IMPLIED EXTERNAL LIMITATIONS ON THE RIGHT TO CROSS-EXAMINE PROSECUTION WITNESSES: THE TENSION BETWEEN A MEANS TEST AND A BALANCING TEST IN THE APPRAISAL OF ANONYMITY REQUESTS

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Both the ad hoc Tribunals and the International Criminal Court have admitted implied external limits to the right of cross-examination by resorting to an extra-textual interpretation of their statutes. The International Criminal Tribunal for the former Yugoslavia has authorised recourse to absolute anonymity by referring to the object and purpose of its Statute*, which incorporates the protection of witnesses. The International Criminal Tribunal for Rwanda has so far refrained from granting or even considering such a protective measure. It nonetheless took a step towards authorising absolute anonymity by permitting the prosecutor to conceal prosecution witnesses' identities from the accused until the witnesses are called upon to testify in court, at a time when this was unambiguously limited to the pre-trial proceedings. The ICC has paralleled the ICTR's process of admitting implied external limits to this defence right. While the ICTR and the ICC share a similar approach to implied external limitations on the right to cross-examine, both ad hoc Tribunals share a similar rationale for tailoring these implied limits. Both the ICTY and the ICC use a 'less restrictive means' test in their justificatory criteria. The sequential justificatory test and the importance of the 'means test' that can be derived from the ICTY's traditional decisions on absolute anonymity have paved the way for a more holistic assessment of interferences with the right to cross-examine, which prioritises defence rights over witnesses' substantive rights. The ICTR has also begun to embrace such a vision of the relationship between the two sets of competing rights. The uncertainty in the field of implied external limitations upon the right to cross-examine is exacerbated by the fact that both ad hoc Tribunals have, in miscellaneous cases unrelated to anonymity, adopted a sequential two-prong test composed of a 'legitimate interest' requirement and a 'less restrictive means' test that are meant to apply to interferences with any defence right.*

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I INTRODUCTION

The aim of this article is to show that the ad hoc Tribunals have gone through a phase of 'tightening', and then of 'loosening', their approach to interferences with the right to cross-examine, unlike the International Criminal Court, which has stuck to its 'end and means' test when considering defence rights.

A central proposition is the absence of commonality between the three international criminal courts regarding judicial treatment of interferences with the right to cross-examine. This observation correlates with the existence of patterns of 'normative similarity' within pairs of tribunals: (i) between the two ad hoc Tribunals; (ii) between the International Criminal Tribunal for Rwanda and the ICC; and (iii) between the ICC and the International Criminal Tribunal for the Former Yugoslavia. The ICTY and ICTR have adopted similar reasoning in order to justify either absolute anonymity (the ICTY) or an extensive form of partial anonymity (the ICTR under the old regime of r 69). Common to the ICTR and the ICC is the judicial endorsement of an intermediate form of implied external limit to the right to cross-examine in the form of rolling disclosure mechanisms, albeit through distinct modes of reasoning. Common to the ICC and the ICTY is the judicial adoption at the theoretical level of an autonomous 'less restrictive means' test through distinct modes of reasoning.

The ICTY has conditioned absolute anonymity on a sequential test, which in practice has been applied holistically and stringently. The ICTY has suggested that absolute anonymity, as a form of implied external limitation upon the accused's right to cross-examine prosecution witnesses, represents an exceptional measure that is more difficult to trigger under international criminal procedure than under European human rights law. Borrowing arguments from the ICTY, the ICTR has initiated a similar process of allowing for implied external limits to the right to cross-examine. The ICTR nevertheless diverged from the ICTY in that the ultimate judicial interference was an extended form of partial anonymity that went beyond the old version of r 69 of the *ICTR Rules*.[1]

Recent developments in the ad hoc Tribunals' case law on protective measures and the admission of written evidence may have rendered judicial recourse to absolute anonymity even less likely, both in law and in fact. These developments are prone to overshadowing the 'means' test for assessing requests for protective measures, and favour a structural form of balancing of competing rights.

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[1] ICTR, *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, UN Doc IT/3/Rev.17 (14 March 2008) ('*ICTR Rules*').

However, despite tightening the permissibility of implied limits to such a fundamental defence right, both ad hoc Tribunals have shaped a general two-prong test that may result in the 'normalisation process' of judicial recourse to absolute anonymity. The ICTY and ICTR have indeed sown the seeds for a general theory of implied external limitation upon human rights even where no qualification or limitation clause in the Tribunal's internal law applies. Here, the theory focuses on a means test and thus on the extent of the permissible interference, therefore offering a more flexible justificatory tool than an 'all-or-nothing' approach to conflicts of values.

The ICC, like the ICTR, has set implied external limits on the right to cross-examine through its rolling disclosure mechanism. It extends partial anonymity beyond the terms of the *Rome Statute*[2] and the *ICC Rules*[3] by permitting the court to conceal the prosecution witnesses' identity from the accused for the duration of the pre-trial proceedings and for the part of the trial proceedings before the witness is called upon to testify.

Implied external limitations can be defined as those external limits to the exercise of a human right based on the pursuance of a public interest or the protection of another individual right. These limits are set by the judiciary in the absence of, or beyond the terms of, an express limitation or qualification clause.

For the purpose of this study, the following terminology will be used. An 'absent witness' is defined as a person whose 'out-of-court statements may be employed as evidence of the matter stated, despite the fact that he or she has not taken the stand at trial'.[4] An 'anonymous witness' refers to a person whose '*real* identity is concealed from the accused and counsel'.[5] 'Confidentiality' is a protective measure designed to conceal the witness's identity from the public only.[6] Whereas 'partial anonymity' here refers to the concealment of the witness's identity from the accused until the end of the pre-trial period or until he or she is called upon to testify in a court of law, 'absolute anonymity' refers to the non-disclosure of the witness's identity to the accused — at least during the testifying period and virtually during the entire trial proceedings. A 'vulnerable witness' is a witness in relation to whom 'adverse-questioning is ruled out as a method of collection of his/her evidence at any stage of the proceeding'.[7]

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2 Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

3 ICC, *Rules of Procedure and Evidence*, UN Doc ICC-ASP/1/3 (adopted 9 September 2002) ('*ICC Rules*').

4 Stefano Maffei, *The European Right to Confrontation in Criminal Proceedings* (Europa Law, 2006) 43.

5 Ibid 47 (emphasis in original). For a similar definition, see Muriel Guerrin, 'Le Témoignage Anonyme au Regard de la Jurisprudence de la Cour Européenne des Droits de l'Homme' (2002) *Revue Trimestrielle des Droits de l'Homme* 45, 48.

6 *Prosecutor v Tadić (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) [36] ('*Tadić Protective Measures Decision*'); Asa Rydberg, 'The Protection of the Interests of Witnesses: The ICTY in Comparison to the Future ICC' (1999) 12 *Leiden Journal of International Law* 455, 474–5; André Klip, 'Witnesses Before the International Criminal Tribunal for the Former Yugoslavia' (1996) 67 *International Review of Penal Law* 267, 279; Richard May, 'The Collection and Admissibility of Evidence and the Rights of the Accused' in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes against Humanity* (Hart, 2006) 161, 170.

7 Maffei, above n 4, 52.

Interference with the accused's right to cross-examine can be imagined in the form of a sliding scale. A measure of confidentiality only qualifies the accused's right to a public hearing, as opposed to interfering with any right to cross-examine prosecution witnesses.[8]

A slight interference with the right to cross-examine, underpinned by the legitimate aim of expediting the trial proceedings, could consist in the admission of testimonial evidence through closed circuit or video link.[9] In this hypothesis, the accused is de facto barred from genuinely observing in a court of law the witness's behavioural manners due to the interposition of a medium, even though the former is aware of the latter's biography and background.

Increasing the intensity of the interference, partial anonymity may directly interfere with the accused's right to adequate time and facilities for the conduct of their defence. If disclosure by the prosecutor takes place at a time unreasonably close to the start of the trial proceedings or to the time when the witness is called upon to testify, it may also incidentally encroach upon the accused's right to cross-examine prosecution witnesses.[10] The accused or the defence counsel's ill-preparedness in reviewing the witnesses' profiles would consequently make cross-examination less effective.

A more intense form of interference consists in the admission of out-of-court testimonial evidence stemming from absent or vulnerable witnesses: their real identity is known to the accused but they are not in a position to attend the hearing due to a circumstance beyond the court's control (such as death, disappearance, disease, detention or imprisonment in another jurisdiction) or to their condition (for example, minors or victims of sexual violence).

The gravest form of interference with the right to cross-examine prosecution witnesses is absolute anonymity. This directly and automatically encroaches upon the express defence right in that it prevents the accused from being able to effectively dispute the witness's allegations.[11] Absolute anonymity has the inevitable consequence of preventing the accused from inquiring into the witness's personal situation and therefore into the accuracy of their testimony.[12] Given that the core of the right to cross-examine prosecution witnesses centres around its 'truth seeking' function,[13] such interference goes to the heart of the witness's credibility and plausibility. Absent the accused's knowledge of the

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8 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995); May, above n 6, 170.

9 Gideon Boas, *The Milošević Trial* (Cambridge University Press, 2007) 48.

10 Implicit in *Prosecutor v Bagosora (Decision and Scheduling Order on the Prosecution Motion for Harmonization and Modification of Protective Measures for Witnesses)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001) [17] ('*Bagosora Protective Measures Decision*').

11 David Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck, 2008) 1275, 1284.

12 Julian Nicholls, 'Evidence: Hearsay and Anonymous Witnesses' in Roelof Haveman, Olga Kavran and Julian Nicholls (eds), *Supranational Criminal Law: A System Sui Generis* (Intersentia, 2003) 239, 287; Michaïl Wladimiroff, 'Rights of Suspects and Accused' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (Kluwer Law, 2000) 415, 448.

13 Alex C Lakatos, 'Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs against Defendants' Rights' (1995) 46 *Hastings Law Journal* 909, 933–4.

witness's identity, the right to cross-examine prosecution witnesses would accordingly become devoid of its effectiveness.[14] The scope of this chapter will focus on partial and absolute anonymity insofar as it translates into implied external limitations upon the right to cross-examine.

II STATUTORY FRAMEWORK

Before elaborating on the case law developments, the statutory framework shaping the right to cross-examine prosecution witnesses under international criminal procedure needs to be spelt out, as it embodies an internal source of law for the international courts under scrutiny.

Article 21(4)(e) of the *ICTY Statute*[15] provides that the accused is endowed with the right 'to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.[16] This provision has been inspired by art 6 of the *European Convention on Human Rights*[17] and art 14 of the *International Covenant on Civil and Political Rights*.[18] Article 20(4)(e) of the *Statute of the International Criminal Tribunal for Rwanda*[19] and art 67(e) of the *Rome Statute* are drafted in a very similar way.

A distinction will now be made between the framework of the ad hoc Tribunals and that of the ICC.

A *The Ad Hoc International Criminal Tribunals*

The right to cross-examine prosecution witnesses suffers no derogation or limitation clause under international criminal procedure and may be termed absolute from a statutory point of view, subject to the express internal limit entailed by such terms as 'witnesses against him' and the notions of 'examine' and 'have examined'.

The ICTY has held that 'the requirements of a fair trial demand that the accused be given the right to cross-examine the witnesses in order to fully test the Prosecution's case'.[20] The ICTY Trial Chamber has found that, as a general

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14 Monroe Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused' (1996) 90 *American Journal of International Law* 235, 236; Monroe Leigh, 'Witness Anonymity Is Inconsistent with Due Process' (1997) 91 *American Journal of International Law* 80, 81.

15 SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) annex ('*Statute of the International Criminal Tribunal for the Former Yugoslavia*') ('*ICTY Statute*').

16 Ibid art 21.4(e).

17 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').

18 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See *Prosecutor v Kupreškić (Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-16, 15 July 1999) [24] ('*Kupreškić*').

19 SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex ('*Statute of the International Criminal Tribunal for Rwanda*') art 20.4(e) ('*ICTR Statute*').

20 *Prosecutor v Milošević (Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92*bis*)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 21 March 2002) [25].

principle, and based on the European Court of Human Rights'('ECtHR') case law, evidence relied upon by the prosecution has to be presented at a public trial so as to be tested by the accused.[21] A corollary of this defence right is thus the principle of 'orality' of testimonial evidence. The rationale behind this principle lies in the fact that the accused can test the witnesses' credibility by watching their behaviour.[22]

Partial anonymity, unlike absolute anonymity, finds a legal basis in the ICTY and ICTR's respective rules. Rule 69(c) of the *ICTY Rules* provides that '[s]ubject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence'.[23] Rule 69(c) of the *ICTR Rules*,[24] which mirrored the equivalent provision of the *ICTY Rules*,[25] was amended on 6 July 2002. The newly drafted rule provides that '[s]ubject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence.' Rule 75(A) of the *ICTY Rules* empowers the Tribunal to issue protective measures that purport to implement the goal of witness and victim protection with an important caveat: these measures need to be 'consistent with the rights of the accused'. Rule 75(A) of the *ICTR Rules* is almost identically worded. Rule 69(c) in that respect represents a qualification clause in relation to the exercise of the right to cross-examine.[26]

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21 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995).

