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# Protecting victims who testify before the ICC: tensions and balances with the defendants' right to a fair trial

## 1. Introduction

Victims have been the center of attention at the International Criminal Court (ICC), since the Rome Statute both allows their participation in the proceedings when their personal interests are affected, and sets up a system of reparation in case of any damage, loss or injury.<sup>1</sup> This revived interest in victims' participation and reparation is also clear from the significantly large body of literature on this topic.<sup>2</sup>

Conversely, little attention has been dedicated to victims when they testify as witnesses (hereinafter, victims) in front of the ICC, although they play a central role in the ICC's evidentiary system. Since the ICC sits in The Hague and the majority of its investigations are conducted outside Europe, the ICC has been experiencing logistic and administrative difficulties in accessing documentary sources or forensic evidence, which are readily available at the crime scene, but spatially separated from the seat of the ICC.<sup>3</sup> For this reason, it has, *inter alia*, relied on the testimony of victims of crime since they can more easily travel to the seat of the ICC.<sup>4</sup> As testimony may be instrumental in determining the innocence of the accused, victims of crimes may be threatened, bribed, injured or even killed due to their participation in the proceedings. In addition to this, appearing as a witness before the ICC can demand considerable courage, because the alleged perpetrators are often the neighbours of victims.<sup>5</sup> Thus, protecting victims'

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<sup>1</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 (p. 3) UNTS 1-38544 (Rome Statute) arts 68(3) and 75.

<sup>2</sup> Chistine Van den Wyngaert, 'Victims before the ICC: Some Views and Concerns of an ICC Trial Judge' 44 *Case Western Reserve Journal of International Law* (2001) 475; Marianna Tonellato, 'The Victim's Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation While Respecting the Rights of the Defendant' 19 *European Journal of Crime Criminal Law and Criminal Justice* (2012) 315; Maria Elander, 'The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia' 7 *International Journal of Transitional Justice* (2013) 95; Povel Singh, 'Victim Protection and Criminal Justice System in 21st Century', 48 *Civil and Military Law Journal on Rule of Law, Military Jurisprudence, and Legal Aid* (2012) 176; Brianne L McGonigle, 'Victim Oriented Measures at International Criminal Institutions: Participation and Its Pitfalls' 12 *International Criminal Law Review* (2012) 375; Conor McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice' 10 *Journal of International Criminal Justice* (2012) 325; Conor McCarthy, *Reparations and victim support in the International Criminal Court* (Cambridge University Press, 2012).

<sup>3</sup> At the time of the writing, the ICC has only opened one investigation within Europe, namely, the Georgia investigation which was opened on 27 January 2016. Currently, the other investigations focus on the Democratic Republic of Congo, Uganda, Sudan (Darfur), Central African Republic, Kenya, Libya, Cote d'Ivoire, Mali, Central African Republic II and Burundi. See ICC, 'Situations under investigation' (ICC, 2019) <<https://www.icc.cpi.int/Pages/Situations.aspx>> accessed 29 March 2019.

<sup>4</sup> International Bar Association, 'Evidence Matters in ICC Trials: An International Bar Association International Criminal Court & International Criminal Law Programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice', August 2016; American University Washington College War Crimes Research Office, 'Expediting Proceedings at the International Criminal Court', June 2011, p. 20.

<sup>5</sup> Cody S Smith, Alexa Koenig and Erik Stover, 'Witness Testimony, Support, and Protection at the ICC' in K M Clarke, A S Kottnerus, E de Volder (eds) *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, 2016) 301, p. 301.

identity, whereabouts and, more generally, their privacy is a key element in ensuring their safety and their willingness to participate in the ICC proceedings. Furthermore, some victims of the most heinous crimes such as sexual violence may also experience isolation, rejection and stigmatization from their families and communities, if the details of these crimes are publicly revealed.<sup>6</sup>

In order to address this gap, and in line with the main topic of this book on ensuring and balancing the rights of victims and defendants in international criminal justice, this chapter asks whether the ICC safeguards victims' privacy during their testimony, according to Article 68(1) of the Rome Statute. Furthermore, in accordance with the dichotomous aim of this book on the rights of both victims and defendants, this chapter aims to verify whether the ICC has correctly balanced victims' rights with the accused's right to a fair trial. Indeed, the application of these measures restricts several aspects of the defendant's right to a fair trial, such as the right to have a public hearing; the right to cross-examine or to have witnesses examined; and the right to have adequate time and facilities to prepare a defence.

Before proceeding with the human rights analysis, Section 2 focuses upon the scope of victims' right to privacy within the Rome Statute, relying on an original definition of this right, which departs from its general understanding under international human rights law. This definition of privacy shapes the content of the human rights analysis, since it defines which protective measures are used by the ICC to protect the privacy of the victims who decide to testify before the ICC. Section 3 focuses on the limitations of this right to privacy against the right to a fair trial. Following this general introduction on the scope of the right to privacy and right to fair trial within the Rome Statute, Section 4 analyses the ICC's case-law and transcripts. It focuses on the first investigation opened by the ICC in the Democratic Republic of Congo (DRC). More specifically, it deals with the cases against Lubanga, who was convicted by Trial Chamber I for the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities; Katanga, who was found guilty by Trial Chamber II of crimes against humanity and war crimes; Ngudjolo Chui, who was acquitted by the very same Chamber; and Ntaganda, who is still under trial for war crimes and crimes against humanity.<sup>7</sup> Furthermore, the analysis includes two cases from the Central African

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<sup>6</sup> Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and ICTR* (Intersentia, 2005) 234; Sandra Ka Hon Chu, Anne-Marie de Brouwer and Renée Römkens, 'Survivors of Sexual Violence in Conflict: Challenges in Prevention and International Criminal Prosecution in Victimological Approaches to International Crimes: Africa', in R Letschert and others (eds) *Prevention and International Criminal Prosecution in Victimological Approaches to International Crimes* (Intersentia, 2011) p. 527, pp. 535-39.

<sup>7</sup> Judgment pursuant to Article 74 of the Statute, *Prosecutor v Lubanga*, (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012; Judgment pursuant to Article 74 of the Statute, *Prosecutor v Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014; Judgment pursuant to Article 74 of the Statute, *Prosecutor v Ngudjolo Chui* (ICC-01/04-02/12-3-tENG) Trial Chamber II, 26 December 2012.

Republic. The first one is the case against Bemba, found guilty by Trial Chamber III of two counts of crimes against humanity and three counts of war crimes.<sup>8</sup> The second case was against Bemba and his co-accused for offences against the administration of justice under Article 70 of the Rome Statute.<sup>9</sup> Among the Kenyan cases, this chapter focuses on the *Ruto and Sang* trial, which was terminated by Trial Chamber V(A) on 5 April 2016 for lack of evidence, and on the case against Kenyatta, Muthaura and Ali, where the charges were withdrawn by the Office of the Prosecutor (OTP) because of interferences with witnesses.<sup>10</sup> Finally, this chapter focuses on the case against Gbagbo and Ble' Goude' in Côte d'Ivoire.<sup>11</sup> Following the human rights analysis of these cases, Section 5 produces some recommendations for the ICC in order to make its practice more respectful of victims' right to privacy without infringing defendants' right to fair trial.

## 2. Protecting Victims' Privacy under the Rome Statute

The obligation upon the ICC to protect victims stems from Article 68(1) of the Rome Statute, which establishes an obligation upon the ICC to adopt appropriate measures to protect victims' privacy.<sup>12</sup> While scholarship agrees on the existence of such an obligation, different views exist as to whether victims who testify as witnesses hold a right, or a mere interest, to be protected. For instance, Zappalà believes that 'the expectation of witnesses to obtain protection do not really amount to a formal right to make application to the Court for measures to be taken'.<sup>13</sup> Unfortunately, Zappalà does not provide any further explanation as to why he believes victims are not the beneficiaries of a proper right, but just of a mere expectation. However, this author does not agree with this view, but rather shares the position taken by other scholars, such as Donat-Cattin, who believe that Article 68 affords a non-derogable right of victims to protection while testifying.<sup>14</sup> The view of Donat-Cattin is based on the idea that to each obligation established by law, a corresponding right exists.<sup>15</sup>

Additionally, it must be noted that the Rome Statute not only grants victims a so called 'status right' to be protected for the fact of testifying at the trial, but it also directly

<sup>8</sup> Judgment pursuant to Article 74 of the Statute, *Prosecutor v Bemba*, (ICC-01/05-01/08-3343), Trial Chamber III, 21 March 2016.

<sup>9</sup> Decision on Sentence pursuant to Article 76 of the Statute, *Prosecutor v Bemba*, (ICC-01/05-01/08-3399), Trial Chamber III, 21 June 2016 and Public Redacted Version of Judgment pursuant to Article 74 of the Statute, *Prosecutor v Bemba et al*, (ICC-01/05-01/13-1989-Red), Trial Chamber VII, 19 October 2016.

<sup>10</sup> ICC, <<https://www.icc-cpi.int/kenya>>, accessed 29 March 2019.

<sup>11</sup> ICC, <<https://www.icc-cpi.int/cdi/gbagbo-goude>> accessed 29 March 2019.

<sup>12</sup> David Donat-Cattin, 'Article 68' in O Triffterer (eds), *Commentary on the Rome Statute of the ICC: Observers Notes, Article by Article* (Hart Publishing, 2008) p. 1275, p. 1277; J Fernandez and X Pacreau (eds), *Statut de Rome de la Cour pénale internationale. Commentaire article par article* (Pedone, 2012), p. 1550.

<sup>13</sup> Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003), p. 239.

<sup>14</sup> Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: a commentary* (Hart, 2016) p. 1683.

<sup>15</sup> *Ibid.*

protects their right to privacy as a 'universally-accepted human right'.<sup>16</sup> This view is also confirmed in the ICC's case-law. In *Prosecutor v Bemba and al.*, a case involving several charges for witness tampering under Article 70 of the Rome Statute, Trial Chamber VII was called upon to decide on whether the way in which some Western Union Documents were provided by the Austrian authorities was in violation of the defendant's right to privacy.<sup>17</sup> In concluding that no violation could be envisaged in that circumstance, Trial Chamber VII stated that '[t]he right to privacy is an internationally recognised human right'.<sup>18</sup> In a footnote linked to this statement, Trial Chamber VII clarified that this view was based on the fact that the right is enshrined in several conventional sources, such as Article 8 of the European Convention on Human Rights, Article 17 of the International Covenant for Civic and Political Rights, Article 11 of the American Convention on Human Rights, Article 12 of the Universal Declaration of Human Rights and Article 21 of the Arab Charter of Human rights. The approach of the ICC in considering the right to privacy as an 'internationally recognised human right' in light of Article 21(3) of the Rome Statute, finds further corroboration in several domestic constitutions and provisions with constitutional force, which demonstrate that the right to privacy is protected throughout the world.<sup>19</sup>

This 'status' of the right of privacy as an 'internationally recognised human right' has three main consequences. First, the ICC is bound to respect the right to privacy when interpreting and applying the provisions on protective measures. Second, this obliges the ICC to interpret the very same right to privacy in consonance with international human rights law, and, finally, since international human rights law establishes that the right to privacy is a qualified right, it follows that it can be limited under certain circumstances. The latter point will be discussed in the next section. Here, it is important to consider the

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<sup>16</sup> Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press, 2016), p. 120.

