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"Anonymity as a protection of victims and witnesses in the International Criminal Court, in relation to the rights of the accused."

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Abbreviations

AJIL	*American Journal of International Law*
WWI	*First World War*
art.	*Article*
ECtHR	*European Court of Human Rights*
ECHR	*European Convention on Human Rights*
ICC	*International Criminal Court*
ICRC	*International Committee of the Red Cross*
ICTR	*International ad hoc Criminal Tribunal for the Rwanda*
ICTY	*International ad hoc Criminal Tribunal for the former Yugoslavia*
ILC	*International Law Commission*
par.	*paragraph*
pg.	*page*
WWII	*Second World War*

Summary

This dissertation shall attempt to initially provide a concise and comprehensible view of the concerning dynamic between the witnesses/victims and accused, in respect to the concept of the former's non-disclosure of identity and the undeniable ramifications for the latter.

Even though witnesses and victims, especially in the case of the International Criminal Court do not share comparable status and therefore the same statutory and procedural rights, there exists an inherent fissure in the pacifying of either side's claims. This innate rumbling dynamic goes further than the surface and touches upon the very notion of what is to be accused of a crime and what it is to be a person officially recognized of having the status of a victim, a witness, or both.

This calls anyone who delves into the recesses of the theoretical subtext to detect not solutions at first glance, but the first seeds of discord between these opposing forces with the mindset of balancing them. This requires first and foremost a true grasp of the origins of said non-disclosure of identity and the consideration of whether this concept's inception is a non-starter or not having in mind the already widely accepted principles of a fairly conducted trial.

Understandingly attentions turns to the International Criminal Court, which with its permanence and heavily institutionalized judicial form is in the perfect position to provide clarity on this age-old problem. The Court is called upon to regulate checks and balances within an opposing system which never stays in balance for very long and whose internal workings call for intense scrutiny and ad hoc consideration.

The Court must manage most importantly to distance itself from any prior misconceptions its own judiciary might hold concerning the relation between procedural rights of witness/victim and accused and certainly ponder on the possibility that there may need be an uprooting of decades-old preconceptions damaging all involved parties.

Aim and structure of the dissertation

This dissertation will focus on the protection of victims and witnesses through anonymity and essentially, how this protection in conciliated with the right of the accused to a fair trial. There will be an initial necessary theoretical overview of the international conventions and norms that have led to the present handling of the matter, touching upon general international framework, the more defined European legal culture, culminating in the practices of the International Criminal Court as a permanent judicial organ meant to embody the role of bastion of International Criminal Justice.

The main research question attempted to be answered here, is whether or not anonymity of victims and witnesses is an absolute violation of the rights of the accused and whether there is room to overcome any extant plateaus or intellectual crossroads.

This research is based on a most classical legal method. The methodology is duly based, but not limited to library-originated research, articles and the definitive jurisprudence of appropriate judicial bodies. Empirical research and critical input is naturally included to provide a new view and not simply constitute a bibliographical reproduction. Comparative research has been seriously included, given the multifaceted nature of the matter under examination and the multitude of sources included.

I. The Nameless Victim/Witness and the Accused: The Journey from National to International Presence in Trial

Chapter One – The Witness/Victim and the Accused: An awkward relationship in time

1.1 A brief history of victims, witnesses and the accused since their inception

Victims' rights in international criminal proceedings can be said to just recently escaped their infantile phase. Most international criminal courts and tribunals established since WWII, including the most prevalent of the international ad hoc criminal tribunals, the ICTY and ICTR, have given only rare consideration to victims' worries and have limited the space for their active participation with such institutions beyond the role of prosecution witness or their dynamic within court proceedings.[1]

However, changes within the last seventy or so years since the proceedings in Nuremberg have been implemented with stronger and more considerate provisions on victims' rights set out in the International Criminal Court statute. Hence, much of the legal literature on victims' rights, international criminal law, and proceedings tends to fall into one of two categories: 1. The scope and nature of participation of victims and witnesses during court proceedings, whether those are of pre-trial, confirmation or trial nature and 2. the inherent and inevitable dynamic that is created relating to the rights of the accused and the competence of courts (mainly here the ICC), the Prosecutor to not impinge upon the rights of the accused.

Victims in their capacity as witnesses mainly and the accused, share a connection throughout time, whether one focuses on the proceedings of 1945 or those of 2019 concerning the very nature of victims described in proceedings relating the Situation in the Islamic Republic of Afghanistan.[2]

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[1] International Bar Association Monitoring and Outreach program *Balancing Rights: The International Criminal Court at a Procedural Crossroads* (May 2008) para 11, p 12.

[2] Decision on the Prosecutor and Victims' Requests for Leave to Appeal the *'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,* 2019 ICC

Initially, in the proceedings of the IMT in 1945, testimony of victims/survivors and was quite sparse[3] considering the heinousness of the acts perpetrated against them and the undoubted amount of information they could supply to bolster the claims of American and British Prosecutors. This limited participation could hypothesized to have been selected for various reason, the most convincing being:

a. The defendants included almost exclusively top-tier participants in the atrocities and that made it most improbable for victims to be able to provide any concrete, credible or even useful information to aid their conviction.
b. The nature of the crimes and their publicity combined with the fact that the prosecuting parties were parties in the preceding war, provided an abundance in evidence to secure a conviction acceptable by the loose binding principles set in the IMT Charter.
c. A perception that the experiences of the survivors caused such a degree of psychological trauma that very little of what information could be provided would be considered useful, unbiased and factual evidence.

This stance on victim and witness participation has been effectively turned on its head for obvious reasons if one is to consider the crimes within the jurisdiction of ad hoc tribunals and ICC specifically, that constitute the most heinous and grievous crimes that can be perpetrated.[4] It is quite easy to see why victims and witnesses can not simply be turned away due to trauma, when their very presence is to prove that their trauma is very much real and valid and are so called to testify, in many instances invading the sphere of protection around the accused and testifying anonymously.

On the other hand, the accused has in many cases, but less so as times progress, been dealt a more unfair hand in their dealing with by various courts. For example, one can only go back to proceedings of 1945 and notice obvious instances of victors' justice in

[3] R.S.. Clark & M. Sann, *Coping with Ultimate Evil Through the Criminal Law*, 7 Crim L. Forum 1996
[4] Statute of the ICC, Art 1 "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons **for the most serious crimes of international concern,** as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."

trial, while in ICC proceedings the nature of the very Court is praise to due process and careful evaluation of evidence.

Even though Prosecutors in ad hoc tribunals and the ICC serve the truth in essence, in all sincerity the Defense never truly simply stands idly by (and neither should they) awaiting the delivery of possibly exonerating evidence, but vigorously conducts research[5] to support their claims, especially if one considers the cries of the public and victims for convictions, which is usually the case in these proceedings, when the alleged perpetrated acts are of widely acknowledged severity. Even though the presumption of justice is a cornerstone of criminal justice on national and international levels, no one truly expects a self-respecting Defense to leave the delivery of justice and quest for the truth to the other party. More importantly, when a person is charged of aforementioned heinous crimes, even before conviction and at pre-trial stages, few outside of the immediate proceedings actually await conviction, but rather may fall into the category of a mob reaction to the allegations and call for said conviction.

These analyses seem to focus on the effects this core dynamic between victim-witness and accused may influence international criminal jurisprudence and how legal norms such as the right to a fair trial and the right to a public hearing are invariably changed. Now that there have been several years of court proceedings before the International Criminal Court, academic circles have begun to evaluate the impact of these new procedures.

1.2 Anonymity as a concept of protection in the face of danger of testifying

While protective measures for victims and witnesses constitute and ever evolving area of procedural justice, no measure has succeeded in attracting more attention than anonymity or more simply put, the withholding of the identity of witnesses, whether they be of fact-based or insider nature

The reason for this is the effect the anonymity of said witnesses can possibly can have on the validity of due process, the gravity during confirmation procedures and even the

[5] Statute of the ICC, Art 53.1" The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute"

ability of the Defense to construct a viable strategy during Trial stages, when the examining of witnesses[6] can prove to be exceedingly crucial.

Witnesses may be tampered with, influenced, blackmailed or worse if their identity is not concealed and the utmost care isn't taken in providing adequately protective measures. One can't help to feel for these individuals, especially if their the victims of sexual or gender-based violence and in danger of having analogous treatment inflicted upon them whether the accused is convicted or acquitted, considering their possible, political and military reach.

On the other hand, principle, legal norms and outright provisions in the statutes of the ad hoc tribunals and the ICC mention the rights of the accused to a fair trial and a public hearing.[7] Anonymity is a clear infringement upon those rights at first glance and removes basic tactics from defendants from proving possible errors in otherwise factual testimony or their very validity. However, it is quite rare that anonymity provided to witnesses is of an absolute nature, meaning that the court involved tends to take it upon itself to safeguard due process by providing other means of examining witnesses, such as closed and private hearings, testimony through audiovisual means with distortion and redaction of information in testimony and other documents.[8]

It is undoubted that those accused of offenses under the jurisdiction of the various ad hoc tribunals and the ICC, must receive a fair trial in accordance with the human rights standards laid down in international instruments, including the ECHR (Article 6) and the ICCPR (Article 14). These standards permeate the Statutes and Rules of Evidence and Procedure of aforementioned courts. Their validity and credibility hinges upon the fulfillment of these guarantees, as does their value in setting precedents for future cases or other judicial organs of similar nature.