22 *Prosecutor v Bagosora (Decision on Prosecution Request for Testimony of Witness BT via Video-Link)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 8 October 2004) [12]; *Kupreškić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-16, 15 July 1999) [18].

23 ICTY, *Rules of Procedure and Evidence*, UN Doc IT/32/Rev.44 (10 December 2009) r 69(c) ('*ICTY Rules*').

24 *ICTR Rules* r 69(c).

25 Nevertheless, a big difference between the two rules is that the ICTR provision envisages non-disclosure of the witness's identity not just to the defence but also the prosecutor, unlike the ICTY provision that only envisages non-disclosure to the defence counsel.

26 The international criminal courts' respective statutes contain one limitation clause that covers exclusively the accused's right to a public trial but not his right to a fair trial. No derogation clause, as embodied in art 15 of the *ECHR*, is expressed in the courts' 'internal legal framework'. Besides a statutory limitation clause that affects the right to a public hearing, some regulatory provisions found in the international criminal courts' statutes, rules or regulations have the potential, although not automatically and depending on the court's interpretative discretion in this respect, of interfering with the exercise of defence rights. They will be grouped under the expression 'qualification clauses'. Rule 69 common to both ad hoc Tribunals and r 81(4), for instance, embody qualification clauses that affect the right to cross-examine. Partial anonymity indeed has the potential of interfering with this defence right depending on how the international judge exercises the power he derives from these rules. Not all regulatory provisions are qualification clauses. Regulatory provisions in general are those provisions designed to control the exercise or the 'mode of utilization' of a particular right without necessarily resulting in a restriction of its exercise. See Esin Orücü, 'The Core of Rights and Freedoms: the Limits of Limits' in Tom Campbell et al (eds), *Human Rights: From Rhetoric to Reality* (Basil Blackwell, 1986) 37, 40.

In contrast, absolute anonymity finds no legal basis in the ICTY and ICTR's internal legal framework.[27] Article 20(1) of the *ICTY Statute* and art 19(1) of the *ICTR Statute* compel Trial Chambers to guarantee the fairness and expeditiousness of the trial proceedings in addition to 'full respect for the rights of the accused'. Less compelling is the requirement that 'due regard' be given to the interest of witness and victim protection. This difference in wording signifies that 'the right of the accused to a fair trial has priority'.[28]

The United Nations Secretary-General's Report on the establishment of the ICTY[29] corresponds to the *ICTY Statute*'s legislative history.[30] Article 108 of the *Report* promotes the goal of witness and victim protection, particularly in the context of allegations of sexual violence, and urges for its implementation in the *ICTY Rules*.[31] Although the *ICTY Report* alludes to 'the protection of the victim's identity',[32] it does not expressly specify against whom this protection is to be exercised besides the public. Even if the Secretary-General also intended to protect the witness's identity from the accused, the *ICTY Report* makes clear that such measures ought to find an express legal basis in the *ICTY Rules*.[33] Both Tribunals' statutory instruments contain an express limitation clause.[34] Such a clause merely qualifies the public character of the international criminal trial to the exclusion of its fairness.[35] As recently reiterated by the Appeals Chamber in *Prosecutor v Karadžić*, the Tribunal cannot derogate from the *ICTY Statute* without an amendment thereof in the form of a new resolution adopted by the UN Security Council.[36] The right to a fair hearing is an 'absolute minimum', which cannot be balanced against other interests in order to guarantee anonymity

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27 James Sloan, 'The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look' (1996) 9 *Leiden Journal of International Law* 479, 497; Leigh, 'Witness Anonymity Is Inconsistent with Due Process', above n 14, 81–2; Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', above n 14, 236; Salvatore Zappalà, 'The Rights of the Accused' in Antonio Cassese, Paolo Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 1319, 1333; Natasha A Affolder, '*Tadić*, the Anonymous Witness and the Sources of International Procedural Law' (1998) 19 *Michigan Journal of International Law* 445, 477–8; Florence Mumba, 'Ensuring a Fair Trial whilst Protecting Victims and Witnesses — Balancing of Interests?' in Richard May et al (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer Law, 2001) 359, 368; Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (Kluwer Law, 2005) 208.

28 Mumba, above n 27, 364.

29 *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, UN Doc S/25704 (3 May 1993) ('*ICTY Report*').

30 Affolder, above n 27, 477–8.

31 *ICTY Report*, UN Doc S/25704 (3 May 1993) [108].

32 Ibid [109].

33 Ibid [108], [109].

34 *ICTY Statute* art 22; *ICTR Statute* art 21.

35 Leigh, 'Witness Anonymity Is Inconsistent with Due Process', above n 14, 81–2; Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', above n 14, 236; Zappalà, above n 27, 1333; Wladimiroff, above n 12, 448; Vincent M Creta, 'The Search for Justice in the Former Yugoslavia and Beyond: Analysing the Rights of the Accused under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia' (1998) 20 *Houston Journal of International Law* 381, 396–7.

36 *Prosecutor v Karadžić (Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-5/18-AR73.4, 12 October 2009) [35].

of testimonies.[37] Furthermore, the *ICTY Report* imposes a reading of the *ICTY Statute* in line with 'internationally recognized standards regarding the rights of the accused'.[38] The Secretary-General was aware of the existence of an ongoing armed conflict when the *ICTY Statute* was conceived, yet deliberately refrained from expressly providing for a derogation clause affecting the accused's minimum rights in case of a public emergency.[39] Even though art 21(2) of the *ICTY Statute* and art 20(2) of the *ICTR Statute* provide that the accused's right to a fair and public hearing is subject to arts 22 and 21 respectively (an enabling clause for the adoption of witness and victim protective measures in the form of rules of procedure), r 75(A) of both Tribunals' rules empowers each Tribunal to adopt protective measures subjecting these rules to the rights of the accused.[40] Even if one argues that the interpretations of the ad hoc Tribunals' respective statutes may become circular, r 75(B)(i) of the *ICTY Rules* and *ICTR Rules* foresees confidentiality of the witnesses' identity only from the public and the media, not from the accused. An *a contrario* understanding of this omission would suggest that the drafters of the rules ruled out the possibility of absolute anonymity.[41] Rule 85 of both the *ICTY Rules* and *ICTR Rules*, which regulates the presentation of testimonial evidence in court and therefore the exercise of the right to cross-examine, is not qualified by or subordinated to r 75 on protective measures.[42] Furthermore, r 69 of the *ICTY Rules*, which enables the Tribunal to conceal the witness's identity from the accused, only covers the pre-trial proceedings (in the ICTR, r 69 may also cover the trial proceedings up until the witness is called upon) and only insofar as is necessary.[43] This regulatory allowance for partial anonymity (in the form of qualification clause) clearly indicates that the drafters of both Tribunals' rules expressly and unambiguously took a position on the degree of permissiveness of interferences with the right to cross-examine prosecution witnesses. Allowing for absolute anonymity in this respect would amount to 'circumventing both the letter and the spirit of a pre-existing Rule'.[44]

B *The International Criminal Court*

The right to cross-examine prosecution witnesses may potentially be interfered with through partial anonymity, which may be validated after triggering a qualification clause of a statutory nature. Article 68(5) of the *Rome Statute* empowers the prosecutor to conceal evidence from the accused at the pre-trial stage if it would be likely to 'lead to the grave endangerment of the security of a witness or his or her family'. Article 68(5) has been implemented in the *ICC Rules* in the form of r 81(4), which specifically allows for the

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37 Leigh, 'Witness Anonymity Is Inconsistent with Due Process', above n 14, 83.

38 *ICTY Report*, UN Doc S/25704, [106]. See also Affolder, above n 27, 477–8.

39 Affolder, above n 27, 478.

40 Ibid 480; Mumba, above n 27, 364.

41 Kellye L Fabian, 'Proof and Consequences: An Analysis of the *Tadić* & *Akayesu* Trials' (2000) 49 *DePaul Law Review* 981, 1005–6; Mumba, above n 27, 368.

42 Creta, above n 35, 396.

43 *ICTY Rules* r 69; Affolder, above n 27, 480, 494.

44 Affolder, above n 27, 494.

concealment of the witness's identity from the accused but during the pre-trial proceedings only. This provision mirrors r 69 of the *ICTY Rules*.

In contrast, absolute anonymity does not rest on any suitable legal basis within the ICC's internal legal framework. First, an *a contrario* interpretation of the *Rules* would, as with the ad hoc Tribunals, suggest that the express allowance in the *ICC Rules* for pre-trial anonymity specifically reflects the opposition of their drafters to absolute anonymity.[45] Second, the absence of provisions in the *Rome Statute* or the *ICC Rules* authorising absolute anonymity in and of itself would suggest its lack of legal basis.[46] Third, the difference in terminology found in art 64(2) of the *Rome Statute* with respect to defence rights and witness protection ('full respect' versus 'due regard') confirms the statutory pre-eminence of the accused's minimum guarantees over the witness's right to privacy and security. Fourth, neither the right to a fair hearing nor the minimum guarantees of the accused are subject to the protection of victims and witnesses: only the right to a public hearing.[47] Fifth, the Preparatory Committee voiced its 'concern … over the possible use of anonymous witnesses' during its 1996 proceedings; recourse to this technique could make it difficult for the accused to dispute the witness's credibility.[48] Finally, the *Draft Statute for an International Criminal Court* adopted by the International Law Commission had proclaimed the accused's right to a fair and public trial before making them expressly 'subject to' the article dedicated to the '[p]rotection of the accused, victims and witnesses'.[49] The *ILC Draft*'s use of the phrase 'subject to', which suggests a form of limitation clause, is absent from the current text of art 67(1) of the *Rome Statute*, which substituted for it the expression 'having regard to the provisions of this Statute'.

III ANALYSIS OF THE INTERNATIONAL CRIMINAL COURTS' CASE LAW THROUGH THE LENS OF CONCEPTUAL TOOLS

The following points represent possible conceptual tools for capturing the ways in which international criminal tribunals (especially the ICTY) have shaped implied external limitations upon the right to cross-examine

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45 Article 68 of the *Rome Statute* expressly limits the concealment of the witness's identity from the accused during the pre-trial proceedings. Rule 76 of the *ICC Rules*, for instance, compels the Prosecutor to notify the accused of the witnesses' names in due course so as to allow him to organize his defence on time: *ICC Rules* r 76. See Nicholls, above n 12, 298–9; Knoops, above n 27, 210–11.

46 Kevin R Gray, 'Evidence before the ICC' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart, 2004) 287, 309; Colin T McLaughlin, 'Victim and Witness Measures of the International Criminal Court: A Comparative Analysis' (2007) 6 *The Law and Practice of International Courts and Tribunals* 189, 206.

47 *Rome Statute* arts 67(1), 68(2). Protective measures are described by the Statute as 'an exception' to the right to a public hearing.

48 M Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transnational, 1998) 425.

49 *Draft Statute for an International Criminal Court*, arts 41, 43, in International Law Commission, *Report of the International Law Commission on the Work of Its 46th Session*, UN Doc A/49/10 (1 September 1994) 114, 119 ('*ILC Draft*').

prosecution witnesses:

(i) the admission of a justificatory framework for reviewing interferences with the right to self-representation;
(ii) the presence of a mixed conflict of values;
(iii) the recognition of a 'means' test which overlaps with the implementation of the concept of practical concordance;
(iv) the recognition of a balancing formula that absorbs the 'means' test;
(v) the recognition of a 'priority to rights' principle;
(vi) the failure of the hierarchy of rights principle as a way of solving the underlying conflict of rights; and
(vii) the non-endorsement of the legality principle.

In view of conceptually analysing the international criminal courts' case law, Robert Alexy's proportionality model will be applied. This model, although based on the German constitutional order, may be transposed to other legal systems.[50] In this model, proportionality *lato senso* is subdivided into three sub-principles or successive stages: suitability, necessity and proportionality *stricto sensu*.[51] Whereas suitability and necessity are concerned with empirical assessments and therefore represent the 'means' test of the broad proportionality analysis, the balancing stage entails a normative test.[52]

The suitability test discards those means not effective enough for achieving the competing principle given the factual possibilities of the case.[53] Suitability is designed to rule out those means that are blatantly irrelevant to the pursuit of the competing principle.[54] It raises the question of whether the interference 'actually furthers the declared policy goal of the government'.[55] In a sense, this requirement prescribes a 'causal link' between the means (the interfering measure) and the end (legitimate objective).[56]

The necessity test requires that between several equally suitable means of pursuing a competing interest, the one which interferes least with the first principle be selected.[57] It has the effect of excluding 'inefficient human rights limitations'.[58] The main question raised will be 'whether the decision, rule or

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50 Lorenzo Zucca, 'A Theory of Constitutional Rights' (2004) 53 *International and Comparative Law Quarterly* 247, 247.

51 Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) 397–401.

52 Ibid; Robert Alexy, 'Individual Rights and Collective Goods' in Carlos Nino (ed), *Rights* (Aldershot, 1992) 163, 178.

53 Alexy, *A Theory of Constitutional Rights*, above n 51, 397–401.

54 Julian Rivers '*A Theory of Constitutional Rights* and the British Constitution' in Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) xxxii.