<sup>17</sup> Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu And Narcisse Aido*, (ICC-01/05-01/13-1854), Trial Chamber VII, 29 April 2016, para. 46.

<sup>18</sup> Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu And Narcisse Aido*, (ICC-01/05-01/13-1854), Trial Chamber VII, 29 April 2016, para. 46.

<sup>19</sup> Among others, see Articles 44 and 45 of the Afghan Constitution, Article 18 of the Argentinian Constitution, Article 37 of the Albanian Constitution, Article 40 of the Algerian Constitution, Article 15 of the Andorra Constitution, Article 1 of the Austrian Constitution, Article II, 3 (f) of the Bosnia and Herzegovina Constitution, Article 40 of Cambodia Constitution, Article 19(5) of Chile Constitution, Articles 23 and 24 of Costa Rica Constitution, Article 72 of the Denmark Constitution, Articles 20 and 24 of the El Salvador Constitution, Article 18(2) of the Ghana Constitution, Article 12 of the Guinea Constitution, Article 59(1) of the Hungary Constitution, Article 71 of the Iceland Constitution, Article 14 of the Italy Constitution, Article 38 of the Kuwait Constitution, Article 16 of the Liberia Constitution, Article 13 of the Madagascar Constitution, Article 21 of the Malawi Constitution, Article 6 of the Mali Constitution, Article 16 of the Mexico Constitution, Article 16(3) of the Mongolia Constitution, Article 104 of the Mozambique Constitution, Article 13(1) of the Namibia Constitution, Article 22 of the Nepal Constitution, Article 21 of the New Zealand Constitution, Articles 27-30 of the Oman Constitution, Articles 34-36 Paraguay Constitution, Article 22 of the Rwanda Constitution, Article 24 of São Tomé and Príncipe, Article 221(1) of Sierra Leone Constitution, Articles 29-30 of the Somalia Constitution, Article 29 of the Sudan Constitution, Article 6 of the Sweden Constitution, article 13(1) of the Switzerland Constitution, Articles 28-29 of the Togo Constitution, Article 9 of the Tunisia Constitution, Article 27 of the Uganda Constitution and Chapter 7 of the Uzbekistan Constitution.

content of the right to privacy, since it determines which protective measures should be used and, thus, the scope of this chapter.

The right to privacy is an amorphous right according to the Human Rights Committee (HRC) and the European and Inter-American Human Rights Courts (respectively, ECtHR and IACtHR), since it is the right to live how one wishes without any interference from the outside world.<sup>20</sup> For instance, the right to privacy might also protect an individual's physical and psychological integrity and well-being.<sup>21</sup> From this perspective, the interpretation of the right to privacy in the Rome Statute according to international standards poses some difficulties, because some of the elements, such as psychological well-being, encompassed under the umbrella term of 'privacy' under international human rights, are interests protected by Article 68 of the Rome Statute. The *travaux préparatoires* of the Rome Statute do not provide any insight into why only these aspects have been included in Article 68.<sup>22</sup> However, since they are listed in Article 68, it could be presumed that the drafters have consciously chosen that these aspects are not synonymous, despite being related to each other. However, although it is clear that the drafters lacked attention in highlighting the differences among these elements, it cannot be excluded that these interests blur into each other. This might expand the scope of the right to privacy to include the other non-synonymous elements contained in Article 68, such as psychological well-being. However, by doing that the presence of 'psychological well-being' in Article 68 of the Rome Statute would be made completely redundant. However, since this provision should be interpreted in line with Article 21(3) of the Rome Statute and 'internationally recognised human rights', a broad interpretation of the right to privacy should be used. Notwithstanding this, the wide meaning should be narrower and exclude well-being in order not to make all the elements contained in Article 68 of the Rome Statute redundant.

In light of this definition, the ICC can use different measures to protect victims' privacy. Rule 87 of the Rule of Procedure and Evidence (RPE), entitled 'protective

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<sup>20</sup> For the ECtHR see *X v Iceland*, (App no 6825/74), ECHR, 18 May 1976; *Niemietz v Germany*, (App no 13710/88), ECHR, 16 December 1992. For the IACtHR see *Ituango Massacres v Colombia*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No.148, 1 July 2006 and *Massacres of El Mozote and Nearby Places v El Salvador*, Merits, Reparations, and Costs, Inter-American Courts of Human Rights, Series C No. 252, 25 October 2012. For the HRC see *Toonen v Australia*, Communication no 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

<sup>21</sup> For the ECtHR see *A, B AND C v Ireland*, (App no 25579/05), ECHR, 16 December 2010. For the IACtHR see *Rivas Quintanilla v El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 37, 25 October 2012 and *Y v Argentina*, Merits, Reparations, and Costs, Inter-American Courts of Human Rights, Series C No. 38, 15 October 1996. For the HRC see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, 2005) 385; Sofia Gruskin and Aart Hendriks, 'The Right to Privacy: Some implications for Confidentiality in the Context of HIV/AIDS', in T S Orlin, A Rosas and M Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach* (Institute for Human Rights, 2000) 227.

<sup>22</sup> United Nations 'Preparatory Committee on the Establishment of an International Criminal Court' (UN Doc. A/AC.249/1997/L.8/Rev.1), 14 August 1997, 204; Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, (UN doc. A/AC.249/1997/L.8/Rev1), 14 August 1997, pp. 36-37.

measures', contains a non-exhaustive list of measures that can be applied within the courtroom to protect victims' and witnesses' right to privacy. These are, for instance, to expunge the name of the victim, witness, or other person at risk on account of testimony from the public records; the prohibition from disclosing such information to a third party; the testimony may be presented by electronic or other special means, which are able to alter the pictures or voice of the witness; the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of sound media; the use of a pseudonym, and, finally, the possibility of conducting the proceedings *in camera*.<sup>23</sup> While Rule 87(3) is echoed by Articles 68(2) and 69(2) of the Rome Statute and Regulation 21(2) of Regulation of the Court,<sup>24</sup> which refer to the same measures, Regulation 94 of the Registry Regulation adds a further protective measure of private sessions, which is not mentioned elsewhere.<sup>25</sup> In addition to these measures, Regulation 94 of the Regulation of the Registry adds that the ICC might apply 'any combination of the protective measures listed above or any modification of a measure ordered by the Chamber which is technically feasible'. This last sentence gives judges some flexibility in deciding which measures to implement. They may either combine protective measures, or modify any of the existent measures as far as is technically achievable.

Against this background, the next section focuses on the limitations upon victims' right to privacy in the Rome Statute.

### 3. Limitations to Victims' Right to Privacy: the Right to a Fair Trial

Although the right to privacy under international human rights law is a qualified right, the Rome Statute does not expressly prescribe a limitation to victims' right to privacy.<sup>26</sup> Conversely, it establishes an indirect limitation to such a right when applying protective measures, because Article 68(1) of the Rome Statute states that '[protective] measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. The scope of the right to a fair and impartial trial for the purposes of the Rome Statute is clarified by Article 67, which includes a set of minimum guarantees, such as the right to have adequate time and facilities for the preparation of the defence; to be

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<sup>23</sup> Rule 87, Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

<sup>24</sup> International Criminal Court, Doc. ICC-BD/01-01-04, adopted by the International Criminal Court on 26 May 2004 and modified (ICC-BD/01-01-04/Rev.01-05) on 9 March 2005.

<sup>25</sup> Regulation of the Registry, entered into force on 6 March 2006 on revised on 25 September 2006, ICC-BD/03-01-06-Rev1.

<sup>26</sup> For instance, under Article 8(2) of the ECHR, limitations to the right to privacy must fulfil 3 requirements: they must be prescribed by law, be necessary in a democratic society and should pursue a legitimate aim, as stated in the exhaustive list of Article 8(2) of the ECHR. According to Article 17 of the ICCPR '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy'. Article 11 of the IACHR reads that '[n]o one may be the object of arbitrary or abusive interference with his private life'.

tried without undue delay; to conduct the defence in person; and to examine, or to have examined, the witness against him or her.

Thus, although the respect for fair trials norms is explicitly listed in the Rome Statute, it is difficult to set the right applicable standard. On the one hand, it has been argued that the ICC should adopt the highest standards of fairness. This view was endorsed by the Ad Hoc Committee of the General Assembly which, by commenting on the ILC Draft Statute for the ICC, stated that '[the ICC] should be bound to apply the highest standards of justice, integrity and due process'.<sup>27</sup> This approach has also been shared by some scholars, such as McDermott, who believes that this would enhance the ICC's legitimacy and the respect for the rule of law world-wide.<sup>28</sup> However, on the other hand, Damaška argued that the highest standard of fairness might be too high for international criminal trials and suggests that the process should be just 'fair enough'.<sup>29</sup>

The practice of the ICC seems to suggest that judges lean towards the first option because, although they may combine protective measures according to regulation 94, they cannot modify the existing protective measures to allow witnesses to testify in full anonymity. Indeed, not only was a proposal of the Italian delegation to allow anonymity for witnesses not accepted by the Assembly of State Parties,<sup>30</sup> but also the ICC has several times rejected the idea that anonymous victims, who enjoy the dual status of victims-witnesses, should maintain their anonymous status when testifying. For instance, in *Lubanga*, Pre-Trial Chamber I ruled that anonymous victims are subjected to some restrictions, such as an absolute ban on submitting evidence during the proceedings.<sup>31</sup> A more lenient approach was endorsed by Trial Chamber I, which overruled the Pre-Trial Chamber's decision. It stated that anonymous victims could never testify as witnesses, explaining that the difficulties in accepting anonymous victims are related to the accused's right to fair trial.<sup>32</sup> Thus, it concluded that whether victims can testify anonymously should be decided on a case-by-case basis.<sup>33</sup>

Although, in this first decision, Trial Chamber I left it to the discretion of the judges as to whether anonymous victims could testify, later decisions were clearer on the matter

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<sup>27</sup> UNGA, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court (UN Doc. A/50/22) 1995, 129.