[6] Statute of the ICC, Art 67.1(e) "To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;"

[7] See Statutes of ICC, ICTY and ICTR, relevant Articles, 67.1, 21.2 and 20.2 respectively

[8] Prosecutor v. Dusko Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 1995

However it is obvious that from their inception these standards are not meant to be absolute,[9] since while a primary aspect of a fair trial, namely the admissibility of evidence is something of a qualitative standard judges much individually weigh, the very core texts of international criminal judicial bodies provide positive protections for victims and witnesses, therefore not so much setting limits to the degree a trial is fair concerning the accused, but rather what is considered acceptable procedural conduct, while respecting due process. These judicial organs however can not be institutionally blind and require functioning within the framework that defines their very inception. This example can be noted in the nature of the Prosecutor of the ICTY, ICTR and ICC.

The Prosecutor is a party in the proceedings before these courts, yet this doesn't mean that they belligerently push for a conviction no matter the gravitas of provided evidence. The Prosecutor serves the "interests of justice"[10] as a purveyor of truth in proceedings and while complete neutrality logically is impossible, this does not preclude them from conducting themselves and relevant procedures with fairness in, for example, providing any and all information, whether or not it aids the Defense. They are called to even weigh and balance conflicting interests between victims, witnesses and the accused, when they deem it necessary to apply for the non-disclosure of their identities. Therefore, it safe to posit that role is naturally not neutral, but simultaneously of course not partisan.

1.3 The accused: A victim of their own circumstance?

The protection of the accused remains unquestionably in the interest of all modern systems of law. All legal systems provide some form of standard for the rights of the accused. These provide that if criminal proceedings are initiated, no ill treatment will befall the alleged perpetrator and their right to a fair trial will be assured. These standards, developed in the human rights law, have been implemented on both the national and international level.

[9] This point seems inceptually extant since, both rights of the accused and rights for protection are provided for in the Statute and Rules of the ICC.
[10] Supra note 5

While examining the notion of the accused, we initially find multiple definitions, that mostly apply and label a person depending on the progress of procedure. For example, civil and common law systems differentiate between accused and a suspect. In the continental legal system, a person is considered a suspect when charges are filed and only with the acceptance of the prosecutor's indictment by a court does the suspect become the accused.[11] In the common law system, the notification of charges seems to be an adequate enough factor for the labeling of the accused.

The Statutes of the ICTY and ICTR discern between the notion of suspect (Article 18 of the ICTY Statute and Article 17 of the ICTR Statute) and the notion of accused (Article 21 of the ICTY Statute and Article 20 of the ICTR Statute). It seems though that the theoretical shift transpires in Rule 47 (H) (ii) of the ICTY Rules of Procedure and Evidence. The Rule provides that "upon confirmation of any or all count in the indictment (…) the suspect shall have the status of an accused".

The Rome Statute seems to forgo the notion of suspect altogether. However it doesn't seem to define the term and allows for the presumption that within its own framework the common law approach to the accused has been adopted since, even during the pre-trial stages of the confirmation of charges, a person may become the accused. The ICC Rules of Procedure and Evidence supports this assumption providing in Rule 76 (3) that "the accused may take an active part in the pre-trial disclosure of evidence." Interestingly enough, neither the Rome Statute nor ICCPR refer to the term 'suspect' in the text of the treaty.

After understanding the central notion of the accused, one can take even a short glance at the relevant articles of the Rome Statute and understand that the intention of the ICC is to treat both accused and Prosecutor as equal Parties during proceedings, even while the Prosecutor is at the helm as the proverbial "driving force". Here is where things might seem to hurt the morals of extra judicial observers and that is that victims and witnesses are not Party to proceedings (can be participants)[12], yet the accused is.

[11] A. S. Goldstein, *'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, pg. 1009, Stanford Law Review, 1974

[12] Statute of the ICC, Art 68.3 "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights

Logically that would mean the court could not possibly afford victims and witnesses the same rights and protections as the accused whose personal freedom is in jeopardy no matter the alleged crimes they face, for that outcome is to be determined through due process.

It is safe to posit, that in the hierarchy of provisions if such a metaphorical construct could exist, victims and witnesses for whose sake the very proceedings essentially take place, rank a lower than the accused. It seems however that the accused historically and even now tends to be themselves a victim of the stigma the alleged crimes they are faced with inflict and so theory and practice seems more than willing to provide protections to witnesses to the point of anonymity, jeopardizing the foundations of the Defence's strategies, even while all possible measures and supposedly in place.

It is important to consider, when focusing on crimes in the jurisdiction of the ICTY, ICTR, IRMCT and ICC, however, that they constitute the most heinous and grievous acts and considering a pragmatic and not a legal approach it is not too far from reality to assume that just because an accused was acquitted of crimes as defined in the respective Statutes, chances are their involvement in perpetration of analogous yet of lesser degree and possibly dissimilar nature acts is highly probable. One could resign themselves to posit that the accused is therefore a victim of circumstance, having their otherwise unperturbed life's foreseeable continuity upended upon the decree that is highly possible their committed any alleged acts described in aforementioned Statutes.

1.4 Granting anonymity: Exceeding judicial purview?

Essentially, what critics of general non-disclosure of the identity of victims and witnesses predicate their opposition on is that, the granting of anonymity in and of itself does not violate judicial purview per se, but rather, is in violation of the original standards that produced all following jurisprudence.

Strictly speaking and considering the ICC's judges power in accordance to relevant articles and rules, granting anonymity to specific witnesses and victims is definitively

of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

within their purview as granted[13], within the theoretical confines and limits aforementioned rules state. It is inherently erroneous to support that the Judges of the ICC have not the power to grant requests by the Prosecutor to grant anonymity of witnesses, when the very core legal texts of the judicial body provide them with said power.

Yet the opposition receives merit upon considering the very legality of the granting of such powers in the first place. One could posit not that the granting of anonymity violates the provisions of Article 68 of the Rome Stature, but rather that Article 68 which essentially empowers Rules of Procedure and evidence 87 and 88 of the Court and said Rules as extant, violate Article 67 protecting the rights of the accused. Therefore, such a claim would naturally be interpreted and analyzed by the competent Chambers at whichever stage of trial, but more so raises the issue of the suitability and lawfulness of such measures as included in the core legal texts of the ICC.

This would call for the action of the Assembly of States Parties to Rome Statute to determine, while considering not only international legal standards and jurisprudence, but the very legal framework within which the Court functions, it's founding goal's for the service of justice's feasibility and compatibility with widely accepted norms and standards. However, due to it's permanence, opposed due to prior temporary ad hoc criminal judicial bodies, the ICC's jurisprudence, may prove if willing, to be a turning point in the interpretation of the balancing act between the rights of victims and witnesses and those of the accused.

Conclusively, as it stands, it would be canonically erroneous to claim that the granting of the protective measure of anonymity to victims and witnesses exceeds judicial purview, when it institutionally doesn't, but rather it seems epistemologically more sound, if one willed it, to question the very legality and validity of granting such purview in the first place.

[13] Rules of Procedure and Evidence of the ICC, see relevant Rules 86, 87, 88 pertaining to protective measures for witnesses.

Chapter Two – The Legal Framework of Anonymity of Victims and Witnesses and the Rights of the Accused

2.1 European Legal Tradition concerning victims, witnesses and the accused

The ECtHR has along the years has been examining the question of the balancing between the rights of the accused to a fair trial, specifically their right to examine witnesses, and the protection of said witnesses within the framework of the ECHR. Specifically, Article 6(3) ECHR provides that:

"Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him[…]"[14]

The ECtHR acknowledges inconsistently one could argue the gravity of nature of the right an under the above provision, as clearly seen in PS v. Germany, where the Court stated:

"23.[…] only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

24. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."[15]

One immediately notices that in the view of the Court the "minimum right" provided in Article 6. 3(d) is not an absolute one, since it allows for counterbalances for any difficulties caused to defence. Simultaneously, it inserts a certain criterium to be

[14] Art. 6.3(d) European Convention of Human Rights
[15] PS V. Germany, ECtHR, Judgment par. 23 and 24, 2001

followed, when ascertaining, whether or not the right of the accused to a fair trial has been violated has been violated, this namely being the matter of predicating a conviction "solely and decisively" upon depositions made by persons the accused has not had the opportunity to examine.

As it stands this criterium has permeated the Court's jurisprudence in following cases providing at first glance a consistent approach towards the matter of the violation of the rights of the accused. This however is not necessarily the case, since this use of language, especially with the word "decisively" provides the Court with an ample amount of discretion to scrutinize the facts, possibly leading to an inconsistent delivery of justice.