55 Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 131, 138.

56 Sébastien Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme: Prendre l'idée simple au sérieux* (Bruylant Bruxelles, 2001) 179 (author's own translation); Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law — In Comparative Perspective' (2007) 42 *Texas International Law Journal* 371, 388.

57 Alexy, *A Theory of Constitutional Rights*, above n 51, 397–401.

58 Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174, 200.

policy limits the relevant right in the least intrusive way compatible with achieving the given level of realisation of the legitimate aim'.[59] It does not imply weighing competing principles against one another but instead involves relating the means (the interfering measure) to the end (the legitimate aim).[60] The necessity test does not prejudge the required degree of satisfaction of a public interest but leads to the exclusion of 'avoidable fundamental rights sacrifices', bearing in mind a specific degree of achievement of a legitimate interest.[61] Means (the public interest interference) that fully impede the exercise of a human right are not necessarily excluded, so long as no less restrictive alternative measure can pursue the legitimate public interest as effectively.[62] This requirement may be applied in a flexible way by inviting an inquiry into alternative means that are 'reasonably available'.[63] Applied in a rigid way, it implies comparing the marginal benefits and costs of the challenged interference with those of alternative means for pursuing the legitimate aim.[64] This test has been given various labels: the 'less restrictive means' test;[65] the 'least restrictive means' test,[66] the 'least violative means' test,[67] the 'least restrictive alternative' test,[68] or the 'least drastic' test.[69] Given that the term 'necessity' is also employed by the ECtHR to convey a broader justificatory model that may or may not include the necessity prong as understood by Alexy, the expression 'less restrictive means test' will for the purpose of this article be adopted to refer to this second prong of the broad proportionality analysis.

Proportionality *stricto sensu* implies carrying out a 'cost–benefit analysis'.[70] It asks whether the interference with a right entails 'a net gain' when balancing the degree of non-satisfaction of a right with the degree of satisfaction of the legitimate interest.[71] In other words, the 'marginal benefit' to the public interest goal will be weighed against the 'marginal damage' to the said right as a consequence of the interference.[72] Proportionality *stricto sensu*, also referred to as 'the law of balancing', involves two stages of balancing. The first implies a

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59 Ibid 198.

60 Julian Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 167, 171, 179; Aharon Barak, 'Human Rights and their Limitations: the Role of Proportionality' (Speech delivered at the Foundation for Law, Justice and Society's Annual Lecture, Oxford, 4 June 2009).

61 Rivers, 'Proportionality, Discretion and the Second Law of Balancing', above n 60, 171.

62 Ibid 172; Andenas and Zleptnig, above n 56, 392.

63 Joel P Trachtman, 'Trade and … Problems, Cost-Benefit Analysis and Subsidiarity' (1998) 9 *European Journal of International Law* 32, 35.

64 Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) 212–13.

65 Gerhard van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (Wolf Legal Press, 2005) 232–4.

66 Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism (2008) 47 *Columbia Journal of Transnational Law* 72, 75.

67 Thomas M Franck, 'On Proportionality of Counter-Measures in International Law' (2008) 102 *American Journal of International Law* 715, 765.

68 Andenas and Zleptnig, above n 56, 389.

69 Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009) 348.

70 Rivers, 'Proportionality and Variable Intensity of Review' above n 58, 200.

71 Ibid 180–1.

72 Barak, above n 60.

positive correspondence between the intensity of the public interference with a right and the compelling nature of a legitimate objective.[73] The second stage implies that the more important a public interference with a human right is, the more certain its 'underlying premises' must be.[74] This second stage of balancing in turn affects the required degree of judicial review of the empirical basis underpinning the interference.[75] The requirement for a legitimate aim reflects the need for a link between the interference with a human right and 'a particular value-system': it thereby represents a 'substantive limitation requirement'.[76] Although many constitutional theorists have incorporated the 'legitimate aim' requirement within the broad proportionality analysis,[77] this test will for the purpose of this article be treated as conceptually distinct.[78] The reason for the non-incorporation of the 'legitimate aim' requirement is to ensure that proportionality is neutral as to the content of the interests that are in conflict.[79] This assumption is without prejudice to the close connection between the two tests: the 'legitimate aim' requirement constitutes a pre-requirement for the triggering of the three-prong analysis.[80]

Three main methods for incorporating public interest grounds into the human rights discourse are:

(i) the definition of a generic criterion that applies to all human rights without distinction between them;
(ii) the enumeration of specific and exhaustive countervailing interests that may qualify certain human rights;
(iii) a combination of the first two methods when the invocation of specified limitation grounds has to be consistent with common principles of interpretation.

The legitimate objective may be either express or implied. It is express when enacted in the same provision as that recognising the human right or in a more

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73 Alexy, *A Theory of Constitutional Rights*, above n 51, 102–9; Balsak Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 *Human Rights Quarterly* 251, 265.

74 Alexy, *A Theory of Constitutional Rights*, above n 51, 418–19.

75 Rivers, 'Proportionality, Discretion and the Second Law of Balancing', above n 60, 180, 187.

76 van der Schyff, above n 65, 183.

77 Rivers, 'Proportionality and Variable Intensity of Review', above n 58, 180–1; Brun-Otto Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue' (2005) 80 *Tulane Law Review* 203, 215; Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement', above n 55, 137; Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 579; Michael Fordham and Thomas de la Mare, 'Identifying the Principles of Proportionality' in Jeffery Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart, 2001) 27, 28; Jeffery Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *Public Law* 671, 679; Benjamin Goold, Liora Lazarus and Gabriel Swiney, 'Public Protection, Proportionality, and the Search for Balance' (Ministry of Justice Research Series No 10/07, September 2001) 1–2; Sweet and Mathews, above n 66, 75; Franck, above n 67, 762.

78 Van Drooghenbroeck, above n 56, 75; Richard A Posner and Aharon Barak, 'Can Democracy Overcome Terror? Democracy Fights Terror with One Hand Tied behind Its Back: Why, When and How This Hand Must be Untied' (Speech delivered at the Shasha Centre for Strategic Studies, Jerusalem, 18 December 2008) 17.

79 Van Drooghenbroeck, above n 56, 75.

80 Paul P Craig, *Administrative Law* (Sweet and Maxwell, 2003) 622–3.

generic provision of the same human rights instrument. The legitimate objective will be implied when put forward by the judiciary in the absence of or beyond the terms of an express mandate found in a limitation or qualification clause.

Specific techniques besides proportionality have been advanced in order to solve authentic conflicts of rights (as opposed to conflicts between a human rights and a public interest ground). These include the practical concordance mechanism and the hierarchy of human rights model.

A *The Admission of a Justificatory Framework for Reviewing Interferences with the Right to Cross-Examine*

In regard to the ICTY's early case law on the admission of absolute anonymity, the adopted approach has been flexible enough to embrace the legitimate objective requirement, the 'less restrictive means' test and a balancing formula.[81] The end and means tests translate into an overlapping series of five conditions and four guidelines. Witness and victim protection is viewed as embodying not only an individual right or interest, but also a public policy ground. So far, only the Trial Chambers of the ICTY have admitted the theoretical possibility of granting absolute anonymity in the 1990s as well as in a 2006 decision. Nevertheless, the ad hoc Tribunals' trial chambers and the ICTR Appeals Chamber have ruled that absolute anonymity is unlikely to be granted in the future given the priority accorded to the accused's defence rights.[82] Patricia Wald has argued that any new admission of absolute anonymity is improbable unless the prosecutor could genuinely demonstrate that the defence is unreliable

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81 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) [62], [66], [71]; *Prosecutor v Tadić (Decision on the Defence Motions to Summon and Protect Witnesses, and on the Giving of Evidence by Video Link)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 25 June 1996) [28] ('*Tadić Defence Motions to Summon and Protect Witnesses Decision*'); *Prosecutor v Tadić (Decision on the Prosecutor's Motion to Withdraw Protective Measures for Witness K)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 12 November 1996) ('*Tadić Witness K Decision*'); *Prosecutor v Delalić (Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed 'B' Through to 'M')* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [66]–[68] ('*Čelebići Protective Measures Decision*').

82 *Prosecutor v Milošević (Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 19 February 2002) [32] ('*Milošević Provisional Protective Measures Decision*'); *Prosecutor v Karadžić (Decision on Prosecution Motion for Non-Disclosure)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 2 September 2008) [6] ('*Karadžić Non-Disclosure Decision*'); *Karadžić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 30 October 2008) [20]; *Prosecutor v Musema (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-13-A, 16 November 2001) [68] ('*Musema Judgment*'); *Prosecutor v Milošević (Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 July 2002) [4] ('*Milošević Protective Measures Decision*'); *Prosecutor v Milošević (Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92*bis*(D) — Foca Transcripts)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 June 2003) [46] ('*Milošević Foca Transcripts Decision*').

in satisfying the requirement for confidentiality and non-disclosure of the witness's identity to the public.[83]

The ICTR initially admitted an implied external limitation upon the right to cross-examine prosecution witnesses by allowing for partial anonymity to extend to the trial proceedings until the witness was called upon to appear at a hearing for cross-examination. Now that r 69 of the *ICTR Rules* has been amended, what used to be an intermediary form of implied external limitation upon the right to cross-examine prosecution witnesses has been turned into an express external limitation.

The ICC has hitherto remained neutral on this question and the drafters of the *Rome Statute* have displayed a bias against its admission.[84] The extreme care with which it has interpreted requests for partial anonymity under r 81(4) (by resorting to rigorous proportionality criteria) is an indication that the Court will not easily defer to a request for partial anonymity.[85] Although it alludes to the ECtHR's case law on absolute anonymity, the ICC has, deliberately or not, refrained from taking a position on the validity of absolute anonymity in general. It has nonetheless admitted an implied external limitation upon the right to cross-examine prosecution witnesses by allowing for partial anonymity to extend to the trial proceedings until the witness is called upon, thereby going beyond the terms of the ICC regulatory framework.

Among the three international criminal courts, only the ICTY has validated the gravest form of interference with the accused's right to cross-examine, namely the judicial reliance upon absolute anonymity as a way of founding a conviction. In contrast, the ICTR (before the amendment of r 69) and the ICC have both validated an intermediary form of implied external limitation on such a defence right. This limitation takes the form of an extension of partial anonymity to part of the trial proceedings (as opposed to being confined to the pre-trial proceedings) beyond the textual bounds of their respective legal bases.

1 *The International Criminal Tribunal for the Former Yugoslavia and the Conditional Admission of Absolute Anonymity*

The ICTY Appeals Chamber has acknowledged that limitations upon the exercise of the right to cross-examine prosecution witnesses are not contrary to the right to a fair trial per se.[86] This in turn leaves the door open for a two stage analysis whereby interferences with a defence right may be validated subject to the satisfaction of justificatory criteria.

The case law can be described as falling within four main waves of decisions. In the first wave, the ICTY has admitted the validity of the judicial recourse to

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[83] Patricia M Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (2002) 5 *Yale Human Rights and Development Law Journal* 217, 223.

[84] M Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transnational, 1998) 425.

[85] *Prosecutor v Katanga (Public Redacted Version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICC-01/04-01/07, 28 May 2009) [18]–[33] ('*Katanga*').

[86] *Prosecutor v Martić (Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-11-AR73.2, 14 September 2006) [13] ('*Martić*').

absolute anonymity based on the qualified nature of the right to a fair trial in the name of victim and witness protection. In the second wave, the ICTY has confirmed the conditional reliance upon anonymous testimony as a matter of principle whilst making more exacting the conditions for triggering it. In the third wave, the ICTY has made general rulings in various areas of procedural law. These rulings have led to the inference that the structural superiority of the accused's rights (to a fair trial and to cross-examine prosecution witnesses) over victims' and witnesses' rights (to life and security) make judicial reliance upon absolute anonymity an exceptional or even an illegal interference with the aforementioned defence right. The observation associated with this third wave will be considered in light of the *Milutinović Protective Measures Decision*,[87] whereby the ICTY reaffirmed the continued validity of the *Tadić Protective Measures Decision*.[88] In the fourth wave of decisions, the ICTY has accepted an open-ended process of human rights interference by admitting that any curtailments of human rights could be validated, provided they satisfied a common set of justificatory requirements. The term 'wave' has been preferred to that of 'stage', as the four groups of decisions do not perfectly match successive time frames and may thus overlap from a temporal viewpoint.

(a) The Tadić Protective Measures Decision

At the outset of its famous *Tadić Protective Measures Decision*, the Trial Chamber distinguished proceedings in national criminal courts from proceedings before the ICTY insofar as the protection of the accused's minimum rights is concerned.[89] In order to make it clear that judicial interpretations of fair trial standards as delivered by the ECtHR were not binding upon the ICTY per se, the Trial Chamber noted that '[t]he International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence'.[90] It also distinguished the ICTY on the ground that it had to pronounce upon allegations of egregious criminal offences that justify the exercise of universal jurisdiction.[91]

The Trial Chamber recalled that, as a general principle and based on ECtHR case law, evidence relied upon by the prosecution has to be presented at a public trial so as to be tested by the accused.[92] Nevertheless, it found that 'the interest in the ability of the defendant to establish facts must be weighed against the interest

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87 *Prosecutor v Milutinović (Decision on Prosecution Sixth Motion for Protective Measures)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-PT, 1 June 2006) [21] ('*Milutinović Protective Measures Decision*').

