhoff Publishers, 2006), Page 244.
\textsuperscript{19} The Prosecutor v. Thomas Lubanga Dylo. Appeals Chamber, on the appeals of the Prosecutor and the Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 No.: ICC-01/04-01/06 OA 9 OA 10 Date: 11 July 2008.
\textsuperscript{20} Id.
The interpretation of the harm concept has some problems. The Rule 85 does not define the extent of the harm, giving the responsibility to the Court to interpret this concept. On the other hand, part b) refers only to organizations and institutions, and also limits the concept to direct damage to any of their properties. Finally, the Appeal Chamber argued that it is necessary to establish a link between the harm and the victims; in other words, the harm suffered by victims must be linked with the charges confirmed against the accused. Thus, the harm should be a consequence of the accused acts.

1.2. Relation between the concept of witness and victims

For the purpose of this thesis, it is necessary to understand the relation between victims and witnesses. Witness can be defined as a person who provides or is due to provide testimony about relevant information that he or she possesses related to criminal proceedings. It is possible to differentiate between different types of witnesses such as eye witnesses who have perceived a crime directly, hearsay witnesses who know relevant aspects about a crime because they have heard relevant information, and expert witnesses who have relevant information according to their expertise (for example in a murder, the doctor who examined the body). When the trial takes place we can distinguish between vulnerable witnesses, threatened witnesses, expert witnesses, etc... The thesis is focused on victims, and, therefore, the analysis will be restricted mainly to victim witnesses, that means persons who have been affected by a crime, and possess important evidence to prove its existence and hence give testimony before the court.

1.3. Victims in the International Criminal Law. Who are the victims?

Modern history of International Criminal Law had its origin after the First World War, as a reaction to violations of the laws of war and humanitarian law. The first modern international criminal tribunals, Nuremberg and Tokyo, were created to judge the horrors committed...
during the Second World War. Both tribunals were established to prosecute war crimes, crimes against peace and crimes against humanity.\textsuperscript{26}

In the 1990s, with the genocide in Rwanda and the war in Yugoslavia, United Nations reconsidered the idea of International Criminal Courts. In 1993, The Security Council created the International Criminal Tribunal for Yugoslavia (ICTY), having jurisdiction over war crimes, and crimes against humanity and genocide, committed after 1 January 1991 in the territory of the former Yugoslavia.\textsuperscript{27} The International Criminal Tribunal for Rwanda (ICTR), created by a Security Council Resolution in 1994\textsuperscript{28}, has jurisdiction over the same crimes as the ICTY.\textsuperscript{29} In 1998 the international community adopted the Rome Statute, creating the International Criminal Court, the first treaty and permanent international tribunal, which came into force in 2002.\textsuperscript{30} The ICC has jurisdiction over “the most serious crimes of international concern:” genocide, crimes against humanity, war crimes, and aggression (article 5(1)).\textsuperscript{31} As regards the crime of aggression, the Court cannot exercise jurisdiction until a definition of aggression is given and the statute is amended. Until now, the victims in ICC come from the Democratic Republic of Congo, Central African Republic, Darfur (Sudan), Uganda and Kenya.

1.4. Is the fair trial an exclusive right of the accused?

One of the most important principles and guarantees of the accused is the right to have a fair trial. According to Karin Calvo-Goller,

“International human rights law requires that the accused be given a fair trial; this clause may also suggest that the Court must respect the development of international law and conduct a trial that is fair by the current standards of international law . . . .” “One such development is the concept of equality of arms which has developed in international law.”\textsuperscript{32}

At international level there is no explicit concept of fair trial; however, the notion is present in different legal bodies, encapsulating a set of guarantees.\textsuperscript{33} For example, article 14 of the International Covenant on Civil and Political Rights (ICCPR) stipulates a catalogue of rights for the accused, ensuring, among others, equality before the courts and tribunals, the right to

\textsuperscript{29} Cryer, R., Friman, H., Robinson, D., Wilmshurst, E., op. cit. at note 17 at p. 113.
\textsuperscript{31} Rome statute art. 5.
\textsuperscript{32} Calvo-Goller, K., op. cit. at note 9 at p. 227-228.
\textsuperscript{33} O’Sullivan E. and Montgomery, D. “The erosion of the right to confrontation under the cloak of fairness at the ICTY.” Page 149.
be presumed innocent until proved guilty according to law, etc. Moreover, article 14 (3) establishes minimum guarantees for the accused such as the right to be informed promptly and in detail of the nature and cause of the charge against him, to be tried without undue delay, to be tried in his presence, to examine, or have examined, the witnesses against him, and to obtain the attendance and examination of witnesses.  

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the American Convention on Human Rights (ACHR) both establish explicitly the right to a fair trial. However, neither the ECHR nor ACHR provide a definition; both conventions enumerate different rights of the accused. Among others, the right to have a fair public hearing, the right to be presumed innocent, and also establish minimum guarantees for the accused. The right to examine or have examined witnesses appears as a fundamental right.

Furthermore, the Statutes of the international criminal tribunals mention the right of the accused, following the same or similar catalogue of rights as the international covenants. All of them establish the right to examine or have examined the witnesses, as a right of the accused, as a minimum guarantee.

It is possible to argue that international human rights law requires that the accused be given a fair trial, which means that the courts must respect the rights of the accused and guarantee a minimum standard. Important to mention in this context is the difference between “the specific fair trial rights and the right to a fair trial.” It is possible to imply that the international legislation recognizes two different categories of the right of the accused: the minimum guarantees, mentioned specifically, for example, in art. 14 (3) of the ICCPR, and the other guarantees, which do not have special treatment. According to Zahar and Sluiter, not violation of the rights of the accused is synonymous with a violation to the fair trial. However, all the measures bordering on violation of the minimum guarantees of the accused may justify the conclusion that the right to a fair trial has been violated. The same authors go on to mention that the right to a fair trial is obviously part of the contents in international legal bodies; it has given rise to other elements which are not covered as specific minimum guarantees. For example, the “principle of equality of arms and the right to a reasoned judgment” are an expression of a fair trial. In summary, “the right to a fair trial is

34 See article 14, International Covenant on Civil and Political Rights (1966) (ICCPR).
35 Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR) and article 8 American Convention on Human Rights (1969) (ACHR) both establish the fair trial as a right of the accused.
37 See article 21 Statute of the ICTY, article 20 Statute of the ICTR and article 67 of the Rome Statute.
40 Id.
not wholly contingent on the application of evidential or procedural rules, but on a wider
global perspective of the trial process so that fairness can be adequately observed.”

However, this right to have a fair trial is not an exclusive right of the accused; according to
Kevin Gray, victims and witnesses have this right as well. As said above, there is no single
concept of fair trial; thus, the notion of fair trial for victims is part of the content of international
legal bodies.

The concept of a fair trial for victims is, for example, the Victim and Witnesses Unit present in
the ICTR, ICTY and ICC, whose objective is to provide protective measures, counseling and
other assistance to victims.

Furthermore, the International Criminal Court is the first international court which allows the
participation of victims of mass crimes and giving to victims an important role to play in the
procedure; for example, the right to present their views and concerns according to article 68
of the Rome Statute. With the creation of the Rome Statute and the ICC, a new stage in the
victim’s right has started.

At the international level, the rights of the victims have received recognition in the UN
Declaration of Basic Principles for Justice for Victims of Crimes and Abuse of Power. The
Declaration recognizes, for example, the access to justice and fair treatment, which implies
the right to be treated with compassion and respect for their dignity, the right to receive and
provide information, the right to restitution, the right to legal advice, and the right to
protection. The Rome Statute also recognizes in article 68 the right to provide information
and present their views and concerns while article 75 ensures the right to receive
compensation.

With all these considerations, it is possible to establish that the right to a fair trial is not an
exclusive right of the accused. As was seen, victims have this right as well. The problem that
arises now is how the right of the victims and the rights of the accused can coexist with
respect to each other? To answer this question, we shall consider the right of the victims and
the right of the accused in the next two sections, focusing especially on the right to protection
as a victim’s guarantee and the right of the accused to examine and cross examines
witnesses.

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41 Gray, K., “Evidence before the ICC.” Edited by McGoldrick, D., Rowe, P., and Donnelly, E., (United States, Hart Publishing,
42 Ibid. at page 302.
43 Ibid. at page 302.
44 Article 68 Rome Statute.
46 See article 68, Rome statute.
1.5 Right or interest of victims?

First of all, it is necessary to clarify whether the victims have rights, or simply an interest in the procedure. Some authors talk about the interests of the victims avoiding the very concept of the victim’s right. They situate the victims under the right of the accused and the trial in general. Some authors even argue that “bringing the victims back into the criminal justice process is a reactionary step back toward the early Middle Ages, when vengeance and personal animosity purportedly ruled the justice system.” However, the victims are taking a prominent role in the criminal justice system. Nowadays, victims have voice and they are present in the criminal proceedings, not just like witnesses. This new participation is considered as a “victim’s movement.” In my point of view, victims are an essential part in the proceedings. As was said at the beginning, they are not only relevant evidence; they are persons who have been affected by a perpetrator. I admit that justice plays an important social role. The need for justice is a social necessity, but the victims are the ones mainly affected by a crime and they are the ones who need justice per excellence.

