

# **Balancing Witness Protection and Fair Trial Rights: A Comparative Analysis of International Criminal Tribunal for the Former Yugoslavia and Kosovo Specialist Chambers & Court**

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## **Abstract:**

**This thesis provides a comprehensive comparative analysis of witness protection measures and fair trial rights within the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Kosovo Specialist Chambers & Court (KSC). It explores the evolution of procedural practices in international criminal law, focusing on the balance between ensuring adequate safety for witnesses and maintaining the fair trial rights of the accused. By examining the established practices of the ICTY and the procedural frameworks introduced by the KSC, this study aims to assess whether the newer tribunal has learned from the experiences of its predecessor and improved upon the mechanisms to protect both witnesses and the accused's rights. The thesis contends that significant advancements in procedural witness protection mechanisms have been implemented from the ICTY to the KSC, which could potentially result in a better balance between protecting witnesses and ensuring the rights of the accused. The findings could contribute to the ongoing development of international criminal law and help in shaping future tribunals to achieve a more just and equitable system.**

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### **List of Abbreviations**

1. **ICTY:** International Criminal Tribunal for the Former Yugoslavia
2. **KSC:** Kosovo Specialist Chambers
3. **RPE:** Rules of Procedure and Evidence
4. **ECtHR:** European Court of Human Rights
5. **ICCPR:** International Covenant on Civil and Political Rights
6. **SPO:** Specialist Prosecutor's Office
7. **RPEs:** Rules of Procedure and Evidence (plural form)

## Introduction: Transitional Justice, Criminal Tribunals, and the Clash of Two Rights

Transitional justice has been widely acknowledged as a popular tool for the restoration of societies transitioning from periods of conflict or authoritarian rule. As defined by the United Nations, transitional justice is a multifaceted approach that addresses serious past abuses, focusing on ensuring accountability, delivering justice, and fostering societal reconciliation.<sup>1</sup> Serving both as an instrument to facilitate state rebuilding and to legitimize new regimes, transitional justice aims to establish democratic principles, the rule of law and reconciliation in war-torn societies. Ruti Teitel describes transitional justice as having a dual focus: it is retrospective, aiming to redress past wrongs, and prospective, intended to prevent future abuses by promoting the rule of law and democracy.<sup>2</sup> Through the use of a variety of judicial and non-judicial instruments—from trials and truth commissions to reparations and institutional reforms, transitional justice is both retributive, in its attempt to punish perpetrators and restorative, in its aiming to rebuild social trust, recognize victims, and address systemic injustices in order to reconstruct society.<sup>3</sup>

The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, amidst the Yugoslav wars, was a landmark in the evolution of transitional justice and international criminal law. Authorized by United Nations Security Council Resolution 827, the ICTY was charged with prosecuting individuals for grave violations of international humanitarian law during the conflicts in the former Yugoslavia, including genocide, war

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<sup>1</sup> United Nations Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (2004) UN Doc S/2004/616.

<sup>2</sup> Ruti. G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

<sup>3</sup> Ibid.

crimes, and crimes against humanity.<sup>4</sup> Unlike previous international tribunals like Nuremberg and Tokyo, which primarily relied on documentary evidence, the ICTY placed evidentiary weight on witness testimonies.<sup>5</sup> The critical reliance on testimonial evidence meant that efficient witness protection measures were not just essential for protecting individuals involved, but also for the administration of justice and the accurate determination of truth. Despite these needs, the ICTY frequently encountered criticism for its insufficient and inconsistent protection of witnesses.<sup>6</sup> Critics argued that the ICTY also struggled to find a fair equilibrium between implementing protective measures for witnesses and preserving the accused's right to a fair trial.<sup>7</sup> They contended that the Tribunal frequently prioritized one right over the other, thereby undermining the very principles of justice it sought to uphold.

Building on the evolved jurisprudence of international criminal law and the lessons learned from the ICTY, the establishment of the Kosovo Specialist Chambers & Court (KSC) in 2015 represents the newest attempt in the pursuit of justice for human rights violations during the Kosovo war.<sup>8</sup> Inevitably, this includes prosecuting former members of the Kosovo Liberation Army (KLA), who are revered as national heroes in Kosovo, including a former president whose trial is currently underway.<sup>9</sup> Situated in a politically and emotionally charged environment, the KSC faces an urgent challenge to establish credibility and gain local

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<sup>4</sup> United Nations Security Council, 'Resolution 827' (25 May 1993) UN Doc S/RES/827.

<sup>5</sup> Joanna Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses Identities in ICTR Trials' (2006) 38 NYU Journal of International Law and Politics 1 <[www.law.nyu.edu/journals/jilp/issues/38/38\\_1\\_2\\_Pozen.pdf](http://www.law.nyu.edu/journals/jilp/issues/38/38_1_2_Pozen.pdf)> accessed 27 May 2024.

<sup>6</sup> See Andrew Trotter, 'Witness Intimidation in International Trials: Balancing the Need for Protection Against the Rights of the Accused' (2012) 44 The George Washington International Law Review; Daniela Kravetz, 'The Protection of Victims in War Crimes Trials' in Torsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (TMC Asser Press 2013) 158.

<sup>7</sup> Huma Haider and Timothy Welch, 'The Protection of Witnesses in Bosnian War Crimes Trials: A Fair Balance Between the Interests of Victims and the Rights of the Accused?' (2008) 20 The Denning Law Journal.

<sup>8</sup> Matthew Cross, 'Strategizing International Prosecutions: How Might the Work of the Kosovo Specialist Prosecutor's Office Come to Be Judged?' (2020) 20 International Criminal Law Review 70-71.

<sup>9</sup> Aidan Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications' (2019) 20 Human Rights Review 11.

acceptance. This lack of local legitimacy is critical as it charges Kosovar “liberators” with crimes against humanity. Without it, the tribunal risks not just failing in reconciliation, but potentially exacerbating already ethnic existing tensions and political radicalization.<sup>10</sup> Amidst these challenges, the KSC stands to re-enact a classic ICTY dilemma: striking the right balance between efficient witness protection measures and the accused's right to a fair trial.