88 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995).

89 Ibid [28].

90 Ibid. Judge Shahabuddeen made a similar analogy, by reference to an opinion of the European Commission of Human Rights, in the context of the assessment of the accused's right to be tried within a reasonable time: *Prosecutor v Kovačević (Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-AR73, 2 July 1998); William A Schabas, 'The Right to a Fair Trial' in Flavia Lattanzi and William A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (2004) 242.

91 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) [28].

92 Ibid [54].

in the anonymity of the witness.'[93] It took the view that a fair trial inherently presupposed the 'balancing of these interests'.[94] The Trial Chamber also collectivised the notion of procedural fairness by holding that the right to a fair trial entailed 'not only fair treatment to the defendant but also to the prosecution and to the witnesses'.[95] More specifically, the ICTY Trial Chamber conceded that the accused's right to a fair and public hearing, and his or her minimum rights more generally, could be balanced against the Tribunal's 'public interest' in victims' and witnesses' protection by reference to arts 20–22 of the *ICTY Statute*.[96] Additionally, the Trial Chamber found support in art 15 of the *ECHR* to conclude that the right to cross-examine prosecution witnesses could be restricted through witness anonymity to the extent that this is 'necessary' and 'appropriate' to ensure the safety of the witness and his or her family.[97] It accordingly held that in order to authorise such an interference with the accused's right to cross-examine, the applicant for protective measures had to demonstrate the existence of 'exceptional circumstances'.[98] The Trial Chamber further observed that:

> The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees (*See* Article 15 of the ECHR, Article 4 of the ICCPR and Article 27 of the American Convention on Human Rights). The fact that some derogation is allowed in cases of national emergency shows that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification. Guidance as to which other factors are relevant when balancing all interests with respect to granting anonymity to a witness can be found in domestic law.[99]

Subsequently, the Trial Chamber enumerated a series of indicia for the award of such a judicial measure:

(i) the presence of a serious ground for suspecting that the witness's or his or her family's security would be jeopardised in the event the witness's identity were disclosed to the accused;
(ii) the importance of the testimony to the accusation;
(iii) the absence of a priori untrustworthiness of the witness;
(iv) the absence of an available effective witness protection program in the witness's home country; and
(v) the 'strict' necessity of the said protective measure.[100]

The Trial Chamber wished to ensure 'that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable'.[101] It added that the

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93 Ibid [55].
94 Ibid.
95 Ibid.
96 Ibid [50], [56]–[57].
97 Ibid [56], [61]–[62].
98 Ibid [60].
99 Ibid [61].
100 Ibid [62]–[66].
101 Ibid.

right to cross-examine would not be breached as a result of anonymity, were the accused allowed to submit questions to the protected witness in question.[102] The Trial Chamber also set a series of 'guidelines' designed to guarantee the fairness of a trial involving anonymous testimony:

> (i) the judges have to be in a position to appreciate the witness's credibility through the observation of his behaviour when testifying;
> (ii) the judges have to be apprised of the witness's identity;
> (iii) the accused should enjoy 'ample opportunity' to cross-examine the prosecution witness so long as the nature of the questions being asked does not make their identification possible; and
> (iv) the witness's identity should be disclosed as soon as the reasons justifying the granting of anonymity have disappeared.[103]

The first three guidelines reflect the 'sufficient procedural safeguards' requirement and the last guideline mirrors the 'strict necessity' condition.

In the same decision, the Trial Chamber held that '[t]he limitation on the accused's right to examine, or have examined, the witnesses against him, which is implicit in allowing anonymous testimony, does not, standing alone, violate his right to a fair trial.'[104] In doing so, the Trial Chamber thereby recognised an implied interference with the right to cross-examine, which can be justified under certain conditions without being contrary to procedural fairness. Although the ICTY did refer to arts 20–22 as legal bases for authorising judicial interference with the right to cross-examine, it was clearly uncomfortable with doing so, given its allusion to the *ECHR* derogation clause and to the military nature of the ICTY as justifying the suspension of due process guarantees. Since it misinterpreted the scope of these articles,[105] it can still be argued that judicial recourse to absolute anonymity is ultra vires and therefore embodies an implied external limitation upon the right to cross-examine prosecution witnesses. As persuasively recalled by Judge Stephen in his separate decision, art 22 of the *ICTY Statute* was only meant to qualify the right to a public hearing, not the fairness of the proceedings or the minimum guarantees of the accused.[106] Judge Stephen adopted a natural reading of art 20(1) in conjunction with arts 21 and 22 of the *Statute*. He first compared the expression 'with full respect for the rights of the accused' found in art 20(1) with the expression 'with due regard' for victim and witness protection, the former concern being stronger than the latter.[107] The use of the word 'minimum' to describe the rights of the accused reinforces their unqualified nature.[108] He also pointed out that only para 2 of art 21 was qualified by art 22 and not the 'minimum' guarantees under para 4 of

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102 Ibid [67].
103 Ibid [71].
104 Ibid [75].
105 Sloan, above n 27, 497; Leigh, 'Witness Anonymity Is Inconsistent with Due Process', above n 14, 81–2; Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', above n 14, 236; Zappalà, above n 27, 1333; Affolder, above n 27, 477–8; Mumba, above n 27, 368; Knoops, above n 27, 208.
106 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) (Judge Stephen).
107 Ibid.
108 Ibid.

art 22.[109] Although art 21(2) refers to the right to both a fair and a public hearing, only the latter is targeted by art 22. Furthermore, the right to a fair hearing is already unconditionally enshrined in art 20(1).[110]

The *Tadić Protective Measures Decision* allows for a balance between the rights of the accused and those of witnesses whilst no 'automatic priority' is assigned to the accused's minimum rights.[111] The Trial Chamber implicitly recognised that the concept of fairness, as embodied in the *ICTY Statute*, includes not only the accused's minimum guarantees but also such other legitimate interests as witness and victim protection.[112]

(b) Confirmation of the Tadić Protective Measures Decision *in Subsequent Case Law*

Subsequent decisions delivered by ICTY Trial Chambers in the *Prosecutor v Blaškić*,[113] *Prosecutor v Delalić*[114] and *Prosecutor v Milutinović*[115] cases have affirmed the main rulings in the *Tadić Protective Measures Decision*, whilst tightening the conditions for triggering absolute anonymity by insisting on the exceptional context within which such a measure is to be granted and on the strict necessity of the protective measure being sought. None of these cases actually granted anonymity at the trial level.

In comparison with the other decisions acknowledging the validity of absolute anonymity, the *Čelebići Protective Measures Decision* has innovated by authorising interferences with the accused's right to cross-examine prosecution witnesses based on public policy grounds more generally.[116]

In the *Tadić Defence Motions to Summon and Protect Witnesses Decision*, the ICTY Trial Chamber endorsed the five requirements for the granting of absolute anonymity as set forth in the earlier *Tadić Protective Measures Decision*.[117] The peculiarity of this case lies in the fact that absolute anonymity was being sought by the defence in relation to a witness fearing prosecution on his visit to the premises of the Tribunal. The Trial Chamber especially insisted on the 'strict necessity' condition.[118] In the *Blaškić Protective Measures Decision*, the ICTY

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109 Ibid.

110 Ibid.

111 Christine M Chinkin, 'Due Process and Witness Anonymity' (1997) 91 *American Journal of International Law* 75, 79.

112 Olivia Q Swaak-Goldman, 'The ICTY and the Right to a Fair Trial: A Critique of the Critics' (1997) 10 *Leiden Journal of International Law* 215, 219.

113 *Prosecutor v Blaškić (Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) ('*Blaškić Protective Measures Decision*').

114 *Prosecutor v Delalić (Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed 'B' Through To 'M')* (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) ('*Čelebići Protective Measures Decision*').

115 *Milutinović Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-PT, 1 June 2006).

116 *Čelebići Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [55].

117 *Tadić Defence Motions to Summon and Protect Witnesses Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 25 June 1996) [28].

118 Ibid.

Trial Chamber reasserted the lawfulness of absolute anonymity in the ICTY criminal proceedings, but only as a matter of exception to the general rule that 'the rights of the Defence shall take precedence [over the protection of the witnesses]'.[119] This point is illustrated in the following ruling that was replicated by the Tribunal in subsequent cases and decisions:[120]

> The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.[121]

The Trial Chamber seemed therefore to consider the accused's rights to be superior to other competing considerations, without excluding the possibility that their balancing against witnesses' rights could occasionally tip the balance in favour of the latter.[122] This also translated in the Trial Chamber's characterisation of the accused's rights as being 'pre-eminent'.[123] In that respect, it adopted and reinforced the five conditions of validity set forth in the *Tadić Protective Measures Decision.*[124] It stressed again the need for 'exceptional circumstances' as an overarching requirement.[125] The ICTY Trial Chamber found that no exceptional circumstance remained, here understood as a 'pre-requisite for taking into consideration the five conditions which might lead to the granting of the protective measures the Prosecutor has requested'.[126] In the *Tadić Witness K Decision*, the Trial Chamber endorsed the *Tadić Protective Measures Decision* and applied the five safeguards surrounding the granting of anonymity.[127]

In the *Čelebići Protective Measures Decision*, the ICTY Trial Chamber had to adjudicate on the prosecution's request for protective measures. The prosecutor invited the Tribunal to authorise the exclusion of 'face to face confrontation' between the accused and the witness with a view to obviating the increased risk to the safety of the witness's family as a result of the former recognising the latter and to preventing the witness in question from being re-traumatised as a result of a visual confrontation.[128] The Trial Chamber recognised that the

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119 *Blaškić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [24], [38]–[39].

120 *Čelebići Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [59]; *Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [50] ('*Blaškić Trial Judgment*').

121 *Blaškić Protective Measures Decision* (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [24].

122 Ibid [38]–[40].

123 Ibid [35].

124 Ibid [41].

125 Ibid [40], [45].

126 Ibid [45].

127 *Tadić Witness K Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 12 November 1996).

128 *Čelebići Protective Measures Decision* (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [14].

exclusion of visual confrontation was tantamount to a form of anonymity, as the accused could only recognise the witness on the basis of his physical appearance rather than his identity.[129] It conceded that this protective measure would interfere with the accused's right to cross-examine prosecution witnesses and also posited that the right to a fair trial did not only benefit the accused but also witnesses.[130] The Trial Chamber also found that the accused's right to cross-examine prosecution witnesses could only be 'compromised' on public policy grounds.[131] Further, it conceded to the validity of anonymous testimony subject to the abovementioned five requirements and the four guidelines set forth by the ICTY in the *Tadić Protective Measures Decision*.[132] It here insisted on the exceptional nature of the anonymity. This is implicit in its reproduction of the excerpt of the *Blaškić Protective Measures Decision* cited earlier.[133]

In this respect, the Trial Chamber held that '[w]here there is a conflict between the protection of a vulnerable witness and the requirement of a face to face confrontation, the latter must yield to the greater public interest in the protection of the witness'.[134]

In both its *Blaškić Protection of Witnesses Decision* and its *Milošević Provisional Protective Measures Decision*, the ICTY Trial Chamber recalled the five conditions for triggering the granting of anonymous witnesses whilst not ruling out the continued validity of its jurisprudence.[135] In the former decision, it held that '[t]he International Tribunal must be satisfied that the accused will not suffer any excessive prejudice which can be avoided, although some imbalance is inevitable'.[136]

In its *Milutinović Protective Measures Decision*, the ICTY Trial Chamber II reaffirmed its power to order witness anonymity as a matter of principle provided that 'the testimony of the witness [is] important to the Prosecution's case' and that a genuine threat to the witness's or their family's safety, absent this protective measure, can be demonstrated.[137] What is troubling is that among the four decisions referred to in the footnote supporting this holding, only one has expressly recognised the continued validity of the *Tadić Protective Measures Decision*, namely the *Blaškić Protective Measures Decision*.[138]

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129 Ibid [50].

130 Ibid [53].

131 Ibid [55].

132 Ibid [57], [60].

133 *Blaškić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [24].

134 *Čelebići Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [65].

135 *Prosecutor v Blaškić (Decision of Trial Chamber I on the Prosecutor's Requests of 5 and 11 July 1997 for Protection of Witnesses)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-PT, 10 July 1997) [12] ('*Blaškić Protection of Witnesses Decision*'); *Milošević Provisional Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 19 February 2002) [25].

136 *Blaškić Protection of Witnesses Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-PT, 10 July 1997) [12].

137 *Milutinović Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-PT, 1 June 2006) [21]–[22].

138 *Blaškić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [42].

(c) Progressive Retreat from the Tadić *Precedent in Subsequent Case Law*

Hitherto, the Appeals Chamber of the ICTY has not expressly stated its position on the question of the validity of absolute anonymity in the face of the accused's right to cross-examine prosecution witnesses. Nevertheless, since the end of the 1990s, the ICTY Trial Chambers have increasingly made general rulings, which suggest that absolute anonymity has become an even more remote possibility, if not ruled out as a matter of principle. These rulings have been delivered in three main areas of international criminal procedure: (i) requests for protective measures under r 69; (ii) requests for protective measures under r 75; and (iii) r 92*bis* requests.