Victims have more than a simple interest in the criminal proceedings. Victims have the right to participate and also the right to protection. Even the International Courts have decided that the protection issue is a duty of the court and is not a favor to the victims. The Trial Chamber I of the ICC argued that “protective measures are not favours but are instead the rights of victims,” The ICC expressly recognize the necessity of protection as a right of victims and not as a simple interest.

1.6 Right of the victims at the international level

The UN Victims Declaration is one of the most important steps towards the recognition of the victims’ rights at the international arena. The Declaration mentions different rights of the victims, such as “the right to be treated with compassion and respect for their dignity.” It is also stated that “victims are entitled to access the mechanism of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.” From this recognition it could be implied that such treatment would include their physical and psychological protection as witnesses in criminal proceedings. For the purpose of this thesis,

50 Article 4 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration).
the right to protection is important; the UN Victims Declaration recognizes the necessity of protection as a right. However, the Declaration also mentions other important rights of the victims such as:

- The right to receive information.

- The right to present their views and concerns. These views and concerns should be without prejudice to the accused and consistent with the relevant national criminal justice system.

- The right to receive proper assistance to victims throughout the legal process.

- The right to receive measures to minimize inconvenience to victims, protect their privacy when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.

- Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

- Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.\(^{51}\)

At the European level the European Convention on Human Rights (ECHR) contains important victims’ rights such as:

- In article 3, the right not to be subjected to inhuman or degrading treatment when given evidence.

- Article 6 specifies that child witnesses and complainers have an implied right under this provision. The accused has the right to a public hearing. However, this norm demands the press and the public to be excluded from all or part of the trial where this is necessary “in the interests of juveniles or the protection of the private life of the parties.”

- Article 8 establishes the right to respect for family and private life.\(^{52}\)

With respect to those rights, the European Court of Human Rights, in the Doorson vs. The Netherlands case, made an interesting analysis about the right to a fair trial, which is mentioned in article 6 of the ECHR as a right of the accused. The article does not consider explicitly the right to a fair trial as a victim’s or witness’s right; however, article 8 of the ECHR stipulates the right to respect for family and private life. According to the ECtHR, the

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\(^{51}\) UN Victims Declarations articles 7, 8, 9, 10, 11, 12 and 13.

\(^{52}\) See articles 3, 6 and 8 of the ECHR.
principles of fair trial require a balance between the right of the defense and the victims. The ECtHR recognizes the right to a fair trial not as an exclusive right of the accused, but also for the victims, who have the right that their private life be respected.

“It is true that Article 6 (ECHR) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 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 organize 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 defense are balanced against those of witnesses or victims called upon to testify.”

Furthermore, the Statutes for the International Criminal Tribunals for the former Yugoslavia and Rwanda, mention important rights of the victims: In the ICTY Statute, article 20 stipulates that “full respect for the rights of the accused” should be in balance with “due regard for the protection of victims and witnesses.” It is possible to imply from this article that the rights of the accused are not an absolute right. The rights of the accused and victims should be balanced and should respect each other. In the same sense article 21 mentions the right of the accused to a “fair and public hearing,” but “subject to article 22” (provision for the protection of victims and witnesses). The ICTR Statute in article 20(1), making reference to article 21, establishes the same limitation. Moreover, the ICTY Statute in article 22 and the ICTR Statute in article 21 both establish the protection for victims and witnesses. Both articles mention some examples such as the conduct of in camera proceedings and the protection of the victim’s identity. However, they leave the door open to other kinds of protective measures.

In the creation of the International Criminal Court, the rights of the victims have played an important role as well. Consequently, it is reflected in the recognition of an important catalogue of victim’s rights. Article 68 of the Rome Statute establishes “protection of the victims and witnesses and their participation in the proceedings.” That article is particularly interesting because it not only establishes the right of victims and witnesses, but also imposes a duty or obligation on the Court: “The Court shall take appropriate measures to

54 In a first approach, special attention should be paid to the word “interest” to make reference to the victim’s rights. The Court also used the word “interest” to imply the right of the accused in the last part of the paragraph. Thus, it could be understood that in this resolution, the Court use the word “interest” to mean “rights”.

protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.\textsuperscript{55} However, this right “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”\textsuperscript{56}

Article 68 (2) establishes an exception to the principle of public hearings. It is possible to “conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.”\textsuperscript{57} Again the Statute allows a restriction of the rights of the accused based on the necessity for the protection of the victims.

In the next chapter, I will focus on the right to protection, and explain or elaborate a concept, elements, and different measures to protect the victims and witnesses. In the same way I will explain the necessity of protection especially in the international arena. And finally, I will explain confidentiality and anonymity as protective measures for victims and witnesses.

\textsuperscript{55} See article 68 (1) Rome Statute.
\textsuperscript{56} See article 68 (1) Rome Statute.
\textsuperscript{57} See article 68 (2) Rome Statute
CHAPTER II

THE RIGHT TO PROTECTION

2.1. Definition of protection

a) In European law

Protection is not defined in European Law;\textsuperscript{58} however, the Recommendation (97) 13 \textsuperscript{59} was established considering the necessity to protect victims and witnesses from the growing organized crime, even within the family. The Recommendation recognizes the special role of witnesses in criminal proceedings and “that their evidence is often crucial to securing the conviction of offenders.”\textsuperscript{60} Important to mention is that the Recommendation considers it as a duty of the states to protect witnesses and victims.

The recommendation does define intimidation broadly to cover “any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever. - This includes intimidation resulting either from the mere existence of a criminal organization having a strong reputation for violence and reprisal, or from the mere fact that the witness belongs to a closed social group and is in a position of weakness therein.”\textsuperscript{61} It also establishes as a general principle that “appropriate legislative and practical measures should be taken to ensure that witnesses may testify freely and without intimidation.”\textsuperscript{62}

\textsuperscript{58} Mackarel, M., Raitt, F. and Moody, S. “Briefing paper on legal issues and witness protection in criminal cases” (Scotland, The Scottish executive central research, 2001) P. 7.
\textsuperscript{59} Recommendation N° R (97)13, Of the Committee of Ministers to Member States concerning intimidation of witnesses and the rights of the defense. Adopted by the Committee of Ministers on 10 September 1997 at the 600\textsuperscript{th} meeting of the Ministers’ Deputies.
\textsuperscript{60} Id.
\textsuperscript{61} Ibid, Definitions
\textsuperscript{62} Ibid, General Principles (1)
The recommendation also stipulates some measures that should be considered as protective measures that can be applied to the witnesses and to their relatives or other persons close to them:

- Revealing the identity of witnesses at the latest possible stage of the proceedings and / or releasing only selected details.
- Excluding the media and / or the public from all or part of the trial.
- Ensuring anonymity as a protective measure but should be an exceptional measure.
- Setting up special programs of witness protections.

b) In International Law

There is no definition of protection. As alleged above, measures for witness protection are provided within the Statutes of the ICTY and ICTR and also in the Rome Statute. The ICTY was the primary reference in international law that regulates the protection of witnesses in criminal proceedings. The first fully contested case before the ICTY was the Dusko Tadic case. The trial Chamber of the ICTY, in Tadic case, set out the duties of the Court regarding the victims, under five categories:

- Preventing the identification of victims and witnesses to the public and media
- Preventing retraumatisation caused by confronting the accused
- Ensuring anonymity from the accused and defense counsel
- Delaying the disclosure of witness identity prior to trial
- General measures concerning the protection of witnesses and victims in and around the premises of the Tribunal

These duties have been applied to the victims and witnesses for whom the prosecutor has asked protective measures. On the other hand, the Trial Chamber has emphasized that the obligation of the International Tribunal to protect witnesses should not go beyond the level of protection they are actually seeking.

In the same sense, the ICC regulates in article 68 of the Rome Statute the protective measures for victims and witnesses. According to article 68 of the Rome Statute, it is possible to distinguish two kinds of vulnerable witnesses.

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63 See Tadic decision ICTY, page 31-41
64 See Tadic decision ICTY, para.80
a) Children
b) Victims of sexual crimes

a) Children:
At the European level, children as victims and witnesses in criminal proceedings have special recognition. Article 6 ECHR establishes the right to a fair trial; article 6 (1) establishes that the judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial...."where the interests of juvenile.... so require."66 The Recommendation 97 (13) states that “the welfare of the child witness must, in general, be the paramount concern over the interests, even the interests of justice.”67

On the other hand, in International Law article 39 and 40 of the United Nations Convention on the Rights of the Child suggest that children and juveniles appearing as witnesses should receive protective measures. The Rome Statute, as was mentioned above, in its article 68 stipulates that it is necessary to consider the age of the witness to determine appropriate protective measures.

b) Victims of sexual crimes: In such crimes, victims of sexual offences end with several traumas and emotional damage. This damage affects the victims and makes it difficult to give their testimony at court. But the main problem with these victims is the second victimization. Victims should deal with interviews, tell their story again and again, go in front of the court and be subjected to cross examination, etc. For those reasons victims of sexual assaults constitute a special category of victims to be considered separately.