2.1.1 Protection of victims and witnesses as a rule or an exception and impinging upon the right to a fair trial of the accused

The matter of disclosure of the identity of witnesses in criminal proceedings has certainly been at the forefront of the need for the Court to provide clarity as to nuances governing what constitutes a violation of Article 6.1 and 6. 3(d). It has most assuredly continued to apply the criterium of "sole and decisive" predication with various results. In Schatschaschwili v. Germany the court held that:

"107. According to the principles developed in Al-Khawaja and Tahery, it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence […] The Court must examine

(i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence […]

(ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction […] and

(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a

result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair […]"[16]

The ECtHR has held strong to these criteria of examination and has seemed to have completely adopted them in its jurisprudence. It hasn't particularly occupied itself with the matter of the considering of the admission of evidence provided by absent or anonymous witnesses as a violation of Article 6, but rather applies the above principles, when deciding upon whether a conviction itself proves to violate Article 6 when said evidence has played a "sole and decisive" role in attaining it.

The Court seems to hold strong to these criteria and tends to find violations of Article 6 in most cases that come before it, such as, Scholer v. Germany[17] and Balta and Demir v. Turkey[18]. So that's not to say that the Court does not allow for anonymous witnesses to testify, only that these testimonies are qualitatively and strictly examined on their role in securing a conviction.

The ECtHR's stance does not mean it omits considering the rights of witnesses. It must never be overlooked that, while respect of the right of the accused must never be understated, witnesses are people who enjoy the same protection as anyone else under the ECHR, namely in this instance the rights provided in Articles 2[19] and 8[20] (the right to life and the right to private and family life).

In *Doorson* deemed there was a need to uphold the anonymity of drug addicts giving evidence against drug dealers and thought that "drug dealers frequently resorted to threats and actual violence against persons who gave evidence against them". Significantly the court held that:

[16] Schatschaschwili v. Germany, ECtHR, Judgment par. 107, 2015
[17] Scholer v. Germany, ECtHR, Judgment par. 51, 2010 "Accordingly, in line with the criteria clarified by the Court in the cases of Al-Khawaja and Tahery (cited above) in respect of absent witnesses, in assessing the fairness of a trial involving anonymous witnesses, the Court must examine, first, whether there are good reasons to keep secret the identity of the witness. Second, the Court must consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction. Third, where a conviction is based solely or decisively on the evidence of an anonymous witness, the Court must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place
[18] Balta and Demir v. Turkey, ECtHR, Judgment, 2012
[19] Art. 2 ECHR "Everyone's right to life shall be protected by law. No one shall be deprived of his life[…]
[20] Art. 8 ECHR "Everyone has the right to respect for his private and family life […]

"It is true that Article 6 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 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." [21]

2.1.2 Counterbalances in the ECtHR and ECHR's framework

The ECtHR has placed various grades of importance on many cases concerning counterbalancing measures. These are varied but include the right of the defence and/or trial judge/magistrate to question witnesses directly or by proxy of through the proper authorities.[22] However, the extent to which counterbalancing measures will prevent a violation of Article 6(3)(d) is unclear. In *Van Mechelen v Netherlands* the court observed that "*Article 6(1) taken together with Article 6(3)(d) requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities."*[23] In *Kok v Netherlands* the court observed that:

"in assessing whether the procedures involved in the questioning of the anonymous witness were sufficient to counterbalance the difficulties caused to the defence due weight must be given to the above conclusion that the anonymous testimony was not in any respect decisive for the conviction of the applicant."

In *Doorson v Netherlands* it was stated that *"even when 'counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence*

[21] Doorson v. Netherlands, ECtHR, Judgment par. 70, 1992
[22] SN v. Sweden, ECtHR, Judgment, par 39, 2004
[23] Van Mechelen v. Netherlands, ECtHR, Judgment, par. 25, 1998

labours, a conviction should not be based either solely or to a decisive extent on anonymous statements". This has remained the Strasbourg Court's stance ruling on Article 6(3)(d) of *Al-Khawaja and Tahery v United Kingdom*. Here the court observed that:

"while it is true that the Court has often examined whether the procedures followed in the domestic courts were such as to counterbalance the difficulties caused to the defence, this has been principally in cases of anonymous witnesses whose evidence has not been regarded as decisive and who have been subjected to an examination in some form or other."[24]

This all clarifies the point that, when speaking of the plethora of counterbalances put in place to alleviate in no uncertain terms the labour of the defence to bring forth a strong argument, lacking basic opportunities of examination of witnesses, these said conterbalances will not prevent conclusively a violation of Article 6. The true core matter that still remains, is the extent to which a conviction is based on the evidence of anonymous witnesses. The ECtHR may seem content with reproducing the same wording in its jurisprudence, when in fact it has shifted albeit mildly its stance in light of every individual case. Therefore it stands to point out not disrespectfully that such a automated response that does not mirror the facts can constitute in and of itself a flaw in meting out proper judgments.

Even more so is it mandatory for courts to not abide by erroneous (either by choice or a conservative interpretation) stances in the face of depositions, no matter the origin of said deposition. That is to say, even if a deposition were to originate from a co-accused, would that imply that said person, a clear party to the proceedings- is not afforded the protections of other witnesses, even those that enjoy anonymity, if their deposition may serve to a material degree as the basis for a conviction[25]. For it would clearly constitute evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply.[26]

[24] Al Khawaja and Tahery v. United Kingdom, ECtHR, 2009
[25] Guide on Article 6 of the European Convention on Human Rights (Criminal Limb-Updated on 31 December 2019)
[26] Kaste and Mathisen v. Norway, ECtHR, par. 53, 2007 and Trofimov v. Russia, ECtHR, par. 37, 2009

The Court acknowledges that the fact that incriminating statements are made by a co-accused and not a typical witness does not bar the application *mutatis mutandis* of the principles enshrined in article 6 of the ECHR, creating an interesting dynamic: The treatment of a person as a witness can originate from more than the singular method of expressly acknowledging one as such, but can also derive from the assessment of material provided from other individuals that could potentially lead to their enjoyment of protections afforded witnesses, even if they're co-accused or their statements were even self-incriminating along with co-accused individuals[27]. So it seems that Court perseveres in assessing the nature of depositions and their role as the basis of a conviction, going so far as to recognize them even if they derive from someone that is not a witness *stricto sensu*[28].

It is quite interesting to see in recent years a bit of clarification of the principles applied specifically in the instance of absent witnesses regardless of whether other protections were afforded them. Even if said principles are interpreted in various and yet not so often inconsistent manners, they lay the theoretical groundwork for the application of aforementioned principles. Specifically, clarified in Seton v. United Kingdom[29], Dimovic v. Serbia[30], T.K. v. Lithuania[31], these principles are as follows:

(i) The Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance;

(ii) When a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort;

(iii) Admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective

[27] Oddone and Pecci v. San Marino, ECtHR, par. 94-95, 2020
[28] Urek and Urek v. Turkey, ECtHR, par. 50, 2019
[29] Seton v. United Kingdom, ECtHR, par 58-59, 2016
[30] Dimovic v. Serbia, ECtHR, par. 36-40
[31] T.K. v. Lithuania, ECtHR, par. 95-96, 2018

opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of the evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings;

(iv) According to the "sole or decisive rule", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted;

(v) However, as Article 6 § 3 of the Convention should be interpreted in a holistic examination of the fairness of the proceedings, the sole or decisive rule should not be applied in an inflexible manner;

(vi) In particular, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case.

2.2 International Legal Standards and Conventions

It would be needlessly redundant to repeat in this chapter the many measures, counterbalances and views of the European legal systems, therefore it would behoove this study to focus on the broader scope of the matter, namely The International Covenant on Civil and Political Rights (ICCPR), an admittedly non-binding legal document that outlines the basic principles that must govern civil and political rights for States. It's main organ, the Human Rights Committee, stands as a quasi-court/judicial/legislative body that hopes to enforce the principles cemented in the

ICCPR. When it comes to the matter of criminal charges and our critical protection measures for defendants Article 14(3) ICCPR provides that:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees...

(e) 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." [32]

The rights stated in the ICCPR constitute the bare minimum[33] of protection States must adhere to and provide, therefore there is no restriction to expanding said protections and providing a wider range and a more liberal interpretation on the rights laid out in the ICCPR. State Parties are obligated to respect and ensure the rights of individuals within their jurisdiction. The Committee's decisions and resolutions constitute authoritative interpretation and therefore do not legally bind the States Parties, but should take precedence, when States interpret the ICCPR and subsequently their interpretation should be predicated on the legal work of the Committee.

The Committee has taken an understandable "no holds bar" approach in its application of Article 14(3)(e). It seems the Committee follows a quite direct approach, when interpreting the ICCPR and follows quite a restrictive interpretation of its text. There is rarely a mention for countermeasures, where the rights of the accused/defendant are even partially compromised, even though the same problem met in the ECHR is seen here, namely the confrontation between the rights of the accused and the rights of witnesses and victims. Therefore the same paradox has materialized within the framework of the ICCPR , but has not been adequately addressed.

