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AN UNEVEN SCALE: AN EXAMINATION OF THE INTERNATIONAL CRIMINAL COURT'S PROGRESSIVE VICTIM PROTECTION RULES IN THE LUBANGA TRIAL

Michael Rolek

On March 14, 2012, Thomas Lubanga became the first person tried and convicted by the International Criminal Court (ICC). Lubanga was convicted for conscripting, enlisting and using children under the age of fifteen years in hostilities within the Democratic Republic of Congo ("DRC").<sup>1</sup> This conviction marked the first time that victims actively participated in an international criminal trial, not as witnesses, but as a separate party with separate rights and separate legal representation. In total, 129 individual victims were allowed to participate in the proceeding pursuant to Article 68(3).<sup>2</sup> Of these victims, three of them were able to express their views during trial, not as supplemental evidence to the prosecution or defense, but as a separate lens which the judges could approach the evidence in this case.<sup>3</sup> Most alarming was that through ICC statutes, these victims received the most extreme protection ever granted by an international court to victims, specifically: (1) the ability to retain legal representation, and (2) the discretionary power of the court to refrain from disclosing the identity of the victim to the defense.

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<sup>1</sup> *Prosecutor v. Lubanga*, Summary of the Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06 (March 14, 2012).

<sup>2</sup> REDRESS, Thomas Lubanga Trial: Timeline of Victims' Engagement. (March 14, 2012).

<sup>3</sup> Article 68(3) of the ICC states: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

These progressive provisions were included in the ICC due to a change in the way victims were utilized in prosecuting international criminal defendants, a change in perception of victims in the criminal setting, and the growing trend of employing restorative justice in the criminal justice community. There have been articles and journal notes both critiquing and praising the progressive victim rules of the ICC.<sup>4</sup> This comment is unique in that it will examine how the victim's rules were practically applied to the Lubanga trial, the first ever trial and conviction by the Court; and discuss how the Court should proceed with these laws in the future. Using the Lubanga trial as a lens, this comment will discuss these pro-victim provisions within the ICC, specifically the ability to have separate legal representation throughout the entire proceeding and the ability to attain complete anonymity, are unnecessary and violate a defendant's right to a fair and impartial trial as required in Article 68 and international due process established in the International Covenant on Civil and Political Rights ("ICCPR").

The preamble in the ICC lists the eleven major principles of the ICC, including recognizing that there are grave crimes that threaten the peace and well-being of the world, putting an end and punishing these crimes and being conscious of the victims who have suffered.<sup>5</sup> The preamble demonstrates the inherent struggle between the ICC's goal of prosecuting offenders in a fair setting while simultaneously provide the victims of these

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<sup>4</sup> Elisabeth Baumgartner, *Aspect of Victim Participation in the Proceedings of the International Criminal Court*, 90 International Review of the Red Cross 409 (June 2008); Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 International Criminal Law Review 345 (2003); Mina Rauschenbach and Damien Scalia, *Victims and International Criminal Justice: A Vexed Question*, 90 International Review of the Red Cross 441 (June 2008); Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court* (July 18, 2007).

<sup>5</sup> Preamble of the Rome Statute of the International Criminal Court, July 17, 1998. U.N. Doc. A/CONF. 183/9.

atrocities with the greatest security and rights possible. This struggle stems from deeper ideological struggle in criminal justice: restorative justice versus the classic, adversarial system.

Part I of this comment will provide a brief history of Thomas Lubanga and his trial and conviction in the ICC. Part II(A) describes the history of victims in international courts, and how victim participation in these proceedings have changed since the Nuremberg and Tokyo Military Tribunals. Part II(B) gives an overview of the ICC's progressive victims provisions. Part III(A) discusses Rule 90 of the ICC which gives victims the ability to have legal representation, while Part III(B) describes the impact on the Lubanga trial. Part III(C) examines how the ability for a victim to have legal representation throughout the entire proceeding is unnecessary and violates defendant's due process. Part IV(A) discuss the victim's ability to be granted complete anonymity, while Part IV(B) describes the impact it had on the Lubanga trial. Part IV(C) discusses how this safeguard violates the defendant's right to a fair trial. Finally, Part V is the conclusion that summarizes the basic arguments of the comment and provides a brief instruction on how the ICC should proceed with these victim provisions.

## I. THE TRIAL AND CONVICTION OF THOMAS LUBANGA

In the early part of the 21<sup>st</sup> century, the Democratic Republic of the Congo ("DRC") was in political turmoil. Several political groups, specifically the Union des Patriotes Congolais ("UPC"), the Armee Populaire Congolaise ("APC") and the Force de Resistance Patriotique en Ituri ("FRPI") engaged in internal armed conflict to gain power of the state. Thomas Lubanga was one of the UPC's founding members and the President from the outset.<sup>6</sup> In September 2002, he established the Force Patriotique pour la Liberation du Congo ("FLPC"), the military wing of

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<sup>6</sup> *The Arrest of Thomas Lubanga Dyilo*. The American Non-Government Organizations Coalition for the International Criminal Court. April 4, 2006.

the UPC.<sup>7</sup> The UPC/FPLC was primarily composed of persons from the Hema ethnic group, and is alleged to have been responsible for many massacres in the Ituri District of the DRC, most notably the massacres involving the Lendu tribes.<sup>8</sup>