2.2. WHY PROTECTION IS NEEDED?

In the accusatory system, the testimony of witnesses in open court is one of the most important evidences. It gives to the accused and the trial transparency and it is synonymous of fair trial. Article 14 (2) (e) of the ICCPR establishes one of the guarantees of a fair trial in these words:

“to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”68

66 See article 6 ECHR.
67 Recommendation 97 (13) para.100
68 ICCPR article 14.
According to Brad Loberg, to achieve the concept of justice, the defense has to have access and the opportunity to examine all the relevant evidence that confirm the criminal guilt against the accused.69

Nevertheless, it is vital to consider the victim perspective as well. In general, victims of crime are afraid to testify, because of the possible threats, difficulty to testify in a public hearing, fear about disclosure of their identities to the press. Victims are afraid to be exposed and of the consequences this exposition could bring. Moreover, if we think of international criminal procedures, where victims of genocide, war crimes or crimes against humanity are affected, this fear increases. 70

Regarding Lubanga case in the ICC, and the security situation of victims, the electronic news papers have published some news related to the victim’s security.

29 January 2009: “The situation regarding the victim who withdrew his testimony on Wednesday is very concerning and could have been foreseen considering Thomas Lubanga’s influence in Ituri where militias are still active and some are still close to him. Lubanga’s supporters still have the ability to cause harm which must have informed the withdrawal of the witness’s testimony. He must have feared for his family and himself knowing that his testimony would be broadcast on TV. There need to be more guarantees for the safety of victims-something that has not been well defined so far and that has worried many more than just the witnesses themselves. This is the beginning of a legal battle which will be full of surprises and emotions.”71

In the case of victims of genocide, they are part of a specific ethnic group; they often continue living in the same territory where they were victims as well as the followers of the leader. In some cases the cohorts continue exercising acts of violence, or in cases of sexual violence, for example, the same community according to their culture, will judge and discriminate the victims. Where these kinds of crimes are committed in areas without a rule of law or complex governmental structure, the necessity of victim’s protection is essential.72

This situation has been recognized by the tribunals. In the Tadic case, the ICTY in its decision of 10 August 1995, considered the situation of armed conflict that existed in the

69 Loberg, B., “The witness protection measures of the permanent International Criminal Court are superior to those provided by its temporary Ad Hoc contemporaries.” Independent Research, Spring 2006. P. 1-6.

70 Id.


72 Id.
area, as an exceptional circumstance “par excellence.”73 “It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees.”74

**Situation of victims**

One of the most recent cases that the Prosecutor Mario Ocampo decided to investigate is in Kenya.

In Kenya there are 42 tribes. The largest one is the Kikuyu. During the colonization period for the British, the Kikuyu supplied labor to the white communities, became close to them. When the British left the country, they transferred the power to the Kikuyu. As they were an agricultural community and they had been dispersed away from central Kenya, they were the first to acquire the lands left by the British. They had easy access to credit, which allowed them to become the most important economic group with access to education; slowly they began to control politics. With the elections in 2007, for the first time in Kenya, people could vote and express their opinion. However, because of the alleged rigging of the elections and because people from the president’s tribe were incorporated into the government, the rest of the population became aware of the huge irregularities committed in the country after the elections. Precisely for that reason the conflict started.75

On 31 March 2010, a majority of the pre-trial Chamber of the ICC approved the prosecutor’s request to open an investigation into Kenya for the violent acts committed after the general elections in 2007. The violence that followed the general elections left over 1,133 people dead, caused 400,000 to flee their homes, and brought Kenya to the brink of civil war.76

As a reaction of the Prosecutor’s and ICC decision, threats to witnesses in post-election violence cases have increased.77 According to the electronic newspaper, Africa speak, “At least 20 witnesses to the violence have gone into hiding after they received death threats. Few have faith in a witness-protection program the government is trying to launch.”78

The situation in Kenya reflects the risk that victims and witnesses are exposed to. Witness protection will be the key challenge as the ICC’s investigation moves forward. After the

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incidents in Kenya, and as a consequence of the announcement that the ICC prosecutor will investigate the violence acts committed in Kenya, threats against victims and witnesses have increased.  

The cases that international tribunals are investigating or have investigated, in general, occur in countries without a rule of law or without complex governmental structure capable of guaranteeing neither the victim’s safety nor the victim’s life. For those reasons, the necessity of protection becomes an important right of the victims, essential to fight against impunity. As Redress mentions in his report of December 2009:

“Without witness protection there can be no fight against impunity. Without witness protection, victims of human rights abuses who complain and seek justice must face serious threats leading to physical harm and possibly death of themselves or their loved ones. This violence is brought onto them by powerful people, whose power invariably comes from the uniforms they wear.

A legal system that promotes justice but does not set in place the means to protect witnesses is a fraud. When victims of human rights abuses understand this, they do not come forward to assert their rights against the perpetrators. No attempt is even begun to make complaints and assert rights. The victims remain silent, inert and fearful.

A justice system depends upon evidence being collected and brought before the courts. If fear prevails, evidence cannot be collected. When evidence is not collected, the courts either do not take up cases or dismiss the charges against the accused, as the judge can only consider what is brought before the court. In this manner, the perpetrators of torture, extrajudicial killings and forced disappearances routinely escape justice…

In human rights cases especially, the determining factor between one outcome and the other is protection.  

2.3. Protection trough confidentiality measures

According to the Oxford Dictionary, confidentiality means, “intended to be kept in secret” or “entrusted with private information.” Confidentiality measures pretend to keep in secret the identity or some information related to the witnesses in the criminal proceedings.

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It is possible to distinguish two kinds of confidentiality measures:

a) “Totally or partially closed proceedings” (in camera proceedings). Those are “measures aiming at concealing a person’s identity tom the public and media” (confidentiality).

b) “Measures aiming at concealing a person’s identity from the accused and the defense team” (anonymity).  

In the following, protective and support measures will be discussed giving special attention to measures that are of importance to victims and witnesses: in camera proceedings and anonymity. It is possible to find provisions in the Rules of the ICTY, ICTR and ICC related to both kinds of measures.

2.4. In camera proceedings, confidentiality measures and its regulation in the International Tribunals

The confidentiality measures limit the disclosure of witnesses’ identity from the public or the media. The level of non disclosure can vary from case to case, and it will depend on the risk exposition of each witness. The most common methods that have been used is to keep in secret some personal details such as name, sex, address, etc. It is also possible to use in camera proceedings where witnesses are not in direct contact with either the accused or the public. Confidentiality measures keep the witnesses’ identity safe from the public, but that differs with complete anonymity, where the identity is withdrawn completely from the accused and his/her counselor.  

For the purpose of confidentiality measures the ICTY, in the case Prosecutor v. Kunarac, took the term “public” as not including those entities or persons who are assisting the accused.  

This protective measure is regulated in different international tribunals. In the ICTY and ICTR, both Statutes mention the right of the accused to have “a fair and public hearing.”  

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84 ICTY, Prosecutor v. Kunarac, IT 96-23 & 23/1, Decision on Prosecution Motion to Protect Victims and Witnesses, 29 April 1998.
85 See article 21 (2) ICTY Statute and article 20 (2) ICTR Statute.
However, this right is subject to the right of the victims. Regarding the protective measures, the Statutes lay down this in the common Rule 75:

“(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

B) A Chamber may hold an in camera proceeding to determine whether to order:
(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as (a) expunging names and identifying information from the Tribunal’s public records; (b) non-disclosure to the public of any records identifying the victim or witness; (c) giving of testimony through image- or voice- altering devices or closed circuit television; and (d) assignment of a pseudonym;
(ii) closed sessions, in accordance with Rule 79.”

The principle that hearings should be held in public is designed to ensure that the activities of administrative tribunals are transparent, giving certainty to the accused; however, confidentiality measures do not infringe the right of the accused to a fair trial. The accused and his defense team know about the witness’ identity, and these measures are expressly considered, in the Tribunal’s Statutes, as an exception to the public hearings.

The ICTY in the Tadic case in the decision of 10 August 1995 recognized the right of the accused to a public hearing. It pointed out the importance of having a public hearing; especially because the press and the public ensure a fair and transparent trial. Even the Courts quoted a decision of the ECtHR in Sutter v. Switzerland: “By tending the administration of justice visible, publicity contributes to the achievement of the aim... a fair trial, the guarantee of which is one of the fundamental principles of any democratic society...”