<sup>28</sup> McDermott, *supra* note 16, p. 147.

<sup>29</sup> Mirjan R Damaška, 'Reflections on Fairness in International Criminal Justice' 10 *Journal of International Criminal Justice* (2012) 611, 616.

<sup>30</sup> Guido Acquaviva and Mikaela Heikkilä, 'Protective and Special Measures for Witnesses', in Goran Sluiter and others (eds) *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 818, p. 844; Michael E Kurth, 'Anonymity witness before the International Criminal Court: Due process in dire straits', in C Stahn and G Sluiter, *The Emerging Practice of the International Criminal Court* (Martinus Hijhoff Publishers, 2009) p. 615.

<sup>31</sup> Decision on the Arrangements for Participation of Victims a/0001/06, a/0003/06 and a/0003/06 at the Confirmation Hearing, *Prosecutor v Lubanga*, (ICC-01/04-01/06-462-tEN), Pre-Trial Chamber I, 22 September 2006, para. 6-8.

<sup>32</sup> Decision on victims' participation, *Prosecutor v Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I, 18 January 2008, para. 130-131.

<sup>33</sup> *Ibid.*



that the ICC should prohibit anonymous victims' testimony. For example, Trial Chamber II in the *Katanga* and *Ngudjolo Chui* case, ruled that victims might be allowed to testify under certain circumstances, but '[u]nder no circumstances the Chamber will allow victims to testify anonymously vis-à-vis the Defence'.<sup>34</sup> The same approach was shared in the *Bemba* case.<sup>35</sup> Here, Trial Chamber III, referring back to the decision of Trial Chamber II in the *Katanga* and *Chui* case, ruled that victims are not allowed to testify anonymously.<sup>36</sup> The prohibition of victims' anonymity is so ingrained in the ICC that in the *Laurent Gbagbo and Charles Blé Goudé* case, the Office of Public Counsel for Victims requested that only victims who present their views and concerns should maintain their anonymity.<sup>37</sup> Conversely, the Common Legal Representatives of Victims recognised that victims who appear as witnesses before the ICC must reveal their identities.<sup>38</sup>

While the boundaries of the application of the right to a fair trial are clear, it remains difficult to strike the right balance between the different rights at stake. In the absence of any clear benchmark by the ICC, a useful guidance can be found in Art 21(3) of the Rome Statute, which establishes that the ICC should interpret and apply the law in conformity with internationally recognised human rights.<sup>39</sup> Since the right to a fair and impartial trial is an 'internationally recognized human right', judges should ensure that the international human right standards are applied and, with it, the relevant case-law which aims to counterbalance victims' against defendants' rights. In the remainder of this chapter, these standards will be applied to the ICC's case law in order to analyse whether the ICC has fully respected victims' right to privacy when testifying, without undermining the right of a defendant to a fair and impartial trial.

#### 4. An analysis of the ICC's case-law

Protective measures, such as pseudonyms, voice and face distortion, redaction from public transcripts, closed or private sessions, can be used to preserve victims' privacy, identity and whereabouts and to keep some information revealed during testimony

<sup>34</sup> Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-1665-Corr), Trial Chamber II, 1 December 2009, para. 22.

<sup>35</sup> Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, *Prosecutor v Bemba*, (ICC-01/05-01/08-2138), Trial Chamber III, 22 February 2012.

<sup>36</sup> *Ibid.*, para. 23.

<sup>37</sup> Further Submissions on the Modalities of Victims' Participation at Trial, *Prosecutor v Gbagbo and Blé Goudé*, (ICC-02/11-01/15-75), Trial Chamber I, 21 May 2015, para. 15.

<sup>38</sup> *Ibid.*

<sup>39</sup> Rebecca Young, 'Internationally Recognised Human Rights' Before the International Criminal Court' 60 *International Criminal Law Review* (2011) 189, 202. See also Alain Pellet, 'Applicable Law' in A Cassese, P Gaeta and J R W D Jones (eds), *The Statute of the International Criminal Court: a Commentary* (Oxford University Press, 2002); Lorenzo Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in G Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) pp. 74, 80-85 and 93; Dapo Akande, 'Sources of International Criminal Law' in A Cassese (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) pp. 41, 47.

confidential. These measures have been used in all the proceedings before the ICC to protect both prosecution and defence witnesses, but to different extents. However, since the focus of this chapter is on victims, the following sections will only analyse whether, in interpreting and applying protective measures, the ICC has safeguarded the right to privacy of victims who testify at trial and whether it has successfully counterbalanced it with the defendant's right to a fair and public trial.

### 3.1. *Prosecutor v Lubanga*

The first trial before the ICC, *Lubanga*, was characterised by an extensive use of protective measures. Victims testified with facial and voice distortion, under a pseudonym, and in a closed or private session to protect their identities. For instance, these measures were granted to Witness 11, a former child soldier trained in one of the Lubanga military camps,<sup>40</sup> and to Witness 10, a female witness, who was enlisted in Lubanga's army and was, like most of the other kidnapped young girls, raped.<sup>41</sup>

The widespread use of measures to protect OTP victims' privacy can be justified under several grounds in the *Lubanga* case. First, it is certainly linked to the type of charges Lubanga was facing. Since he was indicted for having enlisted, conscripted and used child soldiers, it was to be expected that many of the victims testifying were going to be former child soldiers. Protecting their identity was of the utmost importance for the ICC. Second, the situation in Ituri in DRC, where many victims were from, was still volatile at the time they were heard. Thus, preserving their identities and whereabouts was necessary not only to protect their privacy, but also their safety. Finally, the *Lubanga* case was the first case held before the ICC. The ICC was struggling to establish its credibility as a reliable institution and in order to attract more victims to testify before its benches, it was necessary to show that the ICC was actually protecting their privacy.

The Defence was very critical of the use of protective measures during the entire *Lubanga* trial.<sup>42</sup> However, Lubanga's Defence team was able to cross-examine all the victims who testified as witnesses, although partially in closed sessions.<sup>43</sup> International human rights standards establish that any handicap under which the defence team is working must be counterbalanced by some procedures put in place by the judiciary. This principle was clearly stated by the ECHR in *Doorson v Netherlands* and, subsequently, *Van Mechelen v Netherlands*, where the accused were convicted on the basis of

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<sup>40</sup> Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-139-Red2-ENG), Trial Chamber I, 3 March 2009.

<sup>41</sup> Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-144-Red2-ENG), Trial Chamber I, 5 March 2009.

<sup>42</sup> International Justice Monitor, 'Lubanga Defense To Call 'Around 30 Witnesses' (International Justice Monitor, 5 January 2010) <<https://www.ijmonitor.org/2010/01/lubanga-defense-to-call-around-30-witnesses/>> accessed 29 March 2019 and International Bar Association, 'Report on Witness before the International Criminal Court', July 2013, 31.

<sup>43</sup> Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-145-Red3-ENG), Trial Chamber I, 6 March 2009.

anonymous testimonies.<sup>44</sup> Here, in line with the previous and subsequent case-law, the ECHR observed that 'the handicaps under which the defence labours [should] be sufficiently counterbalanced by the procedures followed by the judicial authorities'.<sup>45</sup>

Furthermore, the ECtHR has elaborated a 'sole or decisive rule', which provides that a conviction based 'solely or to a decisive extent' on anonymous witnesses infringes the accused's right to a fair trial.<sup>46</sup> Some authors believe that little consistency on the 'solely or to a decisive extent' principle exists within the ECtHR cases.<sup>47</sup> Indeed, as clarified by Judge van Dijk in *Van Mechelen v Netherlands* this rule 'is difficult to apply, because if the testimony of an anonymous witness is used by the court as part of the evidence, it will always be because the court considers it a "decisive" part of that evidence, making the proof complete or at least sufficient'.<sup>48</sup>

In its later case-law, the ECtHR has further developed the notion of 'counterbalancing' the defendant's right to a fair trial against the right to be protected, and has developed a three-prong test.<sup>49</sup> According to this test, firstly a court must verify what reasons justify the non-attendance of the victim who needs to testify as a witness, and whether all reasonable steps were taken to secure his/her attendance at trial. Secondly, the court must apply the 'sole or decisive' test, and, finally, it is necessary to ascertain whether enough measures were taken to counterbalance the handicap under which the defence labours.

In light of this case-law, it is clear that Lubanga's right to a fair trial was not infringed, since sufficient measures, such as cross-examination, were taken to counterbalance the handicap under which the defence was working.

Furthermore, even when cross-examining victims who testify as witnesses, the ICC and the relevant parties were careful to protect their privacy. This happened, for instance, when the Lubanga Defence team cross-examined one of the intermediaries used by the OTP to contact victims in the DRC, and asked several questions on the allegations that this intermediary had bribed some of the OTP victims who were supposed to testify against Lubanga.<sup>50</sup> The Defence team requested that the cross-examination be held in a

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<sup>44</sup> *Doorson v Netherlands*, (App no 20524/92), ECHR, 26 March 1996 and *Van Mechelen v The Netherlands*, (Apps nos 21363/93, 21364/93, 21427/93), ECHR, 17 April 1997. See also *Kok v The Netherlands*, (App no 43149/98), ECHR, 4 July 2000 para. 54; *Visser v The Netherlands*, (App No 26668/95), ECHR, 14 February 2002, paras. 45-46 and *Lucà v Italy*, (Application no 43870/04), ECHR, 24 September 2013, para. 40.

<sup>45</sup> *Van Mechelen v The Netherlands*, (Apps nos 21363/93, 21364/93, 21427/93), ECHR, 17 April 1997, para. 54. See also *Kok v The Netherlands*, (App no 43149/98) ECHR, 4 July 2000, para. 54; *Visser v The Netherlands*, (App No 26668/95), ECHR, 14 February 2002, paras. 45-46 and *Lucà v Italy*, (Application no 43870/04), ECHR, 24 September 2013, para. 40; *Windisch v Austria*, (App no 12489/86), ECHR, 27 September 1990, para. 31; *Unterpertinger v Austria*, (App no 9120/80), ECHR, 24 November 1986.

<sup>46</sup> *Doorson*, *supra* note 44, p. 76; *Windsch*, *supra* note 31; *Unterpertinger*, *supra* note 45.

<sup>47</sup> Tim Welch and others, 'Witness Anonymity at The International Criminal Court: Due Process For Defendants, Witnesses Or Both?' 23 *Denning Law Journal* (2011) p. 29, 40.

<sup>48</sup> *Van Mechelen*, *supra* note 45, p. 88.

<sup>49</sup> *Schatschschwili v Germany*, (App no 9154/10), ECtHR, 15 December 2015, paras. 110-111.