In the context of requests for protective measures under r 69,[139] the ICTY has recognised that the accused's defence rights, as well as the right to a fair trial, could be balanced against the need for witness and victim protection whilst conceding the presumptive or structural superiority of the former over the latter.[140] The ICTY Trial Chambers have renounced the theoretical possibility of allowing absolute anonymity, as this protective measure would impinge upon the accused's right to effectively prepare his defence, unlike confidentiality from the public.[141] The ICTY Trial Chamber, in the *Blaškić Trial Judgment*, confirmed its earlier *Blaškić Protective Measures Decision*, where it had elevated the right to a fair trial as a superior concern to that of victims and witness protection.[142]

In the *Karadžić Protective Measures Decision*, the ICTY Trial Chamber held that arts 20(1), 21(2) and 22 of the *ICTY Statute* 'reflect the duty of the Trial Chamber to balance the right of the accused to a fair trial, the rights of victims and witnesses to protection, and the right of the public to access information'.[143] It considered that '[w]hile "due regard" must also be given to protection of

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139 Rule 69 of the *ICTY Rules* allows exceptionally for the non-disclosure of the witness's identity to the accused in the course of the pre-trial proceedings provided that the witness is potentially 'in danger or at risk' and that the accused is notified of his or her identity before the commencement of the trial and early enough as to be able to conduct a proper defence.

140 *Prosecutor v Brđanin (Decision on Second Motion by Prosecution for Protective Measures)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36, 27 October 2000) [18]; *Prosecutor v Brđanin (Decision on Third Motion by Prosecution for Protective Measures)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36, 8 November 2000) [13]; *Blaškić Trial Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [50]; *Blaškić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [24]; *Prosecutor v Brđanin (Decision on Motion by Prosecution for Protective Measures)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-PT, 3 July 2000) [20]; *Karadžić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 30 October 2008) [14].

141 *Milošević Provisional Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 19 February 2002) [32]; *Karadžić Non-Disclosure Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 2 September 2008) [6]. See also *Karadžić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 30 October 2008) [20].

142 *Blaškić Trial Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [50]; *Blaškić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [24].

143 *Karadžić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 30 October 2008) [14].

victims and witnesses, this is a secondary consideration'.[144] In both the *Milošević* and *Karadžić* cases, the ICTY Trial Chamber suggested that the right of the accused to know the witness's identity could never be balanced away in favour of absolute witness anonymity,[145] positing that the witness's identity could only be withheld from the public and not from the accused. While preventing the accused from access to the witness's identity would amount to depriving him of his right to 'prepare his defence', concealing the witness's identity merely from the public would have no such effect.[146]

In the *Milošević Protective Measures Decision*, the ICTY held that art 20 of the *ICTY Statute*, as implemented in r 75(A) of the *ICTY Rules*, embodied the 'structural superiority' of the accused's right to a fair and public trial and to cross-examine prosecution witnesses over the interest in witness protection.[147] This presumption is rebuttable through recourse to a balancing exercise.[148] In this case, the ICTY Trial Chamber insisted on the 'necessity' and 'strict proportionality' of the protective measure.[149] This can be inferred from the Trial Chamber's holding that '[t]he more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted'.[150]

In the later *Milošević Foca Transcripts Decision* the Trial Chamber had to pronounce upon the prosecutor's request based on r 92*bis*(D) of the *ICTY Rules* to admit the transcripts of the testimony of 11 witnesses previously heard in another trial without the accused being able to exercise his right to cross-examination.[151] The Trial Chamber recalled that r 92*bis* had to be in

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144 Ibid [20].

145 *Milošević Provisional Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 19 February 2002) [32]; *Karadžić Non-Disclosure Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 2 September 2008) [6]; *Karadžić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 30 October 2008) [20].

146 *Milošević Provisional Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 19 February 2002) [32]; *Karadžić Non-Disclosure Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 2 September 2008) [6].

147 *Milošević Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 July 2002) [4]; Rule 75 of the *ICTY Rules* empowers the Tribunal to adopt measures designed to protect the witness's privacy and security so long as they are compliant with the accused's defence rights. Such measures could consist of: closed sessions; sound and visual altering devices; non-disclosure of the witness's identity to third parties; use of pseudonyms; one-way closed-circuit television; and removal of the witness's identity from public records.

148 *Milošević Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 July 2002) [4].

149 Ibid [5].

150 Ibid.

151 *Milošević Foca Transcripts Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 June 2003) [1]. Rule 92*bis* of the *ICTY Rules* empowers the ICTY to admit testimonial evidence (instead of the witness having to testify in person) for matters unrelated to the accused's conduct, provided that the evidence is accompanied by a statement signed by the witness before a court officer. The requirement for a signed statement is waived in relation to a witness who is untraceable, has died in the meantime or is physically or mentally prevented from testifying verbally. The Tribunal on its own motion or at the accused's request enjoys some discretion in requiring cross-examination of the witness.

congruence not just with the *Statute* but also with 'any laws that bind the Tribunal in the proper exercise of its jurisdiction'.[152] Reaffirming the Appeals Chamber's decision in *Prosecutor v Galić*,[153] the Trial Chamber posited that the right to cross-examine should not be considered an absolute procedural guarantee.[154] The Trial Chamber deferred to the prosecutor's request. With regard to the first nine witnesses, it held that they had been extensively cross-examined in prior proceedings wherein the other accused genuinely shared a 'common interest' with the present accused and the object of the testimony consisted in the description of the 'crime base'.[155]

As to the remaining two witnesses, having been victims of sexual violence, subjecting them to cross-examination would further expose them to the risk of incurring additional trauma.[156] The Trial Chamber held that there was an 'affirmative' interest in the privacy and security of witnesses. In assessing the nature of the protective measure that can be ordered, the Trial Chamber has to weigh the accused's right to a fair and public hearing against the need for witness and victim protection. Based on the *Statute* and *Rules*, it found that the accused's minimum guarantees enjoy 'primary consideration' whilst victim and witness protection is deemed to be 'important'.[157] The Trial Chamber held as a matter of general consideration that '[c]ross-examination should not be permitted mechanically and as a matter of course'.[158] In this case, it held that the balance should tilt in favour of witnesses and victims given that the accused's minimum guarantees had been safeguarded through the prior exercise of his right to cross-examination by the previous accused.[159]

Judge Robinson, in his dissenting opinion, took the view that, although the *ICTY Statute* permits a weighing of the accused's interests against the victims', it also puts in place 'a hierarchical structure that ensures that the protection of victims and witnesses is not achieved at the expense of the rights of the accused'.[160] He held that art 20(1) of the *ICTY Statute* clearly indicates that protective measures 'must not compromise the rights of the accused'.[161]

These decisions may have made the recourse to a 'means' test redundant: structural balancing might overshadow the 'less restrictive means' test. There would be no need to evaluate the intensity of the proposed protective measure in comparison with other equally effective interfering measures if the ICTY Trial Chamber has in advance ruled that absolute anonymity violates the accused's right to cross-examine per se.

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152 *Milošević Foca Transcripts Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 June 2003) [23].

153 *(Decision on Interlocutory Appeal concerning Rule 92*bis*(C))* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-98-29-AR73.2, 7 June 2002).

154 *Milošević Foca Transcripts Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 June 2003) [24].

155 Ibid [39]–[42].

156 Ibid [48].

157 Ibid [46].

158 Ibid [48].

159 Ibid.

160 *Milošević Foca Transcripts Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 30 June 2003) [24] (Judge Robinson).

161 Ibid.

(d) Autonomous Two-Prong Justificatory Test Applying to Interferences with Any Defence Right

Those third wave decisions which give prevalence to the accused's defence rights, and seem to make absolute anonymity either a legal or a factual impossibility, ought to be compared with those general rulings delivered by the ICTY in self-representation cases. In *Milošević*, the ICTY Appeals Chamber endorsed the proposition that, according to international human rights case law, 'any restriction of a fundamental right must be in service of a sufficiently important objective, and must impair the right … no more than is necessary to accomplish the objective'.[162] This reflects the ICTY's further orientation towards the adoption of a minimum two-prong justificatory test (based on the 'legitimate aim' requirement and the 'less restrictive means' test) for assessing interferences with any human rights, not just those covered by a limitation or qualification clause. This ruling was confirmed by the ICTY Trial Chamber in *Prosecutor v Šešelj* wherein the Tribunal retained as minimum requirements for interfering with any human right the 'less restrictive means' test and an 'end' test focused on the need to ensure the expeditiousness of the trial proceedings.[163] These general rulings therefore leave the door open for the creation of an infinite number of implied external limits to human rights, including limits in the form of absolute anonymity and extended forms of partial anonymity.

2 *Intermediary Forms of Interference with the Accused's Right to Cross-Examine Prosecution Witnesses: Partial Anonymity and Rolling Disclosure*

Both the ICTR and ICC have yet to expressly admit judicial recourse to absolute anonymity. Nevertheless, they have both admitted a limited form of interference with the accused's right to cross-examine. They have both tailored a system of rolling disclosure of the witness's identity to the accused, that is to say until the witness is called upon to appear before the court of law even though the legal basis for partial anonymity limits (or limited in the case of the ICTR) the concealment of the witness's identity from the accused to the pre-trial stage.

(a) The International Criminal Tribunal for Rwanda

The case law can be described as falling within three main waves of decisions. In the first wave, the ICTR has admitted the validity of an extensive form of partial anonymity beyond the terms of r 69, by virtue of the qualified nature of the right to a fair trial and in the name of victim and witness protection. In the second wave, the ICTR has made general rulings in various areas of procedural law that suggest the structural superiority of the accused's rights (to a fair trial and to cross-examine prosecution witnesses) over victims' and witnesses' rights (to life and security). These rulings present implied external limits on the right to

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162 *Prosecutor v Milošević (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-54-AR73.7, 1 November 2004) [17].

163 *Prosecutor v Šešelj (Consolidated Decision on Assignment of Counsel, Adjournment and Prosecution Motion for Additional Time)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 24 November 2009) [77] ('*Šešelj Representation Decision II*').

cross-examine prosecution witnesses as exceptional interferences with the aforementioned defence right. In the third wave of decisions, the ICTY has accepted an open-ended process of human rights interference by admitting that any curtailments of human rights could be validated, provided they satisfied a common set of justificatory requirements.

(i) Implied External Limit to the Right to Cross-Examine through the Judicial Endorsement of a Rolling Disclosure Mechanism

The original version of r 69 of the *ICTR Rules* only permitted the concealment of the witness's identity from the accused during the pre-trial proceedings. The new r 69 is more flexible as regards the choice of the time limit for disclosure of the witness's identity, which could extend to part of the trial proceedings so long as the accused has 'adequate time' to organise their defence.

Under the old regime, the ICTR's judicial allowance for partial anonymity between the start of the trial and the date of the witness's appearance in court constituted an implied external limitation on the accused's right to cross-examine prosecution witnesses. Their identity would be known to the accused only several days before they testified in court, in the form of 'rolling disclosure',[164] even when r 69 required that the accused be already acquainted with the witness's identity at the very least towards the end of the pre-trial stage.

In *Prosecutor v Rutaganda*, for instance, the ICTR deferred to the *Tadić Protective Measures Decision* in order to prescribe protective measures, which included the concealment of the witnesses' identity from the accused until they were under the Tribunal's protection.[165] This ruling distorts the unambiguous wording of r 69. It indeed impliedly limits the accused's right to cross-examine prosecution witnesses by making more extensive the period within which the accused is deprived of the prosecution witnesses' identity. This in turn will affect the accused's way of preparing him- or herself for the witnesses' cross-examination in court.

In the *Bagosora Protective Measures Decision*, the ICTR Trial Chamber III granted the prosecutor's request for rolling disclosure of the witnesses' identity to the accused, using as a reference date for the 'advance disclosure' requirement the day of appearance of a witness before the Trial Chamber in lieu of the starting day of the trial proceedings in general.[166] In its reasoning based on the

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164 *Bagosora Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001) [5], [22], [25], [27].

165 *Prosecutor v Rutaganda (Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 26 September 1996) ('*Rutaganda Protective Measures Decision*').