This thesis sets out to determine whether the KSC has adequately geared up for this crucial test. Specifically, it performs a comparative analysis to determine if the KSC, through its procedural rules, is better equipped than the ICTY to balance witness protection measures with the accused's right to a fair trial. The main research question asks whether KSC is better than its predecessor, the ICTY, in finding a balance between witness protection and the accused's rights. The hypothesis posits that there have been significant advancements in procedural witness protection mechanisms from the ICTY to the KSC and a better balance of the protection of witnesses with the accused's rights. Before testing its hypothesis, the thesis first provides essential background information that led to the establishment of both judicial bodies. It then discusses the importance of witness protection measures and explores the fair trial rights of the accused, analyzing any perceived imbalances between the two. Following this, the thesis examines why the ICTY has been accused of failing to maintain this balance and reviews existing scholarly expectations of the KSC. Finally, it compares the KSC's Rules of Evidence and Procedure with those of the ICTY to identify differences and similarities in their approaches to witness protection and balance with the rights of the accused. It also explores the practical application of these rules in its examination of the hypothesis.

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<sup>10</sup> Sara L Ochs and Kirbi Walters, 'Forced Justice: The Kosovo Specialist Chambers' (2022) 32(2) *Duke Journal of Comparative & International Law*.

The significance of this research lies in its critical examination of the evolution of transitional justice mechanisms, particularly focusing on the balance between witness protection and the rights of the accused. By comparing the procedural frameworks of the ICTY and the KSC, this study aims to uncover whether new courts, like the KSC, have effectively learned from their predecessors' lessons and implemented a more balanced approach to justice.

Furthermore, it addresses a vital gap in the literature on the KSC by evaluating the practical application of its procedural rules against the backdrop of an ongoing debate in international criminal law. The outcomes of this research could inform future tribunal practices and contribute to the broader mission of finding a sustainable formula for lasting peace and reconciliation in post-conflict societies.

## International Criminal Tribunal for the Former Yugoslavia

### 1.1 Necessary Background

In the early 1990s, the declarations of independence by Slovenia and Croatia, along with the subsequent dissolution of Yugoslavia, triggered the war in Bosnia and Herzegovina (BiH). BiH faced a critical challenge: to remain within Yugoslavia, risking domination by Serbia under Milosevic's leadership, or to opt for secession, a choice strongly opposed by Bosnian Serbs who favored remaining in Yugoslavia.<sup>11</sup> BiH was comprised of three primary ethnic groups: Bosnian Muslims (Bosniaks), Croats, and Serbs. On March 1, 1992, BiH conducted a referendum for independence, which was participated in by Croats and Bosnian Muslims but boycotted by the Serbs. Despite the discontent among Bosnian Serbs following the referendum, Bosnia and Herzegovina declared independence on April 6, 1992. What followed was a three-year war waged along ethnic lines, marked by unprecedented brutality

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<sup>11</sup> Janine Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (1st edn, Routledge 2014) 25

not seen in Europe since World War II. In 1995, the Dayton Peace Agreement was signed, ending the war and establishing Bosnia as an independent country under interim international administration.

Even before hostilities ceased, efforts towards reconciliation and accountability were initiated. On October 6, 1992, the United Nations Security Council (UNSC) created an international commission of five experts under Resolution 780, tasked with investigating breaches of the Geneva Conventions and International Humanitarian Law in Yugoslavia.<sup>12</sup> While the war was still ongoing, on May 25, 1993, the UNSC unanimously passed Resolution 827 under Chapter VII of the UN Charter, establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>13</sup> The tribunal was empowered to prosecute individuals for violations of international humanitarian law committed within the territory of the former Yugoslavia since 1991, with precedence over domestic courts for such offenses.<sup>14</sup> Furthermore, the Bosnian courts were required to grant unrestricted access to and collaborate with the Tribunal.<sup>15</sup>

## 1.2 Establishment of the ICTY and Mandate

Resolution 827 outlines the mandate of the ICTY as follows: "... to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them... the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and

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<sup>12</sup> n 4

<sup>13</sup> United Nations Security Council, 'Resolution 827' (25 May 1993) UN Doc S/RES/827.

<sup>14</sup> United Nations Security Council, 'Statute of the International Criminal Tribunal for the Former Yugoslavia' annexed to 'Resolution 827' (25 May 1993) UN Doc S/RES/827.

<sup>15</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (signed 14 December 1995) art II(8).



maintenance of peace."<sup>16</sup> Therefore, ICTY had three-fold mandate: justice, deterrence and peace. The inclusion of peace as the third goal of the ICTY was a ground-breaking departure from traditional expectations of criminal justice administration. This mandate made the ICTY the first criminal court to explicitly incorporate the restoration of peace as a core objective, thus setting a significant precedent for international tribunals and marking a pivotal development in the evolution of transitional justice. Furthermore, while reconciliation was not explicitly referenced in the resolution, both the presidents and the members of the tribunal consistently emphasized the importance of delivering justice, acknowledging victims, and often connecting reconciliation with the overarching goal of peace.<sup>17</sup>

Over the course of its 25 years of operation, the ICTY has earned a reputation for its significant achievements. Endowed with jurisdiction over crimes against humanity, genocide, grave breaches of the Geneva Conventions, and violations of the laws or customs of war, the tribunal indicted 161 individuals, including major protagonists of the war, and played a pivotal role in shaping the landscape of international criminal law. Furthermore, its precedent paved the way for the establishment of other international courts, such as those for Rwanda, Sierra Leone, and ultimately, the ICC, thereby significantly advancing transitional justice, enhancing international criminal jurisprudence, and shaping post-conflict reconstruction strategies.