<sup>50</sup> Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-317-Red2-ENG), Trial Chamber I, 25 October 2010; Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-319-Red-ENG), Trial Chamber I, 27 October 2010.

closed session and argued that this was justified by the fact that the names of many protected victims and witnesses were going to be mentioned during cross-examination.<sup>51</sup> Similarly, the week after, the Defence Counsel requested that the cross-examination of Witness 321 be carried out in closed session. The cross-examination lasted for four days, throughout which the entire public and media were completely excluded from the proceedings.<sup>52</sup> Well aware that this could undermine the right to a fair trial of Lubanga since no public sessions were carried out, Presiding Judge Fulford requested the Defence to conduct the cross-examination of Witness 316 in open trial, as far as possible. He pointed out that:

[r]egrettably with the last witness effectively all of his evidence was held in private session. If there is any way of being able to deliver at least part of this evidence in open session, I would ask you please to construct your questions in such a way as to make that a real opportunity, that the Court can avail itself of, but I imagine you're going to want to start in private session so that the witness can give his name and his present circumstances.<sup>53</sup>

It is questionable whether the protracted use of closed or private sessions affected Lubanga's right to a public trial. This right is not absolute according to international human rights standards, but some exceptions can be introduced if the 'interest(s) of [...] the private life of the parties so require, or to the extent strictly necessary on the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.<sup>54</sup> Furthermore, according to the ECtHR's case law, it is necessary to consider the proceedings as a whole. This principle was expressed in *Axen*, where the applicant claimed that his right to a public trial was violated because, while the trial in first instance was heard in public, the appeal phase was all conducted *in camera*.<sup>55</sup> Here, no violation was found because the trial, taken as a whole, could be regarded as public.<sup>56</sup> It therefore seems clear that Lubanga's right to a public trial was not infringed by the use of protective measures, since Judge Fulford urged the Defence team to conduct the cross-examination

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<sup>51</sup> Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-317-Red2-ENG), Trial Chamber I, 25 October 2010, p 38 I 14.

<sup>52</sup> Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-320-Red2-ENG), Trial Chamber I, 1 November 2010; Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-321-Red2-ENG), Trial Chamber I, 2 November 2010; Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-322-Red2-ENG), Trial Chamber I, 2 November 2010; Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-323-Red2-ENG), Trial Chamber I, 3 November 2010; Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-324-Red2-ENG), Trial Chamber I, 4 November 2011; Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-325-Red2-ENG), Trial Chamber I, 4 November 2011.

<sup>53</sup> Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-327-Red2-ENG), Trial Chamber I, 8 November 2010, p 9, II 4-9.

<sup>54</sup> *P and B v United Kingdom*, (Apps nos 36337/97 and 35974/97), ECtHR, 24 April 2001.

<sup>55</sup> *Axen v Germany*, (App no 8273/88), ECtHR, 8 December 1983.

<sup>56</sup> *Ibid.*

in open trial and, at the time of writing, the relevant documents have been reclassified as open, as the security concerns, which led to the application of protected measures, changed, and some measures were lifted.<sup>57</sup> Having said that, if a formal human rights violation could not be found, the protracted use of protective measures which excluded the public, had the potential to undermine the reliability and legitimacy of the ICC, which was already the target of open criticism. This did not diminish in the following cases.

### 3.2. *Prosecutor v Katanga and Ngudjolo Chui*

Fewer closed or private sessions characterised the *Katanga* and *Ngudjolo Chui* trial. Indeed, at least 90 percent of the hearings were held in public sessions.<sup>58</sup> The OTP called a total of 26 victims to testify as witnesses on the events which happened on the 24<sup>th</sup> February 2003 during an attack in Bogoro, a village in the DRC Ituri Region.<sup>59</sup> In order to keep victims' identity, whereabouts and other relevant information confidential, the ICC mainly relied on facial and/or voice distortion, redaction of the transcripts, or relocation through the International Criminal Court Protection Programme.<sup>60</sup> For instance, with a pseudonym and his voice and image distorted, OTP Witness 250, a former soldier who fought at Bogoro within the ranks of the *Front des Nationalistes et Intégrationnistes*, took the stand on the 27<sup>th</sup> of January 2010.<sup>61</sup> OTP Witness 250 was also considered vulnerable and, for this reason, some special measures were also applied so that the witness was not supposed to have visual contact with the two accused and a psychologist was present.<sup>62</sup>

Nevertheless, few private or closed sessions were held in the case. For example, in the first part of his testimony, OTP Witness 233 was granted image and voice distortion in order to preserve his identity, and he gave part of his testimony in private session to keep his identity and whereabouts confidential.<sup>63</sup> Similarly, OTP Witness 161, who

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<sup>57</sup> All of these were reclassified as open apart from this: Transcript, *Prosecutor v Lubanga*, (ICC-01/04-01/06-T-327-Red2-ENG), Trial Chamber I, 8 November 2010.

<sup>58</sup> J Easterday, 'International Justice Monitor, Q&A with Eric MacDonald, Senior Trial Lawyer for the ICC: Part II' (International Justice Monitor, 2 June 2011) <<https://www.ijmonitor.org/2011/06/qa-with-eric-macdonald-senior-trial-lawyer-for-the-icc-part-ii/>> accessed 29 March 2019.

<sup>59</sup> J Algueró Llop, 'Katanga-Ngudjolo Trial Poised to Resume' (International Justice Monitor, 21 February 2011) <<https://www.ijmonitor.org/2011/02/katanga-ngudjolo-trial-poised-to-resume/>> accessed 16 October 2017.

<sup>60</sup> J Easterday, 'International Justice Monitor, Q&A with Eric MacDonald, Senior Trial Lawyer for the ICC: Part II' (International Justice Monitor, 2 June 2011) <<https://www.ijmonitor.org/2011/06/qa-with-eric-macdonald-senior-trial-lawyer-for-the-icc-part-ii/>> accessed 29 March 2019.

<sup>61</sup> Transcript, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-T-91-Red-ENG), Trial Chamber II, 27 January 2010, p. 1 II 21-25, p. 2, II 1-2.

<sup>62</sup> *Ibid.*, p 2 II 9-14.

<sup>63</sup> Transcript, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-T-83-Red-ENG), Trial Chamber II, 26 November 2009, pp. 5-12; Transcript, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-T-84-Red-ENG), Trial Chamber II, 27 November 2009, pp. 3-7; Transcript, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-T-86-Red2-ENG), Trial Chamber II, 27 November 2009, pp. 9-10 and 13-22; Transcript, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-T-87-Red-ENG), Trial Chamber II, 30 November 2009, pp. 20-23. For the reasons used to request private sessions, see Transcript, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-T-84-Red-ENG), Trial Chamber II, 27 November 2009, pp. 3, II 17-19.

unexpectedly accused the two defendants of being present at the crime scene, provided part of his testimony in private session.<sup>64</sup>

The fact that many of the hearings were held in public and that the Defence team was able to cross-examine the victims who testified as witnesses called by the other party posed no threat to Katanga's and Ngudjolo's right to a fair trial. Conversely, as emerged from an interview with the senior trial lawyer for the ICC, Eric MacDonald, cross-examination might undermine victims' right to privacy, because sometimes there are slip-ups, for example, when questioning some of them, it has happened that they have been named by their first name.<sup>65</sup> For this reason, Trial Chamber II ordered that the transcript or the recording of the hearings be redacted.<sup>66</sup>

Against this background, it is clear that the ICC protected the right to privacy- of the victims who testified as witnesses. Nevertheless, given the limited application of judicial protective measures, and the small number of private or closed hearings, the ICC judges fully safeguarded Katanga's and Ngudjolo's right to a fair and public trial. However, a different picture emerged in the *Bemba* case.

### 3.3. *Prosecutor v Bemba*

In the *Bemba* trial, the use of protective measures was massive. For instance, among the 40 OTP witnesses, only the expert witnesses testified in open court without any protective measures.<sup>67</sup> As explained below in this section, all the remaining OTP witnesses, both victims (who were crime-based witnesses, such as children, women and men, who had been raped and sodomised by Bemba's troops) and insider witnesses (who were members of President Ange-Félix Patassé's armed forces) testified with protective measures.<sup>68</sup> The privacy of victims who decided to appear as witnesses was fully

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<sup>64</sup> Transcript, *Prosecutor v Katanga and Ngudjolo Chui*, (ICC-01/04-01/07-T-84-Red-ENG), Trial Chamber II, 27 November 2009, pp. 3-9, 16-21; 38-42, 44-45.

<sup>65</sup> J Easterday, 'International Justice Monitor, Q&A with Eric MacDonald, Senior Trial Lawyer for the ICC: Part II' (International Justice Monitor, 2 June 2011) <<https://www.ijmonitor.org/2011/06/qa-with-eric-macdonald-senior-trial-lawyer-for-the-icc-part-ii/>> accessed 29 March 2019.

<sup>66</sup> *Ibid.*

<sup>67</sup> The experts were: Dr. Adeyinka Akinsulure-Smith, who is an expert on post-traumatic stress disorder affecting victims of sexual violence perpetrated by Bemba's militia, Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-38-ENG), Trial Chamber III, 29 November 2010; Samarin, a professor of linguistics and anthropology at the University of Toronto, Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-88-ENG), Trial Chamber III, 24 March 2011; Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-89-Red2-ENG), Trial Chamber III, 25 March 2011; Transcripts, *Prosecutor v Bemba* (ICC-01/05-01/08-T-90-Red2-ENG), 28 March 2011; Transcripts, *Prosecutor v Bemba* (ICC-01/05-01/08-T-91-Red2-ENG), Trial Chamber III, 29 March 2011; and Dr. André Tabo, the Head of the psychiatry department at Centre National Hospitalier Universitaire de Bangui in the CAR, Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-91-Red2-ENG), Trial Chamber III, 29 March 2011.