166 *Prosecutor v Blaškić (Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001) [22]. This precedent was a follow-up to the Trial Chamber's previous decision of 29 November 2001 wherein it had ordered the non-disclosure of the indentifying information to the accused 'until further orders', thereby leaving the door open for an extension of the concealment measure to part of the trial proceedings: *Bagosora Protective Measures Decision* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001) [30].

interpretative rules of the *Vienna Convention on the Law of Treaties*,[167] the Trial Chamber argued against a strict interpretation of the old r 69.[168] The need for disclosure of the witness's identity to the accused, as a corollary of the right to cross-examine prosecution witnesses, has to be understood in light of the principal object and purpose of r 69(c) and of the *Statute*, including the effectiveness of victims and witness protection.[169] In reaching this conclusion, the ICTR took into account the ICTY jurisprudence, especially the *Tadić Protective Measures Decision*.[170] The Trial Chamber also interpreted art 20(2) of its *Statute* as embodying a general limitation clause that qualifies not just the publicity of the proceedings but also its fairness, thereby making the right to cross-examine prosecution witnesses a non-absolute defence right.[171] The Trial Chamber concluded that the drafters of the ad hoc Tribunals' respective statutes and rules had placed on an equal footing the right to a fair trial and the need for victim and witness protection, which have to be balanced against one another when construing the ambit of r 69.[172]

As with the *Tadić Protective Measures Decision*, the ICTR expanded *extra legem* the scope of the statutory provision embodying a limitation clause pertaining to the right to a public trial: art 20(2) of the *ICTR Statute*. In the absence of a correct reading of art 20(2), the Tribunal is left without a legal basis for interfering with the right to cross-examine and the external limitation upon that right shifts from being express to implied. Although deriving inspiration from the ICTY, the ICTR failed to follow the conditions and guidelines that were set forth in the *Tadić Protective Measures Decision*. It failed to put forward a justificatory mechanism for assessing protective measures requests aside from its reference to a loose end-test based on witness and victim protection.

Judge Dolenc, in his dissenting opinion, opposed the majority decision that would allow encroachments on the accused's rights to cross-examine prosecution witnesses and to enjoy adequate facilities to organise a defence.[173] He persuasively argued that the right to a fair trial is statutorily unqualified unlike the right to a public trial.[174] From his perspective, defence rights, including the right to cross-examine, enjoy higher normative status than victim and witness protection.[175] They are not to be balanced against the latter competing concern, as they are 'non-negotiable'.[176] The dissenting judge arrived at this conclusion through several considerations pertaining to the ordinary wording, object and purpose of the *ICTR Rules* and the *ICTR Statute*.[177] As far as the *ICTR Statute* is

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167 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

168 *Bagosora Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001) [2], [6].

169 Ibid [6], [8]–[17], [23], [25].

170 Ibid [8]–[10].

171 Ibid [14].

172 Ibid [16], [23].

173 *Bagosora Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001) [4], [21]–[22] (Judge Dolenc).

174 Ibid [13], [15].

175 Ibid [6], [12], [14].

176 Ibid [14].

177 Ibid [7].

concerned, the limitation clause based on witness and victim protection does not concern the presumption of innocence or the other minimum guarantees of the accused, but only affects the publicity of the hearings.[178] The detailed references to procedural guarantees of the accused found in the *Statute* are at odds with its minimal elaboration on victim and witness protection, thereby reinforcing the 'paramount' nature of defence rights.[179] The contrast between the statutory obligation placed on the Tribunal to pay 'due regard' to victim and witness protection and the judicial obligation to guarantee 'full respect' of the defence rights supports the higher normative treatment accorded to the latter.[180] The notion of 'minimum' guarantees of the accused reflects the absolute nature of those rights.[181] As far as the *Rules* are concerned, r 69(c) is quite clear about limiting concealment of witnesses' identity from the accused to the pre-trial stage.[182] Judge Dolenc found that this ordinary meaning of r 69(c) is confirmed by the official French translation.[183] Further, he held that r 75 may not be used as a legal basis for extending the concealment from the accused to the trial proceedings.[184] The range of measures provided is essentially aimed at 'protecting witnesses' identities from the public and media' and from 're-traumatisation'.[185] Furthermore, this rule stipulates that protective measures adopted thereunder may not encroach upon defence rights.[186] Judge Dolenc also alluded to the general philosophy underpinning the *ICTR Statute* and *ICTR Rules* in order to reinforce the precedence enjoyed by defence rights over witness and victim protection.[187]

Judge Dolenc's concern about the need for a legal basis when interfering with the accused's right to cross-examine has seemingly been echoed in the ICTR's *Prosecutor v Muhimana* decision of 20 May 2004.[188] Here, the ICTR Trial Chamber III, seized of an art 92*bis* request, held that the *ICTR Rules* could not 'derogate' from the accused's right to cross-examine prosecution witnesses, as protected in art 20(4)(e) of the *ICTR Statute*.[189] It considered this right to be so 'fundamental' as to require an 'express statutory provision' to be 'taken away'.[190] This ruling, although not concerned with absolute anonymity as such,

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178 Ibid [12]–[14].

179 Ibid [12].

180 Ibid [11]; *ICTR Statute* art 19(1).

181 *Bagosora Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001) [14] (Judge Dolenc).

182 Ibid [19], [24].

183 Ibid [24].

184 Ibid [19].

185 Ibid.

186 Ibid.

187 Ibid [9]–[20].

188 *Prosecutor v Muhimana (Decision on the Prosecution Motion for Admission of Witness Statements)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-95-1B-T, 20 May 2004).

189 Ibid [24]. The Tribunal is here using the term 'derogate' in lieu of 'limit' or 'curtail', which is a reflection of the unease with which the ICTR transposes limitation concepts that are inherent to international human rights instruments into international criminal procedure.

190 Ibid.

reaffirms the strictness with which the Tribunal will assess curtailments of the right to cross-examine prosecution witnesses.

The *Rutaganda Protective Measures Decision* and the *Bagosora Protective Measures Decision* currently represent old case law given that the ICTR has, since the r 69 amendment, extended the legal basis for partial anonymity to part of the trial proceedings. They nevertheless remain relevant for the purpose of shedding light on the process of judicial creation of external limits to a fundamental defence right guaranteed in the *ICTR Statute*. Such case law sets a precedent for the possible future judicial recognition of a more intense form of interference with the right to cross-examine prosecution witnesses, that is to say absolute anonymity. The *Bagosora Protective Measures Decision* also shows how the ICTR has paralleled the ICTY, at an early stage of its judicial evolution, in tailoring implied external limitations on a defence right in the name of witness and victim protection. It displays, as persuasively put by Pozen, the automatic reliance by the ICTR upon the ICTY's landmark authority on absolute anonymity without any reflection on the structural and contextual differences between the two ad hoc Tribunals.[191] The main differences consist in the absence of ongoing conflict in Rwanda at the time of the foundation of the ICTR (unlike the situation of the ICTY), and in the absence of an effective witness protection scheme administered by the ICTY at the time of the *Tadić Protective Measures Decision*.[192]

(ii) Recognition of the Superiority of the Accused's Defence Rights over Victim and Witness Protection

The ICTR's decisions on partial anonymity requests reflect its propensity to prioritise the protection of the accused's defence rights to the detriment of witness and victim protection.[193]

The ICTR Appeals Chamber ruled, in its *Musema Judgment* of 16 November 2001, that when deciding upon witness and victims protection measures:

> [T]he Tribunal has to interpret the provisions [on protective measures] within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the right of the public to access information and the protection of victims and witnesses. How the balance is struck will depend on the facts of each case.[194]

In this same judgment, the Appeals Chamber held that the appraisal by the Trial Chamber of protected witnesses' testimony did not require 'special caution'.[195] The Appeals Chamber also endorsed the view that the accused's rights represented 'the first consideration' whilst the interest in victims and witness protection only a 'secondary one'.[196]

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191 Joanna Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identity in ICTR Trials' 38 (2006) *New York University Journal of International Law and Politics* 281, 282–3.

192 Ibid 295–6.

193 *Musema Judgment* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-13-A, 16 November 2001) [68].

194 Ibid.

195 Ibid [71].

196 Ibid [68].

This in turn suggests that the ICTR will be unlikely to grant absolute anonymity through a 'means' test and that a structural form of balancing between the accused's rights and the witness and victim protection will overshadow the 'less restrictive means' test.

(iii) Autonomous Two-Prong Justificatory Test Applying to Interferences with Any Defence Right

Parallel to this normative position, the ICTR (as the ICTY did in self-representation cases) may have opened 'Pandora's box' by reason of its virtual admission of implied external limitations on any human rights, subject to their pursuing 'a sufficiently important objective' and complying with the 'less restrictive means' test.[197] In the *Zigiranyirazo Interlocutory Appeal Decision*, a case concerned with the right to be present, the ICTR Appeals Chamber did not differentiate between human rights based on their *jus cogens* character or on their being covered by a qualification or limitation clause enshrined in the ICTR's internal legal framework before making such a judicial admission of implied external limits to human rights in general.[198] The ICTR Appeals Chamber has so far found the following objectives to be 'sufficiently important': (i) 'witness protection'; (ii) 'the proper assessment of an important prosecution witness'; and (iii) 'the need to ensure a reasonably expeditious trial'.[199]

(b) The International Criminal Court

The ICC has not yet pronounced upon the question of the validity of absolute anonymity under the ICC's internal legal framework. In the context of requests for partial anonymity, the ICC has tailored an intermediary form of interference with the accused's right to cross-examine by allowing for the extension of partial anonymity to part of the trial proceedings, despite the contrary wording of r 81(4). As with the ICTR, this amounts to the recognition of an implied external limitation on the right to cross-examine prosecution witnesses, albeit of a lower intensity than absolute anonymity.

In *Katanga*, the Trial Chamber II granted the prosecutor's request to have the identity of one of the two key prosecution witnesses disclosed to the accused only 45 days before being summoned to testify.[200] The Trial Chamber conceded

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197 *Zigiranyirazo v Prosecutor (Decision on Interlocutory Appeal)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-73-AR73, 30 October 2006) [14] ('*Zigiranyirazo Interlocutory Appeal Decision*'); *Prosecutor v Karemera (Decision on Joseph Nzirorera's Motion for Stay of Proceedings while He Is Unfit to Attend Trial or Certification to Appeal)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 11 July 2007) [13]–[19]; *Prosecutor v Karemera (Decision on Nzirorera's Interlocutory Appeal concerning His Right to Be Present at Trial)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-AR73.10, 5 October 2007) [15]; *Prosecutor v Bagosora (Decision on Nsengiyumva Motion to Call Doctors and to Recall Eight Witnesses)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 19 April 2007) [18]; *Prosecutor v Bagosora (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [129], [131].

198 *Zigiranyirazo Interlocutory Appeal Decision* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-73-AR73, 30 October 2006) [14].

199 Ibid [17].

200 *Katanga* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICC-01/04-01/07, 28 May 2009) [7].

that this measure was particularly detrimental to the accused but justified it on the basis of the 'exceptional' nature of the situation of the witness in question.[201] The Trial Chamber made it clear that, in the future, it would not easily defer to requests for rolling disclosure.[202] Neither the parties to the case nor the Trial Chamber itself discussed the issue of partial anonymity by reference to the right to cross-examine: instead they directed the reasoning within the context of the accused's rights to disclosure of evidence, and to enjoy adequate time and facilities to prepare a defence.[203] The Trial Chamber clearly went beyond the wording of r 81(4) of the *ICC Rules* by extending the partial anonymity measure to a segment of the trial proceedings. This ruling has thus validated an implied external limitation on the accused's right to cross-examine prosecution witnesses. The interference is nonetheless of medium intensity in this case, falling short of absolute anonymity, as the concealment may not cover the period within which the witness is to testify. In its justificatory analysis, the Trial Chamber focused on the legitimate objective requirement and the 'less restrictive means' test.[204] It found that the risk of threat to the security of the witness had been objectively established and that the interference was 'absolutely necessary' in the absence of a less intrusive but equally effective measure.[205]

A parallel can be drawn with the treatment of anonymity requests in relation to the procedural participation of victims in the ICC trial proceedings. The ICC Trial Chamber I in *Prosecutor v Lubanga* left the door open for victims to actively participate in the trial proceedings *qualitate qua* whilst remaining anonymous to the accused.[206] The Trial Chamber on the facts of the case nevertheless marked its preference for a confidentiality measure in lieu of anonymity in light of the objective of pursuing 'open justice'.[207] The Trial Chamber held that the judicial appraisal of an anonymity request required 'extreme care'.[208] It held that the more substantial the victims' participation was, the less likely their request for anonymity would be approved.[209] It also held that the proportionality analysis, through the 'less restrictive means' test, had to permeate such an assessment.[210] The ICC has thus endorsed a clear two-prong

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201 Ibid [48], [53].

202 Ibid [53].

203 Ibid [16], [20], [24], [28], [31].

204 Ibid [17]–[33].

205 Ibid [44].

206 *Prosecutor v Lubanga (Decision on the Applications by Victims to Participate in the Proceedings)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 15 December 2008) [127] ('*Lubanga Applications by Victims to Participate Decision*'); *Prosecutor v Lubanga (Decision on Victims' Participation)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [130]–[131] *('Lubanga Victims' Participation Decision')*.

207 *Lubanga Applications by Victims to Participate Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 15 December 2008) [127].

208 *Lubanga Victims' Participation Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [131].

209 *Lubanga Applications by Victims to Participate Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 15 December 2008) [124]; *Lubanga Victims' Participation Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 18 January 2008) [131].

210 *Lubanga Applications by Victims to Participate Decision* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 15 December 2008) [129], [132].

justificatory framework requiring satisfaction of a legitimate aim and 'means' test. This leaves no place for ambiguity or legal uncertainty unlike the ad hoc Tribunals' case law on partial and absolute anonymity.

B *The Presence of a Mixed Conflict of Values*

The determination of the nature of the underlying conflict of values in any case involving external limitation on human rights is necessarily contingent upon the characterisation of the legitimate aim at stake. International criminal courts in that respect perceive the grant of absolute anonymity as being the outcome of a conflict of rights (the right to cross-examine versus the rights of the witness or the witness's family) *and* of a conflict between a right and a public interest (for example, public policy goals).