In March 2005, the DRC initially arrested Lubanga in connection with the assassination of nine Bangladeshi soldiers of the UN peacekeeping force in the Congo. On February 10, 2006, a sealed arrest warrant was officially issued by the ICC's Pre-Trial Chamber I.<sup>9</sup> On March 16, 2006, the Congolese authorities agreed to surrender Lubanga to the ICC, and on March 20, under the authority of Judge Claude Jorda, Lubanga was informed of his rights under the Rome Statute and officially charged with conscripting and enlisting children under the age of fifteen in armed conflicts.<sup>10</sup> Trial commenced in January 2009, and after being stayed twice as a consequence of disclosures and the validity of certain witnesses and intermediaries participating in the trial, concluded in August 2011.<sup>11</sup> On March 14, 2012, the ICC convicted Lubanga of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to August 12, 2003.<sup>12</sup> He received a fourteen-year jail sentence, six of which were previously served.

In total, 129 victims participated in the trial, and eight different legal representatives represented them.<sup>13</sup> The majority of these victims participated during the investigation and pre-

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<sup>7</sup> *Prosecutor v. Lubanga, supra*, note 1.

<sup>8</sup> *The Arrest of Thomas Lubanga Dyilo, supra*, note 6.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.*

<sup>13</sup> The legal representatives of the victims included: Luc Walley, Franck, Mulenda, Carine Bapite, Buyangandu, Joseph Keta Orwinyo, and Paul Kabongo Tshibangu.

trial periods.<sup>14</sup> Three of these victims were able to present their views in court during trial.<sup>15</sup> These victims became the first to be able take advantage of the opportunity to present their views and concerns to the judges, not as representatives of the prosecution or defense, but as a separate party on their own volition.<sup>16</sup> Each victim was also afforded the ability to have complete anonymity during the course of the trial. In total, these rights are the most extreme form of protection ever granted to victims.

Although it is necessary to have safeguards in place in order to ensure a sufficient prosecution and appropriate victim safety, these two provisions violate the defendant's right to a fair trial, and violates defendant's due process. Victim protection is necessary and vital in the ICC, however the protection granted to victims today in the ICC is too broad and a huge leap from the level of protection victims were afforded at the inception of criminal tribunals beginning at the end of World War II. In the advent of restorative justice, the ICC has lost focus of the main propose of international courts: to try and convict the accused.

## II. INTERNATIONAL CRIMINAL COURT'S PROTECTION OF VICTIMS

In the first international criminal tribunals after World War II, victims were not afforded many rights or paid that much attention. As time progressed victims have received greater

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<sup>14</sup> Article 15(3) states "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the pre-trial chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."

<sup>15</sup> In total, the Chamber heard sixty-seven witnesses: the prosecution called thirty-six, twenty-four called by the defense, four experts called by the Chamber and three by the victims. *Prosecutor v. Lubanga, supra*, note 1.

<sup>16</sup> Tracey Gurd, *Why are Victims Testifying Now?* [www.lubangatrial.org](http://www.lubangatrial.org). January 16, 2010. Ultimately, however, the Chamber did not rely on the testimony due to material doubts of the identity of two of the individuals. *Prosecutor v. Lubanga, supra*, note 1, pg. 5.

attention from advocacy groups and have been used more often in the prosecution of international criminals, and as a result have received greater protection from international courts and tribunals. However, the ICC's protective measures, specifically the ability of victims to have separate legal representation and the ability to receive total anonymity, goes beyond mere "safeguards," and instead, infringes upon the rights of the accused which threatens basic criminal justice principals and the legitimacy of the Court.

*A. History of the Treatment of Victim's in International Criminal Tribunals and Courts*

After World War II, the Allied commanders understood that a judicial body needed to be created in order to handle the trial and convictions of members of the Axis forces that committed various war crimes. The result were the Nuremberg and Tokyo Military Tribunals, the first international criminal tribunals of its kind. From 1945 through 1948 these Courts prosecuted Nazi and Japanese leaders guilty of war crimes. Both of these courts gave little attention to the role, rights and protection of victims,<sup>17</sup> mainly because, these tribunals relied on documentation and records to prosecute these war crimes.<sup>18</sup>

Soon thereafter in the 1960s, a new discipline of research dealing with the study of victims began to take effect. Termed "victimology," this discipline studied victims and their reactions to the trauma they sustained and experienced. Soon experiments regarding treatment for victims and investigations into the personal experiences victims had had with the criminal justice system started to effect criminal courts, prompting domestic jurisdictions to take more

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<sup>17</sup> Founding Statutes in the Nuremberg and Tokyo International Military Tribunals made no mention of the word "victim," nor did it mention that victims or witnesses might have right to protection and support.

<sup>18</sup> Christine Chinkin, *Due Process and Witness Anonymity*, 91 *The American Journal of International Law* 75 (Jan., 1997) (Nuremberg and Tokyo was dependent upon eyewitness testimony).

action regarding the protection of victims and their role in the judicial process.<sup>19</sup> Over time the study and focus on victims began to effect the international stage, culminating in 1985 when the United Nations General Assembly unanimously agreed on the Basic Principles of Justice for Victims of Crime and Abuse of Power. This established victims' rights to respect and dignity, information about proceedings and the right to present their views and concerns.<sup>20</sup> It also recognized, at an international level, the right to reparations.