<sup>68</sup> For example, see Witness 178, Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-154-Red2-ENG), Trial Chamber III, 6 September 2011 and Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-157-Red2-ENG), Trial Chamber III, 8 September 2011. For Witness 33 see Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-158-Red2-ENG), Trial Chamber III, 9 September 2011; Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-159-Red2-ENG), Trial Chamber III, 12 September 2011. For Witness 32, Transcripts, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-165-Red2-ENG), Trial Chamber III, 23 September 2011; Transcripts, *Prosecutor v Bemba* (ICC-01/05-01/08-T-166-Red2-ENG), Trial Chamber III, 26 September 2011; Transcripts, *Prosecutor v Bemba* (ICC-01/05-01/08-T-167-Red2-ENG), Trial Chamber III, 27 September 2011. For Witness 65 see Transcripts,

protected. First, their identities were not known by the public and media since all of them were attributed pseudonyms.<sup>69</sup> Furthermore, in testifying before Trial Chamber III, those victims were granted a further set of protective measures, including face and voice distortion, and total or partial private or closed sessions to protect their security, dignity and privacy.<sup>70</sup>

Following the accusation that Bemba and his defence team tried to bribe some victims to falsify their testimony, a new investigation and prosecution was launched against Bemba; Aimé Kilolo-Musamba, his lead counsel at the time the charges were issued; Jean-Jacques Mangenda Kabongo, the case manager; Narcisse Arido, a defense witness; and Fidèle Babala Wandu, a member of the Congolese parliament. For this reason, Trial Chamber III ordered that the presentation of evidence be reopened.<sup>71</sup> During this phase, some of the victims who had been previously heard were called back to testify concerning the offences against the administration of justice, according to Article 70 of the Rome Statute, for '[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness forgiving testimony or destroying, tampering with or interfering with the collection of evidence.'<sup>72</sup> In recalling these witnesses, Trial Chamber III kept the previous protective measures in place granting witnesses pseudonyms and allowing witnesses to testify in closed or private sessions with the use of voice and/or facial distortion.<sup>73</sup>

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*Prosecutor v Bemba*, (ICC-01/05-01/08-T-168-Red2-ENG), Trial Chamber III, 11 October 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-169-Red2-ENG), Trial Chamber III, 4 October 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-170-Red2-ENG), Trial Chamber III, 5 October 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-171-Red2-ENG), Trial Chamber III, 6 October 2011. For testimony both in closed session and via video-link see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-171-Red2-ENG), Trial Chamber III, 6 October 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-214-Red2-ENG), Trial Chamber III, 14 March 2012; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-215-Red2-ENG), Trial Chamber III, 15 March 2012; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-216-Red2-ENG), Trial Chamber III, 16 March 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-217-Red2-ENG), Trial Chamber III, 19 March 2012.

<sup>69</sup>For example, for Witness 38, see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-34-Red2-ENG), Trial Chamber III, 24 November 2010. For Witness 22 see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-40-Red2-ENG), Trial Chamber III, 30 November 2010; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-41-Red2-ENG), Trial Chamber III, 1 December 2010; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-41-Red2-ENG), Trial Chamber III, 1 December 2010. For Witness 87 see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-44-Red3-ENG), Trial Chamber III, 11 January 2011. For Witness 23 see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-48-Red2-ENG), Trial Chamber III, 17 January 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-49-Red2-ENG), Trial Chamber III, 18 January 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-51-Red2-ENG), Trial Chamber III, 21 January 2011. For Witness 81 see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-55-Red2-ENG), Trial Chamber III, 27 January 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-56-Red2-ENG), Trial Chamber III, 28 January 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-57-Red2-ENG), Trial Chamber III, 31 January 2011; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-162-Red2), Trial Chamber III (15 September 2011); Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-164-Red-ENG), Trial Chamber III, 19 September 2011.

<sup>70</sup>Corrigendum to "Prosecution's Request for Protective and Special Measures for Prosecution Witnesses at Trial", *Prosecutor v Bemba*, (ICC-01/05-01/08-800-Conf-Exp-Corr), Trial Chamber III, 6 July 2010, para. 10.

<sup>71</sup>Notice of limited reopening of the presentation of evidence and rescheduling of closing statements', *Prosecutor v Bemba* (ICC-01/05-01/08-3155), Trial Chamber III, 2 October 2014.

<sup>72</sup>Art 70 (1)(c), Rome Statute.

<sup>73</sup>For Witness 242 see Transcript, *Prosecutor v Bemba* (ICC-01/05-01/13-T-37-Red-ENG) Trial Chamber III, 13 November 2015; for Witness D21-3 Transcript, *Prosecutor v Bemba* (ICC-01/05-01/13-T-40-Red2-ENG), Trial Chamber III, 2 March 2016. For Witness D21-P-0003 also testifying via video link see Transcript, *Prosecutor v Bemba* (ICC-01/05-01/13-T-40-Red2-ENG) Trial Chamber III, 2 March 2016.

Furthermore, the ICC has also safeguarded the right to privacy of victims who testified as witnesses from third parties. For instance, in order to protect Witness 22's privacy, judges of Trial Chamber III rejected the Defence request to disclose to third parties confidential documents carrying information on the health status of Witness 22 provided by an HIV specialist doctor.<sup>74</sup> Considering that no public information is available, it can be easily concluded that the ICC has fully protected victims' right to privacy from unwanted intrusions by the public and media, although this makes the study of this topic quite challenging.

Against this background, it seems that the ICC has correctly balanced the necessity to protect the right to privacy of the victims who were called by the OTP as witnesses, with Bemba's right to a fair and public trial. With reference to international human rights standards, according to which the handicap under which the defence team is working must be counterbalanced by some procedures put in place by the judiciary, it seems that the judges have successfully balanced the two rights at stake. There are a few points to note. First, not all the testimonies were held in private or closed sessions, Trial Chamber III switched to open sessions when no sensitive information was discussed. Second, all the victims who testified as witnesses were cross-examined by the *Bemba* Defence team, although these cross-examination sessions were often held in private or closed sessions.<sup>75</sup> Finally, as happened in the *Lubanga* and *Katanga* and *Ngudiolo* trials, most of the transcripts have been reclassified as open, meaning that the risks for victims' privacy are no longer so serious, with the result that some information can be realised publicly.<sup>76</sup>

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<sup>74</sup> Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-42-Red2-ENG), Trial Chamber III, 2 December 2010, p. 7, ll. 4-8.

<sup>75</sup> For Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-156-Red-ENG), Trial Chamber III, 7 September 2011, which became public pursuant to Trial Chamber III's Second Order (ICC-01/05-01/08-2223), dated 4 June 2012, and the instructions in the email dated 24 September 2013, from p. 22; for Witness 87, Transcript *Prosecutor v Bemba* (ICC-01/05-01/08-T-44-Red-ENG) and (ICC-01/05-01/08-T-47-Red2-ENG), Trial Chamber III, 14 January 2011, which became public pursuant to Trial Chamber III's Second Order (ICC-01/05-01/08-2223) dated 4 June 2012, and the instructions in the email dated 7 October 2013; For Witness 68 see Transcript *Prosecutor v Bemba*, (ICC-01/05-01/08-T-50-Red2-ENG), Trial Chamber III, 20 January 2011, which became public pursuant to Trial Chamber III's Second Order (ICC-01/05-01/08-2223) dated 4 June 2012, and the instructions in the email dated 4 November 2013. For Witness 23 see Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-53-Red2-ENG), Trial Chamber III, 25 January 2011, which became public pursuant to Trial Chamber III's Orders ICC-01/05-01/08-2223 and ICC-01/05-01/08-3038, and the instructions in the email dated 4 November 2013.

<sup>76</sup> For Witness 38, see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-34-Red2-ENG), Trial Chamber III, 24 November 2010, which became public pursuant to Trial Chamber III's Second Order, ICC-01/05-01/08-2223, dated 4 June 2012, and the instructions in the email dated 9 October 2013; for Witness 22 see Transcript *Prosecutor v Bemba*, (ICC-01/05-01/08-T-40-Red2-ENG), Trial Chamber III, 30 November 2010, which became public pursuant to Trial Chamber III's Second Order, ICC-01/05-01/08-2223, dated 4 June 2012, and the instructions in the email dated 24 September 2013 and Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-41-Red2-ENG) Trial Chamber III, which became public pursuant to Trial Chamber III's Second Order, (ICC-01/05-01/08-2223), dated 4 June 2012, and the instructions in the email dated 24 September 2013; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-41-Red2-ENG), Trial Chamber III, 1 December 2010, which became public pursuant to Trial Chamber III's Second Order, ICC-01/05-01/08-2223, dated 4 June 2012, and the instructions in the email dated 24 September 2013. For Witness 87 see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-44-Red3-ENG), Trial Chamber III, 11 January 2011, which became public pursuant to Trial Chamber III's Second Order, ICC-01/05-01/08-2223, dated 4 June 2012, and the instructions in the email dated 7 October 2013. For Witness 23 see Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-48-Red2-ENG), Trial Chamber III, 17 January 2011, which became public pursuant to Trial Chamber III's Orders, ICC-01/05-01/08-



Despite this, although the right to a fair and public trial was not unduly restricted in *Bemba*, it is necessary to note that all the victims called by the OTP as witnesses testified with protective measures, which contradicts the view that protective measures have an exceptional nature. With this in mind, we can turn to the Kenyan cases, where even greater use was made of exceptional measures.

### 3.4. The Kenyan cases

The OTP faced several challenges in prosecuting those alleged responsible for the 2007-2008 post-election violence in Kenya. One of the challenges was to keep identity of victims and witnesses confidential during the proceedings. Interference reached such systematic and alarming levels that the Prosecutor, Fatou Bensouda, while commenting on the killing of a defence witness, Meshak Yebey, announced that '[p]rosecution witnesses in this case have been under siege.'<sup>77</sup>

In the Confirmation of Charges Hearings in the *Ruto and Sang* and *Muthaura, Kenyatta and Ali* cases, no one testified, since the OTP preferred to maintain victims' and witnesses' identities and their whereabouts confidential.<sup>78</sup> Thus, the OTP used the statements of several victims, who were granted protection as witnesses, to uphold the charges.<sup>79</sup> While the use of statements *per se* remains outside the scope of this chapter, this technique has been heavily criticised by the Defence team, because not only it did not have the

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2223 and ICC-01/05-01/08-3038, dated 4 June 2012, and the instructions in the email dated 4 November 2013 and Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-49-Red2-ENG), Trial Chamber III, 18 January 2011, which became public pursuant to Trial Chamber III's Orders, ICC-01/05-01/08-2223 and ICC-01/05-01/08-3038, dated 4 June 2012, and the instructions in the email dated 4 November 2013; Transcript, *Prosecutor v Bemba*, (ICC-01/05-01/08-T-51-Red2-ENG), Trial Chamber III, 21 January 2011, which became public pursuant to Trial Chamber III's Orders, ICC-01/05-01/08-2223 and ICC-01/05-01/08-3038, and its instructions in the email dated 29 November 2013. For Witness 81 see Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-55-Red2-ENG), Trial Chamber III, 27 January 2011, which became public pursuant to Trial Chamber III's Orders, ICC-01/05-01/08-2223 and ICC-01/05-01/08-3038, and the instructions in the email dated 9 September 2013; Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-56-Red2-ENG), Trial Chamber III, 28 January 2011, which became public pursuant to Trial Chamber III's Orders, ICC-01/05-01/08-2223 and ICC-01/05-01/08-3038, and the instructions in the email dated 9 September 2013; Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-57-Red2-ENG), Trial Chamber III, 31 January 2011, which became public pursuant to Trial Chamber III's Orders, ICC-01/05-01/08-2223 and ICC-01/05-01/08-3038, and the instructions in the email dated 9 September 2013. For Witness 178, Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-154-Red2-ENG), Trial Chamber III, 6 September 2011, made public pursuant to Trial Chamber III's Orders, ICC-01/05-01/08-2223 and ICC-01/05-01/08-3038, and its instructions in the email dated 6 February 2014. Among those private sessions which were not reclassified as public see for Witness 32, Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-166-Red2-ENG), Trial Chamber III, 26 September 2011; for Witness 178, Transcript, *Prosecutor v Bemba* (ICC-01/05-01/08-T-156-Red-ENG), Trial Chamber III, 7 September 2011.