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<sup>16</sup> n 13

<sup>17</sup> n 11

## *Kosovo Specialist Chambers*

### 1.3 Necessary background

When Milosevic assumed power in Serbia, Kosovo Albanians, who made up the overwhelming majority in Kosovo—then an autonomous Serbian province—faced severe oppression and terror.<sup>18</sup> The signing of the Dayton Peace Accords in 1995 — which marked the end of the war in the former Yugoslavia — failed to address the situation in Kosovo, offering no solution or recognition of the issue. As peaceful resistance strategies lost traction, Kosovo society began supporting the Kosovo Albanian separatist militia, the Kosovo Liberation Army (KLA). The conflict quickly escalated between the KLA and Yugoslav government forces, leading to the outbreak of the war in 1998. Yugoslav security forces launched military offensives against the KLA, deliberately targeting Albanian civilians in a campaign of ethnic cleansing. Although the KLA was initially perceived as a terrorist group, by early 1999, the international community's perspective began to shift. When peace negotiations failed and violence continued, NATO initiated bombing campaigns in Serbia and Kosovo without UN Security Council authorization, continuing for 78 days until Milosevic capitulated to a peace agreement. This led to the withdrawal of Yugoslav forces from Kosovo and the establishment of an international peacekeeping force. Eventually, Kosovo transitioned into an international protectorate and declared its independence in 2008.

### 1.4 KSC Jurisdiction and Mandate

In April 2009, the European Union Rule of Law Mission (EULEX) assumed certain duties previously held by United Nations Interim Administration in Kosovo (UNMIK) and took over responsibilities to investigate and prosecute war crimes, grave crimes, and serious

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<sup>18</sup> n at 29

offenses like enforced disappearance.<sup>19</sup> EULEX fell short of expectations, drawing criticism for its inefficiency and perceived incapacity to effectively fulfill its duties. On August 3, 2015, Kosovo passed legislation establishing the Specialist Chambers (KSC) and Specialist Prosecutor's Office (SPO), which became effective on September 15, 2015.<sup>20</sup> Article 1 of the Law specifies the mandate as follows: "...to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo, and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo...."<sup>21</sup> Significantly, the KSC is attached to every tier of the Kosovo judiciary: the Basic Court of Pristina, the Court of Appeals, the Supreme Court, and the Constitutional Court. It authorizes the Supreme Court chamber to act as a third instance of appeal and assigns the Constitutional Court the task of ensuring that all rules, procedures, and practices of the chambers comply with its Rules and the Law.<sup>22</sup> The Specialist Chambers is also granted primacy in their subject matter jurisdiction over all other courts in Kosovo, as stipulated in Articles 10 and 54. This jurisdiction includes crimes against humanity and war crimes, criminal offenses against the administration of justice and public administration, offenses against public order, and official corruption and offenses against official duty. It can prosecute any Kosovo or Former Republic of Yugoslavia citizens for crimes committed between January 1, 1998, and December 31, 2000, regardless of the crime's location, provided the offense began or occurred within Kosovo.

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<sup>19</sup> Michael G Karnavas, 'The Kosovo Specialist Chambers' Rules of Procedure and Evidence: More of the Same Hybridity with Added Prosecutorial Transparency' (2020) 20 International Criminal Law Review 77, 80.

<sup>20</sup> Kosovo Specialist Chambers, 'Law No 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office' [https://www.scp-ks.org/sites/default/files/public/05-l-053\\_a.pdf](https://www.scp-ks.org/sites/default/files/public/05-l-053_a.pdf) accessed 27 May 2024.

<sup>21</sup> *ibid* art 1 para 2

<sup>22</sup> n 20 art 47(1) and 49.

## Witness Protection and Fair Trial Rights

### 2.1 Importance of Witness Protection

The importance of effective witness protection programs within the judicial systems, especially in international tribunals, is undisputed. Witnesses play a crucial role in delivering justice through their testimonies. The Organization for Security and Co-operation in Europe (OSCE) highlights: "In war crimes trials, as in any criminal case, the reliable and comprehensive testimony of witnesses is essential to a fair and effective procedure."<sup>23</sup> In turn, the comprehensiveness of witness testimony depends on the witnesses' sense of security. Scholars have repeatedly stressed that without protection from reprisals or harm, witnesses may be reluctant to come forward or unable to testify comprehensively.<sup>24</sup> This reluctance can stem from the fear of confronting the accused and the potential re-traumatization that could follow the testimony, as well as concerns about threats to their own safety or that of their families.<sup>25</sup> By choosing to testify and cooperate with the court, witnesses expose themselves to significant risks.<sup>26</sup> Indeed, witness intimidation, especially in international trials that often prosecute former high-ranking politicians who still have extensive influence, is one of the biggest challenges the courts have in securing reliable and uninhibited testimonies.<sup>27</sup>

Therefore, effective witness protection measures are crucial not only for safeguarding

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<sup>23</sup> Organisation for Security and Co-operation in Europe (OSCE), *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles* (March 2005) 23.

<sup>24</sup> See Christine M Chinkin, 'Due Process and Witness Anonymity' (1997) 75 *The American Journal of International Law* 76; Alex C Lakatos, 'Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights' (1994-1995) 6 *Hastings LJ* 920-921; Jonathan Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 *Legal Studies* 21.

<sup>25</sup> Goran Sluiter, 'The ICTR and the Protection of Witnesses' (2005) 3 *Journal of International Criminal Justice* 965.

<sup>26</sup> Maille Brady Bates, 'Balancing Act: The Rights of the Accused and Witness Protection Measures' (2014) 17 *Trinity College Law Review* 147.

<sup>27</sup> Robert Cryer, 'Witness Tampering and International Criminal Tribunals' (2014) 27(1) *Leiden Journal of International Law* 199-201.

individuals from harm but also for ensuring that they feel secure enough to come forward and aid in delivering justice.