In the 1990s, following the atrocities in the conflicts in the Balkans and in Rwanda, the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), respectively, took progressive steps in victims' rights including: establishing Victims and Witness Units ("VWU") to assist and support victims dealing with the tribunals;<sup>21</sup> developing special measures for the protection of certain victims, namely those of sexual assault; and allowing victim reparations. Despite these unprecedented protective measures, many believed that more needed to be done. The result was strong lobbying for victims rights leading up to the Rome Conference in 1998, specifically over witness care in judicial proceedings, and protective measures of victims.<sup>22</sup> As a result the ICC, expanded

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<sup>19</sup> Sam Garkawe, *Modern Victimology: Its Importance, Scope and Relationship with Criminology*, 14(2) South African Journal of Criminology, 90-99 (2001).

<sup>20</sup> United Nations General Assembly Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).

<sup>21</sup> VWU would provide administrative, financial and practical arrangements to bring a witness from their home to the Hauge. Also, provide emotional support, including counseling and arranging medical and psychological care. See Rydberg A., *The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC*. 12 Leiden Journal of International Law 455 at 462 (1999).

<sup>22</sup> Kofi Annan, the Secretary-General of the United Nations (January 1997 to December 2006) described victims' concerns as the "overriding interest" that drove the Rome conference. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15 – July 17, 1998 at p. 62.



upon victim rights, granting “victims an independent voice and role in proceeding before the Court.”<sup>23</sup>

### B. *Progressive Protection to Victims by the ICC*

The ICC defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”<sup>24</sup> The term “natural person” has been broadly defined to also include organizations, hospitals and historic monuments.<sup>25</sup> In the ICC, victims are active participants of international justice, rather than mere passive subjects. In the ICC, their participation has become essential in every stage of the trial, as participation can range “from petitioning the Court or volunteering information to applying for participant’s status.”<sup>26</sup>

Although victims do have the broad ability to participate in judicial proceedings, there are some procedural restrictions in place. In order to participate, victims must make written applications to the Court, and demonstrate a “personal interest” in the proceedings pursuant to Article 68(3) and ICC’s Rule 89.<sup>27</sup> If the Court accepts the application, the Chamber shall then

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<sup>23</sup> Situation in the Democratic Republic of Congo (ICC-01/04-101-T), *Decision on the Applications for Participation in the Proceedings of VPRS* 1-6, para 52 (January 17, 2006).

<sup>24</sup> ICC Rule 85.

<sup>25</sup> ICC Rule 85(b): “Victims may include organizations for institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

<sup>26</sup> *Report of the Court on the Strategy in Relation to Victims* (“ICC Strategy in Relation to Victims”), ICC-ASP/8/45, November 10, 2009, para. 46.

<sup>27</sup> ICC Rules of Procedure and Evidence, Rule 89: “In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defense, who shall

“specify the proceedings and manner in which participation is considered appropriate, which may even include making opening and closing statements.”<sup>28</sup>

Despite the Court having broad discretion in victim participation, the Court is limited by the requirement that victim participation must be appropriate and not prejudicial to or inconsistent with the rights of the accused and a fair, impartial and expeditious trial.<sup>29</sup> This vital clause located in Article 68, establishing the defendant’s right to a fair trial, is consistent with the original purpose of the international courts: to have a body that can prosecute serious crimes against humanity when national governments and domestic judicial systems are insufficient.<sup>30</sup>

The growing trend of pro-victim rights in the ICC, specifically the Court’s discretion to not disclose the identity of a victim<sup>31</sup> and the ability to provide victims the right to attain legal representation,<sup>32</sup> are grounded in a principle called restorative justice. The goal of restorative justice is to encourage dialogue and reconciliation between victims, perpetrators and the community.<sup>33</sup> What restorative justice fails to consider are the defendant’s right in a trial and the

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be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.”

<sup>28</sup> Rule 89(1)

<sup>29</sup> Article 68(3) and Rule 91(3)(b)

<sup>30</sup> Preamble of ICC states that the Court is “determined to put an end to the impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,” and has “resolved to guarantee lasting respect for and the enforcement of international justice.”

<sup>31</sup> Article 68(1) of the ICC Statute states: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” See also Article 68(5).

<sup>32</sup> ICC Rule 90(1): “A victim shall be free to choose a legal representative.

<sup>33</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, (Oxford, 2002).

main purpose of the ICC: maintain efficient fair proceedings for those accused of international crimes.

Victims need protection and rights in the throughout a proceeding, but when restorative justice becomes the overreaching goal, then it not only clouds the original purpose of international courts,<sup>34</sup> but establishes bad precedent for the Court in the future, and ultimately violates the defendant's right to a fair and impartial trial. The goal of the ICC is to prosecute international war crimes. When these pro-victim initiatives impeded on the defendant's right to a fair trial and due process rights then the pro-victim initiatives go too far. The ability to receive separate legal representation throughout the entirety of the trial and the ability to have complete anonymity violates the defendant's right to a fair trial, and is ultimately, unnecessary in order to achieve the true goal of the ICC: to put an end to grave international crimes.

### III. VICTIM'S ABILITY TO HAVE LEGAL REPRESENTATION

Under Rule 90, a victim is entitled to legal representation.<sup>35</sup> This marked the first time in an international proceeding that victims were granted this extraordinary and controversial right. Proponents of this rule argue that without victim participation and their legal representatives, "the trial is a confrontation between... the international community and the other who claims being the representative of his people,"<sup>36</sup> while opponents characterize the rule as an invitation

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<sup>34</sup> Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*. *American Journal of International Law*. April 2012.