<sup>77</sup> Office of the Prosecutor, 'Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr Meshak Yebey', 9 January 2015 <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-09-01-2015&ln=en>> accessed 29 March 2019.

<sup>78</sup> For the *William Samoei Ruto and Joshua Arap Sang* case, see for instance Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-6-Red-ENG), Pre-Trial Chamber II, 2 September 2011, p. 6 ll. 5-19; p. 9, ll. 12-21; p. 10, ll. 20-25; p. 11, ll. 2-7. See also Transcript, *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* case *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-T-5-Red-ENG), Pre-Trial Chamber II, 22 September 2011, p. 12 ll. 13-19, pp. 13-14, ll. 23-25, ll. 1-10, p. 14, ll. 11-19; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-02/11-T-6-ENG), Pre-Trial Chamber II, 23 September 2011, p. 6, ll. 16-21, p. 7, ll. 23-25; p. 8, ll. 1-3.

<sup>79</sup> *Ibid.*

opportunity to test victims' honesty, credibility, reliability and accuracy, but also because the statements were heavily redacted to preserve victims' privacy. According to Article 61(5) of the Rome Statute, the OTP is not obliged to rely on testimony at the hearing of the confirmation of charges, but it may rely on documentary or summary evidence. Furthermore, the Defence does not know the identity of those victims who agreed to testify as witnesses, who are *de facto* anonymous witnesses.<sup>80</sup> This posed a great disadvantage to the Defence, which was not counterbalanced by the judiciary.

The charges against Muthaura and Kenyatta were quickly dropped,<sup>81</sup> as victims of the crimes refused to testify because they were intimidated or bribed, and the Kenyan Government did not disclose the relevant documentation as requested by the ICC.<sup>82</sup> Thus, no victims appeared to testify before Trial Chamber V(b), and the focus on the defendants' right to fair trial in this respect, was soon removed.

Conversely, charges against Ruto and Sang were confirmed.<sup>83</sup> In these two cases, significant use of protective measures to safeguard victims' identity and privacy was made, because the OTP was working in a very difficult environment. For this reason, all the victims who testified were called by a pseudonym in order to safeguard their identity. Furthermore, in order to preserve their privacy, Trial Chamber V(a) made frequent use of closed or private sessions; heavily redacted transcripts of the hearings; pixilation; voice distortion; and use of some curtains.<sup>84</sup> However, the fact that several victims who testified

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<sup>80</sup> For Ruto and Sang see Transcript, *Prosecutor v Ruto and Sang*, (ICC-01/09-02/11-T-6-ENG), Pre-Trial Chamber II, 23 September 2011, p. 110, ll. 5-11; p. 111 ll. 23-24; p. 112, ll. 10-18. For *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* case see Transcript, *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-T-10-ENG), Pre-Trial Chamber II, 28 September 2011, p. 27, ll. 14-19, p. 29, ll. 19-21.

<sup>81</sup> Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-687), Trial Chamber V(B), 11 March 2013; Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, *Prosecutor v Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-983), Trial Chamber V(B), 5 December 2014.

<sup>82</sup> Public redacted version of the Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses, *Prosecutor v Kenyatta* (ICC-01/09-02/11-823-Red2), Trial Chamber V(B), 11 October 2013; Public redacted version of the 16 July 2013 Prosecution notification of withdrawal of witnesses, *Prosecutor v Kenyatta* (ICC-01/09-02/11-773-Red), Trial Chamber V(B), 16 July 2013; Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, *Prosecutor v Kenyatta* (ICC-01/09-02/11-875), Trial Chamber V(B), 19 December 2013; Prosecution appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, *Prosecutor v Kenyatta* (ICC-01/09-02/11-100), Trial Chamber V(B), 20 March 2015; Decision on Prosecution request to add P-548 and P-66 to its witness list, *Prosecutor v Kenyatta* (ICC-01/09-02/11-832), Trial Chamber V(B), 23 October 2013.

<sup>83</sup> Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11-373), Pre-Trial Chamber II, 4 February 2012.

<sup>84</sup> For Witness P-536 see Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-29-Red3-ENG), Trial Chamber V(A), 17 September 2013; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-33-Red-ENG), Trial Chamber V(A), 24 September 2013; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-34-Red2-ENG), Trial Chamber V(A), 20 September 2013. For testimony almost entirely in private session see Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-39-Red-ENG), Trial Chamber V(A), 2 October 2013, pp. 5-36, 38-56, 72-86, 87-94; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-41-Red2-ENG), Trial Chamber V(A), 3 October 2013; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-41-Red2-ENG), Trial Chamber V(A), 3 October 2013. For witness P-326, see Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-43-Red2-ENG), Trial Chamber V(A), 7 October; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-44-Red2-ENG), Trial Chamber V(A), 8 October 2013, which was heavily redacted because in closed sessions pp. 29-46; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-44-Red2-ENG), Trial Chamber V(A), 8 October 2013; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-45-Red-ENG), Trial Chamber

as crime-based witnesses were bribed or intimidated and their names were revealed to third parties, shows that more effort should have been invested in protecting those individuals.<sup>85</sup>

As far as the right to a fair trial is concerned, the main issue was represented by the disclosure of victims' identities to the Defence teams.<sup>86</sup> However, the OTP did not disclose these identities in advance for security reasons, missing the effective deadline of 9 January 2013 fixed by the judges of Trial Chamber V(a). Despite this, the judges decided that the identities of the victims who were supposed to testify should have been disclosed on a rolling basis closer to the date of their testimony and, in order to mitigate any prejudice to the accused resulting from delayed disclosure, the OTP should have provided to the Defence summaries of witnesses' statements.<sup>87</sup> However, the Defence did not agree with the OTP's point of view, according to which the summaries would give the Defence team enough time to investigate the case, because the deadline of the 9<sup>th</sup> of January was missed.<sup>88</sup>

In truth, the concerns of Ruto's and Sang's Defence Teams can be justified in light of international human rights standards. Indeed, no violation could be envisaged in the process of disclosing evidence, since international human rights standards require that the prosecution must consult trial judges should they wish to withhold evidence in their possession. In this case, judges were consulted. Conversely, the principles of equality of arms and to have adequate time and facilities for the preparation of the defence was affected.<sup>89</sup> Although some scholars believe that the delayed disclosure of evidence is a 'necessary evil',<sup>90</sup> this forced the defence to work under more disadvantageous conditions than the other parties in the proceedings.<sup>91</sup>

Finally, in order to demonstrate that the Defence was bribing the victims called by the OTP as witnesses, the OTP relied on prior recorded testimonies, which were deemed admissible by Trial Chamber V(a).<sup>92</sup> However, this decision highlights that the ICC did not strike the right balance between the obligation to protect witnesses' right to privacy and

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V(A), 9 October 2013; Transcript, *Prosecutor v Ruto and Sang*, ICC-01/09-01/11-T-46-Red-ENG, Trial Chamber V(A), 10 October 2013; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-47-Red2-ENG), Trial Chamber V(A), 11 October 2013; Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-48-Red2-ENG), Trial Chamber V(A), 14 October 2013.

<sup>85</sup> ICC, <<https://www.icc-cpi.int/Pages/item.aspx?name=pr941&ln=en>> accessed 29 March 2019.

<sup>86</sup> For *William Samoei Ruto and Joshua Arap Sang* case see Transcript, *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-T-19-ENG), Trial Chamber V(A), 14 February 2013, p. 8, ll. 1-25 and 9, ll. 1-2.

<sup>87</sup> *Ibid.*, p. 9, ll. 3-13, pp. 10-13.

<sup>88</sup> *Ibid.*, p. 9, ll. 17-25.

<sup>89</sup> *Rowe v Davis*, (App no 28901/95), ECHR, 16 February 2000; *Jasper v UK*, (App no 27052/95), ECHR, 16 February 2000; *Fitt v UK*, (App 29777/96), ECHR, 16 February 2000.

<sup>90</sup> Sangkul Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals', 1 *Journal of East Asia and International Law* (2016) 53, 87.

<sup>91</sup> *Edwards and Lewis v UK*, (Apps nos 39647/98 and 40461/98), ECHR, 27 October 2004.

<sup>92</sup> Decision on Prosecution Request for Admission of Prior Recorded Testimony, *Prosecutor v Ruto and Sang*, (ICC-01/09-01/11-1938-Red-Corr), Trial Chamber V(a), 19 August 2015.

the opposed right of the accused to a fair and impartial trial for several reasons. First, Trial Chamber V(a) erred in defining 'prior recorded testimonies'. Indeed, the OTP requested that the Chamber admit unsworn 'formal statements made by any person who is questioned in connection with an investigation or with proceedings', as understood under Rule 111 and 112 of the ICC RPE. The judges considered that the unsworn formal statements could qualify as prior recorded testimonies and be admitted as evidence in line with the new Rule 68, which reads that the Trial Chamber may 'allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused'.<sup>93</sup> However, this chapter agrees with the Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony' (hereinafter 'Separate, Partly Concurring Opinion'), according to which 'testimony [is] as an oral or written statement under oath or affirmation.'<sup>94</sup>

Furthermore, Trial Chamber V(a) concluded that the interests of justice were served because these statements are necessary to understand whether any crime against the administration of justice has been committed on the accused person's behalf, and because the Defence was able to use cross-examination.<sup>95</sup> While it is true that the ICC has the material jurisdiction to investigate any offences against justice under Article 70 of the Rome Statute, this chapter does not consider that the right to fair trial has been respected. This point was clearly highlighted, once again, by Judge Eboe-Osuji in his Separate, Partly Concurring Opinion, when he clarified that it is true that the witnesses were examined and cross-examined in court under an oath.<sup>96</sup> However, neither the OTP nor the Defence questioned the witnesses on the specific issues, which were of particular interest to the OTP and which were contained in the witnesses' out-of-court statements. For this reason, Judge Eboe-Osuji believes that 'only the evidence of these witnesses to the extent of those questions and answers (including questions and answers connected to documentary and other materials put to the witness while on the stand) may be considered for the truth of their content'.<sup>97</sup> Since Trial Chamber V(a) admitted this evidence without giving the Defence the possibility to cross-examine the witnesses on specific and relevant points, this chapter argues that in these circumstances the ICC infringed the right to a fair trial of Ruto and Sang.

