



THE NECESSITY OF MAINTAINING PROTECTIVE MEASURES IN BALANCING THE RIGHTS OF VICTIMS AND THE ACCUSED

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Lady Justice holds in her left hand a scale in which she weighs evidence in favor of and against the accused, blindfolded so that she is not improperly influenced by appearances. In her right hand she holds a sword indicating the power associated with her decisions. Amongst her difficult responsibilities include the balancing of rights of the accused against the rights of victims. This task becomes particularly challenging in a setting of emerging international justice. The International Criminal Tribunal for the former Yugoslavia (ICTY) was only recently established in 1993, and the International Criminal Court (ICC), the first permanent criminal court for the world, only came into force in 2002. These courts have been established to try suspects of the most atrocious crimes, to avenge the victims of such crimes, and to prevent future occurrences. The need to ensure the legitimacy of these emerging courts is of the utmost importance, and the legitimacy of these courts is substantially derived from due process being guaranteed to defendants.

In bringing forth these trials for crimes against humanity, war crimes, genocide, and aggression, these courts must rely heavily on eyewitness testimony. The need for eyewitness testimony can be seen from the numbers of witnesses testifying in trials. For example, within one year, from 2000 to 2001, the ICTY handled over 550 witnesses from thirty different countries for eight trials. For the Srebrenica genocide case involving only one defendant, 103 prosecution witnesses, 12 defense witnesses, and two Chamber witnesses were called over a 98-day trial.¹ Indeed, in some instances, there can be so little evidence of a crime that the most important proof of the crime is eyewitness testimony. In the trial of General Radislav Krstic, “the massacres were so effective that only one or two victims survived.”² Other times, there may be no survivors, as was the case with an alleged incident in which hundreds of bodies of executed Muslims were dumped into a river.³ The majority of witnesses are victims who have suffered under extraordinary circumstances. Public hearings of these stories are crucial in order to prove such grave crimes.

In light of the need for eyewitness testimony, the ICTY and the ICC have included provisions in their statutes and rules identifying protective measures that should be taken to ensure eyewitness testimony. Both courts have also taken measures to ensure that witnesses are not interfered with. Unfortunately, the difficulties in ensuring safety for witnesses, the problems encountered with trying to punish those who interfere with witnesses, as well as the inability to compel witness testimony, are problems that continue at both courts. The first section of this paper will analyze these issues related to ensuring eyewitness testimony and how mechanisms to enforce the courts’ will remain weak at both the ICTY and the ICC. These issues are fundamental to understanding protective measures taken by both courts. The second section will assess whether certain protective measures such as closed sessions and complete anonymity are prejudicial to the accused. Despite criticisms to the contrary, the paper concludes that closed sessions and the more extreme tactic of granting anonymity are measures that should be preserved for extraordinary circumstances at both the ICTY and the ICC.

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¹ Patricia Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2002).

² *Id.*

³ *Id.*