Witness protection is crucial across all legal systems, but it holds particular importance for criminal tribunals, such as the ICTY and the KSC, which investigate lesser-documented crimes, or crimes committed a long time ago, and hence, rely on witness testimonies for evidence.<sup>28</sup> The concept of witness protection first emerged in the United States in the mid-twentieth century, with the first significant cases appearing in the 1960s.<sup>29</sup> By the 1980s, formally administered domestic witness protection programs had expanded to include a range of measures such as financial compensation, relocation, assignment of new identities, confidentiality, and restrictions on disclosure.<sup>30</sup> The procedural witness protection measures implemented by ad hoc tribunals, including restrictions on disclosures, closed sessions, redactions of identifying information from transcripts, and temporary non-disclosure of identities to the accused, set a foundational precedent for many hybrid tribunals.<sup>31</sup> These protective measures, including the creation of specialized units for the witnesses, and various non-procedural strategies such as physical protection and temporary relocation, have been adopted and adapted by other tribunals/chambers, including the Kosovo Specialist Chambers.

## 2.2 The Accused's right to a fair trial and a Clash with Witness Protection Measures

The principle of a fair trial, a cornerstone of every criminal proceeding, is deeply rooted in the historical development of human rights norms related to evidence and is enshrined in major regional and international human rights treaties. Particularly significant are the fair trial

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<sup>28</sup> n 5

<sup>29</sup> n 6 (Trotter, 2012) 532-533

<sup>30</sup> *ibid*

<sup>31</sup> *ibid*

guarantees articulated in Article 6 of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>32</sup> Article 6 (1) of ECHR ensures that individuals are entitled to "a fair and public hearing by an independent and impartial tribunal established by law," a principle that is also reiterated in Article 14 (1) of the ICCPR. Article 6(3) of the ECHR and Article 14(3) of the ICCPR list minimum of the accused, such as the right to an effective counsel and 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 (ICCPR 14(3e))." These provisions are also mirrored in the statutes of international courts such as the ICTY and the KSC.

Central to these provisions is the assurance of a public and impartial trial, including the right to examine witnesses. In interpreting these general provisions, several fundamental rights have been defined as constituting a fair trial. Among these are "legal certainty," which ensures that the legal system and its rules are precise and clear, enabling situations to be foreseeable and "predictable." Another key principle is "equality of arms," which guarantees that each party has the opportunity to present their case under conditions that do not place them at a disadvantage compared to their opponent.<sup>33</sup> Furthermore, the right to confrontation is a fundamental right of the accused that defines the essence of a criminal trial.<sup>34</sup> Confrontation includes "the right of the accused to ascertain the true identity of their accusers, the privilege to be present during their testimony, and the opportunity to challenge

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<sup>32</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6.

<sup>33</sup> B N McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 14-16

<sup>34</sup> David Lusty, 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials' (2002) 24 Sydney Law Review 361

their evidence through cross-examination."<sup>35</sup> This process is vital for assessing the credibility of evidence, serving as a procedural guarantee against wrongful convictions, and lending legitimacy to court proceedings. The process of cross-examination is a critical method for testing factual accuracy of the evidence by confronting witnesses. Any obstacle or deficiency in this process may compromise the legitimacy of the verdict.<sup>36</sup>

However, the implementation of certain witness protection measures can clash with the standards of a fair trial. For example, when such measures are in place, witnesses are typically referred to by pseudonyms in court judgments and proceedings. Often, the court will conduct parts of the testimony in a closed session to prevent revealing the identity or location of a protected witness. This limits public access to the proceedings, thereby impacting the ability to scrutinize the fairness of the trial and raising questions about the maintenance of the accused's right to a public trial.<sup>37</sup> More controversial is the use of anonymity as a protective measure. When the identity of a witness is unknown, it prevents the accused from investigating potential ulterior motives, past experiences, undisclosed relationships with parties involved in the trial, reputation, or prior inconsistent testimonies. This inability to fully challenge these aspects undermines the defense's capacity to challenge the credibility and reliability of the testimony, thereby compromising the accused's right to a thorough confrontation or examination of the witness.<sup>38</sup> Secondly, the burden of proof on the accused to demonstrate substantial or undue prejudice due to the non-disclosure of a witness's identity inherently tilts the scales of justice against the defendant from the start, hence violating his right to the equality of arms.<sup>39</sup> This challenge is compounded by the obscurity surrounding

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<sup>35</sup> *ibid*, 362

<sup>36</sup> n 26 at 150

<sup>37</sup> n 6 (Kravetz 2013) 158.

<sup>38</sup> n 34, 423-426

<sup>39</sup> *ibid*

the witness's identity, leaving the accused practically incapable of demonstrating that knowing the identity of the witness would be material to the defense's case, and not knowing-prejudicial. Furthermore, witness anonymity can threaten the conviction of innocent individuals and erode public trust in the judicial system due to perceived or actual inaccuracies in the verdict. Thus, while witness protection measures such as anonymity, confidentiality or closed sessions are intended to protect witnesses, they can also constrain the accused's right to confrontation and potentially lead to illegitimate verdicts, highlighting a balance that must be carefully managed in judicial proceedings.

### *2.3 the ICTY Witness Protection Measures and Balance with the Rights of the Accused*

Despite having protective measures in place, the ICTY has encountered significant criticisms due to organizational inconsistencies and the practical inefficacy of those measures. Trotter, for example, has pointed out that the Tribunal's reliance on closed sessions and redaction to maintain witness confidentiality is inherently flawed, as it depends on the discretion and competence of the defense, including self-represented accused, to refrain from disclosing identifying information.<sup>40</sup> Although the ICTY employed delayed broadcasts during sessions to ensure that protective information was redacted before airing, organizational lapses still occurred. A notable example involved former Serbian president Milošević, who, while self-representing himself before the Tribunal, repeatedly called a protected witness by his name during cross-examination.<sup>41</sup> This "slip" was not caught by the registrar, and the unredacted version was broadcasted half an hour later. Tragically, the witness was later found dead, illustrating the severe consequences of these procedural failures.<sup>42</sup> Meanwhile, Kravetz notes

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<sup>40</sup> n 6 (Trotter 2012) 534

<sup>41</sup> *Prosecutor v Milosevic* (Transcript of Proceedings, Case No IT-02-54, 2 December 2003) T 29844.