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<sup>93</sup> *Ibid.*, paras. 28-33.

<sup>94</sup> Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the Decision on Prosecution Request for Admission of Prior Recorded Testimony, *Prosecutor v Ruto and Sang*, (ICC-01/09-01/11-1938-Anx-Red), Trial Chamber V, 19 August 2015, para. 19.

<sup>95</sup> *Prosecutor v Ruto and Sang*, (ICC-01/09-01/11-1938-Red-Corr), *supra* note 92, para. 57.

<sup>96</sup> Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, *Prosecutor v Ruto and Sang*, (ICC-01/09-01/11-1938-Anx-Red), Trial Chamber V(a), 19 August 2019, para. 48.

<sup>97</sup> *Ibid.*, 48.

### 3.5. Prosecutor v Ntaganda

The *Ntaganda* case dealt with some crimes committed in the Ituri region in the DRC and, for this reason, shared the same investigative background as the *Lubanga* and the *Katanga and Ngudiolo* cases. As with the preceding cases, it did not experience challenging situations in protecting victims who testified as witnesses, and successfully protected their privacy and balanced the different concurring interests at stake.

In order to preserve their privacy within the courtroom, Trial Chamber VI confirmed the same protective measures (pseudonym, facial and voice distortion) previously applied to 11 witnesses who testified at the *Lubanga* Trial.<sup>98</sup> More specifically, Trial Chamber VI was of the view that 'the in-court protective measures ordered by Trial Chamber I in relation to the Witnesses are directly applicable to the *Ntaganda* case'.<sup>99</sup> In addition to these measures, the majority of the victims who were called by the OTP as witnesses also testified in private or *ex parte* hearings.<sup>100</sup> Once again, the widespread use of private hearings was heavily criticised by the Defence Team for *Ntaganda*, because no one outside the courtroom could understand the content of each testimony.<sup>101</sup>

Against this background, the few exceptions where protective measures were denied can be explained by a correct balancing exercise of Trial Chamber VI judges. For instance, the use of facial and voice distortion for Witness P-886 and Witness P-39 was denied.<sup>102</sup> In both examples, the judges believed that the objectively justifiable risk was missing. The lack of this element in conjunction with the uncertainty of the level of risk at the early stage of proceedings encouraged the judges that less stringent protective measures were needed.<sup>103</sup> Despite this, Witness P-886 decided to testify in the *Ntaganda* case without the

<sup>98</sup> Decision on Prosecution request for in court protective measures, *Prosecutor v Bosco Ntaganda*, (ICC-01/04-02/06-774-Red), Trial Chamber VI, 10 August 2015.

<sup>99</sup> *Ibid.*, 4. Footnote omitted.

<sup>100</sup> For example, for private hearings see Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-36-Red2-ENG), Trial Chamber VI, 22 October 2015, pp. 7-22, 24-51; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-39-Red-ENG), Trial Chamber VI, 27 October 2015, pp. 3-12, 14-31, 35-40, 43-50, 66-88; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-40-Red-ENG), Trial Chamber VI, 28 October 2015, pp. 13-32, 33-62, 68-80; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-41-Red-ENG) Trial Chamber VI, 30 October 2015, pp. 3-9; 12-18; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-43-Red-ENG), Trial Chamber VI, 30 October 2015, pp. 2-13; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-44-Red-ENG), Trial Chamber VI, 3 November 2015, pp. 11- 14, 23-26; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-45-Red-ENG), Trial Chamber VI, 4 November 2015, pp. 26-36, 54-61; Transcript, *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-46-Red-ENG, Trial Chamber VI, 10 November 2015, pp. 7-18, 44-49, 52-55; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-53-Red-ENG), Trial Chamber VI, 18 January 2016, pp. 9-11; 14-20, 25-27, 33-35, 44-63; Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-54-Red-ENG), Trial Chamber VI, 19 January 2016, pp. 5-12, 19-21, 30-38, 43-45, 46-52, 64-68, 70-73; Transcript, *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-54-Red-ENG), Trial Chamber VI, 19 January 2016, pp 2-6; Transcript, *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-104-Red-ENG, Trial Chamber VI, 17 June 2016. For *ex parte* hearing, see Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-42-Red-ENG), Trial Chamber VI, 30 October 2010.

<sup>101</sup>W Wakabi, 'Q&A with Stéphane Bourgon, Lawyer Representing Bosco Ntaganda: Part II' (International Justice Monitor, 23 August 2016) <<https://www.ijmonitor.org/2016/08/qa-with-stephane-bourgon-lawyer-representing-bosco-ntaganda-part-ii/>> accessed 29 March 2019.

<sup>102</sup> For Witness P-39, see Decision on Prosecution's request for in-court protective measures for Witness P-0039, *Prosecutor v Ntaganda*, (ICC-01/04-02/06-956-Red), Trial Chamber VI, 28 October 2015. For witness P-886 see Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-36-Red2-ENG), Trial Chapter VI, 22 October 2015, p. 56, ll. 24-25; p. 57, ll. 1-8.

<sup>103</sup> *Ibid.*

use of these measures, while Witness P-39 refused to continue collaborating with the ICC.<sup>104</sup> While no particular challenges characterised the *Ntaganda* case, a different scenario can be envisaged in the *Gbagbo* case.

### 3.6. Prosecutor v Gbagbo

The *Gbagbo* case constitutes the most emblematic and well-documented example of the ICC failing to protect the right to privacy of victims who decided to participate in the proceedings as witnesses. Gbagbo, the former president of Côte d'Ivoire, was indicted by the ICC for crimes against humanity committed after the presidential election between 28 November 2010 and 19 September 2012. As had happened in several other cases, protective measures such as pseudonyms, voice and facial distortions and testified in closed or private hearings were granted.<sup>105</sup>

At a hearing on 5 February 2016 before Trial Chamber I, some witnesses were promised protective measures, such as face and voice distortion. During a closed session called by the Presiding Judge Cuno Tarfusser, the lead prosecutor Eric MacDonald, listed the names of some protected witnesses. However, due to an error made by the Registry, who are responsible for the non-judicial aspects of the administration and servicing of the ICC, the microphones were still on.<sup>106</sup> Thus, the public present in the ICC public gallery heard witnesses' names. A transcript of the hearing is not currently available but, following the incident, a clip of the hearing with the names of the protected witnesses circulated on YouTube.<sup>107</sup>

Presiding Judge Tarfusser described the accident as being 'of (the) utmost gravity', saying that:

because what happened is really incredible, and in order to find out exactly what happened and who is responsible for what and how is the situation is now, we have to -- we're making a closed session just ex parte, Prosecutor and

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<sup>104</sup> For Witness P-886 Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-36-Red2-ENG), Trial Chamber VI, 22 October 2015, p. 61, ll. 12-13. For Witness P-39, see Transcript, *Prosecutor v Ntaganda* (ICC-01/04-02/06-T-40-Red-ENG), Trial Chamber VI, 28 October 2015, p. 82 ll. 3-5.

<sup>105</sup> For Witness P-547 see Transcript, *Prosecutor v Gbagbo and Blé Goudé* (ICC-02/11-01/15-T-15-Red2-ENG), Trial Chamber I, 5 February 2016; Transcript, *Prosecutor v Gbagbo and Blé Goudé* (ICC-02/11-01/15-T-18-Red2-ENG), Trial Chamber I, 8 February 2016; Transcript, *Prosecutor v Gbagbo and Blé Goudé* (ICC-02/11-01/15-T-19-Red-ENG), Trial Chamber I, 9 February 2016.

<sup>106</sup> Art 43(1), Rome Statute.

<sup>107</sup> See the comments to the video on YouTube available at <[https://www.youtube.com/watch?v=Bzo\\_RZH093s](https://www.youtube.com/watch?v=Bzo_RZH093s)> (accessed 12 February 2016). AFP, 'ICC to probe 'outing' of secret witnesses in Gbagbo case' (Daily Mail, 6 February 2016) <<http://www.dailymail.co.uk/wires/afp/article-3434827/ICC-probe-outing-secret-witnesses-Gbagbo-case.html>> accessed 29 March 2019.

Registry only, in order just to find out and to find out what is also the security issues which have to be put in place or whatever, we will hear.<sup>108</sup>

Ultimately, the judges of Trial Chamber I had to take extreme measures to protect witnesses' identities in the case. The measures adopted at trial did not reach the desired effect however, as speculations over witnesses' identities on the internet became very serious. Unfortunately, the speculations did not cease and, after having threatened the parties with holding the proceedings *in camera*, on 9 June 2016, the judges of Trial Chamber I decided to introduce prior recorded testimonies for 28 crime-based witnesses and 11 insider witnesses.<sup>109</sup> Although Trial Chamber I was publicly challenged on the impact of this decision on the right to a fair and impartial trial, the judges considered 'that introduction of prior recorded testimony under Rule 68(3) of the Rules typically carries a lower risk of interfering with the fair trial rights of the accused, because the witness still appears before the Chamber and is available for examination, including by the Defence'.<sup>110</sup> Thus, the restrictions on the right to a fair trial were not justified since the judges correctly concluded that sufficient safeguards were established.

## 5. Findings and Recommendations

This analysis of the ICC's case-law has revealed that the information on which judges rely to decide whether to grant protective measures is confidential given the sensitive nature of the rights at stake. Recognising that confidentiality in this matter is necessary, this chapter recommends that the ICC should be as transparent as possible in sharing information on protective measures in full respect of the rights of victims who testified as witnesses. This would guarantee an independent evaluation of the protection system, which can lead to its enhancement.

Furthermore, the analysis has showed that, although the ICC has an appropriate legal system to protect the privacy of the victims who testify within its courtroom, some confidential information was revealed to the public and the media. This chapter urges parties to check in advance for any possible risks to victims' privacy in order to choose

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<sup>108</sup> Transcript, *Prosecutor v Gbagbo and Blé Goudé*, (ICC-02/11-01/15-T-16-ENG), Trial Chamber I, 8 February 2016, pp. 1, ll 19-23.

<sup>109</sup> Lesser public redacted version of "Public redacted version of Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088", *Prosecutor v Gbagbo and Blé Goudé*, (ICC-02/11-01/15-829-Red2), Trial Chamber I, 8 June 2017.