Nevertheless, the Court also concluded that the right to a public hearing should be balanced with the right of the victims to protection. First, this is according to article 21 and 22 of the ICTY Statute and Rule 75 (Rule of Procedure and Evidences ICTY). On the other hand, in camera proceedings and confidentiality are in accordance with international treaties such as ICCPR article 14 (1) and article 6 (1) of the ECHR. Both articles establish the right of the

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86 See Rule 75, Rules of Procedure and Evidence of the ICTY and ICTR.
accused to a fair and public hearing, but the necessity of the victim’s protection is established as an exception: “the press and public may be excluded from all or part of the trial in the interests of moral, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require.”

To resolve this problem the Court also argued that measures to prevent disclosure of the identities of victims and witnesses are also regulated and accepted in domestic courts. The United Kingdom has prohibited disclosure to the public of the information about a complainant in a sexual assault case. The Court put emphasis in the United States, because even the rights to a public trial and free speech are constitutionally protected. The United States courts have also resolved that “the accused’s right under the Sixth Amendment to a public fair is not absolute and must, in some cases, give away to other interests essential to the fair administration of justice.”

The Court pointed out that the national jurisdictions have special consideration towards sexual cases. The Court also mentioned the necessity of protection in the Yugoslavia case, which is regarded not merely as a sexual assault, but also as one where fears of reprisals are always present in the witnesses. The Court emphasized that it had the duty of protecting victims and witnesses, and pointed towards the lack of an effectiveness protection program at this time. Finally, and for those reasons, the Court concluded that these measures do not affect the right of the accused to a fair and public hearing.

The Rome Statute also regulates confidentiality measures. Article 68 (1) Rome Statute establishes the right of the victims to protection. Article 68 (2) establishes, as an exception to the general rule of the public hearings, “the possibility to conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special methods.” The Statute pays special attention in cases of sexual violence or when a child is involved as a victim or witness. The Statute also stipulates that in camera proceedings should be implemented automatically “for victims of sexual violence, or a child who is victim or witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.”

To summarize, the general rule is giving due importance to the right of the accused to a fair and public hearing. The publicity is an important element to guarantee an impartial judgment

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89 See articles 14(1) of the ICCPR and article 6 (1) of the ECHR.
91 Ibid para. 40
92 Ibid para. 42
93 See article 68(2) Rome Statute.
94 Id.
and to ensure a fair and transparent trial. However, the Court Statutes and also the International conventions such as the ICCPR and ECHR recognize as a limitation of this right the necessity of the victim’s protection. The absence of such measures and forcing a witness to testify in public may affect the search for truth and may violate the interest of justice.\textsuperscript{95} This exception does not mean a violation of the right of the accused. The national and international courts justify this limitation not only for the necessity of the victim’s protection but also for the necessity of justice. It might so happen that important witnesses are unwilling to testify in public because of fear; thus, one of the most important objectives of the courts, to see that justice is done, could be affected.

CHAPTER III

ANONYMITY

Anonymity measure conceals the true identity of the witness. The identity is withheld not only from the public and mass media, but also from the accused and his or her counsel. Anonymous witness, as protective measure, affects not only the right of the accused to have a public hearing, but also his right to examine witnesses. With anonymous witnesses, the accused does not know who his or her accuser is. The main criticism against this protective measure is that the accused cannot investigate the witness, which is essential for an adequate cross examination. Anonymity seems to affect one of the minimum guarantees of the accused, the right to examine witnesses and the right to have a fair trial.

To analyze this problem, first I will focus on national or regional cases, Doorson v. The Netherlands and Kostovic v. The Netherlands, both decisions of the European Court of Human Rights. Then, I will analyze the Tadic case, the only international case where anonymity has been accepted, before international criminal tribunals. And finally shall look at the International Criminal Court and its position on this matter.

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96 Calvo-Goller, K., op.cit. at note 18 at pp. 281.
3.1. CASES BEFORE THE EUROPEAN COURT OF JUSTICE

3.1.1. Case of Doorson v. The Netherlands

The facts

The case was referred to the European Court of Human Rights by the European Commission of Human Rights (The Commission) on 8 December 1994 against the Kingdom of The Netherlands.

In August of 1987, in a police investigation, the accused was recognized by several witnesses, all of them drug addicts, as a drug dealer. The identification was done using a set of photographs from different drug dealers and some innocent people. Six of the witnesses remained anonymous.98

The applicant was arrested. During the proceeding, the defense did not have access to the witnesses’ identity, nor could it examine them.

In December 1988, the applicant was condemned to 15 month imprisonment. The defense appealed to the Appeal Court, requesting that anonymous witnesses be summoned, and that they should be given the opportunity to examine them and to have access to their identities. The Appeal Court ordered the investigating judge to decide whether anonymity should be preserved and to reexamine the witnesses. The defense continued trying to know the witnesses’ identity and to examine them. Finally, the counsel examined some witnesses without knowing their identities. The accused was not present in the hearing. 99

The Netherlands Court decision

Finally, on 6 December 1990, the Appeal Court found that the applicant was guilty. The Court arrived at that decision on the basis of the testimonies of the anonymous witnesses, even those taken without the defense lawyer. As a final argument, the Appeal Court mentioned

99 Ibid. Para. 7-36.
that “the mere fact that the defense had not had the opportunity to question R (anonymous witness) did not mean that his statement could not be used in evidence.” Eventually, the Supreme Court ratified that decision.

**European Court of Human Rights**

The European Court of Human Rights stipulates like this:

- Regarding the admissibility of evidence, “that it is a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them.” The ECtHR remarked that the most important is to analyze the procedure as a whole, including the way in which evidence was taken. After that analysis it can be concluded whether the whole procedure was fair or not.
- Regarding anonymous witnesses, the Court argued:
  a) The Convention does not preclude identification for the purpose of article 6 para. 3 (d)
  b) “Counterbalancing procedure followed by the judicial authorities in obtaining the evidence of witnesses Y.15 and Y.16 must be considered sufficient to enable the defense to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements, which it did in open court by, amongst other things, drawing attention to the fact that both were drug addicts.”
  c) The Court’s conviction “should not be based either solely or to a decisive extent on anonymous statements.” In this case the ECtHR concluded that the national court did not base its decision solely on the anonymous witnesses. The national court considered other evidence such as the recognition of the accused in a collection of pictures, and the fact that the applicant recognized himself in the police photograph.
  d) Witness N, who in a first testimony recognized the accused in the police photograph, later on retracted arguing that he felt ill and he was afraid that the police might not give him back the drugs which they had found in his possessions. In this point the ECtHR insisted that the Court should analyze if the whole procedure is fair in its entirety, including the way in which evidence was taken. In this case the fact that one witness was not reliable does not affect the procedure, because the national court based its decision also on other elements which support the conviction of guilt.

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100 Ibid. Para. 33.
101 Ibid. Para. 67
102 Ibid. Para. 75.
103 Ibid. Para. 76.
e) For all the reasons above the ECtHR concluded that there has been no violation of article 6 para. 1 together with article 6 para 3(d) of the Convention.

In summary, the main arguments of the ECHR regarding whether to allow complete anonymity are:

a) To determine whether the proceeding is fair or not, it is necessary to analyze if the procedure was fair as a whole but it is not necessary to analyze each activity.

b) It is necessary to do a counterbalancing. That means if some rights of the accused are limited, they should be compensated with other guarantees. In the case referred to above, even the defense did not have access to the witnesses’ identity; the counsel had the opportunity to examine the witnesses except for the information related to their identities. Thus, anonymous witnesses are allowed, but the defense should have the opportunity to examine them; however, the defence is not permitted to ask questions regarding their identities.

c) The applicant argued that he was not present in the witnesses’ examination. The ECtHR concluded that the Convention does not establish as an essential requirement the presence of the accused in the examination. Besides, the counsel was present and he examined them.

d) The conviction of the court cannot be based only on anonymous statements.

3.1.2. Case of Kostovski v. the Netherlands

The facts

The case was referred to the Court by the European Commission of Human Rights in September 1988.

Kostovski was a Yugoslav citizen. He had a very long criminal record, including conviction for armed robbery in the Netherlands. Even the Swedish government was requiring his extradition for two armed robberies in Sweden.

In August 1982, Kostovski escaped from the Scheveningen prison in the Netherlands, with Stanley Hillis and other people.
In January 1982, an armed robbery was attempted in a bank in Baarn, the Netherlands. The Bank was robbed by three masked men. The police suspected the involvement of Stanley Hills and his cohorts, because those men had been involved in other robberies with the same modus operandi.

After the robbery, the police received an anonymous call informing that the perpetrators of the robbery were Stanley Hills, a Yugoslav man, and another man.

Days later another man visited the police in the Hague. He desired to remain anonymous. He informed that the culprits in the bank robbery were Hills, a Yugoslav, and another man. He gave information about their destination.

In February, a third informant appeared in the police station giving information in the same way. He informed that those three persons did the bank robbery and gave secret information about their whereabouts.

In April 1982, the police arrested Hillis and Kostovic. During the procedure the examining magistrate interviewed one of the anonymous witnesses in the presence of the police, but in the absence of the prosecutor, the applicant and his counsel. The Judge did not know his identity and he found the fear of the witness well-founded and his wish to remain anonymous a rational decision.