<sup>42</sup> *Prosecutor v Stanisic & Simatovic* (Prosecution Motion to Admit the Evidence of Witness C-057 Pursuant to Rule 92quater, Case No IT-03-69-PT, 8 April 2008).



that although the tribunal is authorized under Article 77 of its rules to penalize those in contempt of court, including for the disclosure of confidential information, the ICTY has repeatedly encountered instances where protected witnesses' identities and other sensitive information were leaked to the public by the media and involved parties.<sup>43</sup> Furthermore, ineffective witness protection measures not only affected the protection of witnesses themselves, but also the delivery of justice. Widespread witness intimidation was so significant during cases against the former Kosovo Liberation Army's members, that the prosecutor was unable to bring his key witnesses to the court.<sup>44</sup> In the case against Haradinaj et al, the chamber granted protection to 34 out of 100 witnesses.<sup>45</sup> Despite these measures, the atmosphere of fear was so pervasive that many witnesses altered their testimonies, refused to testify even under subpoena, or even disappeared. Given these overwhelming challenges, the prosecution struggled to substantiate its case, and two of the three defendants were acquitted. These difficulties highlight the ICTY's struggles with effectively implementing witness protection measures.

At the same, the chamber has faced extensive controversy surrounding its inability to balance the witness protection measures with the accused's right to a fair trial. Extensively discussed is the Chamber's decision in the Tadic case to grant anonymity to witnesses and withhold names, addresses, images, voices, and any other identifying information from the defence indefinitely. The critics argued that the chamber had no clear legal provisions regarding testimony of the witness that is granted anonymity, and hence, full scale anonymity was not permitted by the procedural regulations.<sup>46</sup> Others argue that through anonymizing witnesses,

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<sup>43</sup> n 6 (Kravez 2013) 159

<sup>44</sup> Ibid 161

<sup>45</sup> *Prosecutor v Haradinaj et al* (Judgment, Case No IT-04-84-T, 3 April 2008) para 22.

<sup>46</sup> See n 6 (Kravez 2013). Also, *Prosecutor v Tadić* (Separate Opinion of Judge Stephen, Case No IT-94-1-T, 10 August 1995).

the ICTY undermined the fundamentals of due process by preventing the defense from ascertaining the identity of witnesses, which is essential for effective cross-examination and ensuring a fair trial.<sup>47</sup> They argue that withholding witness identities impedes the accused's ability to conduct thorough background checks and prepare for cross-examination, thereby compromising the accused's right to challenge the credibility of the testimony and adequately defend himself against the accusations. According to Leigh, anonymizing witnesses is running a risk of being a “miscarriage of justice” and throws the tribunal’s legal integrity into question.<sup>48</sup>

Others emphasize the importance of witness protection, particularly in cases involving sexual crimes and close-knit communities, but caution that such measures should not override the defendant's historic right to a fair trial, suggesting that the ICTY may have overly prioritized victim interests at the expense of the accused.<sup>49</sup> More recently, Combs continued to emphasize that finding a proper balance between witness protection with the accused's rights is a fundamental mission of every criminal tribunal. Combs stresses that while protective measures are morally imperative and practically necessary, they must not obstruct the defendant's ability to contest the charges. She points out the potential for inaccuracies in witness testimony, whether deliberate or accidental, and argues that only a meticulous defense investigation and confrontation can address them. Hence, maintaining the accused’s right to confrontation is not just a legal obligation, but practical necessity in upholding human rights norms and ensuring convictions are based on accurately scrutinized testimony.

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<sup>47</sup> Ibid. See also, Michael Scharf and Valerie Epps, 'The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal' (1996) 29 Cornell International Law Journal 635; 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; Bates (n 26) 2014.

<sup>48</sup> Monroe Leigh, 'Witness Anonymity is Inconsistent with Due Process' (1997) 91 The American Journal of International Law 80, 80-81.

<sup>49</sup> n 7 (Haider and Welch 2008)

From another perspective, some argued that the tribunal's operational context - characterized by ongoing conflict, lack of police enforcement, and absence of strong witness protection programs - warranted departure from established procedural guarantees.<sup>50</sup> They argued that fair trial rights could not be defined in “abstract” and circumstances at the ICTY presented a unique situation.<sup>51</sup> However, the risks of failing to balance witness protection with the accused's right to confrontation were highlighted at the ICTY when Witness L, who had been granted an anonymity protection and assigned a pseudonym in the Tadic case, committed a perjury.<sup>52</sup> Witness L testified about 12 rapes and 30 murders committed by Tadic, including the murder of his own father that he had seen with his own eyes. On the third day of the testimony during cross-examination, Witness L's father was produced into the courtroom, running and embracing the witness. This case further underscored the importance of allowing the accused to confront evidence as a crucial aspect of discovering the truth, an element that must be preserved to ensure the fairness of a trial.

### Current Expectations from the KSC

The literature surrounding the KSC presents varied predictions regarding the effectiveness of this new hybrid court. For instance, Hehir points out that the KSC struggles with local legitimacy issues similar to those faced by the ICTY, exacerbated by its perception as an external, foreign-imposed entity.<sup>53</sup> This view is particularly prevalent among the Albanian

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<sup>50</sup> See n 24 (Chinkin 1997); *Prosecutor v Tadić* (Decision on Prosecution Motion for Protective Measures for Witnesses, Case No IT-94-1-T, 10 August 1995) paras 26-27.