In *Peart v Jamaica* a violation was found where authorities denied the defence access to a police statement from a witness.[34] This, the Committee stated, *"obstructed the*

[32] Art. 14.3 ICCPR
[33] M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, pg. 342, 2005 ed.
[34] Peart v Jamaica Communication No 464/1991 and 482/1991. U.N.Doc.CCPR/C/54/D/464/1991 (1995).

defence in its cross-examination of the witness". In *Espinoza de Polay*[35], the Committee found that "faceless judges" in trials, where no even the basic transparency could be guaranteed, violated of Article 14(3). Even in cases of drug trafficking, where admittedly danger for the lives of those participating in the meting out of justice is very real, there is no measure of counterbalancing from the Committee, only a distanced declaration of violation of Article 14. This constitutes a direct misinterpretation from the standpoint of legal common sense. The purview of the Committee doesn't end at Article 14 as we will see further on. It must attempt a subjective and essential syncretism of the rights its called to protect and understand, there is not a singular answer, for the simple reason that, there exists not a singular problem arising from the plethora of real-life circumstances.

The Committee interestingly enough, will not find a violation of Article 14(3) where the defendant has waived his rights to confrontation. In *Adams v Jamaica*[36] the police denied the defendant the right to cross-examine prosecution witnesses. However, the Committee noted that "even though counsel objected to its submission into evidence, from the record it appears that he did not request an adjournment or even ask for a copy of the statement." Even though no violation was found, this stance seems a bit problematic. It would behoove the Committee to not allow such waiving of rights, when there can exist a myriad of reasons a party can be coerced to do so. It falls to the Committee itself to determine the various inroads and details and reach a conclusion. A main issue of course is how it accepts even a silent waiving of rights from the defendant as permissible grounds to not find a relevant violation. The Committee is not a court, yet this doesn't mean it shouldn't hold itself to the same standards as more organized institutions, higher even since it's purview is wider and its decisions and resolutions can be provided as grounds in said cases before judicial bodies.

When relating to the rights of witnesses/victims they should be balanced by the Committee, against the rights of the defence when finding a violation of Article 14(3). Articles 6 and 17 of the Covenant provide for the right to life and protection of privacy respectively. Of course, these rights offer protection to victims and witnesses appearing

[35] Communication No. 577/1994: Peru. 09/01/1998. U.N.Doc.CCPR/C/61/D/577/1994.
[36] Michael Adams v. Jamaica, Communication No. 607/1994, U.N. Doc. CCPR/C/58/D/607/1994

before international courts and tribunals and from an initial standpoint seem like a direct hurdle in the application of Article 14, since any protection if victims/witnesses would inevitably detract from the defendant some measure of protection, whether that be a delayed disclosure of the identity of witnesses or the their complete withholding. State Parties have an obligation in accordance in Article 2 to *"respect and to ensure to all individuals"* the rights set out in the Covenant. This includes taking *"the necessary steps...to adopt such laws or other measures as may be necessary to give effect to the rights recognized."*

Here if one was allowed a more layman's expression, the name of the game is the word "necessary". The problem here is that it comes as a surprise to no one the rights laid out in the ICCPR of are of equal value and should be protected without discrimination. However, is the "necessity" of described in Article 2 a term that gives power to some rights to supersede the equal application of the another. If i.e. the life of a witness before the ICC was "in danger" by decision of the Court itself, could it draw on its own core texts and such an interpretation of the ICCPR to protect victims/witnesses from the other party? Would this constitute necessary protection and enforcement?

The rights of witnesses/victims giving evidence in court are also protected by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Article 6 provides that: *"The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system".* [37]

Again, no one can possibly argue the importance of all-around protection for all parties involved in trial and the wording itself seems not to be so problematic. Even the restrictions of the presentation of the concerns of victims at "appropriate stages of proceedings" is not as restrictive as it sounds. More so, it ensures that this specific party must be protected and acknowledged imperatively. It however befalls the appropriate courts to interpret these principles.

[37] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

2.3 Anonymity as protection of victims and witnesses in the Statutes of the ICTY and ICTR.

Prior to the activation of the jurisdiction of the ICC in 2002, these was already some essential judicial groundwork laid out on witness protection and the rights of the accused in the international criminal tribunals then in operation in Yugoslavia and Rwanda. Article 21(2) and Article 22, and Rule 69(a) of the ICTY statute and rules of procedure, and ICTY decisions related to these provisions, attracted attention. Article 21(2) rendered the accused's right to a fair trial subject to the need to protect witnesses and victims (Article 22). This included non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal (Rule 69(A). These combined provisions thus qualified the right of an accused to a fair trial by allowing for anonymity for victims and witnesses.

Therefore, immediately, the Courts acknowledged that a compromise and balancing act would constantly be in effect when examining these protections of parties bilaterally. So it is obvious to the examiner of this approach, that by their very own inceptual texts and further core texts, these Tribunals accepted that any protection of victims and witnesses that may seem to detract from the rights of the accused, did conclusively not constitute an automatic violation of any article pertaining the said rights.

The most important case where a definitive stance was taken and constituted the groundwork of following criteria for protection of either parties was the Proscutor v. Tadic, where ICTY definitively accepted That it had an affirmative obligation *"to protect victims and witnesses, but that this could be done in the context of trial rules as much as in witness protection programs."* [38]

This was the inception for balancing measures within the trials for either parties. It was initially obviously predicated on the fact that that such a balance operated in *"exceptional circumstances"* (in the Tadic case, in the context of the armed conflict and…terror and anguish of the wars in former Yugoslavia). In this specific case the

[38] *Prosecutor v Tadic,* Decision on Prosecution Motion for Protective Measures for Witnesses, par. 26 and 27, 1995

Tribunal, no matter its obvious independency to provide justice, did either consciously or not draw from its inceptual binding text, namely a Security Council resolution of the special nature of its mandate. The Trial Chamber in Tadic laid out five criteria to apply in determining the applicability of anonymity:

"[…] first and foremost, there must be real fear for the safety of the witness or her or his family [...]. Secondly, the testimony of the particular witness must be important to the Prosecutor's case [...]. Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy [...]. Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case [...]. Finally, any measures taken should be strictly necessary."[39]

These criteria were obviously meant to be applied in their entirety and not divisively. Therefore, one could posit that the initial protections provided to the accused laid in the difficulty and fair application of these criteria in order to enable even a partial compromise of their rights. One could easily see a qualitative and gradually logical approach of these criteria, beginning with the safety of witnesses, admittedly a more vulnerable party, especially since they must be declared so by the appropriate Tribunal and simply to not present themselves an acquire such a status. Then, it must be ensured that the testimony of these witnesses is important to the case and are not of secondary or tertiary importance or even to lead the judgment of the judges based on emotion. Continuing, these witnesses after having achieved this status, must be initially trustworthy and conclusively not easy to prove that special interests are included. Also, the Tribunal accepted that if essential protection can be provided to avoid the physical and emotional harm of witnesses, then said anonymity may not even be provided. Finally, the necessity met in the terms of the ICCPR is mentioned. Even if all these criteria are, therefore met, if anonymity is not deemed necessary, it shall not be provided. In the least the Tribunal here, took the first step in ascertaining the responsibility of the appropriate judicial body to enter the very core of the matter and

[39] Tadic, Judgment, par. 62-66

cemented, not the discretion, but the obligation to proceed to balance the rights of the accused and those of witnesses and victims.

The ICTR functioned a year after the hostilities it was to examine ended. It did however, apply the above criteria very mechanically[40], possibly even doing so, even unconsciously as redemption for the unacceptable and delayed response that if not permitted, essentially allowed the worsening of the catastrophe and genocide that ensued. Even so, it seems both Tribunals still stepped on eggshells and found difficulty providing qualified anonymity after Tadic, being almost non-existent on the jurisprudence of the ICTR.

[40] J. Pozen *Justice Obscured: The Non-Disclosure of Witnesses " Identities in ICTR Trials"* NYUJ Int"L L & Pol, pg 281, 2006

II. The modern dynamic of the protection of victims, witnesses and the accused in the legal framework and case law of the International Criminal Court

Chapter Three – The Victim, the Witness and the Accused under the Legal Framework of the International Criminal Court

3.1 The meaning and content of the notion of "victim" and "witness" as defined by the ICC. Is there room for "potential victims?

The permanence of the ICC and the timely process of its inception provided for a more detailed approach and definition ab initio of core definitions and procedures, not limited to the idiosyncrasies of a specific situation, but stemming rather the root of the crimes within its jurisdiction. Therefore, the ICC provides a much more detailed definition of what constitutes a victim in Rule 85 of the Rules of Procedure and Evidence:

"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 heir 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."[41]

Rule 85 discerns between two types of victims: natural persons and organizations and institutions. This distinction permeates the Article and provides a concrete differentiation presented for the first time, expanding the subjects capable of being granted the status of "victim" by the appropriate chamber. The Appeals Chamber, in

[41] Rule 85 of the Rules of Procedure and Evidence, ICC

an attempt to deepen the understanding of said article and clarify points it found vague, 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." [42]

The Appeal Chamber distinguishes between natural persons and organizations. Natural persons can suffer either direct or indirect harm, meaning that the damage could be physical and/or psychological However, indirect victims also exist and derive their status from their proximity or nature relationship to 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*."[43]

[42] 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, 2008
[43] Ibid

Some would argue that the interpretation of harm laid out here is problematic since it is not definitive and allows for discretion. However, the teleological interpretation here functions as a proponent of the power of the judiciary in not limiting them, effectively allowing for inclusion of possible forms of harm not yet discovered, implemented or widely practiced. It is of course easier to see why natural persons are protected from direct and indict harm, where organizations as a more impersonal entity suffers much less in terms of long lasting harm, allowing for the status of victims only if harm has been caused to "*to any of heir 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.*"

One can find a connection here between natural persons and organizations of course, a connection not yet observed by the Court, namely, that direct harm to an organization may constitute indirect harm to natural persons, i.e. if a hospital is damaged irrevocably and natural person suffer because of it. Therefore, while a distinction may exist between the two, nothing bars the Court from reaching a conclusion by ways of instance b), leading to instance a).