During the trial, the examining magistrates were heard as witnesses. They gave a hearsay testimony, based on the declarations of the anonymous witnesses. The anonymous witnesses were not heard in the court.\textsuperscript{104}

**The Netherlands Court Decision**

Finally, mister Kostovski was found guilty. The conviction was based on the statements of the anonymous witnesses. The reliability of the anonymous witnesses was established by the investigating magistrates. The tribunal considered the fact that the accused had previously been found guilty of similar offences.

An appeal was put forward contesting the verdict. The Court of Appeal also convicted the applicant and his co-accused and imposed the same sentence. The Appeal Court justified the necessity of anonymity on the basis of the real danger that the witnesses were exposed to. Regarding the fact that the anonymous witnesses were not heard during the trial, the

Appeal Court “considered the official reports of their interviews with the police and the examining magistrates to be admissible evidence.” The Court also justified the necessity of allowing the witnesses to remain anonymous.

Finally the Supreme Court dismissed the appeal by the applicant on the basis of the above points of law.

**European Court of Human Rights**

Before the ECtHR, the applicant alleged the violation of article 6 of the Convention.

First, according to article 6(1), everyone is entitled to a fair and public hearing. Secondly, everyone has as a minimum right, “the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as a witnesses against him.”

The ECtHR argued, first, considered the fact the anonymous witnesses were not heard at the Court:

“In principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court. To use as evidence such statements obtained at the pre trial stage is not in itself inconsistent with art. 6(3)(d) and art. 6(1).”

However, the ECtHR established, as a rule, that the accused “should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.”

However, in this particular case, the defense was not able to examine the witnesses. They were not heard at the court and they did not have the opportunity to examine them in stages. Even the examining magistrates did not know the witnesses’ identity. For that reason the ECtHR argued: “In these circumstances, it cannot be said that the handicaps under which
the defense labored were counterbalanced by the procedures followed by the judicial authorities.\textsuperscript{10}

The ECtHR stipulated that in this case, there were limitations on the rights of the defense which were irreconcilable with the guarantees established in article 6 of the Convention. Moreover, there was the fact that the government recognized that the applicant’s conviction was based “to a decisive extent” on the anonymous statements.\textsuperscript{11}

For the reasons given above, the ECtHR concluded that under those circumstances Kostovski did not receive a fair trial. Finally, the ECtHR recognized a violation of article 6 para. 3 (d) and para. 1 of the Convention.

3.1.3. Criteria of the European Court of Human Rights

In general it is possible to argue that the ECtHR has allowed the existence of witnesses protected with full anonymity. However, it has established some requirements with respect to the minimum guarantees:

a) The existence of a real danger that the witnesses were exposed to.

b) Counterbalancing. Even when the rights of the accused are limited for the court, the anonymity should be a balance or compensation. In other words, if the rest of the proceeding is compensated sufficiently for the restrictions on the defense rights, the trial as a whole will still be considered fair.

c) The Court conviction should not be based solely, or to a decisive extent, on anonymous statements.

d) Regarding the right to examine, the defense should have had the opportunity to examine and ask questions to the witness, except those questions related to his/her identity.

3.2. DECISION ON THE PROSECUTOR’S MOTION REQUESTING PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES (ICTY)

\textsuperscript{10} Ibid Para 43.
\textsuperscript{11} Ibid. Para 44.
Dusko Tadic was the first accused to appear before the International Tribunal for the former Yugoslavia. He was sentenced to 20 years of imprisonment for:

- Crimes against humanity, article 5 ICTY Statute (persecution on political, racial and / or religious grounds, murder and inhumane acts)
- Violations of the laws or customs of war, article 3 ICTY Statute (cruel treatment and murder)
- Grave breaches of the 1949 Geneva Convention, article 2 ICTY Statute (inhuman treatment, willful killing, torture, or willfully causing great suffering or serious injury to body or health)\textsuperscript{112}

On 18 May 1995 the prosecutor submitted a motion requesting protective measures for victims and witnesses who may testify in the case. The prosecutor requested five categories of protective measures:

a) Those seeking confidentiality, “whereby the victims and witnesses would not be identified to the public and the media” (prayers 1-6, 9, 10 and 12).

b) Those seeking protection from retraumatization (prayers 1-6, 9, 10 and 12).

c) Those seeking anonymity, “whereby the victims and witnesses would not be identified to the accused and his counsel (prayers 8 and 11 a).

d) Miscellaneous measures (prayer 11b and 13).

e) Those seeking general measures for all victims and witnesses (prayer 14).\textsuperscript{113}

The analysis will focus on those measures seeking anonymity. In its decision the ICTY follows some arguments of the ECtHR in its previous decisions, especially in Kostovski v. The Netherlands.

The ICTY cited the ECtHR decision on Kostovski v. The Netherlands, as follows: “In principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument.”\textsuperscript{114} However, the ICTY argued that the balancing between the interest of the accused and witnesses and prosecution is inherent in a “fair trial.” For that reason, the notion of fair trial does not only mean fair treatment to the accused but also to the prosecution and to the witnesses.\textsuperscript{115}

The balancing is reflected in the ICTY Statute, in article 21 (2) of the Statute, which provides the right of the accused to a fair and public hearing, but subject to article 22. This article

\textsuperscript{114} Kostovski v. The Netherlands. ECHR; cited for the ICTY in Tadic case.
\textsuperscript{115} Tadic. Para. 55.
regulates the protection of witnesses. Thus, the ICTY understood that the Statute mentions and recognizes the necessity of balance between the rights of the accused and witnesses.116

The analysis of the ICTY was focused on international and national legislations. The Court made reference to some decisions of the English Court of Appeal. The UK Court recognizes that, under exceptional circumstances, the Chamber can restrict the right of the accused to examine or have examined witnesses against him.117 The ICTY stipulated that the situation of armed conflict that existed in the former Yugoslavia and all the atrocities committed in the place are exceptional circumstances “par excellence.”118 According to the Court, in this kind of situations, the gravity and risk of what victims are exposed to lead to major international human rights instruments allowing some guarantees to the accused.

Following some national decisions, the ICTY formulated some guidelines or conditions to grant anonymity to the witness:

1) “There must be real fear for the safety of the witness or her or his family.”
2) “The testimony of the particular witness must be important to the Prosecutor’s case.”
   “The evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it.”
3) “The Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy.”
4) “The ineffectiveness or non existence of a witness protection program.”
5) “Any measure taken should be strictly necessary.”119

In addition to these five criteria, four guidelines were set out that need to be followed in order to ensure a fair trial:

a) The judges must be able to observe the demeanor of the witness, in order to assess the reliability of the testimony.
b) The judges must be aware of the identity of the witness, in order to test the reliability of the witness.
c) The defense must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable.

116 Ibid. Tadic, Para. 57.
117 Ibid. Tadic para.60.
118 Ibid para.61.
d) The identity of the witness must be released when there are no longer reasons to fear for the security of the witness.\footnote{120}

The Trial Chamber concluded that granting complete anonymity does not necessarily violate the rights of the accused, as long as the defense is given ample opportunity to question the anonymous witness, with the exception of those questions related to his or her identity.

The Court quotes what Judge Brooking observed in the Jarvie case:

“The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it . . . A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused.”\footnote{121}

The Trial Chamber ultimately granted anonymity to four witnesses, while witness L (the fifth one) had his protected measures revoked out of concerns about his truthfulness before the Court. Of the other four witnesses, two were never called to give evidence; and one witness testified in open session without any protective measure. Finally, only one witness was heard in closed session with his or her identity concealed from the defense and from the accused.

\section*{3.3 ANONYMITY AT THE INTERNATIONAL CRIMINAL COURT}

As was seen, the International Tribunals have been challenged with witnesses’ safety. The International Criminal Court is not the exception. Currently the ICC has to deal with the victim’s security. The security situation in Kenya is an example. Security issues are important also in the Court’s regulation as was shown above.

On 22 September 2006, in the case of The Prosecutor v. Thomas Lubanga Dyilo,\footnote{122} the trial chamber decided about a request motion of the victim’s representatives requesting complete anonymity. Complete anonymity means that “the names and all other information identifying victims not be disclosed to the defense and to the public, and that they be deleted from the record of the Chamber, and that the victims be assigned a pseudonym for the entire proceedings, particularly at the confirmation hearing.”\footnote{123} The Trial Chamber based its decision on the fact that the confirmation hearing “is an essential stage of the proceeding”\footnote{124} and that its objective is determined depending on whether there is enough evidence to prosecute the accused. The Chamber recognized the right of the victims to participate in the hearing and present their views and concerns according to article 68 (3) of the Rome Statute.