<sup>51</sup> *ibid*

<sup>52</sup> *Prosecutor v Tadić*, Case No IT-94-1-T, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 December 1996

<sup>53</sup> n 9

majority, who regard the KLA-whose former members are being prosecuted by the KSC-as national heroes and liberators. Hehir argues that without gaining local legitimacy, the Kosovar population is unlikely to cooperate with the court or respond positively to its rulings, thereby undermining its goals of transitional justice.<sup>54</sup> Similarly, Ochs contends that any court ruling against a KLA fighter could exacerbate divisions within Kosovo, heighten tensions, and bolster the promotion of nationalistic narratives, rather than fostering reconciliation and peace.<sup>55</sup> Indeed, public perception studies have indicated that a majority of Kosovars would oppose legal actions against the KLA, with 36 percent stating they would actively interfere with the court proceedings to prevent the prosecution of KLA members.<sup>56</sup> Similarly, Crosby and Zejneli highlight that the KSC will face substantial challenges in gathering witness testimonies due to the culture of "honor system" in Albanian society and the potential for witness intimidation in a tightly-knit region where the KLA has deep governmental connections.<sup>57</sup> Some think that the KSC has done all it could to diminish interference by residing in the Hague, and excluding Kosovar authorities from its judicial process.<sup>58</sup> Meanwhile, others think that residency in the Hague will do KSC more harm than good, particularly because it will make it harder for the court to protect witnesses who live in Kosovo, and because it will be harder for the court to gain local legitimacy.<sup>59</sup>

In light of the critical need for legitimacy and effective witness protection measures that not only encourage witness participation but also uphold the integrity of the judicial process, it is

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<sup>54</sup> Ibid 283

<sup>55</sup> n 10, 239-285.

<sup>56</sup> Alan Crosby and Amra Zejneli, 'Explainer: New Hague Tribunal Looks To Avoid Mistakes Of Past Kosovar Prosecutions' Radio Free Europe (18 January 2019) 16 <https://www.rferl.org/a/explainer-new-hague-tribunal-looks-to-avoid-mistakes-of-past-kosovo-prosecutions/29718149.html> accessed 27 May 2024

<sup>57</sup> ibid

<sup>58</sup> Mathias Holvoet, 'Introducing the Special Issue "Critical Perspectives on the Law and Politics of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office"' (2020) 20 International Criminal Law Review 15.

<sup>59</sup> Alison Smith, 'Outreach and The Kosovo Specialist Chambers: A Civil Society Practitioner's Perspective' (2020) 20 International Criminal Law Review 140.

evident that there exists a significant gap in the scholarly literature concerning the Kosovo Specialist Chambers' methods. Specifically, there is a dearth of comprehensive analysis on how the KSC balances witness protection with the fair trial rights of the accused—a balance crucial to both the perception and reality of justice, and the balance which was deemed tilted at the ICTY, as discussed above. This thesis aims to address this gap by exploring and evaluating the KSC's approach to integrating witness protection measures within the framework of ensuring the accused's right to a fair trial and comparing it to the experiences of the ICTY. Through this analysis, the thesis will contribute to understanding the evolution and implementation of judicial standards in international tribunals, with a focus on comparing these developments from the ICTY to the KSC.

## Procedural Comparative Analysis of the ICTY and the KSC

The balance between witness protection and the rights of the accused to a fair trial in international criminal tribunals is a fundamental aspect of transitional justice. This balance is crucial for maintaining the legitimacy of the courts and ensuring that justice is done. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the Kosovo Specialist Chambers & Court (KSC) are tasked with prosecuting serious violations of international humanitarian law. This chapter aims to assess the evolution of witness protection mechanisms and the balance with the accused's fair trial rights from the ICTY to the KSC, analyzing how this balance has shifted towards greater procedural fairness while still ensuring adequate safety for witnesses.

This thesis adopts a comparative analysis methodology to investigate witness protection measures within the ICTY and the KSC, focusing on their compliance with and impact on

fair trial rights. The primary data consists of statutory provisions, Rules of Procedure and Evidence (RPEs) from both tribunals, and judicial decisions, supplemented by academic literature and international human rights treaties. This method is chosen to allow for a comprehensive examination of legal frameworks and their practical applications, providing a robust analysis of procedural fairness and witness protection. The sources are selected for their contribution to the international legal standards and their direct relevance to the tribunals under study.

Both tribunals operate under their respective RPEs, as well as their statutes, which guide their conduct and overall judicial processes. The ICTY has undergone multiple amendments to its Rules, reflecting challenges and experiences over two decades of operation. The KSC, established in 2016, has had the opportunity of learning from the ICTY and other tribunals for implementing more refined procedures from the start. This section compares the latest, 2015 version, of ICTY's Rules of Procedure and Evidence (ICTY RPE) with KSC's latest, 2020 version of Rules of Procedure and Evidence (KSC RPE) to examine whether KSC's procedures represent an evolved version of ICTY's in terms of witness protection and the balance with the accused's right to a fair trial. The thesis expects that the KSC's RPE is an evolved version in its approach to witness protection measures and the balance with the rights of the accused in comparison to ICTY RPE. To further test this argument, analysis not only examines the textual provisions of the Rules but also supplements findings with their practical application. This involves reviewing case law, procedural orders, and the experiences of those involved in the judicial processes of both tribunals. By assessing how these rules function in practice, the analysis aims to determine the evolution of the protective measures and the balance with fair trial rights from ICTY to KSC.