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.[44]

Furthermore to provide a logical connection with the witnesses and specifically witnesses who are also victims an initial definition must be provided. A witness therefore can be defined as a natural person who provides or may provide testimony about relevant and important information in relation to criminal proceedings.

There are several types of witnesses who can testify before the Court.

(a) Fact witnesses having general knowledge may provide information on the circumstances revolving around the crimes concerning a specific case. They can be witnesses who have allegedly suffered harm from the crimes committed

[44] Supra note 35

and testify about what happened to them. Some of these witnesses may also be dual-status witnesses, if they also participate in proceedings.

(b) Insider witnesses have a direct connection with the accused. This relationship can be familial, social, political or even professional. If it can be proven that it is direct, a term not defined and left to the discretion of the Chamber.

(c) Expert witnesses testify about matters within the field of their expertise, for example, ballistic or forensic experts.

(d) Overview witnesses help establish facts about the context in which a conflict occurred, and can be, but are not limited to, professors or NGO representatives.

Witnesses can be asked to give testimony, by the Office of the Prosecutor, the Defence, the Legal Representative of Victims, or the Judges themselves, but can not initiate their own recognition as such.

The ICC has recently begun to redefine what it means to be a victim within the purview of the Core Texts of the ICC, connecting the victim to due process more procedurally, rather than singularly providing the status of "victim". This can have true repercussions on the rights acknowledged and allocated to participatory victims and by extent dual-status witnesses in their fight for justice, but also the protection they enjoy at different stages of procedure. For example, Pre-Trial Chamber II in its Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan' finds multiple natures of victims that can be acknowledged:

"[…] while the Statute refers to 'victims' in the context and for the purposes of all stages of the proceedings, including the pre-authorisation stage, the Chamber is of the view that the specific nature and scope of the prerogatives attached to the status of victims significantly varies depending on the nature, object and purpose of the specific procedural phase at stake."[45]

[45] Decision on the Prosecutor and Victims' Requests for Leave to Appeal the *'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,* par.18, 2019

This specific statement finds conclusively, rather than implying, that the Chamber has the power not only to grant the status of victim according to the relevant statutory procedures, but also to grant or deny specific rights in accordance of its own view of their necessity pertaining to the stage of procedure currently in process. This could possibly mean the granting of anonymity ab initio for prima facie witnesses, that maybe overturned in later stages, if the importance of the testimony is disproven or otherwise subverted.

Interestingly enough, the Chamber finds that there exist "potential victims" during the stage of investigation, yet does not define conclusively what rights may be provided during this specific stage, only allows itself the discretion to at any time, even during this stage vest the victims with whatever protections it deems fit and since does define what these may be, could even include anonymity.

"[…]at this stage, individuals alleging having suffered harm within the meaning of rule 85 of the Rules can only be considered as potential victims, aiming at having their status assessed by the Court in accordance with the relevant statutory instruments; only in the event that the relevant requirements are met, will the applicants be recognised as victims and specific individual procedural rights will be vested in them[…]".[46]

3.2 Anonymity as a form of protection in the Core Legal Texts of the ICC

Anonymity as such, is not expressly provided for within the purview of the Core Legal texts of the ICC. It is a term used to describe the effective non-disclosure of the entirety of the identity or partial information that may lead to the identity of a victim or witness. According to Rule 87(3) of the Rules of Procedure and Evidence:

"A Chamber may, on a motion or request under sub-rule 1, hold a hearing which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a

[46] Supra note 38, par. 19

victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
(e) That a Chamber conduct part of its proceedings in camera."[47]

These measures directly interpreted seem initially to hold that at any given time only one of these measures can be put into effect, implying that a truly completely anonymous witness does not exist. The totality of such a measure could never be analogous to the rights of the accused, but in theory only ever constitute a direct violation of them, since the absolute nature of the measure wouldn't allow the defence any course of action to counter the claims of said witness or victim, nor attempt to diminish or disprove their credibility the Court therefore, can adopt these measures, that admittedly effectively protect the identity of a victim/witness to various degrees depending on the measure chosen, but at the same can claim that these are not in direct violation of the rights of the accused, unless it is proven beyond a doubt.

This might cause a flux in the dynamic of between accused and victim/witness, since the accused would not only have to prove their innocence concerning charges, but also rather, file motions to disclose aforementioned identities, or disprove the need for special "in-camera" proceedings. Rule 88 can be read in tandem with Rule 87 as 'special measures' constitute those taken 'to facilitate the testimony of a traumatized

[47] Rule 87(3) of the Rules of Procedure and Evidence, ICC

victim or witness, a child, an elderly person or a victim of sexual violence', therefore restricting even further, not only the scope if instances in which these special measures can be granted, but the argument to support such a decision from the Chamber.

It is therefore imperative to assume here, that the aforementioned "potential victims" now acknowledged by the Court are in any circumstance capable to receive such protective measures, until the status of victim is expressly granted to them.

Just because the Court has defined the terms, stages and circumstances of providing protective measures for victims/witnesses (and effectively anonymity), this by no means infers that Court has often provided such measures, since July 2002, when the Rome Statute entered into force. At the time of writing, it has opened 9 preliminary examinations and began 12 situations under investigation. It has conducted 27 cases of which only 4 have led to convictions. One could easily begin to question in effectiveness. [48]

Colin T. McLaughlin has idenetified six methods of protection for witnesses and victims and each correspond with an Article or Rule of the Core Texts of the ICC[49]:

(a) non-disclosure of identity, associated with Rule 76(4) on pre-trial disclosure;
(b) protection from media and public photography, video and sketch, associated with Rule 87 (3) on protection measures;
(c) protection from confrontation with the accused, also covered by Rule 87(3). In particular, Rule 87(3)(c) allows for testimony to be presented by electronic or other special means; and Rule 87(3)(d) allows the use of a pseudonym;
(d) anonymity, while not directly discussed can be addressed by the same Rules above and by Articles 64(6)(e) and 68(1), which provide for the general protection of victims and witnesses;
(e) reparations to victims, dealt with by Article 75; and
(f) protection for victims of sexual assault, comprehensively covered by Articles 68(1); Article 68(2), which provides for in camera proceedings for victims of sexual assault;

[48] International Criminal Court https://www.icc-cpi.int/
[49] C. T. McClaughlin, *Victim and Witness Measures of the International Criminal Court: A Comparative Analysis", pg.*189, 2007

and Article 43(6), which calls for staff within the VWU to be trained in dealing with trauma from sexual violence. These provisions are complemented by Rule 88, which gives a Chamber the power to order special measures on the basis that the witness or victim is a child, an elderly person, a victim of sexual violence, or simply traumatised."[50]

These methods although extant, hinge on their applicability, that insofar the Court has been quite reluctant to provide, finding assumed difficulties in providing them in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

These special measures of course can be provided not only to witnesses strictly, but to victims as well as clearly stated. However, it is interesting to see how the Court can conciliate a simple victim (non-witness), being allotted these special protections. However, victims can participate in proceedings under Article 68(3):

"Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[51]

What we immediately see here is the omitting of any mention of witness or providing on their part of information relevant the charges at any stage of the proceedings, but an allowance of their presentation of their views and concerns at stages the Court deems appropriate if so at all.

The Court provided effective anonymity in the Prosecutor v. Lubanga for victims in their roles of participation (not as witnesses). The accused was charged with using children as soldiers in the Democratic Republic of Congo (DRC). The ICC Pre-Trial Chamber allowed anonymous participation at the confirmation hearing, citing the

[50] H. Haider and T. Welch, *The Use of Protective Measures For Victims and Witnesses and the Balance of Competing Interests Under International Law: The Special Case of War Crimes Trials*, 28 *L'Observateur des Nations Unies* Special Edition on "The Place of the Victim in International Law" pg.37-62, 2010

[51] Statute of the ICC, Art. 68.1

deterioration of the safety situation in areas of the DRC which had lesened the capability to protect victims and witnesses living in these areas.[52] The defence argued, that it was imperative to know the identities of said victims in order to further their argument. The Chamber finally addressing its active obligation struck a balance. It stressed that:

"[…]The fundamental principle prohibiting anonymous accusations would be violated [if victims] were permitted to add any point of fact or any evidence at all to the Prosecution's case file against Thomas Lubanga Dyilo in the notification of charges document and the list of evidence[…]".[53]

The nature of this form of participation meant that inadvertently the victims waived their own right or under another lens, the Court precluded them from adding information that could affect at all the nature of the charges at the confirmation or support the claims made by the Prosecutor investigating the situation. Therefore their participation was essentially limited to accessing public documents and being present during public hearings. [54]

However, their representatives were allowed to make opening and closing statements during the confirmation hearing and to intervene with the authorization of judge.[55] This should have never been allowed. When the Chamber spoke of the presentation of their views and concerns, they should have strictly been restricted to their claims for reparations and not permitted in the participate in the very fundamental procedure of the authorization of Judges. The Chamber did exercise its discretion with providing greater participatory status and rights to those who waived their right to anonymity, again most controversially. The problem was never the extent of their participatory status in tandem with the rights of the accused, but rather the very nature of their participation openly or not that could potentially be discredited by the Defence.