<sup>35</sup> ICC Rule 90(1).

<sup>36</sup> Luc Walley, attorney for victims in Lubanga's Trial. Interview by Mairagala Wakabi. January 13, 2010. <http://www.lubangatrial.org/201/01/13/qa-with-luc-walley-lawyer-for-victims-in-lubanga's-trial/>,

by the ICC to allow a second set of prosecutors at the trial.<sup>37</sup> Although, having legal representation enables victims to effectively participate in their trial as their own entity, allowing them to participate in every aspect of the trial, including cross-examining witnesses, will lead to procedural injustice to the defendant and a violation of a defendant's right to a fair trial.

#### *A. Victim Participation in the ICC and the Effect of Having Legal Representation*

Granting victims the ability to attain separate legal representation was a monumental step in favor of victim's rights and restorative justice.<sup>38</sup> Neither the ICTY or the ICTR had an equivalent clause.<sup>39</sup> The purpose of this legal representation clause is: "to ensure that victims are able to fully exercise their right to participate in ICC proceedings..."<sup>40</sup> However, this can be accomplished without having their legal representatives participate in every proceeding that the prosecution and defense does.<sup>41</sup>

The ICC has two distinct bodies devoted to providing support to victims who interact with the Court: the Victims Participation and Reparations Section (VPRS) and the Office of Public Counsel for Victims (OPVC).<sup>42</sup> The OPVC provides support and assistance to the legal

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<sup>37</sup> Garkawe, S., *Victims and the International Criminal Court Three Major Issues*, 3 *International Criminal Law Review* 359-60 (2003).

<sup>38</sup> See, e.g., Emily Haaslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, The Permanent International Criminal Court: Legal and Policy Issues, 315 Dominic McGoldrick, et al., eds., (2004) (noting that the Rome Statute marked a departure in traditional criminal justice theory towards a "more expansive model of international criminal law that encompasses social welfare and restorative justice.")

<sup>39</sup> See Tochilovsky V, "Rule of Procedure For the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals" *XLVI Netherlands International Law Review* 343 (1999).

<sup>40</sup> Objective 4 of the ICC Strategy.

<sup>41</sup> ICC Rule 91 – Only victims assisted by legal representatives enjoy the specific enhanced procedural rights which go beyond the right to participate in hearings.

<sup>42</sup> Susan SaCouto, *Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*, War Crimes Research Office, 12 (December 2011).

representatives of the victims, while the VRPC is in charge of the procedural issues, including determining who the legal representatives should be. In order to qualify as a legal representative of the victims, the attorney must meet the same qualifications that counsel for the defense must demonstrate: competence in the international or criminal law and procedure, and excellent knowledge and be fluent in one of the working languages of the Court.<sup>43</sup>

The rule states that a victim shall be free to choose a legal representative, but if there are a number of victims, the Chamber may request that victims or groups of victims choose a common legal representative.<sup>44</sup> In an international criminal case, there will likely be a high number of victims. Individual victim representation must be balanced with “the important practical, financial, infrastructural and logistical constraints faced by the Court.”<sup>45</sup> When the Court determines that an effective trial and efficiency outweigh the victim’s right to have every victim obtain individual representation, the Chamber will request the victims to choose a common legal representative.<sup>46</sup> Having a common legal representative allows the Court to group victims together. If victims are unable to choose a legal representative or lack the necessary means to pay for a common legal representative, the Chamber shall facilitate the process by requesting the VRPC to choose one or more common legal representatives and provide appropriate legal assistance.<sup>47</sup> A common legal representative has OPVC support staff at their

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<sup>43</sup> Rule 22(1) – Appointment and Qualifications of Counsel for the Defense.

<sup>44</sup> Rule 90(1) and Rule 90(2). In *Lubanga*, victims were largely represented by counsel of their own choosing throughout the proceeding.

<sup>45</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case. No. ICC-01/04-01/07, Trial Chamber II, Order on the Organisation of Common Legal Representation of Victims, pg. 11 (July 22, 2009).

<sup>46</sup> See Rule 90(2).

<sup>47</sup> See Rule 90(3) and 90(5).

disposal both at the ICC's location in the Hague and on the ground in the relevant locale for the case, talking to and supporting the victims.<sup>48</sup>

Although, a victim has a statutory right to participate in hearings, pre-trial and trial proceedings, and questioning witnesses; this right is not automatic, as participation will ultimately be determined on a case-by-case basis.<sup>49</sup> In order to participate or attend a hearing or question a witness, the legal representative of the victim must submit a written application to the Court. Ultimately, participation of victims should be consolidated to the largest extent possible in order to ensure certainty and consistency for victims themselves. The Court then has the ability to grant, deny, or be confined to written observations or submission, or in the case of questioning witnesses, provide a note of questioning witnesses.<sup>50</sup> In making this determination, the Court must consider a variety of factors, including: the stage of the proceedings, the rights of the accused, the interests of witnesses, and the need for a fair, impartial and expeditious trial in order to give full effect to Article 68(3).<sup>51</sup> In *Lubanga*, the Court considered these factors in making its determination about the legal representatives participating in the proceeding, the

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<sup>48</sup> There are currently offices of ICC outreach in four countries (Uganda, Central African Republic, Democratic Republic of the Congo, and Chad) that work with victims.

<sup>49</sup> Rule 91 – Participation of Legal Representatives in the Proceedings.