\footnote{120} Ibid. Para. 71.
\footnote{121} Ibid. Opinion of the Judge Brooking, ICTY para. 72.
\footnote{122} Case of the Prosecutor v. Thomas Lubanga Dyilo. Pre Trial Chamber I. ICC-01/04-01/06, 22 september 2006.
\footnote{123} Ibid. Page 3.
\footnote{124} Ibid page 5.
To decide the request, the Chamber gave special attention to the security situation in certain regions of the Democratic Republic of Congo. The Chamber concluded that the ongoing conflict and the high risk for the victims, necessarily have repercussions on the range of protective measures. For all the reasons mentioned above, the Court decided to grant anonymity to the victims.

But, even when the Court allows the victim’s participation in the confirmation hearing, their participation may be very limited. The victims can only have access to the public documents and be present at the public hearings. The Chamber did not allow the victims to question the witnesses. The Chamber argued that it is against the principle and it prohibits anonymous accusations.\(^{125}\)

**3.3.1. Decision of 18 January 2008, on victim’s participation in the case of the Prosecutor v. Thomas Lubanga Dyilo**

In the International Criminal Court, one of the most important decisions regarding victim’s protection has been the decision of 18 January 2008 on the victim’s participation in the case of the Prosecutor v. Thomas Lubanga Dyilo.

Regarding the protective and special measures for victims, the Court recognized the necessity of protection as a victim’s right and not as mere favors.\(^{126}\) It is to be mentioned that the Court recognized or distinguished different categories of victims. Children, elder victims and victims of sexual and gender violence have special “needs to be taken into account.”\(^{127}\)

“….The Trial Chamber rejects the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognizes that it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure safety.”\(^{128}\)

However, the Trial Chamber stipulated that these protective measures should be adopted with extreme care, especially regarding the right of the accused.\(^{129}\)

In summary, it is important to mention that the Court recognized different elements to take into account while deciding whether to grant anonymity:

- First, the categories of victims and their vulnerability

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\(^{125}\) Ibid. page 7.
\(^{127}\) Prosecutor v. Thomas Lubanga. Decision on victim’s participation, Trial Chamber I, 18 January 2008. Para. 127
\(^{128}\) Ibid. Para. 130.
\(^{129}\) Ibid. Para 131.
- The ongoing conflict existing in the area
- The granting of protection for victims and witnesses is a duty of the Court. At the same time, protection is a right for victims and not merely a favor for them
- Following the reasoning of the ECHR, there is the need to balance the right of the accused with the necessity of the victim's protection.

In certain circumstances the anonymity could be accepted as a necessary tool of protection.

3.3.2. Katanga and Chui case

After 18 January 2008, more requests for anonymity have been presented. In the case of the Prosecutor v. German Katanga and Mathieu Ngudjolo Chui, the Pre Trial Chamber I, in its decision of 23 June 2008, decided about the request for anonymity for certain victims. The Chamber took into consideration the security situation in Ituri District and its surrounding areas and in Kinshasa. Also, the Chamber affirmed that the security situation had had repercussions on the range of protective measures. For those reasons, the Chamber decided to grant anonymity to the victims, but limited their participation in the confirmation hearings as in its decision in the Lubanga case.

To conclude, the ICC seems to be willing to grant anonymity for victims. In this context it may be noted that the Court recognized the ongoing conflict and the high risk for victims in the conflict zones as an especial circumstance to be considered. The Chamber concluded that the security risk obviously has repercussions on the protective measures for victims. For those reasons, and considering the exceptional circumstances, the Chamber decided to grant anonymity for victims. However, even when the Chamber recognized the necessity of special measures, it has limited the victim's participation. The Court has argued that the fundamental principle prohibiting anonymous accusations would be violated if, for example, victims are allowed to examine the witnesses.

It seems that the Tribunal position is to allow anonymity but with restrictions giving importance to the rights of the accused. Thus, the question that arises now is how the Court will decide about the victim's participation during the trial.

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130 Case of the Prosecutor v. German Katanga and Mathieu Ngudjolo Chui. ICC 01/04-01/07, 23 June 2008. Decision on Victim's request for anonymity at the Pre Trial of the case.
CHAPTER IV

The rights of the accused and anonymity

4.1. The accused perspective

Until now, the perspective of the victims was being analyzed. On the basis of the findings given above it may be argued that the victim’s protection is important and that to guarantee safety to victims is crucial for the interest of justice. But, what happens to the right of the accused and anonymity as a protective measure?

In this section anonymity will be analyzed from the perspective of the accused. First, the right of the accused in general will be analyzed, then the right to a fair trial, and finally, the right to examine witnesses.

As was seen, the rights of the accused have evolved at the international arena. The first modern international Criminal Tribunals were Nuremberg and Tokio. Both International Military Tribunals were created as a response to the horrors committed during the war. They had a political origin, because they were established by the Allies after war to judge the crimes committed. The Nuremberg Tribunal was hardly criticized for the lack of impartiality.¹³¹

In the trial were present irregularities in the evidence and mainly violation of the principle of *nullum crimen sine lege*, such as Cryer, Friman, and Robinson & Wilmshurst expressed::

“In relation to the critiques of the law, it is true that the law on crimes against humanity and peace was defined by the Allies in London, with the actions of the Nazis in mind, and at least

in relation to crimes against peace the charter was, in essence, ex post facto legislation. It might be doubted, however, if the Nazis truly thought that their actions were not criminal according to principles of law recognized by the community of nations, especially after the Moscow declaration of 1943.”

Later on, in the ad hoc tribunals for Rwanda and the former Yugoslavia, the rights of the accused started to receive recognition. As argued above, the concept of fair trial is recognized in international instrument such as the ICCPR and the European Convention of Human Rights. The Statutes and Rules of Procedure of the ICTY and ICTR followed the international regulation, giving importance to the rights of the accused. The concept of fair trial became the most important concept and the catalogue of rights and minimum guarantees for the accused were respected.

The right to be equal before the courts, the right to a fair and public hearing, and the right to presume innocence until proved guilty according to law, are some of the most important rights for the accused.

The ICCPR and the ECHR both establish a catalogue of minimum guarantees for the accused. Among these rights there is the right “to examine or have examined witnesses against him and to obtain attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

Thus, I wonder why these international instruments distinguish two kinds or types of rights. On the one hand, general rights such as the right to a fair and public hearing, and on the other hand, the right to examine witnesses.

When confidentiality was analyzed as a protective measure, it was seen that this measure could affect the right to a fair and public hearing. However, the same international instruments as well as the Statute for Rwanda and the former Yugoslavia recognize the necessity of the victim’s protection as an exception. Thus, those legal bodies establish a general rule, but at the same time some exceptions. The national and international courts have decided that confidentiality does not violate the rights of the accused. However, confidentiality measures need not affect one of the minimum guarantees, which is the right to examine or have examined the witnesses. This right seems to be protective in other levels.

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132 Ibid. at p 95.
133 See article 14 (1) and (2) International Covenant on Civil and Political Rights.
134 See articles 6 (3)(d) ECHR and article 14 (3)(e) ICCPR.
4.1. The right to examine witnesses

One of the minimum guarantees accorded to the accused under the Statutes and international covenants is the right: “to examine, or have examined the witnesses, against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”\(^{135}\)

Transparency is one of the most important principles to obtain justice. The oral presentation gives the opportunity “for the other party to challenge that evidence and allows the trier of fact to better assess the credibility of the evidence presented.”\(^{136}\) The oral principle, the testimony of the witnesses at court, the possibility to confront witnesses and the examination in general, all are concepts which help create the Court’s conviction. The judges are impartial and it is the responsibility of the parties to create in the Tribunal the conviction that the accused is guilty or innocent.

The cross examination is an essential tool to discover the truth; as Ruth Costigan argued, “cross-examination is the greatest legal engine ever invented for the discovery of the truth.”\(^{137}\) When the credibility of a witness is an important issue, it is essential to know who the witness is, where he or she lives, and why he or she knows all the facts. When the defense does not know the identity of the witnesses, it is deprived of crucial access to essential information. This information could be useful to demonstrate to the Court whether the witness is reliable or not. As the Defense Counsel for the ICTY, Eugene O’Sullivan argued: “Cross-examination is the ultimate means of demonstrating truth and of testing veracity and credibility, for the cross-examination with the most honest witness also can provide the means to explore the frailties of the testimony.”\(^{138}\)

A trial has three parties, the prosecutor has to prove with relevant evidence the liability of the accused. On the other hand, the defense, which has to prove the innocence of the accused, sometimes has to play a role as a filter for the prosecutor’s evidence. And finally, the Court is an impartial party who has to decide, according to the evidence presented before them.


\(^{138}\) O’Sullivan, E., “The erosion of the right to confrontation under the cloak of fairness at the ICTY.” Op. cit. at note 24 at p.3.
The hidden witnesses break the balance between the parties. The role of the defense is limited and they cannot play the filter role. This role is necessary to create the correct conviction to the Court. The presence of anonymous witnesses “encourages the development of value judgments about the witnesses’ credibility which are based on the granting of anonymity rather than on the evidence itself.”