The underlying conflict of rights has the following characteristics:

(i) it is authentic: the rights are truly in conflict, after operating an interpretative exercise;[211]
(ii) it is inter-rights: the rights in conflict do not derive from one another but are distinct;[212]
(iii) it is partial: there is a margin of manoeuvre for regulating the exercise of both rights without annihilating one or the other;[213]
(iv) it is vertical: the dispute is between an individual applicant and a public authority;[214] and
(v) it is external: the applicant's right here clashes with the substantive rights of a distinct category of persons (ie those of witnesses and victims) whose protection the interfering authority promotes.[215]

The ICTY has elevated the security of witnesses or of their family (and thus their rights to life, liberty and not to be subject to torture, inhumane or degrading treatment) to a legitimate concern that competes with the right to cross-examine prosecution witnesses. The ICTY overruled the prosecutor's choice of 'legitimate aim' in *Čelebići* by denying the existence of a security threat, and instead retaining the risk of re-traumatisation for the witness as a result of facing the accused in person. This ruling suggests the prevalence, on the facts of the case, of the competing concern based on the witness's right to privacy (under a specific angle) in lieu of the witness's right to security in the evaluation of the prosecutor's request for absolute anonymity.[216]

Nevertheless, the allusion by the ICTY to 'exceptional circumstances' (such as the existence of an ongoing armed conflict) by reference to art 15 of the

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211 Stephan Gardbaum, 'Limiting Constitutional Rights' (2007) 54 *UCLA Law Review* 789, 811.

212 Lorenzo Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008) 19, 26.

213 Ibid 27.

214 Peggy Ducoulombier, 'Conflicts between Fundamental Rights and the European Court of Human Rights: an Overview' in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008) 217, 220–4.

215 Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press, 2007) 64–6.

216 *Čelebići Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [14].

ECHR also reinforces the idea that the witnesses' interests have been overtaken by a wider transnational public interest, which the Tribunal must take into account. In *Čelebići*, the ICTY held that the accused's right to cross-examine prosecution witnesses could only be 'compromised' on public policy grounds.[217] The Trial Chamber, more specifically, spoke about the 'greater public interest in the protection of the witness'.[218] These considerations therefore converge towards the conclusion that the conflict of values under international criminal procedure is of a mixed nature. The public interest dimension is further reinforced by reference to the *Šešelj Representation Decision I* wherein the ICTY Trial Chamber elevated witness protection as a legitimate concern falling under the broader criterion of 'the interest of justice'.[219]

In several cases involving the interpretation of the right to cross-examine prosecution witnesses in general (albeit unrelated to witness anonymity), the ICTY (including its Appeals Chamber) has suggested that interferences with this defence right could be pursued in the name of procedural fairness.[220] The Tribunal held that art 21 of the *ICTY Statute* was subservient to art 20(1) according to which '[t]he Trial Chambers shall ensure that a trial is fair and expeditious'.[221] This position gives teeth to the argument that the interests of justice are the overarching legitimate aim in the case law on witness anonymity, procedural fairness being only a subset thereof, and witness protection being itself a concern inherent in procedural fairness. Procedural fairness under international criminal procedure certainly has a public interest dimension, and is not just a right conferred upon the accused in a criminal trial.[222]

The ICTR and ICC, when setting implied external limitations upon the right to cross-examine through 'rolling disclosure', may have implicitly recognised the mixed nature of the conflict of values. The ICC and ICTR did allude to victim and witness protection as a competing concern with the rights to a fair trial and to cross-examine prosecution witnesses, with an emphasis on the witnesses' 'security'. Nevertheless, the ICTR modelled much of its reasoning on that found in the *Tadić Protective Measures Decision* in relation to which the mixed nature of the conflict of values has already been underscored.[223] Furthermore, the ICC endorsed, in its decision allowing for a rolling disclosure mechanism, the substance of *Dowsett v United Kingdom*[224] wherein the ECtHR had admitted that

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217 Ibid [55].

218 Ibid [65].

219 *Prosecutor v Šešelj (Decision on Assignment of Counsel)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-03-67-PT, 21 August 2006) [16] ('*Šešelj Representation Decision I*').

220 *Martić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-11-AR73.2, 14 September 2006) [14]; *Prosecutor v Delalić (Decision on the Motion of the Joint Request of the Accused Persons regarding the Presentation of Evidence)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21, 12 June 1998) [32] ('*Čelebići Presentation of Evidence Decision*').

221 *Martić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-11-AR73.2, 14 September 2006) [14]. See also *Čelebići Presentation of Evidence Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21, 12 June 1998) [32].

222 Boas, above n 9, 21.

223 *Bagosora Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No ICTR-98-41-I, 5 December 2001)) [8]–[10].

224 [2003] VII Eur Court HR 259, 275.

national security, in addition to victim and witness protection, could underpin a curtailment of the accused's right to disclosure of exculpatory evidence.[225]

C *The Recognition of a 'Means' Test*

The purpose of this subsection is to demonstrate that the international criminal courts have endorsed a 'means' test, albeit to different degrees. A means test is here understood as encompassing the first and second prongs of a broad proportionality model. It raises the double question of whether the means used to achieve the legitimate goal are relevant thereto (ie suitability test) and whether they are the least burdensome whilst still equally effective in pursuing that legitimate goal (that is, a 'less restrictive means' test).[226] These two prongs therefore presuppose the existence of a legitimate aim and are conceived, under constitutional theory, as successive stages in the proportionality review. The 'less restrictive means' test may lead to the same results as the practical concordance test, when the conflict of values consists of a conflict of rights.

1 *The Suitability Criterion*

In the *Tadić Protective Measures Decision*, the Trial Chamber concluded that the right to cross-examine prosecution witnesses could be restricted through witness anonymity to the extent that it is, inter alia, 'appropriate' to ensure the safety of the witness and of his family.[227] The ICTY has also applied the suitability prong when requiring proof of a serious ground for suspecting that the witnesses' or their family's security would be jeopardised in the event that the witnesses' identity were disclosed to the accused.[228] The factual premise underlining the legitimate objective will help create the genuine connection between the nature of the interference and the objective in question.

Neither the ICC nor the ICTR has elaborated or made use of such a proportionality prong in the cases relating to implied external limitations upon the right to cross-examine.

2 *The 'Less Restrictive Means' Test*

The ICTY and the ICC have expressly adopted a 'less restrictive means' test in evaluating the justifiability of an interference with the right to cross-examine entailed by their decisions to respectively grant absolute anonymity and partial anonymity.

In the *Tadić Protective Measures Decision*, the ICTY as a preliminary matter held that '[i]f a less restrictive measure can secure the required protection, that measure should be applied'.[229] The ICTY has searched for the least burdensome measure that would equally offset the security risks to the witness and/or their family. Although the status of the 'less restrictive means' test has been raised to

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225 *Katanga* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICC-01/04-01/07, 28 May 2009) [32].

226 Alexy, *A Theory of Constitutional Rights*, above n 51, 397–401.

227 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) [56], [62].

228 Ibid [62].

229 Ibid [62]–[66].

an independent condition, this was indirectly done by the enactment of another condition (that is, the absence of an available witness protection program) and through a series of four guidelines, one being that the interference ends as soon as the threat to the witness's security has disappeared. These guidelines also draw upon the broader requirement for sufficient procedural safeguards. The degree of encroachment upon the right to cross-examine prosecution witnesses can be reduced if the accused is in a position to question the witness and if other procedural modalities are followed: the judiciary must be aware of the witnesses' identity, given the presumption of impartiality and independence, and the international judges must be able to observe the witness during the confrontation between the accused and the witness.[230]

In the *Tadić Defence Motions to Summon and Protect Witnesses Decision*, the Trial Chamber especially insisted on the 'strict necessity' condition when holding that '[f]ear of arrest, unlike the fear of retaliation expressed by the witnesses for whom the Trial Chamber has granted anonymity, can be obviated by the granting of less restrictive measures' through recourse to the safe conduct procedure or to video link testimony.[231] In the later *Tadić Witness K Decision*, the Trial Chamber recalled that 'if a less restrictive measure can satisfy the requested protection, that measure should be applied'.[232] It then held that 'the identity of the witness must be released when there is no longer a reason to fear for the security of the witness.'[233] In the *Čelebići Protective Measures Decision*, the Trial Chamber found that there had been no sufficient objective indicia demonstrating the witness's fear of retaliation or the importance of the anonymous testimony to the Prosecution case.[234] It then granted an equally effective protective measure, albeit less restrictive than that requested by the Prosecution, on the ground that the witness risked being re-traumatised as a result of facing the accused.[235] Pursuant to r 75(B)(iii), the Trial Chamber ordered that a protective screen should separate the witness from the accused so as to enable the former not to have any visual contact with the latter whilst allowing the accused to observe the witness through electronic monitors.[236]

The ICTR, when setting implied external limits to the right to cross-examine in the context of partial anonymity requests, had refrained from prescribing a 'means' test of any sort, rendering the assessment of these requests legally uncertain.

The ICC Trial Chamber in *Katanga*, before allowing for the partial anonymity of a prosecution witness, held that the risk of threat to the security of the witness

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230 Ibid [71].

231 *Tadić Defence Motions to Summon and Protect Witnesses Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 25 June 1996) [28].

232 *Tadić Witness K Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 12 November 1996).

233 Ibid.

234 *Čelebići Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [62]–[63].

235 Ibid [66], [68].

236 Ibid [68].

had to be objectively established and that the interference be 'absolutely necessary' in the absence of a less intrusive whilst equally effective measure.[237]

The importance of this proportionality prong has been diminished as a result of the ICTR and ICTY underlying the structural superiority of defence rights over competing concerns (that is, witness and victim protection) in respectively their second[238] and third wave of decisions.[239] Parallel to this development, the ICTR in its third wave of decisions and the ICTY in its fourth wave of decisions have adopted a common less restrictive means test that is meant to govern the assessment of interferences with any defence right. This later development has been most visible in ICTY decisions regarding the right to self-representation[240] and ICTR decisions involving the right to be present.[241]

The anonymity case law therefore a source of legal uncertainty as far as the proportionality technique is concerned especially due to the apparent clash of the last two judicial developments.

3 *The Principle of Practical Concordance: An Alternative Explanation?*

The judicial outcomes in the anonymity cases adjudged by the international criminal courts under scrutiny could be analysed not only through the lens of the 'less restrictive means' test, but also from the angle of an alternative theoretical framework that is inherent in conflict of rights dispute mechanisms — namely the principle of practical concordance. This tool is designed to settle conflicts between rights and dictates that 'both rights must be fully protected, which requires limited restrictions of both'.[242] The tension between the two conflicting rights in anonymity cases before the ICTY can be characterised as a 'partial inter-right conflict'. Lorenzo Zucca refers to the latter as a situation in which 'two different rights conflict, but a case-by-case regulation is still available'.[243]

The ICTY case law on anonymity may be interpreted as reflecting practical concordance through the enunciation of the strict necessity condition and the four guidelines that ought to trigger any Tribunal's decision to grant anonymity. The application of these criteria to ICTY international criminal proceedings suggests that the granting of anonymity should not completely annihilate the

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237 *Katanga* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICC-01/04-01/07, 28 May 2009) [35], [44].

238 *Musema Judgment* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-13-A, 16 November 2001) [68].

239 *Prosecutor v Brđanin (Decision on Motion by Prosecution for Protective Measures)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-PT, 3 July 2000) [20]; *Karadžić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 30 October 2008) [14].

240 *Prosecutor v Milošević (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-54-AR73.7, 1 November 2004) [17]; *Šešelj Representation Decision II* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 24 November 2009) [77].

241 *Zigiranyirazo Interlocutory Appeal Decision* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-73-AR73, 30 October 2006) [14].

242 Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*' (2005) 27 *Human Rights Quarterly* 294, 317.

243 Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', above n 212, 27.

right to cross-examine prosecution witnesses and should allow for accommodation between the conflicting values. The same observation could be applied to the ICC's case-law on rolling disclosure wherein the ICC's recognition of the less restrictive means test could result in the same result as judicial accommodation between conflicting rights.

D *The Recognition of a Strict Proportionality Requirement*

The ICTY's justificatory model, fleshed out in the *Tadić Protective Measures Decision*, gives the impression of a sequential set of criteria, from which a 'legitimate aim' requirement, the suitability prong, the 'less restrictive means' test and strict proportionality may be deduced.

In practice, the ICTY has applied the balancing exercise to its assessment of whether judicial recourse to, and reliance upon, absolute anonymity disproportionately interferes with the accused's right to cross-examine prosecution witnesses. This stage is not easily distinguishable from the legitimate end, suitability and strict necessity prongs given the ICTY's global and holistic assessment of the conditions and guidelines set forth in the *Tadić Protective Measures Decision*.