<sup>50</sup> Rule 91(3)(a): “When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defense, who shall be allowed to make observations within a time limit set by the Chamber.”

<sup>51</sup> Rule 91(3)(b): “The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.”

extent they would participate and, ultimately, the amount of success they would have representing their clients.

### *B. Legal Representation in the Lubanga Trial*

In *Lubanga*, 129 victims participated in the trial. “Victims” in this case were defined as “children who were recruited and/or actively used as child soldiers” as well as “the children’s parents or next of kin who are able to demonstrate harm suffered on account of the recruitment of their children” and “individuals who may have suffered as a result of intervening to prevent the commission of the crimes” (other individuals pillaged, killed, or raped by FPLC rebel forces were not granted victim status).<sup>52</sup> Eight different legal representatives, including Paolina Massidda, the Principal Counsel of the Office of the Public Counsel for Victims at the ICC, represented different groups of victims.<sup>53</sup>

Being the first trial under the ICC, both the Office of The Prosecutor (OTP) and the defense were reluctant when it came to victim participation and the use of legal representatives, fearing that their participation would disrupt the trial, abuse procedures and lead to an unfair trial for the accused.<sup>54</sup> Despite the angst towards the victim’s legal representatives, the eight always

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<sup>52</sup> The children’s parents or next of kin who were able to demonstrate harm suffered on account of the recruitment of their children were also considered victims, as well as individuals who may have suffered as a result of intervening to prevent the commission of the crimes; *see* Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008*, July 11, 2008, ICC-01/04-01/06-1432, par. 31.

<sup>53</sup> Susan SaCouto, *Ensuring Effective and Efficient Representation of Victims at the International Criminal Court*, War Crimes Research Office, 3 (December 2011).

<sup>54</sup> Luc Walley, attorney for victims in Lubanga’s Trial. Interview by Mairagala Wakabi. January 13, 2010. <http://www.lubangatrial.org/201/01/13/qa-with-luc-walley-lawyer-for-victims-in-lubanga’s-trial/>,

attended the court hearings and pre-trial and trial proceedings.<sup>55</sup> In every court appearance, each stressed upon the harm caused to children during the conflict and abuses they faced in military training camps.<sup>56</sup>

The legal representatives also made grand attempts to attach additional charges of sexual slavery and cruel and unusual punishment to Lubanga, and their petitioning to the court to allow three of the victims to give their opinions in court. Lubanga was initially charged with enlisting underage children in the UPC. In May 22, 2009, victims participating in the trial filed a motion arguing that the evidence that came out during the trial, specifically that fifteen of the victims were young girls that were allegedly raped, warranted the additional charges of sexual slavery and inhumane treatment. On December 8, 2009, after months delay, the Trial Chamber judges announced the decision to not allow any additional charges.<sup>57</sup>

Furthermore, triggered by the request made by the victims' legal representative, Joseph Keta, the Court allowed for three victims to testify, not on behalf of the prosecution, but as separate entities imparting their views on the Court. Two of the victims were former child soldiers, and testified to their experience in the UPC. While the other was a school teacher who described his indirect experiences dealing with the UPC and the FLPC. In making its

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<sup>55</sup> REDESS, Thomas Lubanga Trial: Timeline of Victims' Engagement (March 14, 2012). The legal representatives participated in the trial from January 26, 2009, when the eight lawyers each made opening statements on behalf of their victims to May 20, 2011, when the victims submitted their final observations. The legal representatives are still currently participating in the negotiations of reparations.

<sup>56</sup> Briefing Paper: The Trial of Thomas Lubanga Dyilo at the ICC, Open Society: Justice Initiative. [www.lubangatrial.org](http://www.lubangatrial.org) (March 2012). Specifically, in their openings, some of the representatives noted that the chamber should reject the defense's portrayal of Lubanga as a mere accomplice to these the crimes charged and went even further, stating Lubanga should be found guilty as a direct perpetrator in addition to the co-perpetrator liability requested by the prosecution.

<sup>57</sup> After the prosecution closed its case in July 2009, the Trial Chamber judges initially ruled in favor of the victims' motion in considering new charges. This decision was reversed.



determination, the judges made note that there was a distinction in victims “expressing their views and concerns” and victims “giving evidence.”<sup>58</sup> Victims who gave evidence were witnesses for the prosecution. These three separate victims were merely providing information in order to help the judges in their approach to the evidence presented by both the prosecution and the defense. In detailing the experience, the Court made sure to tell the legal representatives that they expected them to properly prepare the victims to in order to ensure that their views were properly presented. What the victims testified to and the specific procedure the legal representative and victims went through is unclear based on the records and the manuscripts from the ICC proceedings. However, on December 10, 2010, the identity of two of the victims who testified came under question. Given the material doubts of their identities, the Court, ultimately, chose not to rely on their identities.<sup>59</sup>

The Lubanga trial demonstrated that allowing victims to have separate legal representation throughout the entire course of the proceedings, including having the ability to cross examine witnesses, file motions and petition for victims to present their view to court, is unnecessary as it had a minimal effect on the trial. In this case, the Court demonstrated that it is weary about granting the victims’ counsel any power that would violate the due process rights of the defendant. This hesitation by the Justices is warranted. However, even the victims’ legal representatives ability to be present and participate in every proceedings violates the defendant’s international due process rights and right to a fair trial.