[52] ICC, *Situation in the Democratic Republic of the Congo*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462, 2006
[53] Supra note 45
[54] Ibid
[55] Ibid

"[…]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."[56]

The Court here then definitively allows for anonymity, but as an exception. The ICC trials in the DRC proved to be groundbreaking in moving forward, at the minimum, the Court's view on implementing modalities and exercising its discretion. For example, the trials of Thomas Lubanga Dyilo[57], Germain Katanga[58], and Mathieu Ngudjolo Chui[59] alone led to requests from over 400 victims to participate in proceedings, either with the status of victim, witness, or both. Requests for anonymity were filed and subsequently provided with various degrees. This proved to be if not a minefield, then rocky ground for the Court, that had to discover ways to exercise discretion in a consistent manner, so as to not directly violate the rights of the accused.

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[56] Supra note 45

[57] Ibid

[58] ICC, The Prosecutor v. Germain Katanga, Situation in the Democratic Republic of Congo, Decision on the Defence Application for Leave to Appeal the "Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08" "the process to decide upon applications for the procedural status of victim in situation and case proceedings before the Pre-Trial Chamber ("the application process") is a specific procedural feature provided for in rule 89 of the Rules and regulation 86 of the Regulations. Its object and purpose is limited to the determination of whether such procedural status should be granted to applicants. Hence, the application process is prior to, distinct and separate from, the determination and exercise of the modalities of participation by those to whom the procedural status of victim has been granted"15 , **"the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only aims at determining whether the procedural status of victim should be granted to applicants.** Hence, it can be distinguished from criminal proceedings before the Court, which include the investigation of a situation, the initiation of a case and the pre-trial, trial and appeal stages of a case, which are governed by specific articles, rules and regulations. Moreover, the Single Judge considers that the application process is not related to questions pertaining to the award of reparations, which are the subject of the proceedings provided for in article 75 of the Statute and rule 94 of the Rules"

[59] ICC, The Prosecutor v. Ngudjolo Chui, Situation in the Democratic Republic of Congo, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case "Hence, the Single Judge considers that the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules in light of the regulation of the pre-trial stage of a case by the Statute and the Rules (in particular those provisions relating to the disclosure process) leads to the conclusion that the right to have full access to the Prosecution's situation and case files cannot be part of the set of procedural rights attached to the procedural status of victim at the pre-trial stage of a case.

In the case of the Prosecutor v. German Katanga and Mathieu Ngudjolo Chui, the Pre-Trial Chamber issued decisions on granting anonymity to certain victims. As with the Lubanga case, the victim's participation was restricted to afford them such anonymity.

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. As aforementioned, the Court determined that basic rights of the accused would be violated, if the victims were allowed to participate in a more active role, namely as witnesses.[60]

There is controversy of course surrounding the stance the ICC has taken concerning the hierarchy of rights, to clarify, whether or not the rights of the accused or the rights of victims/witnesses take precedence or are considered a priority. It was clear, while examining the jurisprudence of the Tribunals and considering the rarity with which such measures were provided, that the rights of the accused took priority. Presently, there still exists great inconsistency and not even close to enough convictions to ascertain the trends and tendencies of the ICC with great accuracy.

3.3 A sense that "practice is far from perfect"

The rules and regulations of the ICC seem to make the issue a bit convoluted, since not only is true anonymity not granted or prohibited under the Statute or Rules, but it is not even mentioned as such and therefore, if it were granted would need to be explicitly defined by the Court. And still one could effectively argue that such a provision exceeds judicial purview and must aptly defined within the Core Texts. The judiciary therefore has, since Lubanga opted for allowing a certain creative tension to exist wherein Articles 64(6)(e) and 68(1) are balanced with Article 67. Creative tension allows for discretion, but it also allows for inconsistent judgments, and opens the ICC to extreme criticism concerning its inconsistency in attaining justice not only for victims, but the serving the interests of justice on all sides.

[60] Supra note 38

It seems that theory seems to be on the side of reserving anonymity for the most egregious of supporting that anonymity cannot be reconciled with the right to a fair trial. Joanna Pozen, for example, argues that minimum rights should be placed in context and tailored. In making specific recommendations for the ICC, Pozen suggests that anonymity should be factored through four filters.

One is the existence of any ongoing conflict or war, and the existence of any viable witness protection program. A second is the extent of any threat of bodily harm to witnesses. A third is the cultural issues and practices regarding identities of witnesses. A fourth relates to the cultural traditions that may influence the importance of cross-examination (eg conflating hearsay with firsthand experiences in Rwanda) and thus the acceptance of anonymity. [61]

These essentially do not stray far from the initial findings of the ICTY in *Tadic,* but rather seem to differ, not so much in the factors leading up to the granting of anonymity, but the inherent intention of such measures taken and ascertaining whether they are all met conclusively and then and only then, can it even be implied that the right to a fair trial is not broadly violated.

[61] Supra note 33, pg.321

Chapter Four – A Counterbalancing Dynamic in the ICC

4.1 Fair trial for the accused and identity non-disclosure. A matter of hierarchy or balance in theory and within the ICC?

It is evident that the ICC shows interest in the granting of protections for victims/witnesses, while always assuring the conduct of a fair trial for the accused in all stages of due process. While the point has been obviously made that there exists in inherent dynamic between the rights of the accused to fair trial and protections for witnesses, there is a need to delve a bit deeper into this balancing act.

It is important to study this dynamic from the perspective of the accused, not because they seem to be a priority for the courts, but because they stand to lose the most in proceedings. For victims especially, the damage has already been done and what remains is the delivery of justice and possible reparations, where the accused may very well lose their personal freedom.

As has been clearly stated, the rights of the accused have evolved over the years, not only more often than not being the epicenter off which analogous protections are granted, but often reflecting the stance every judicial body has taken in response to the obvious horrors they were and have been called to adjudicate. The first International Military Tribunals as aforementioned, were barely international bodies, but multi-national organs, with clear political origins and inclinations, rife with instances and opportunities for the "judges" to exercise almost gross impartiality from (at the least) a procedural standpoint. [62]

However, moving on the International Criminal Tribunals of the 90's, we see that the accused began to receive not protections and safeguards reflecting the most notable internationally recognized criminal concepts, such as nullum crimen nulla poean sine lege and the assumption of innocence. As previously stated, the concept of fair trial is

[62] Cryer R., Hakan F., Robinson D., Wilmhurst E., *An introduction to International Criminal Law and Procedure. 2nd Ed*., Cambridge University Press, pg. 901, 2010

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 institutionally adhered to international standards, even though their inception stemmed from the principal political organ of the United Nations, ameliorating the position of the accused.

The ICCPR and the ECHR both ensure bare minimum guarantees that are not restrictive and can be expanded upon for safeguarding the rights of the accused. Among these is the cornerstone of the right to a fair trial, namely 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."*

Obviously, the international judicial bodies and their creators understood the need to avoid absolute restrictions on the protections of either parties, when pertaining to the conduct of the trial. It is obvious that they came to understand the necessity (at least in theory) of compromise between the two sets of rules and principles, with an obvious inclination to more likely begin from the standpoint of the accused. Therefore, by creating two sets of rules invariably pertaining to a common dynamic, they inevitably created an inherent relation of rule and exception ab initio, a problem left for the courts to solve in their jurisprudence. In theory it was easy for to simply add the safeguard of protection for the accused to hang on the assumption that protective measures provided by courts (especially the ICC) do not infringe upon the basic right of the accused to a fair trial, and obviously in the instance of anonymity of victims and witnesses, the right of the accused to examine them.

Therefore it is safe to say that the right of the accused to examine said witnesses stems from the necessity for transparency during due process and any detraction from said transparency would most likely lead to a violation of the right of the accused to examine witnesses[63]. The impartiality of judges is what allows the oral conduct of the procedure to allow the accused to challenge the charges and claims made against them and at the same time function as a bastion for the protection of due process in general.[64]

[63] Beltz A., *Prosecuting Rape in International Criminal Tribunals; the Need to Balance Victim"s Rights with the Due Process Rights of the Accused*, 23 St Johns Journal of Legal Commentary, 2008
[64] Zahar A. and Sluiter G. *International Criminal Law*, Oxford University Press, pg. 376, 2008

Cross examination is an essential tool to discover the truth. The credibility of a witness is of utmost importance for the simple reason that it is not absolute and need not go unchallenged. While prima facie witnesses may be acknowledged by the Court as such and be afforded various protective measures, during cross-examination errors maybe made, witness tampering may be proven and as such even a conviction can be overturned.

So it is obvious why the disclosure of the identity of witnesses constitutes such a hurdle for Courts to bypass and decide upon, since it all but completely eradicates the opportunity for the accused to discredit the testimony of a witness or the very status of a person as such and therefore on first glance is a direct violation the right to a fair trial.