The ICTY has mentioned five conditions, sometimes referred to as elements of a five-prong balancing test, when considering the validity of absolute anonymity as a matter of principle.[244] The strict proportionality has translated into the weighing of the positive effects generated by the judicial curtailment of the defence right (that is, the importance of the witness to the prosecution case) against the costs inflicted on the accused's legal condition (that is, the absence of effective cross-examination). In the *Tadić Protective Measures Decision*, a strict proportionality requirement can be inferred from the following two rulings in which the Trial Chamber reserved itself the right, when subsequently pronouncing upon the substance of the case, to minimise the impact of the present protective measure following a balance of interests:

> The Trial Chamber, by majority, finds that the Prosecutor has met the necessary standard to warrant anonymous testimony in respect of witnesses H, J and K. If, after considering the proceedings as a whole, as suggested in *Kostovski*, the Trial Chamber considers that the need to assure a fair trial substantively outweighs this testimony, it may strike that testimony from the record and not consider it in reaching its finding as to the guilt of the accused. It would be premature for the Trial Chamber to determine now that such testimony must be excluded.
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> This balancing of interests shows that, on the one hand, there is some constraint to cross-examination, which can be substantially obviated by the procedural safeguards. On the other hand, the Trial Chamber has to protect witnesses who are genuinely frightened. In this situation the Trial Chamber, by majority, grants anonymity to witnesses G (of present identity only), H, J and K as requested by the Prosecutor in his Prayer 11(a). The Prosecutor's Prayer in the alternative is denied.[245]

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244 *Tadić Witness K Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 12 November 1996).

245 *Tadić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) [84]–[85] (citations omitted).

The ICTY's recognition of the structural priority of the accused's defence rights over the need to ensure witness and victims protection suggests that balancing has overshadowed the 'means' test. This a priori hierarchical relationship between the two values is tantamount to a rebuttable presumption which can tip the balance in favour of the witnesses in cases where compelling reasons relating to their life or security can be adduced. In the *Blaškić Protective Measures Decision*, which admitted the lawfulness of absolute anonymity as an exceptional measure, the ICTY had already referred to the abovementioned conception of the right to cross-examine as a 'shield' against other competing interests.[246]

Although the *Čelebići Protective Measures Decision* implicitly confirmed the autonomous nature of this proportionality prong,[247] the language found in subsequent ICTY Trial Chamber decisions suggests that the hierarchy between witness and victim protection and the accused's right to cross-examine will always tip the balance in favour of the accused in absolute anonymity requests.[248] This is reminiscent of a principled form of balancing without a 'means' test or with a minimised 'means' test.

This shift from a sequential to a global assessment of the conflict of values is now being questioned, due to general rulings found in the ICTY's case law that indicate the ICTY's resolve to establish a common benchmark for appraising the validity of curtailments of any human right, or at least any defence right. This benchmark involves a sequential two-prong justificatory framework consisting of a 'legitimate aim' requirement and a 'less restrictive means' test.

Although the ICTR was originally silent on the use of justificatory criteria for triggering a rolling disclosure mechanism, its later rulings on the right to cross-examine suggest that it would adopt a balancing approach to a conflict of values that would give priority to the accused's defence rights. This flexible approach is also questioned in light of its decisions in cases involving the right to be present wherein it adopted the same sequential two-prong justificatory framework as the ICTY's that would apply to any interferences with human rights.

E *The Recognition of the 'Priority to Rights' Principle*

The 'priority to rights' principle is an illustration of the theory of human rights as shields against the public interest.[249]

The ICTY and the ICTR have acknowledged the possibility of balancing the accused's right to a fair trial and their minimum guarantees against the

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246 *Blaškić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [24]. See generally Frederick Schauer, 'A Comment on the Structure of Rights' (1993) 27 *Georgia Law Review* 415, 429–31.

247 *Čelebići Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [65].

248 *Karadžić Non-Disclosure Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 2 September 2008) [6]; *Karadžić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 30 October 2008) [20].

249 Expression borrowed from Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006) 208–10.

competing interest in victim and witness protection, whilst according priority to the former. Such a conception amounts to conceding that an international trial could be consistent with the Tribunals' procedural guarantees whilst 'being a little unfair'.[250] But any conception based on the balancing nature of the right to a fair trial would be antithetical to the understanding of fairness as 'an absolute minimum'.[251] The ad hoc Tribunals are thus embracing a conception of defence rights that is in the middle ground between the supremacy of the theory of rights and a pure ad hoc balancing test. This is further supported by the Appeals Chamber's apparent elevation of all defence rights generally recognised in art 14 of the *International Covenant on Civil and Political Rights* to *jus cogens* norms.[252] Already in the *Tadić Protective Measures Decision*, a tendency on behalf of the ICTY to consider the right to cross-examine to be structurally superior to witnesses' substantive human rights could be inferred from the five conditions and four guidelines necessary to trigger judicial recourse to absolute anonymity. More specifically, in the *Blaškić Protective Measures Decision* and *Čelebići Protective Measures Decision*, where the ICTY recognised the lawfulness of absolute anonymity as an exceptional measure, the Tribunal elevated the right to cross-examine to a primary consideration, and witness and victim protection to a secondary concern.[253] This principled position was taken over by the both Tribunals, including the ICTR Appeals Chamber, in subsequent cases involving rr 69, 75 and 92*bis* requests. An endorsement of this view can be found in the ICTY's more general case law on the right to cross-examine prosecution witnesses where it has stated that whilst this defence right is non-absolute,[254] it is also of a 'fundamental' nature.[255]

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250 Christoph J M Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2001) 278.

251 Leigh, 'Witness Anonymity Is Inconsistent with Due Process' above n 14, 81.

252 *Prosecutor v Tadić (Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A-AR77, 27 February 2001) 3.

253 *Blaškić Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 5 November 1996) [24]–[25]; *Čelebići Protective Measures Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 28 April 1997) [59]–[60].

254 *Martić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-11-AR73.2, 14 September 2006) [12]; *Čelebići Presentation of Evidence Decision* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21, 12 June 1998) [41]; *Prosecutor v Blagojević (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-60-T (12 June 2003) [14]; *Prosecutor v Milutinović (Decision on Prosecution's Rule 92*bis *Motion)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-05-87-PT(4 July 2006) [11].

255 *Prosecutor v Prlić (Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an* Amicus Curiae *Brief)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-74-AR73.2, 4 July 2006) 2.

F *The Failure of the Hierarchy of Rights Principle for Solving the Underlying Conflict of Rights*

The ICTY has identified an underlying conflict of rights (albeit tainted by public interest considerations) in situations involving anonymous witnesses. From this normative perspective (rather than a public interest approach), recourse to a hierarchy of rights model would be unhelpful and impracticable. The outcome of such a model would be contingent upon the nature of the witness's rights and lead to a judicial stalemate if the two conflicting rights are of equal normative status.

As far as the ICTY is concerned, it has not specifically identified all the witness's rights which enter in conflict with the accused's right to cross-examine prosecution witnesses, although it presumably had in mind the right to life, the right to privacy and the right not to be subject to torture, inhumane or degrading treatment. The Tribunal will have to resign itself to the conclusion that the *ICTY Statute* is silent on the question of hierarchy between human rights, given the absence of a derogation clause and of statutory reference to substantive human rights (and their possible limitations). This makes it difficult to draw a hierarchical model of human rights as a whole. Even if a hierarchical model could be based on whether a human right is subject to a qualification or limitation clause or not, that would not answer the question of how much normative weight should be accorded to essential human rights like the right to life. It must be conceded that the ICTY has in practice not been oblivious to the protection of fundamental rights, to which it has occasionally granted a *jus cogens* status. This was particularly the case with the right against torture.[256] The right to life is subsequently also likely to attain such a status. If a de facto hierarchical model can be imagined based on the *jus cogens* characterisation of a human right, then surely the witness's right to life would always prevail over the individual right to cross-examine prosecution witnesses. As described earlier, this common sense conclusion is not consistent with the reality of the ICTY's admission of a structural priority attached to the right to cross-examine over concerns of witness and victim protection in the face of an absolute or partial anonymity request. Furthermore, the ICTY Appeals Chamber may be interpreted as having assigned *jus cogens* status to all defence rights, which makes the hierarchical model based on *jus cogens* status completely redundant.[257]

IV CONCLUSION

The judicial authorisation to conceal the witnesses' identity from the accused in both the pre-trial and the entire trial proceedings, including while testifying, despite the absence of an express enabling provision to that effect, amounts to an endorsement of the gravest form of implied external limitations upon the right to cross-examine prosecution witnesses. So far, only the ICTY Trial Chambers

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256 *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [153]–[157], [170]; *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [54].

257 *Prosecutor v Tadić (Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A-AR77, 27 February 2001) 3.

have admitted the validity of absolute anonymity within a very strict justificatory framework that consists of the need for exceptional circumstances, five conditions of validity and four guidelines. Neither the ICTR nor the ICC have taken a position on the legality of absolute anonymity per se in light of the accused's right to cross-examine prosecution witnesses. By contrast, both have admitted intermediary forms of implied external limitations upon the accused's right to cross-examine in the form of rolling disclosure of a protected witness's identity to the accused.

The ICTY Trial Chamber in the *Tadić Protective Measures Decision* adopted a sophisticated set of conditions and guidelines. The conditions make it obligatory for the prosecutor to demonstrate: that the interference is the least burdensome protective measure; that there is a genuine threat towards the security of the witness and victim; the importance of the testimony to the prosecution case; that the protected witness is not prima facie untrustworthy; and that no national programme of protective measures can be relied upon. As part of the guidelines, the accused or his defence counsel must be in a position to pose certain questions to the witness. The judiciary must also be aware of the witness's identity given its presumption of impartiality and independence. The international judges must be able to observe the witness during the confrontation between the accused and the witness. Finally, absolute anonymity must cease once the reason for triggering it in the first place has disappeared.

The sequential nature of the justificatory model that the ICTY has fashioned in its landmark judgment (the *Tadić Protective Measures Decision*) from which a 'legitimate aim' requirement, a suitability test, a 'less restrictive means' test and a strict proportionality requirement may be theoretically derived, has in practice given way to a more holistic and global approach to the accommodation of conflicting interests of values. In the judicial practice of the ICTY, these justificatory criteria have been somehow interwoven in the form of a holistic appraisal where different factors are weighed against one another. This is confirmed by the third generation of ICTY decisions that have prioritised the protection of defence rights. Some of these decisions make it clear that concealing the prosecution witness's identity from the accused during the trial proceedings infringes upon the accused's right to an effective defence and their right to cross-examine. This phenomenon could be foreseen in the adoption in *Tadić* of the term 'guidelines' that compliment the conditions for triggering absolute anonymity. Mercedeh Momeni even referred to the list of conditions as exemplifying a 'five-prong balancing test' and qualified it as 'rigid and lengthy'.[258] Christine Chinkin on the other hand perceived these five conditions as mere 'guidelines' offering 'a flexibility that allows all the relevant factors in

[258] Mercedeh Momeni, 'Balancing the Procedural Rights of the Accused against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia' (1997) 41 *Howard Law Journal* 155, 165, 170. Kriangsak Kittichaisaree used the expression 'five-pronged balancing test' to refer to these five conditions set by the ICTY: Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001) 300.

any particular claim to be assessed and the type and level of protection ordered to be adapted to the precise conditions'.[259]

At the same time, this holistic assessment is also questioned in light of the ICTY's general rulings that propound a sequential two-prong justificatory framework based on the need to satisfy a 'legitimate aim' requirement and a 'less restrictive means' test.

The ICTR has not set forth any specific 'means' test when establishing a rolling disclosure mechanism under the old regime of r 69 of the *ICTR Rules*. Its end-test is rather rudimentary, as it merely refers to the need to ensure witness and victim protection. It could be speculated that by borrowing the underlying reasoning inherent to the *Tadić Protective Measures Decision*, the ICTR had implicitly endorsed the set of conditions and guidelines contained therein. The latter scenario is highly unlikely though given that this omission is at odds with the detailed reasoning that it made explicit in its *Bagosora Protective Measures Decision*. The ICTR was fully aware of the ICTY *Tadić Protective Measures Decision* and yet it was selective in what it borrowed therefrom. Now, this intermediate form of interference with the right to cross-examine has found a legal basis in the new r 69. This means that what used to be an implied external limit to this defence right in the *Bagosora Protective Measures Decision* now constitutes an express external limit thereto. The ICTR has opted for a structural form of balancing for the assessment of conflict of values involving the right to cross-examine and witness and victim protection. This augurs the bias in favour of the accused that the ICTR would manifest if confronted in the future with a request for absolute anonymity. This emphasis on a structural superiority of defence rights over witnesses' substantive rights may be questioned in light of the ICTR's admission of a mere two-prong justificatory framework for assessing interferences with any human right. These latest rulings, which are modelled on the ICTY's jurisprudence, open the door for a general theory of implied external limitations upon defence rights beyond the terms of any limitation or qualification clause.

The ICC's case law, unlike the ad hoc Tribunals, does not suffer from such a tension between two opposite normative tendencies. The ICC has set implied external limits to the exercise of the right to cross-examine in the form of rolling disclosure mechanism. It has conditioned the grant of such a measure upon a clear 'end and means' test that is generally in line with its overall case law on defence rights.

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259 Christine Chinkin, 'The Protection of Victims and Witnesses' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (Kluwer Law, 2000) 451, 470.