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<sup>58</sup> *Prosecutor v. Lubanga*, Decision on the Participation of Victims in the Appeal, Case No. ICC-01/04-01/06 (August 6, 2008).

<sup>59</sup> *Prosecutor v. Lubanga*, *supra*, note 1.

*C. Why Having a Legal Representative Throughout the Entire Proceeding Violates Due Process of the Defendant.*

The International Covenant on Civil and Political Rights (ICCPR) sets forth the international standard of due process.<sup>60</sup> The ICCPR states “all persons shall be equal before the court and tribunals,”<sup>61</sup> and shall be entitled to minimum guarantees, including the right “to be tried without undue delay.”<sup>62</sup> Read in conjunction with Article 68 of the ICC, which states that victim participation and their legal representatives are warranted as long as it is “not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial,”<sup>63</sup> the ICC makes clear that a defendant’s due process is important to the Court. However, the mere presence of the legal representatives violate both of these bedrock principles and is contrary to basic understandings of the criminal justice system.

Unlike the longstanding right of defendants to a just trial with due process, the right of alleged victims to participate and have legal representation in proceedings is a new concept in international criminal law. Having essentially a second prosecutorial wing in the courtroom violates the defendants right to a fair trial, as the defendant is essentially being attacked from two different sides of the same coin. This is not fair under the fair trial clause in Article 68. Even if the prosecutors official role is not to the victim, in prosecuting the defendant and in their attempt to build a case, the prosecutor fulfills much of the victims concerns in terms of charging the

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<sup>60</sup> The ICCPR is a treaty adopted by the United Nations on December 16, 1966. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. As of March 2012, the Covenant had 74 signatories and 167 parties.

<sup>61</sup> ICCPR 14(1)

<sup>62</sup> ICCPR 14(3)

<sup>63</sup> Article 68 of the ICC.

defendant with the appropriate crime, assigning witnesses to the case and seeking a just punishment for the defendant.

Other than the ICC, no other criminal court allows for victims to have legal representation. Whether the system is inquisitorial, like in the majority of European states, or adversarial, like in the United States and Ireland, domestic jurisdictions understand the necessity of maintaining balance in the courtroom.<sup>64</sup> The ICC's restorative approach stems from the inquisitorial criminal system that allows for victims to have standing participating in the courtroom.<sup>65</sup> The main reason for allowing victims to participate in an inquisitorial criminal system is because a civil claim for compensation is directly integrated into the criminal proceedings, enabling the criminal victim to simultaneously act as civil claimants.<sup>66</sup> In an adversarial system, where civil and criminal matters are in two separate cases, the victim plays no role in the criminal proceeding.

Following the inquisitorial approach, which the ICC is patterned off of, the only time victims should be allowed to be represented in the ICC are at the conclusion of criminal matters, specifically during the reparation proceedings, when the criminal court turns to the civil matter of compensating victims. Allowing the victims to have legal representation during the "criminal aspect of the trial" is unprecedented in any jurisdiction, and clouds the primary purpose of criminal law: to convict or acquit the accused. Furthermore, *Lubanga* demonstrates that legal representatives during the "criminal portion" of the proceedings will have very little impact,

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<sup>64</sup> Mugambi Jouet, *supra*, note 5, pg. 254-55.

<sup>65</sup> William Bourdon & Emmanuelle Duverger, *La Cour Penale Internationale: Le Statut de Rome* (Commentary on the Rome Statute) 203, 39 (Olivier Duhamel ed., 2000).

<sup>66</sup> *Id.* at 27.

acting more as intermediaries between the Court and the victims because of the Court's fear of violating the defendant's due process.<sup>67</sup>

Reparations, however, go "beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victim."<sup>68</sup> Lawyers for victims should be able to participate in this discussion because it is at this stage that the ICC turns more into a civil matter, as the primary purpose of reparations are to compensate the victims themselves. In *Lubanga*, specifically, the Court stated that the reparation proceeding will be an inclusive process centered around interviewing and consulting victims.<sup>69</sup> Since, the main objective of the reparations is to compensate the victims, rather than prosecute the defendant, legal representation is necessary during this portion of the proceedings and more importantly does not violate the defendant's international due process.

#### IV. VICTIM'S ABILITY TO BE GRANTED COMPLETE ANONYMITY

Along with the right of legal representation, the defendant's due process and right to a fair trial are also violated in the Court's ability to grant victims complete anonymity, including from the defense. Recognizing the peril and risks that victims and witnesses place themselves in when offering testimony and evidence to the prosecutors in all stages of the proceedings, international

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<sup>67</sup> The legal representatives failed in attempting to persuade the Prosecutors and the Court to charge Lubanga with sexual and inhumane treatment crimes. Luc Walley, attorney for victims in Lubanga's Trial. Interview by Mairagala Wakabi. January 13, 2010.

<http://www.lubangatrial.org/201/01/13/qa-with-luc-walley-lawyer-for-victims-in-lubanga's-trial/>,

<sup>68</sup> *Prosecutor v. Lubanga*, Decision on Principles and Procedures to be Applied to Reparations, Case No. ICC-01/04-01/06, (August 8, 2012).