Some scholars have already offered comparative analyses of the KSC RPE with the ICTY RPE. For instance, Alexander Heinze comments on the unique approach of KSC RPE on prosecutorial obligations, specifically KSC RPE Rule 86(3)(b), which obliges the prosecution to file an indictment with a detailed outline demonstrating the relevance of evidentiary material to each allegation.<sup>60</sup> Heinze notes that this requirement far surpasses the obligations of the ICTY and other tribunals like the ICTR and SCSL, which only request "supporting material" (ICTR RPE Rule 47(b) and SCSL Rule 47(c)).<sup>61</sup> Additionally, Michael Karnavas commends the KSC RPE for pioneering the codification of ineffective assistance of counsel relief into an RPE through a specific rule.<sup>62</sup> To this end, the KSC RPE includes Rule 64, which allows the panel to determine that counsel is ineligible to continue representing the accused if the representation is so ineffective that it compromises the equality of arms. Karnavas praises this approach, highlighting its importance in protecting the rights of the accused to a fair trial and ensuring that justice is served.<sup>63</sup> Although scholars have compared some aspects of the KSC RPE and ICTY RPE, marking where it does well and where it could have done better, there is still no scholarship offering a comparative analysis on the evolution of witness protection measures and its balance with the rights of the accused to a fair trial between the KSC and ICTY. This thesis aims to fill this gap.

Having established the methodological framework, it is now possible to delve into the findings of this comparative analysis. By examining the statutory provisions and procedural rules of both the ICTY and KSC, alongside key judicial decisions, the subsequent findings will analyze how each tribunal has addressed witness protection and the need to balance

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<sup>60</sup> Alexander Heinze, 'The Kosovo Specialist Chambers' Rules of Procedure and Evidence: A Diamond Made Under Pressure?' (2017) 15(5) *Journal of International Criminal Justice* 985-1009

<sup>61</sup> *ibid* 994

<sup>62</sup> Michael G Karnavas, 'Kosovo Specialist Chambers – Part 6' (Michael G Karnavas Blog, 26 June 2017) <https://michaelgkarnavas.net/blog/2017/06/26/kosovo-specialist-chambers-part-6/> accessed 20 May 2024.

<sup>63</sup> *ibid*

protection measures with the rights of the accused. Specifically, Section 3.1 will focus on Rules regarding witness protection measures, including non-disclosure of identity; Section 3.2 will show the procedural approaches the tribunals take to protecting vulnerable witnesses. Section 3.3 will look at the KSC's procedural approach to cross-examination of anonymous witnesses. The section will then proceed to analyze the differences and similarities in the approaches of the KSC and the ICTY, incorporating case laws and judicial decisions to support the analysis. This will help assess the evolution of measures aimed at ensuring the balance of fair trial rights and effective witness protection.

### 3.1 Protective Measures and Non-Disclosure of Identity

Rule 75 of the ICTY RPE provides for witness protection measures, with considerable emphasis on judicial discretion to tailor these measures according to the needs of each case<sup>64</sup>. The rule authorizes the chamber to “order appropriate measures for the privacy and protection of victims and witnesses.”<sup>65</sup> These may include expunging names and identifying information from public records, non-disclosure to the public, use of face and voice-altering devices, closed sessions, or use of pseudonyms. Although nowhere do the ICTY rules of procedure mention “anonymity,” Rule 69 permits non-disclosure of the identity of the witness “who may be in danger” and says that the identity of the witness must be disclosed within such time as determined by the chamber to allow prosecution or defense for adequate preparation, subject to Rule 75.<sup>66</sup> Rule 75, as discussed above, refers to witness protection mechanisms but doesn't specifically refer to non-disclosure of identity and/or conditions to the accused/prosecution. This means that although not explicitly stated, the ICTY RPE left

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<sup>64</sup> ICTY RPE, Rule 75

<sup>65</sup> *Ibid*, (A).

<sup>66</sup> ICTY RPE, Rule 69



the Chamber with judicial discretion to order non-disclosure of witness identity to the parties for protection reasons. Therefore, ICTY RPE's witness protection rules offer flexibility, but they may also reduce predictability concerning the extent and nature of protection measures, which can potentially impact the defense's preparation and the accused's right to a fair trial. This is to be discussed later in the chapter.

Meanwhile, KSC Rules such as KSC Rule 105 and Rule 80 provide more specific criteria and processes for the non-disclosure of identities and the application of protective measures. KSC RPE Rule 80 states that the panel may order appropriate measures "for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the accused."<sup>67</sup> These measures include, among others, non-disclosure of identity to the public, redacting names, holding private or closed sessions, using pseudonyms, and employing voice or image-altering devices.<sup>68</sup> Similar to ICTY RPE, the KSC RPE also states that the panel may grant interim non-disclosure of witness or participating victim identity until necessary protective measures are in place.<sup>69</sup> The rule stipulates that the identities should be disclosed in time to allow the defense to prepare his case properly, but this is made subject to Rule 80 (4)(e).<sup>70</sup> Unlike the ICTY RPE, the KSC RPE Rule 80(4)(e) grants the panel the authority to order non-disclosure of a witness's identity to the parties or total anonymity in exceptional circumstances, with necessary safeguards.<sup>71</sup> Interestingly, Rule 80(4)(d) addresses non-disclosure of any material that could lead to identifying the victim or witness specifically to the accused.<sup>72</sup> However, this clause is

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<sup>67</sup> KSC RPE, Rule 80(1)

<sup>68</sup> KSC RPE, Rule 80(4)

<sup>69</sup> KSC RPE, Rule 105(1)

<sup>70</sup> KSC RPE, Rule 105(3)

<sup>71</sup> KSC RPE, Rule 80(4)(e)

<sup>72</sup> KSC RPE Rule 80(4)(d)

not cited as an exemption from identity disclosure obligations, unlike Rule 80(4)(e) referenced in Rule 105(3). This means that any witness/victim identity and related materials must be disclosed to the defense in time for their preparation, except for those witnesses or victims granted protection under Rule 80(4)(e). In such cases, the identity is withheld from both parties.

Both, ICTY and KSC employ a variety of procedural (and non-procedural) protective measures, which are crucial in cases involving high risks to witnesses or victims. The extent to which they balance these measures with the rights of the accused will be discussed later in this section.