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."*[65]

It is not hyperbole to infer from the above, that the affording of anonymity to witnesses especially, by Courts may create a category of witnesses considered as "untouchables" by the accused, therefore institutionalizing parties to trial that are above any safeguards set in place for the protection of the accused and affording the ICC powers it explicitly does not have to remove specific persons from the extant dynamic between witnesses and accused, not allowing the latter to exercise their right to cross-examine and simultaneously risking the violations of the principle of innocence, implying that the Court will *proprio motu* protect the interests of the accused and not base a conviction solely or decisively on these testimonies.

As we've seen in the Tadic case the ICTY conceded full anonymity to certain witnesses, as was seen above. However, the same case enlightened the Court to the dangers of allowing complete anonymity and depriving the defense of the bare minimum opportunity to investigate and examine the credibility of witnesses. As

[65] O'Sullivan, E., *The erosion of the right to confrontation under the cloak of fairness at the ICTY*, Journal of Interntional Criminal Justice, pg.3, 2010

decisively proven when the ICTY removed the protection of a specific witness that proved to be untrustworthy. *"…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."*[66]

The problem here is that this removal of protection was a product of happenstance and sheer luck, achieved simply through the admission of the anonymous to the investigator. One could only guess the implications such a direction would have if most crucial witnesses, especially in cases of sexual violence, where victims were able to identify the perpetrators and the theoretical prerequisites for their protection fulfilled the demands of the Court.

Even is inconsistency is difficult to avoid, the ICC still provides many methods to protect witnesses, from soft to more concrete measures. The redaction of the filings is beyond question the most common 'soft' protective measure, granted its frequent use by the parties. When dealing with filings that contain protective measures for witnesses, the ICC Chamber most of the time instructs the parties to provide the Chamber with proposed public redacted versions of their filings, retaining only as much minimal information as is absolutely necessary to identify the witnesses for whom protective measures have been sought. For instance, in the Bemba case, the information which had to be redacted included, "the witnesses' occupations, places of residence and roles, if any, within the Mouvement de Libération du Congo" 92 which was the political party led by the accused.[67]

4.2 The rigidity or fluidity of witness/victim and accused dynamics may lead to judicial inertia

[66] Prosecutor v. Dusko Tadic, Decision on prosecution motion to withdraw protective measures for witness L. par. 4, 1996

[67] The Prosecutor v. Bemba Gombo, Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", par. 31, 2008

It is dangerous to imply that the ICC does not adhere to its own rules, yet at the same time, its number of convictions in the face of most apparent and obvious egregious crimes and conflicts is reason to be concerned. Of course, it can never be proven that the ICC in lieu of affording protections to witnesses simply chooses to ride the fence and follow the trend of prioritizing the accused.

So far, the protection of witnesses hasn't been cemented clearly. It seems that oppositely to the definition of the Court recently about the potential victims the Court doesn't follow a quantitative approach, giving analogous protections to victims and witnesses as due process moves forward, but rather seems to trade those off in favor of the accused, especially when they transform, from *the suspected*, in investigation proceedings, *to accused*.

The Court has created a bit of a dual approach, when affording redaction of identities or identifiable information, but ground-breakingly speaks of anonymity directly, even though that term is not used in its core legal texts. Specifically, the ICC denotes:

"However, this does not mean that victims' identities need not be disclosed in all contexts. For instance, should a victim's participation in the proceedings increase to the extent that he or she is called to appear as a witness, he or she must relinquish his or her anonymity vis-à-vis the Defence. In such a case, the calling participant must disclose identifying information about the victim in accordance with the disclosure and redaction regime in place.

Further, the Single Judge considers that victims presenting their views and concerns also assume a more active role in the proceedings and their continued anonymity before the Chamber could prejudice the accused or be inconsistent with his rights to a fair and impartial trial. Thus, victims presenting their views and concerns before the Chamber shall also relinquish their anonymity vis-à-vis the Defence. The Single Judge notes that exceptional circumstances may warrant a victim's continued anonymity."[68]

[68] ICC, The Prosecutor v. Dominic Ongwen, Situation in Uganda, Decision on Disclosure of Victims' Identities

The Court's take with this approach is far from perfect, but refreshingly hopeful. It actually exercises discretion and moves to an active stance on the matter. It essentially discerns between victims and witnesses and more so in the cases of victims. Initially it protects victims it deems to be in need of relevant protection mentioning anonymity explicitly, but only allows for it as long the participation remains restricted. Any increase in the participation of the victim in regard to rights allotted to them by the Chamber and the identity or at least identifiable information must be disclosed to the Defence. The same applies if the victim attains dual status.

This stance \belies an obvious adoption of the protection of the rights of the accused as the predicate upon which and by which the Court deems the granting or revoking of anonymity necessary, not so much precipitating the disclosure or not of the identity of said victims or witnesses upon their role of decisiveness for conviction, but rather creates a threshold, beyond which only under exceptional circumstances, especially in the case witnesses, anonymity is granted or maintained.

This is an obvious indication that there is fluidity within the jurisprudence of the ICC and there is no singular approach. Critics of cemented options for the above protections, fearing an inconsistency in the delivery of justice fail to consider the multifaceted nature of testimony and every individual case, being culturally and institutionally blind to the very real dangers lurking in respect to the well-being of victims and witnesses; well-being that the Court is in no place to absolutely guarantee, even if it takes it into consideration.

4.3 A dire need for a paradigm shift within the framework of the ICC

The protection of witnesses is a complex and important issue that demands an integral balancing act against the rights of the accused. An individual that finds themselves tried before the ICC can be guaranteed beyond the statutory provisions of the ICC, that the appropriate Chambers will apply every international norm to protect above all else the right to a fair trial. The Rome Statute of the ICC explicitly states in Article 21(3) that the Court must interpret law in accordance with "internationally recognized human rights". The credibility and legitimacy of the ICC will depend on how far the Court is able to fulfil these guarantees. The Court is free however to apply these principles and

must feel obligated to adhere to older interpretations, that may seem not only outdated, but severely inconsistent with the case in point, which is the widely accepted fact, that there exists a dynamic of rights that must always be addressed and that the utter ignorance of one party is prima facie a violation of that party's rights as provided in the Rome Statute and the Rules of the Court.

As it stands, the Court treats the requirements of a fair trial as more pivotal initially than any other, in a procedural context at least. Nevertheless, simply by the inclusion of provisions for special measures pertaining to the various degrees of identity disclosure at various stages of procedure cannot overstate that the ab initio purview of the Statute implies that the opportunity to examine witnesses is not absolute and is mandatory to be balanced against the need for the protection of victims and witnesses.

It can not be overstated that the practice of the Court will be littered with challenges. These challenges, however, should never be considered as hurdles in the proper service of the interests of justice, but rather opportunities to grow from past shortcomings of the Tribunals and create new paths where there seemed to be none. This will require a proactive stance in respect to judges, who mustn't rely on interpretations that allow for an exorbitant amount of leeway. The Statute and Rules provide enough room in which their interpretation may lawfully move within.

It however self-evident how necessary these protections prove to be, when the texts that define and provide them are stripped from the equation and the cases are treated practically. If protections do not exist, witnesses will not come forward, nor can they be coerced, ergo, quite simply, heinous crimes may go unpunished. The credibility of witness testimony can be seriously endangered[69], when not provided in "quantitatively satisfactory" amounts considering the strict and copious amounts of evidence needed to convict.[70]

[69] The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Defence Applications for Judgments of Acquittal, 2016

[70] R. Beqiri, Reflections on Certain Witnesses Protective Measures Under the Rome Statute of the International Criminal Court, European Scientific Journal Vol.13, pg. 342, 2017

There is critical need to for a paradigm shift within the framework of the ICC on two fronts, the first pertains to the interpretive stance the judges must take and the second involves institutional changes that may allow for fewer violations of the right to a fair trial and will allow the judges to continue with their mandate unencumbered.

Initially, it would behoove the judges to understand the actual privileged position in which they find themselves, having the freedom to define their own jurisdiction they are capable of shifting the very basis on which the international community predicates the granting of special measures to victims and witnesses. It would be a step in the right direction to gradually abandon the notion of setting the accused in a rather higher position than victims and witnesses, lessening the dynamic effect that exists between them. Allowing a bit of distance and following a more pragmatic approach, the persons finding themselves tried before the ICC have been proven in their majority to not be convicted of the crimes within the jurisdiction of the Court.

This doesn't mean they aren't implicated in criminal activities relevant to the investigated situation, but rather that they couldn't be convicted under the restrictions set in place by the Rome Statute, since the ICC can only convict them in accordance according to the Statute of the "most serious crimes of international concern", meaning that these crimes within the jurisdiction of Court do not refer to singular or minimal perpetrations, but more egregious instances. Therefore, in would be in the interest of the international community, which one could argue, supersedes the need for nigh on absolute protection and prioritization of the accused, which most likely, while being under the assumption of innocence, has been a perpetrator of less serious, but by no means less factually inaccurate grievances.