<sup>69</sup> *Id.*

courts have traditionally put in place protective measures for those who come before the court.<sup>70</sup> The ICC has also recognized that victim and witness protection is necessary in order to have victims and witnesses come forward in establishing a case against the accused during the investigative, pretrial and trial. However, the ICC takes this protection too far, granting victims the ability to receive total anonymity without disclosing their appearance to the defense.<sup>71</sup>

#### *A. The ICC's Ability to Grant Complete Anonymity*

To allow a victim to receive total anonymity is a violation of the accused's due process and a violation of Article 68's fair trial clause.<sup>72</sup> Article 68(1) states that the court may take "appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." Article 68(5) states that one of the measures a prosecutor is entitled to is the ability to withhold disclosure of evidence and grant total anonymity if this may lead to "grave endangerment" of a victim or his or her family.<sup>73</sup> This ability denies the accused a fair trial in that it prohibits the accused from confronting the victim or witness, and may lead to the conviction of accused persons on the basis of tainted evidence.

Traditional "in court" protective measures sufficiently protect the victims and witnesses without violating the defendant's due process. These protective measures include: facial

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<sup>70</sup> ICTY's Rules of Procedures and Evidence Rule 75(A): "A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."

<sup>71</sup> Article 68(1)

<sup>72</sup> See ICPPR Due Process Rule and Article 68(3) for the defendant's right to a fair trial.

<sup>73</sup> Article 68(5): "Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

distortion, the use of pseudonyms, voice distortion, private sessions, closed sessions, use of a remote witness room, video-link testimony and safe conduct.<sup>74</sup> These measures have the effect of protecting witnesses by excluding certain identifying features about the victim from the press and the public, but not from the defense.

The ICC is not the first international court to grant this right to anonymity,<sup>75</sup> and to receive harsh criticism because of it.<sup>76</sup> The ICTY also had a provision that allowed the prosecution to seek total anonymity for a victim or witness.<sup>77</sup> In making its determination the ICTY considered five factors: the fear for the safety of the witness and his or her family, importance of testimony of the particular witness, the trial chamber satisfaction that there is no prima facie evidence that the witness is untrustworthy, lack of an effective witness protection program, and lack of ability to apply any less restrictive measures.<sup>78</sup> In making its determination as to whether or not a victim is entitled to receive protective measures or the level of protection a victim shall receive, the ICC involves itself in a similar balancing test that the ICTY did, considering the victim's age, gender, health, the nature of the crime and if the crime involves crime against sexual or gender violence or crimes against children.<sup>79</sup>

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<sup>74</sup> Article 87(3).

<sup>75</sup> ICTY held that “the identities of several victims and witnesses can be indefinitely withheld from the accused and his counsel.” *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, UN Doc. IT-94-1-T (August 10, 1995)

<sup>76</sup> See Roberston, G., *Crimes Against Humanity: The Struggle for Global Justice*, Penguin Press, 290-92 (1999); Monroe, Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AJIL 235, 236 (1996).

<sup>77</sup> Article 22 of the ICTY Statute.

<sup>78</sup> *Prosecutor v. Tadic*, majority judgment of Judge McDonald & Vohrah, at [62]-[66]. This five factor test was endorsed by Trial Chamber I in the case of *Blaskic* (IT-95-14-T), Decision of the Prosecutor dated October 17, 1996 requesting protective measures for victims and witnesses, November 5, 1996, at [41].

<sup>79</sup> Article 68(2).

In determining whether or not a victim is entitled to this egregious benefit, the Court must ultimately balance two important objectives: protection of a witnesses versus fair trial of accused persons. By favoring the former, the ICC simultaneously loses its legitimacy and violates defendant's right to a fair trial. As seen in *Lubanga*, the ICC is weary to apply this extreme protective measure in fear of those potential outcomes.

### *B. The Use of Protective Measures in the Lubanga Trial*

In *Lubanga*, the Court did grant anonymity to many of the victims, but did so with restrictions based on the different times of the trial. This is a tactic has been used by the Court since then.<sup>80</sup> In *Lubanga*, during Pre-Trial Chamber I, anonymity came with restricted modalities of participation, such as victims were not entitled to submit evidence during the confirmation of charge hearing in the case.<sup>81</sup> The Trial Chamber I then removed any categorical limitations on the modalities of participation by anonymous victims, but recognized that “[w]hile the security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself.”<sup>82</sup>

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<sup>80</sup> In the Katanga and Ngudjolo Chui case the Court upheld the victims request for anonymity on the grounds, of security concerns. However, the participation rights were more limited in order to safeguard the fundamental principle prohibiting anonymous accusations. For instance, at the pre-trial stage of proceedings, anonymous victims “could not add any point of fact or any evidence, nor could they question witnesses...” See ICC, Decision on the Arrangement for Participation of Victims a/0001/06, a0002/06 and a/0003/06 at the Confirmation Hearing, op. cit., p7; and ICC, Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case, Doc. ICC-01/04-01/06-462-tEN, 23 June 2008, p8.

<sup>81</sup> *Prosecutor v. Lubanga*, Victim Participation Decision. ICC, Case No. ICC-01-04-01-06. para. 131 (January 18, 2008)

<sup>82</sup> *Id.*

Although the Court employed a limited application of the anonymity clause, the perils of applying this rule, specifically the potential for tainted evidence and doubts of victim or witness identification, were still present in this case. The three victims who presented their views in the Court only had voice and face distortion and were referred to by an identification number, rather than their name.<sup>83</sup> However, almost eleven months after they testified in December 2010, the identities of the victims were being questioned. The Court, in taking a cautious approach chose not to rely on the opinions of the three victims who presented their views in court because of “the material doubts that exist[ed] as to the identities of two of these individuals, which inevitably affect the third.”<sup>84</sup> The Chamber decided to withdraw the permission originally granted to them to participate as victims.