Following Costigan, it is possible to mention that anonymity creates “super-witnesses” “whose credibility should neither be tested nor doubted.” Even it is possible to argue that anonymous witnesses put on risk the principle of innocence. Anonymous witnesses can create the idea in the Court that the accused is dangerous and guilty; hence it is necessary to protect the witness and “believe” in her or his testimony, without challenging his/her credibility.

The Tadic case is one of the best examples to argue that anonymity can attempt against fairness. The ICTY conceded full anonymity to certain witnesses, as was seen above. However, the same case demonstrates the danger of allowing complete anonymity and deprive the defense of the minimum information to investigate credibility. The ICTY on decision of 5 December 1996, decided to withdraw the protective measure of anonymity for witness L. The reason was that the witness appeared to be an unreliable witness.

“…witness L confirmed to Mr. Reid (prosecution’s investigator) that Janko Opacic is his father and Pero Opacic his brother. Mr. Reid testified that witness L had admitted to him that he had lied about the death of his father while under oath. Witness L asserted that he had done this at the behest of the Bosnian government authorities who had allegedly “trained” him to give evidence against the accused, Dusko Tadic.”

It could be argued in favor of anonymity that in the case of L witness, even the defense did not have access to the identity of the witness, and it was able to discover that he was lying. However, it should be considered that the right to examine witnesses is an essential right of the accused, thus, it is not possible to add extra obstacles to this right. To limit this right, even when the defense could investigate, means a limitation to a fair trial and a violation of the principle of equality of arms.

140 Ibid page 333.
141 Prosecutor v. Dusko Tadic. Decision on prosecution motion to withdraw protective measures for witness L. 5 December 1996. Para.4
Indeed, in interview Caroline Buisman\textsuperscript{143} answered the question, why is it so important for the defense to know the identity of the witnesses. She replied that it is essential to know who the witness is, where she or he lives, and to know her/his background. The cross examination, cannot be limited to the direct facts, it is necessary to locate the witness in the place and date and to know the circumstances which made him or her to be in the crime scene. Without this information it is not possible to establish whether the witness is reliable or not.

Moreover, “the right to have adequate time and facilities for the preparation of his defense…”\textsuperscript{144} is recognized as another minimum guarantee for the accused. Anonymous witnesses not only deprive the defense of the right to examine them; but also affect the right to have adequate time to prepare his defense. In this case, this right is totally violated, because the defense cannot prepare his defense.

\textsuperscript{143} Interview with Caroline Buisman. 4 May 2009. In the ICC. Caroline Buisman is a member of the Defence Counsel for Germain Katanga, current trial before the International Criminal Court.

\textsuperscript{144} Article 14 (3)(b) ICCPR. Article 67 (1) (b) of the Rome Statute. Article 6(3)(b) of the ECHR.
CHAPTER V

BALANCING THE RIGHT OF THE ACCUSED AND THE RIGHT OF VICTIMS

5.1. Balancing

Having considered the victim’s rights, the question that arises now is, whether the victims have or should have equal rights with the accused?¹⁴⁵

Without doubt it is a complex question. Justice is symbolized with a balance, which means equilibrium. Balance, according to the Oxford Dictionary, means: “a condition in which different elements are in the correct proportion.”¹⁴⁶ Following this concept, we should understand that the victim’s rights and the rights of the accused should not be necessarily similar. To have justice, both rights should be in the “correct proportion.”

Regarding with confidentiality measures, the general rule of public hearings is not just a guarantee for the accused; it is an important element for the public scrutiny and to bring justice and reconciliation. However, as has been seen above, this principle has some

¹⁴⁵ NHU B. Vu. “The necessity of maintaining protective measures in balancing the rights of victims and the accused.” Pp. 32
¹⁴⁶ Oxford Dictionary.
exceptions, which are recognized in the courts, statutes and international legal bodies. In general, confidentiality measures are not seen as a violation of the rights of the accused.\textsuperscript{147}

However, complete anonymity affects not only the right to a fair and public hearing, but also, one of the minimum guarantees of the accused, the right to examine witnesses. To resolve this problem, it is necessary to use a balance. On one side are the rights of the accused, especially the right to a fair and public hearing and the right to examine or have examined the witnesses. On the other side, the rights of the victims, the right to protection.\textsuperscript{148}

Regarding whether anonymity should be accepted as a protective measure or not, we find that the doctrine is not uniform. As Gavin Ruxton mentions, “the use of anonymous testimonies highlights the tension between the rights of the accused to a fair trial and the protection of victims and witnesses.”\textsuperscript{149}

\textbf{5.2. Two rights in conflict}

With anonymity as a protective measure two rights are in conflict; the right of the victims to protection and the right of the accused to examine witnesses. Are both rights equal? If we put both rights in the balance, is the balance in equilibrium?

The International Tribunals as well as the ECtHR have considered different elements to determine when the balance is broken. One of the most important elements is the process of counterbalancing. The counterbalance means the necessity to compensate in a satisfactory way “the handicaps under which the defense labours.” Only after that analysis, is it possible to conclude whether the whole procedure was fair or unfair.\textsuperscript{150}

As has been already pointed out, some courts such as those in the Netherlands, the ECtHR, the ICTY and ICC, have accepted the existence of anonymous witnesses. All the courts were unanimous in considering counterbalancing as an essential element to allow anonymity. Although, the tribunals have recognized that anonymity is a violation or limitation of the rights of the accused, it is possible to allow anonymity, only when the whole procedure is fair, which is possible only if several elements are respected.

\textsuperscript{147} Nhu B. Vu. “The necessity of maintaining protective measures in balancing the rights of victims and the accused.” Op. Cit. at note 124 at p.34.
\textsuperscript{149} Ruxton, G. “The treatment of victims and witnesses and the International Criminal Tribunal for the former Yugoslavia (ICTY).” Part IV (2)
\textsuperscript{150} See Doorson v. The Netherlands. ECtHR. para. 75 and 76.
To resolve whether anonymity should be allowed or not, first we have to consider that law is not an exact science. In law there are general rules, but always there are some exceptions. It is not possible to have only one formula and give the same interpretation to every case. For that reason, justice needs to adapt and the courts should interpret the legal bodies according to the specific case. Every rule has exceptions, and without doubt anonymity as well.

In fact the right to examine witnesses and the right to know the identities of the victims are essential components for the defense strategies. As was seen above, if the defense does not know the identity of witnesses, it cannot investigate. If they do not know the identities, they cannot have the tools for an adequate cross examination. As was said, the defense also has a filter role, and even if they have the possibility of cross examining a witness about the main facts, if it does not have the elements to investigate the witness’ credibility, one part of the balance is affected. As Elise Groulx (president of the International Criminal Defense Attorneys Association) argues: “defense lawyers do more than represent the individual accused person. They also test the system, in particular, the ability of the system to threaten the accused fairly and give him a full hearing. In a phrase, defense counsel acts as fair trial watchdogs, acting both for their clients and for the system.”

On the other hand, protective measures are essential to give safety to the victims. Without protective measures, the prosecutor could be deprived of some important witnesses. Protective measures are necessary to bring justice and an adequate and balanced procedure as well.

In my opinion, the counterbalancing and the analysis whether anonymity could be allowed or not is a complex question, and definitely it is not possible to give a rule applicable to all the cases.

Having this statement in mind as a premise, two elements are to be pointed out:

1.- It is not discussed that anonymity means a violation, or at least a limitation to the rights of the accused, specifically the right to examine witnesses.

2.- It is not discussed that protection is essential to bring victims to the court, especially in countries with complex conflicts and lack of security for victims.

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Both elements are essential to obtain justice and discover the truth. As was said, without witnesses it is not possible to have a trial. And without the filter role of the defense, justice is affected.

According to this analysis, both the right to examine and the right to protection seem to be in the same position in the balance. Both are essential for justice. How can this problem be resolved? One question we have to answer and which, in my opinion, is the key, does exist. Is there another option that does not involve a violation of any of these rights?

a) If the defense is deprived of the witness'es identity, they do not have other options to replace this lack of information. If the information is not given, the defense does not have any chance to investigate the witness, and prepare an adequate examination or cross examination. If the defense does not play the filter role, justice could be affected. One example to clarify this point was the Tadic case and witness L. On 5 December 1996, the Trial Chamber of ICTY decided to withdraw protective measures for witness L, based on the confirmed fact that the witness was lying. The defense put forward to the prosecution, some evidence revealing that witness L could be unreliable. According to this evidence, the prosecution investigated witness L, who confirmed that Janko Opacic was his father and Pero Opacic his brother. A prosecutor investigator testified that witness L had admitted to him that “he lied about the death of his father while under oath. Witness L asserted that he had done this at the behest of the Bosnian government authorities who had allegedly trained him to give evidence against the accused.”

This situation reflects the high risk that anonymous witnesses imply.