<sup>110</sup> *Ibid.*, para. 18; Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), *Prosecutor v Gbagbo and Blé Goudé*, (ICC-02/11-01/15-573-Red), Trial Chamber I, 9 June 2016, para. 24; Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *Prosecutor v Gbagbo and Blé Goudé*, (ICC-02/11-01/15-744), Trial Chamber I, 1 November 2016, para. 28.

the correct measures in advance and avoid expunging *ex post* any confidential information from the public transcripts. In order to prevent other macroscopic mistakes, as occurred in the *Gbagbo* case where the Registry did not switch off the microphone, some internal rules should be changed. Following this incident, it is unclear whether a new procedure to check that protective measures are correctly applied in court has been established, although the ICC launched an internal investigation to identify those responsible.

In addition, the ICC should improve its compliance concerning respect for the defendants' right to a fair, impartial and public trial, while applying judicial protective measures which safeguard witnesses' privacy. International human right standards establish that the handicap under which the defence works should be compensated with sufficient guarantees. Since all the victims who testified in person or via video-link before the ICC judges have been cross-examined, it is easy to conclude that the ICC judges have struck the right balance between the opposing rights at stake. However, some concerns still remain. For instance, the widespread and, in some cases, disproportionate use of closed and/or private sessions has the potential to undermine both the defendants' right to a public trial and the very same principle under which protective measures were created: their exceptional nature. Although the ICC alternates open sessions with closed or private sessions, and periodically reclassifies the transcripts and the decisions as public, it has been very difficult for the public and the media to follow what is happening, for instance, in the *Bemba* and Kenyan cases.

Also, the analysis of the ICC's practice in the Kenyan cases highlighted that identities of some victims who were supposed to testify were kept confidential during the confirmation of charges hearing, but were later disclosed to the other parties during the actual trial. If this way of proceeding was justified by the incredible difficulties the OTP was encountering at the time, due to several victims being bribed, intimidated or even killed, it also impaired the right of the defendants to equality of arms and to have adequate time and facilities to prepare their defence.

In this regard, the ICC could solve this problem using some alternatives to testimony, such as documentary forensic or digital evidence. The International Bar Association, in a report entitled 'Witnesses before the International Criminal Court', proposed such changes to ICC practice and launched an app called eyeWitness.<sup>111</sup> Such an option has a positive impact on witnesses' rights, as it would solve the problem at its roots: victims would not be involved as witnesses in ICC proceedings and their rights would not be put at risk.

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<sup>111</sup> International Bar Association, 'Report on Witness before the International Criminal Court', July 2013, pp. 8, 18, 36. See Eye Witness Project <<https://www.eyewitnessproject.org/>> accessed 29 March 2019.



Also, the OTP released a Strategic Plan for 2016-2018, which lists among its strategic goals that of prioritising alternative forms of evidence, or preferring to use victims as witnesses with a low-risk profile.<sup>112</sup> From this perspective, it should be noted that the ICC has lately been relying on digital evidence, defined as 'data [...] that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a communication system, that is relevant to the proceedings', in some of its recent cases.<sup>113</sup> For instance, in the *Al -Mahdi* case, after the confirmation of charges, the accused pled guilty and admitted to being responsible for the war crime of destroying ten of Timbuktu's mausoleums and mosques between June and July 2012.<sup>114</sup> More specifically, in order to corroborate the plea of guilty pursuant to Article 65(1)(c) of the Rome Statute, the OTP used only 3 witnesses, together with a significant amount of digital evidence. The OTP clarified that:

[i]n view of the guilty plea entered, the public must understand, therefore, today that the Prosecution does not intend to deal with each of the 700 pieces of evidence that have been filed before the Court, we will deal only with specific aspects; namely, starting with an interactive platform, the Prosecution will use satellite images, photographs, videos and other material gleaned from the Internet which are included on the list of our evidence material to show the situation of the mausoleums before, during and after the destruction, including the participation of the accused.<sup>115</sup>

In addition to these sources, the OTP used open source evidence, such as Google Earth satellite images, to demonstrate the status of the buildings before, during and after the attacks; videos taken from YouTube where the accused and his soldiers were shown destroying religious buildings; and videos of Timbuktu residents uploaded on public websites.<sup>116</sup>

Similarly, in *Bemba et al*, in order to prove that Bemba and his affiliates bribed some witnesses, the OTP relied on alternative types of evidence, such as some Western Union documents (obtained by the Austrian authorities) indicating money transfers between Bemba and some witnesses. Additionally, the OTP used telephone communications,

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<sup>112</sup> OTP, Office of the Prosecutor, Strategic Plan, 6 July 2015.

<sup>113</sup> Stephen Mason, *International Electronic Evidence* (British Institute of International and Comparative Law, 2008), xxxv.

<sup>114</sup> Judgment and Sentence, *Prosecutor v Al Mahdi*, (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016.

<sup>115</sup> Transcript, *Prosecutor v Al Mahdi*, (ICC-01/12-01/15-T-4-Red-ENG), Trial Chamber VIII, 22 August 2016, p. 41 ll. 4-10.

<sup>116</sup> *Prosecutor v Al Mahdi*, (ICC-01/12-01/15-171), *supra* note 114, ft 79-89.

including data records on the use of telephones by the accused, and some digital audio-recordings of communications between the parties.

Following this trend, in the *Al-Werfalli* case, the OTP mainly relied on open-source evidence.<sup>117</sup> It presented seven videos of executions published on Facebook and other social media websites, which resulted in an arrest warrant being issued for Al-Werfalli, a commander within the Al-Saiqa Brigade, who allegedly ordered 33 murders in the area of Benghazi.<sup>118</sup>

Some authors, such as Freeman, argue that the use of digital evidence in the above-mentioned cases does not constitute an 'anomal[y] or temporary deviation[...], but rather the first in a growing trend'.<sup>119</sup> Similarly, this chapter recognises the necessity of integrating witness testimony with digital data, but it is more cautious than Freeman.

The use of digital evidence is deeply linked to the typology of facts that must be proven during the trial. For instance, in the *Al-Mahdi* case, it was necessary to prove the destruction of certain religious buildings in the area of Timbuktu. Proving the existence of these buildings and their consequent destructions through the use of Google Earth images might be a good example if the OTP wants to have access to satellite imagery to demonstrate the burning and destruction of villages and the movement of populations. However, the *Bemba* case cannot be considered as a good example, because the accused was in the ICC's detention facilities and certain a type of evidence was readily available to the investigation team. Furthermore, this case was closer to a national public corruption type of case rather than an investigation into war crimes.<sup>120</sup> In addition to this, it has to be noted that in both the *Al Werfalli* and the *Al-Mahdi* cases, the indicted persons were the direct perpetrators of the alleged crimes. Digital evidence has not been yet used by the OTP to demonstrate the existence of a chain of command, and it remains to be seen whether these different types of evidence are economically sustainable.

In conclusion, the ICC should continue its work in granting measures to protect witnesses' privacy while balancing, on a case-by-case basis, the defendants' conflicting right to a fair, impartial and public trial, in line with the obligation contained in Article 68 of the Rome Statute.

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<sup>117</sup> Public Warrant of Arrest, *Prosecutor v Al-Werfalli*, (ICC-01-11-01/17-2), Trial Chamber VIII, 15 August 2017.

<sup>118</sup> *Ibid.*

<sup>119</sup> Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials', 41 *Fordham International Law Journal* (2018) 283, p. 333.

<sup>120</sup> *Ibid.*, p. 322.

## 6. Conclusion

While this book took inspiration from the idea that the ICC should ensure victims' rights and balance them with the defendants' rights, in the current legal debate, little attention has been given to victims' rights when they testify as witnesses before the ICC. For this reason, this chapter specifically focused on the measures implemented by the ICC to safeguard victims' right to privacy when they testify. This obligation, which stems from Article 68 of the Rome Statute, shall not be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.

This chapter has demonstrated that the ICC's practice in granting protective measures is generally consistent with the right to privacy of victims who decide to testify as witnesses before the ICC. Thus, the ICC should continue its good work in granting protective measures on a case-by-case basis when this is justified by the necessity of protecting victims' privacy. Furthermore, although the ICC has an appropriate legal system to protect and safeguard the privacy of victims and witnesses in its courtrooms, some confidential information was revealed to the public and media in the *Lubanga* and *Gbagbo* cases. Following the latter incident, it is unclear whether a new procedure that ensures that protective measures are correctly applied in court has been established. Although the ICC has since launched an internal investigation, at the time of the incident, it was not using all appropriate and reasonable means to protect the rights of those involved in the proceedings.

This chapter has also suggested that the ICC should be as transparent as possible in sharing information on protective measures, since the analysis of protective measures depended on publicly available case-law and transcripts. Many relevant documents which discuss sensitive topics are confidential and not accessible for further assessment. For instance, the circumstances and reasons which determine the decision as to whether to grant protective measures are always expunged.

In addition, the ICC should improve its compliance with respecting the defendant's right to a fair, impartial and public trial while applying judicial protective measures, because the sum of all protective measures can create a substantial disadvantage for the Defence. In light of international human rights standards, which establish that the handicap under which the Defence works should be compensated with sufficient guarantees, this chapter highlighted some concerns about the wide-spread use of closed and/or private sessions. Furthermore, it stressed that this practice contravenes the same nature of protective measures as exceptional measures, which should not be used routinely. Rather, the ICC should continue to alternate open sessions with closed or private sessions and to periodically reclassify the transcripts and the decisions as open. Furthermore, the ICC should limit, when possible, the use of closed or private sessions.

Finally, following several cases of witness tampering, witnesses' identities were kept confidential during the confirmation of charges hearing, before being disclosed to the other parties during the actual trial, impairing the rights of defendants to have adequate time and facilities to prepare their defence. In future, the ICC should carefully balance the necessity of protecting victims who testify before the ICC, with ensuring that the defence is provided with enough time to read the relevant material and adequately prepare.

Finally, this chapter recommends that the ICC pursue additional forms of evidence, such as written statements and new electronic evidence. In addition to forensic evidence, for instance, the ICC could temper witness testimonies with new digital and video technologies, cyber investigations, satellite imaging or remote sensing. The ICC has heavily relied on live testimony, because this is necessary to assess witnesses' reliability and to preserve the defendant's right to a fair trial. Using alternative forms of evidence and, more specifically, digital evidence, as in the recent cases of *Prosecutor v Bemba et al.*, *Prosecutor v Al Mahdi* and *Prosecutor v Al-Werfalli*, would relieve victims from the burden of testifying, while allowing the prosecutor to base her cases on reliable evidence.