The Lubanga trial demonstrates that even when the Court applies a restricted form of the anonymity clause or similar forms of protection, abuse is still possible. The Court understands this, and is taking an extremely conservative approach granting total anonymity. This is good, and is how the ICTR and ICTY applied their similar statute. Yet, despite the restrictive application of the rule and the importance of protecting victims and witnesses, the ability to employ the total anonymity clause should not be available in the Court because its use without any restrictions would violate the defendant’s due process and right to a fair trial.

### *C. Why Having a Total Anonymity in ICC violates Due Process of the Defendant.*

Under Article 68, victims have the ability to present views and concerns to the ICC in a manner, which is not prejudicial to, or inconsistent with the rights of the accused and a fair or

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<sup>83</sup> The Victims were identified to the public as victims a/0225/06, 1/0229/06, and a/0270/07.

<sup>84</sup> *Prosecutor v. Lubanga, supra*, note 1.



impartial trial.<sup>85</sup> The requirements of a fair trial include a public hearing in which the accused has the opportunity “[t]o 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.”<sup>86</sup> This right to a fair trial is paramount, as it establishes the legitimacy of the Court. This is vital and cannot waver, based on the context of each case. Although protections for victims are necessary, when the level of protection, such as granting complete anonymity to the victim, rise to the level where it is prejudicial to the rights of the accused, then it violates the international standard of due process and fair trial.

In the past, in order to adhere to the defendants right to a fair trial, prior tribunals have employed the same restrictive approach that the ICC employed in *Lubanga*. For example, the European Court in *Kostovski v. The Netherlands*, concluded that the disadvantages that an accused must face when addressing the evidence of an anonymous witness can be counterbalanced by the safeguards provided by the trial court.<sup>87</sup> However, as the Lubanga trial demonstrates even when there are safeguards in place, such as extremely diligent research into the identification of the victim and restrictive use of anonymity, the potential for the lack of a fair trial still exists.

The right to a fair trial is not a malleable one, which can be determined in the context of every situation, as some scholars have argued.<sup>88</sup> Pro-victim initiatives gained at the expense of the offenders violate the accused’s right to a fair trial even when these restrictive measures are in

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<sup>85</sup> Article 68 of ICC.

<sup>86</sup> ICCPR, 999 UNTS 171, 176 note 5, Dec. 16, 1966; European Convention on Human Rights, Art. 6(3)(d), 213 UNTS at 228; American Convention on Human Rights, Nov. 22, 1969, Art. 8(2)(f), 1144 UNTS 123, 147-48.

<sup>87</sup> 166 Eur. Ct. H.R. (ser. A) at 3 (1989).

<sup>88</sup> Chinkin C, ‘Due Process and Witnesses Anonymity’ (1997) 91 American Journal of International Law 75-79.

place because every defendant has the right to examine or cross-examine adverse witness or victim.<sup>89</sup> Without knowing the identity of the victims, including the name, background, residence and whereabouts of the alleged crime, the defendant's right to a fair trial is breached. Pro-victim initiatives that blatantly affect the rights of the accused cannot be tolerated, as the right to a fair trial is a fundamental cornerstone of the ICC in order to maintain a sense of legitimacy for the Court.<sup>90</sup> The defendant is innocent until proven guilty, and according to Rule 68, has the right to a fair trial, which includes the ability to cross-examine witnesses. If the court grants complete anonymity to victims without restrictions, then this right is violated.

## V. CONCLUSION

The ICC must “establish itself as the preeminent defender of human rights and particularly of the right of every accused to a fair trial according to the most exacting standards of due process required by contemporary international law.”<sup>91</sup> Moving forward, it is not enough for the Court to employ these victim protection provisions restrictively as the defendant's right to a fair trial and the defendant's due process rights are not some rules that can be changed based on the context of each case. Rather due process and the right to a fair trial are fundamental to the existence and reputation of the court. Although restorative justice should play a role in ICC

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<sup>89</sup> Sam Garkawe. *Victims and the International Criminal Court: Three Major Issues*, *International Criminal Law Reviews* (2003) pg. 356-57.

<sup>90</sup> See. Hender L., ‘The Wrongs of Victims Rights’ (1985) 37 *Stanford Law Review* 937; Hinton M, ‘Guarding Against Victim – authored Victim Impact Statements’ (1996) 20(6); *Criminal Law Journal* 310; Hall G, ‘Victim Impact Statements: Sentencing on Thin Ice?’ (1992) 15 *New Zealand Universities Review* 143.

<sup>91</sup> Monroe, Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 *AJIL* 235, 236 (1996).

proceedings, it cannot be the overriding principle during the criminal proceedings. Rather, victims should only have the ability to have legal representation during the reparation portion of the proceeding, once the conviction of the accused is final; and the use of total anonymity should never be employed, especially without restrictions.

In enacting these broad victim protective measures in the ICC laws, the ICC shows its hand in favoring the victims or the accused. In order to have a reputation as an unbiased legal arena, the Court must abandon the victim's ability to have legal representation at all trial proceedings and the Court's ability to grant victim's total anonymity without restrictions. Failure to do so will lead to an unfair trial, a violation of defendant's due process, and a growing sense of weariness towards the Court.