It may be argued that even with anonymity, it is possible to determine if a witness is reliable or not. In this case, the defense gave some value evidence to the prosecution, in order to argue that witness L was lying, thus even without the information the defense was able to investigate. However, it should be considered an extra obstacle for the defense. This obstacle affects not only the right to examine witness, but also the right to a fair trial and the equality of arms. As a consequence, two essential rights could be violated or could be in risk if anonymity is allowed.

b) If anonymity is not granted to the witnesses, it is necessary to analyze if there exists another protective measure powerful enough to give security. Witnesses and victims are from countries with ongoing conflicts, thus in most of the cases protection is essential not only for victims, but also for the procedure and the interest of the society. Without witnesses

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it is not possible to obtain justice. There might be situations “where the identities of witnesses are often well known in their small villages and the absence of a few days by a witness who has never left his/her village would arouse suspicion. Moreover, the experience of the International Criminal Tribunal for Rwanda, shows that even when witness protection measures have been provided, the identities of witnesses were well known in their communities.”\textsuperscript{153} It seems that anonymity is not always a good solution. This characteristic could be present in small villages and communities such as the African cases. But, what could happen in other realities? In the hypothetical case, the ICC put its eyes on Colombia and the “guerrillas.” Clearly, we are not talking about a small community; perhaps, anonymity could be a good protective measure in this case, where transnational organized crime is involved.

We come back to the starting point again: it is not possible to have a general rule applicable to all the cases: necessity of protection versus the right of the defense to know the identity of witnesses. Does the defense have another option if it deprives of the witnesses’ identities? The answer is no. Do the witnesses have another option of protection? The answer is not a total no.

Applying the reasoning that law is not an exact science and that all general rules can have exceptions I would say that as a general rule it is not possible to allow anonymity as a protective measure. First, because it implies a violation of the essential rights of the accused; even a violation of minimum guarantees such as the right to examine witnesses. Secondly, it affects the right to a fair trial and the equality of arms between parties. Thirdly, it deprives the defense of the right to play a filter role which is essential to obtain justice. Fourthly, it is not possible to counterbalance the rights of the accused.

However, given the extremely complex cases that the Court is facing, where the security of the victims is one of the most important issues, it is not possible to establish as a universal rule the prohibition of anonymity.

However, it should be decided if anonymity is possible or not, according to the reality of each case. To resolve this problem, the rules or steps that the ICTY established play an important role. But before we apply these rules important actions should be taken, and only when these measures would not be enough to guarantee the witness’ safety, can we apply the rules of the ICTY.

First, it would be useful to analyze the possibility of establishing a National Program of Measures, where the Court could play a role in the creation of new policies of local protective measures. With these programs, the Court could assist the national governments to create effective protective programs according to the reality and necessity of each region. A national program could have a better knowledge of the necessities according to the reality of the country, and that could be more effective than the measures taken for the international tribunals.\textsuperscript{154} At the international level, it is not possible to establish general and standard protective measures for all the cases; it is necessary to consider the reality and necessities of the communities that have been affected by the crimes.

Secondly, apply the ICTY rules only when it has been proven that there are no protective measures powerful enough to protect the witnesses. That means including relocation as an ultima ratio measure to protect witnesses.

Regarding relocation, it is undoubtedly a polemic measure, because of the “enormous impact on a witness’es psychological wellbeing,”\textsuperscript{155} but also because of the resources implications for both the Tribunal and the receiving country.\textsuperscript{156} Another existing problem in this respect is that many countries are not willing to receive people from the countries in conflict.\textsuperscript{157} Despite all these difficulties, in my opinion, relocation should be considered and analyzed if it is possible as an effective measure to protect witnesses, before considering anonymity.

Only when those steps have been taken, will it be possible to consider anonymity as a protective measure and then continue applying the rules of the ICTY. However, I would give them different priorities:

1. The existence of a real and extremely grave fear for the safety of the witness or his/her family.
2. It is proved that no other protective measures including relocation, could be useful to protect the witness’es safety. Should be an ultima ratio measure.
3. The testimony should be essential for the prosecution.
4. The trial chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy.
5. Any measure taken should be strictly necessary.

\textsuperscript{155} Ibid. p. 35.
It is crucial to consider the order of importance. The first consideration should be a real and “extremely grave” fear for the safety of the witness or his/her family. After that all protective measures, even after the creation of National Protective Programs, are not enough to guarantee safety. The third point is extremely important as well. The Court must have the conviction that the witness is reliable. As an important tool to determine whether the witness is reliable or not, the Court should consider using a third party, independent and objective, to help in the reliability evaluation. The third party should have faculties to investigate the witness’ identity, his/her background, and must have prima facie evidence that the witness could have relevant information and his/her testimony is reliable.

It may be safely concluded that anonymity as a general rule should not be granted to the courts. Anonymity means a violation of important rights of the accused, especially the right to examine witnesses and the right to have full access to the information. Anonymity affects the correct balance between the right of the accused and the right of the victims. However, it should be recognized that the victims have rights as well, and also that they have the right to have a fair trial, which means that the right to protection is recognized and should be respected not only for the victims, but also for the interest of justice. For that reason, from my point of view, only when all the steps mentioned above have been considered, and it has been proved that there is no effective measure to protect the witnesses, should the rules established for the ICTY be analyzed to decide whether to grant anonymity or not. Once the court decides to allow anonymous witnesses, it is important to counterbalance the right of the accused, which means the defense has to have opportunity to examine the anonymous witness with respect to the facts.

5.3. Summary of recommendations
1. Create a National Protection Program, in accordance with the reality of each country. Create national policies together with the National Protection Program, considering the culture, reality and other local factors, in order to obtain the best protective measures in the zone in conflict.
2. Consider it as a general rule that anonymity affects the balance between the rights of the accused and the rights of the victims.
3. Only when the National Program has failed, or if it is not possible to create a National Program according the reality of the country in conflict, should the rules or steps of the ICTY

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in the Tadic case be applied. However, one has to remember that this may be implemented in extremely grave cases where all the measures above mentioned are not enough to give safety.

4. Subject the witness to an evaluation to determine his/her reliability. The Court should consider using an independent party to help in the evaluation.

CONCLUSIONS

The International Criminal Law is evolving. In the last 20 years the concept of fair trial is one of the bases of the criminal system. Fair trial means a recognition of and respect to the rights of the accused, especially the minimum guarantees established in the ICCPR and ECHR. However, a fair trial is not exclusively for the accused; victims have this right as well. The rights of the victims have been recognized in the last years. It was concluded that victims have more than a simple interest in the proceeding. They have rights, which must be respected.

To analyze the protective measures and especially anonymity, we focussed on two rights; the right of the accused to examine the witnesses against him, and the right of the victims to protection.

The right to protection is essential for victims. The ICC in Lubanga case and the ICTY in the Tadic case, both concluded that given the situation of the armed conflict existing in the area, it is difficult to ensure victim’s safety. Protection is one of the keys to obtain justice. The prosecutor needs witnesses, but the witnesses need protection.

The central question was how to balance the rights of the accused and victims? Does anonymity affect the right of the accused?
The confidentiality measures, as seen above, could affect the right of the accused to have a fair and public hearing. However, it was concluded that it was an exception to the general rule, and does not mean a violation of his rights. Still his minimum guarantees are respected even if it is not granted during a public hearing.

Instead, anonymity not only affects the right to a public hearing, but also affects one minimum right, which is the right to examine witnesses. And here is the main problem, if the defense does not know the identity of the witnesses, it is not possible to prepare an adequate and fair cross examination. The equality of arms and the balance is broken. On the other hand, if anonymity is not given to the witnesses, still it is possible to ensure their security through other protective measures.

For the reasons above mentioned and from my point of view, as a general rule it is not possible to grant anonymity as a protective measure. However, the Court must decide whether anonymity is possible or not, analyzing the peculiarities of each case. It could be “ultima ratio”, what means that it is considered only when all the other measures are not available or are not enough to fulfill the security requirements, even considering the relocation of the witnesses and their families as the most prejudicial measure for the witnesses. Only when this analysis is done, should the Court apply the rules established for the ICTY in the Tadic case and decide whether the requirements are fulfill to grant anonymity as a protective measure.
ARTICLES


BOOKS


5. Groulx, E. “The defense pillar: Marking the defense a full partner in the international criminal justice system.” In Hallers, M., Joubert, Ch. And Sjöcrona, J., “The position of the defense at the International Criminal Court and the role of the Netherlands as the host State.” (The Netherlands, Criminal Sciences, Leiden, Publishing, 2002).


TABLE OF CASES


2. The Prosecutor v. Thomas Lubanga Dylo. Appeals Chamber, on the appeals of The Prosecutor and The Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008 No.: ICC-01/04-01/06 OA 9 OA 10 Date: 11 July 2008.

3. ICTY, Prosecutor v. Kunarac, IT 96-23 & 23/1, Decision on Prosecution Motion to Protect Victims and Witnesses, 29 April 1998.


7.- Case of the Prosecutor v. Thomas Lubanga Dyilo. Pre Trial Chamber I. ICC-01/04-01/06, 22 september 2006.


TABLE OF STATUTES AND LAWS

Regional Statutes


International Statutes


5.- International Covenant on Civil and Political Rights (1966) (ICCPR)

RESOLUTIONS


WEB SITES