The Court could easily, ignoring the criticism it will inevitably face, (criticism it faces since its creation), shift the center of gravity from the notion of balancing the rights of parties with different grades of initial import, to balancing the rights of parties that initially have equal import and begin the addition or subtraction of legal value according to the circumstances of each case ad hoc.

A proposed theoretical standpoint could be to determine the grade of injustice the granting of anonymity would cause. One could very well posit that every granting of

anonymity to victims and witnesses, constitutes a direct violation of the right to a fair trial and is initially unjust, but determine if it is ultimately unjust by providing specific instances on a Statutory level, that overpower the initial assumption.

These interpretations could flourish, allowing that specific changes be made on an institutional level. Unfortunately, the Judges of the ICC, cannot of their own volition amend parts of the Statute they deem necessary, this falls to the Assembly of States Parties.[71] Therefore, enters a political factor that binds the Judges, namely the framework within which they can function, according to the combined will of States Parties. Even though the Judges are in better position to deem which Articles or Rules need amending.

This leads into the final aspect of institutional changes. The international community and here more specifically the Assembly of States Parties to the Rome Statute, must find the political will that the service of the interests of justice, will only strengthen the institution and allow to be seen as more than an eclectic judicial body that investigates alleged criminals only in States in which its access is relatively easy.

Changes to the Statute and Rules to include anonymity explicitly, an upgrade and financial bolstering of the Victims Participation and Reparations Sections (VPRS) of the Registry and Victims Witness Unit, could allow fewer changes to be made on the theoretical front and allow judicial purview to run its course.

[71] Statute of the ICC, Art. 121 and 122.

Conclusions

It is undeniable that there exists an uneasy relationship, a truce even within the camps of witness/victim and the accused. The flawed theoretical subtext, a detected unwillingness from the judiciary to conclusively set standards, and institutionalized prejudice towards the ICC have created stagnation on a core subject affecting the very ability of the Court to adjudicate.

The confusion has its clearly visible roots in the manner with which international conventions have defined and confined the right to a fair trial and the rights of the witness/victim, creating an opposing dichotomy from their inception throwing any interpretation in disarray and discouraging judicial organs from either wading too far from the original intent or providing definitive interpretation.

There exists a prevalent notion of the inconsistency between the right of the accused to a fair trial and the provision for anonymity for victims and/or witnesses. The notion tends to side with the accused, claiming the right to a fair trial is immediately violated, when such non-disclosure of identity enters the confines a trial. However, no matter how hard one tries, in all international jurisprudence, no one can help but notice that the thought processes of the judiciary hold within the subtext of the international conventions that institutionalized the right to a fair trial and consider it a “minimum right”, ignoring its binding or non-binding nature and in doing so completely invalidating the most obvious intent of a necessary compromise with the victims and witnesses need to be protected as a basic right.

One need not only state the obvious, meaning that an accused must be presumed innocent and given every possible path towards proving it within the judicial framework they’re indicted under, however the underlying issue is the borderline Mendel effect that is prolifically regurgitated, that is ab initio incompatibility of the above aforementioned rights.

Such incompatibilities are quite prevalent in the argument of the Defence in the Ongwen case before the ICC. The Defence deftly argues that protections can be

systematically revised the corresponding Chamber and clearly criticizes the Court for providing protections for a witness whose testimony's validity was already under question not only at the moment the Chamber decided upon the granting of special protective measures, but at the moment this information reached the Court in the form of an email from the VWU that itself questioned the quality of the testimony, yet still pre-emptively sought the above protective measures[72].

Indeed there is no single perfect approach to witness protection, however, ICC as a leading institution in International Criminal Law as well as the leading forum for debate on witness-related matters, should be at the helm of pioneering the most effective methods to ameliorate the situation in close cooperation with States Parties. It is beyond a shadow of a doubt that the parties to the Rome Statute hold in their hands the actual proverbial key that will determine the efficacy and also actual practice and application of the ramifications of the jurisprudence of the ICC judiciary[73].

Beyond the obvious need for a rework in respect to the international conventions theoretically presiding over how the legal community treats these rights, which is admittedly harder for one to instigate, it will take a daring approach from the judiciary, especially the judiciary of the ICC to come forth and provide not a path of least resistance, but a definitive path, not based on preconceptions and stagnant repetitiveness, but ad hoc scrutiny, well-regulated criteria and a strong and most importantly consistent and impartial approach.

[72] Prosecutor v. Dominic Ongwen, Public Redacted Version of Motion to rescind the in-court protective measures of witness UGA-OTP-P-0440, par. 6-9, 2020

[73] R. Beqiri, Reflections on Certain Witnesses Protective Measures Under the Rome Statute of the International Criminal Court, European Scientific Journal Vol.13, pg. 358, 2017

Bibliography

Foreign Titles:

Cryer R., Hakan F., Robinson D., Wilmhurst E., *An introduction to International Criminal Law and Procedure. 2nd Ed.*, Cambridge University Press, 2010

C. T. McClaughlin, *Victim and Witness Measures of the International Criminal Court: A Comparative Analysis",* Martinus Nijhoff Publishers, 2007

Nowak M., *UN Covenant on Civil and Political Rights: CCPR Commentary,* N. P. Engel 2005 ed.

Schabas W., Bernaz N. (ed.), *Routledge Handbook of International Criminal Law*, Routledge, 2011

Schwebel St. M., *Justice in International Law*, Cambridge University Press, 1994

Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft Baden-Baden, 1999

Schabas W., *Commentary on the Rome Statute of the International Criminal Court, 1999*

Zahar A. and Sluiter G., International *Criminal Law*, Oxford University Press, 2008

Articles:

Beltz A., *Prosecuting Rape in International Criminal Tribunals; the Need to Balance Victim"s Rights with the Due Process Rights of the Accused*, 23 St Johns Journal of Legal Commentary, 2008

Clar R.S. and Sann M. *Coping with Ultimate Evil Through the Criminal Law*, 7 Crim L. Forum, 1996

International Bar Association Monitoring and Outreach Program, *Balancing Rights: The International Criminal Court at a Procedural Crossroads*, 2008

Haider H, Welch T., *The Use of Protective Measures For Victims and Witnesses and the Balance of Competing Interests Under International Law: The Special Case of War Crimes Trials*, 28 L'Observateur des Nations Unies Special Edition on "The Place of the Victim in International Law", 2010

Goldstein A. S., *'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, Stanford Law Review, 1974

O' Brian W., *The Right of Confrontation: US and European Perspectives,* 121 Law Quarterly, 2005

O'Sullivan, E., *The erosion of the right to confrontation under the cloak of fairness at the ICTY*, Journal of International Criminal Justice, 2010

R. Beqiri, Reflections on Certain Witnesses Protective Measures Under the Rome Statute of the International Criminal Court, European Scientific Journal Vol.13, 2017

International Conventions Statutes and other materials:

European Convention of Human rights

Guide on Article 6 of the European Convention on Human Rights (Criminal Limb-Updated on 31 December 2019)

International Covenant on Civil and Political Rights

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda

Statute of the International Criminal Court

Rules of Evidence and Procedure of the International Criminal Court

Peart v Jamaica Communication No 464/1991 and 482/1991U.N.Doc.CCPR/C/54/D/464/1991

Communication No. 577/1994: Peru. 09/01/1998. U.N.Doc.CCPR/C/61/D/577/1994

Michael Adams v. Jamaica, Communication No. 607/1994, U.N. Doc. CCPR/C/58/D/607/1994

Websites:

https://www.icc-cpi.int/

www.asil.org (American Society of International Law-Contains Journals AJIL)

www.esil-sedi.org (European Society of International Law-Contains Journals EJIL)

www.oxofordhandbooks.com

legal.un.org/repertory

Table of Cases

ECtHR

Kostovski v Netherlands, 1990

Doorson v. Netherlands 1992

Van Mechelen v. Netherlands 1998

PS v Germany, 2003

SN v. Sweden 2004

Kaste and Mathisen v. Norway 2007

Al-Khawaja and Tahery v United Kingdom 2009

Trofimov v. Russia, 2009

Scholer v. Germany 2010

Schatschaschwili v. Germany 2015

Seton v. United Kingdom 2016

Dimovic v. Serbia 2016

T.K. v. Lithuania 2018

Urek and Urek v. Turkey 2019

Oddone and Pecci v. San Marino 2020

ICTY

Prosecutor v Tadic,1995

Prosecutor v. Dusko Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 1995

ICC

Prosecutor v Lubanga, Situation in the Democratic Republic of the Congo, *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462*, 2006

Prosecutor v Lubanga, Situation in the Democratic Republic of the Congo, *Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06, ICC-01/04-01/06-379,* 2006

Prosecutor v. Germain Katanga, Situation in the Democratic Republic of Congo, Decision on the Defence Application for Leave to Appeal the "Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08, 2008

Prosecutor v. Ngudjolo Chui, Situation in the Democratic Republic of Congo, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 2008

The Prosecutor v. Bemba Gombo, Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, 2008

The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Defence Applications for Judgments of Acquittal, 2016

Prosecutor v. Dominic Ongwen, Situation in Uganda, Decision on Disclosure of Victims’ Identities, 2019

Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 2019

Prosecutor v. Dominic Ongwen, Public Redacted Version of Motion to rescind the in-court protective measures of witness UGA-OTP-P-0440, 2020