### 3.2 Special Measures for Vulnerable Witnesses, Gender or Sexual Violence Victims, and Underage and Elderly Witnesses

Rule 75 of the ICTY RPE addresses vulnerable witnesses and victims, stating that "appropriate measures to facilitate the testimony" may be ordered, but it does not provide further elaboration.<sup>73</sup> KSC RPE provides special provisions under Rule 80 to accommodate vulnerable witnesses, with general protection of all such witnesses through redaction or non-disclosure of any identifying information from the public, unless they expressly object.<sup>74</sup> Other measures include shielding the witness from the view of the accused, use of technology like one-way closed-circuit television, and psychological support through the attendance of a psychologist, counselor, or a family member during testimony, as well as having questions pre-submitted.<sup>75</sup> Both the ICTY and KSC have paid special attention to vulnerable witnesses in practice, to be discussed later. However, when it comes to procedural measures, the KSC,

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<sup>73</sup> ICTY RPE Rule 75(B)(iii)

<sup>74</sup> KSC RPE Rule 80(4)(c)

<sup>75</sup> *ibid*

in particular, emphasizes special, guaranteed and specific measures to protect these individuals and mitigate the trauma they might experience during testimony.

### *3.3 Cross-Examination and Anonymity*

The KSC has specific procedural rules that allow for questioning of anonymous witnesses under strict conditions, ensuring that the parties can still engage with the evidence through indirect means such as submitting questions to be relayed by the panel. This structure aims to balance witness protection with the fundamental defense right to interrogate evidence and cross-examine the witness. To this end, KSC RPE Rule 147, "Questioning of Anonymous Witnesses," states that the panel may decide to question a witness in the absence of the parties if revealing the witness's identity could cause significant physical or mental harm to the witness or a person close to the witness, and no other measures under Rule 80 can provide adequate protection.<sup>76</sup> This rule also applies when national security interests might be compromised if the witness identity or affiliation is revealed. If the Panel grants the request, it allows the Parties and, where applicable, Victims' Counsel to submit questions to the witness that do not reveal their identity. The Panel transmits these questions herself to the witness and may also question the witness on her own initiative.<sup>77</sup> The Parties and Victims' Counsel receive a transcript of the witness's answers with identifying information redacted.<sup>78</sup> They may submit additional questions, and the final redacted transcript is made available to the Parties and Victims' Counsel, forming part of the official record.<sup>79</sup> Meanwhile, the ICTY RPE does not have specific rule in its RPE or Statute comparable to the KSC Rule 147.

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<sup>76</sup> KSC RPE, Rule 147(1)

<sup>77</sup> KSC RPE, Rule 147(2)

<sup>78</sup> KSC RPE, Rule 147(3)

<sup>79</sup> KSC RPE, Rule 147(4)

Instead, it relies on judicial discretion to decide on handling examination of anonymous witnesses.

### 3.4 A New Well-Balanced Court? Witness Protection and the Accused's Right to a Fair Trial

Both the ICTY and the KSC emphasize the safety of witnesses and victims and the necessity of protective measures that respect the rights of the accused. Notably, the ICTY was the first war crimes tribunal to recognize the importance of establishing a special unit dedicated to the support and protection of witnesses and victims.<sup>80</sup> To this end, the ICTY established the Victim and Witness Section (VWS), an impartial body responsible for providing support and protection to the victims and witnesses from both the prosecution and defense. This section was designed to address the unique needs and vulnerabilities of those involved in the tribunal processes, ensuring their safety and well-being throughout the duration of their participation in the legal proceedings. However, the protective measures at the ICTY were neither guaranteed nor applied automatically.<sup>81</sup> Parties requesting these measures had to demonstrate the extent to which they met specific criteria.<sup>82</sup> These criteria included an objective and specific risk faced by the applicant, rather than a subjective or general fear. Additionally, there needed to be evidence of a real risk of interference or antagonization by fellow citizens. This rigorous assessment ensured that protective measures were granted based on concrete threats. By 2015, the ICTY had granted some form of protective measures to about a quarter of all witnesses.<sup>83</sup> The KSC has also established a legal

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<sup>80</sup> UNDP, Needs Assessment in the Field of Support to Witnesses/Victims in BiH: A Situation and Needs Assessment of the Cantonal / District Prosecutors' Offices and Courts in the Field of Witness/Victim Support and Protection in War Crimes Cases in BiH (2010).

<sup>81</sup> n 6 (Kravez 2013) 150

<sup>82</sup> *ibid*

<sup>83</sup> 'Witness Statistics International Criminal Tribunal for the Former Yugoslavia' (ICTY, 2015) <https://www.icty.org/en/about/registry/witnesses/statistics> accessed 18 May 2024.

framework to decide if withholding information from the receiving party is permissible for protection purposes.<sup>84</sup> In making this determination, the judge must evaluate three criteria: the existence of an objectively justifiable risk that disclosure could harm the protected individual, the absolute necessity of the measure such that no less restrictive option would suffice, and whether the protective measure is balanced considering the potential harm to the accused and the fairness of the trial.<sup>85</sup> Furthermore, for the rest of the protection measures under KSC RPE Rule 80, the pre-trial judge has the discretion to select any applicable measure.<sup>86</sup>

It is noteworthy that, contrary to the ICTY, which only envisioned participating victims as witnesses, the KSC provides a much more extensive role for victims in the judicial process. At the KSC, participating victims' interests are actively represented through a victims' counsel, and the victims can not only provide testimony but also to have legal representation that can advocate for their rights and interests throughout the proceedings.<sup>87</sup> The KSC RPE empowers the Victims' Counsel to make opening and closing statements, access confidential material, and make oral or written submissions, question witnesses and request the panel to order the submission of relevant evidence or call witnesses to testify if they believe that the evidence presented by the parties did not produce or adequately address the personal interests of the victims.<sup>88</sup> Article 22(3) of the Law governing the KSC delineates the personal interests of victims to be reparations, acknowledgment, and notification. This includes the significant right "to have the harm they allegedly suffered recognized and, to that end, to contribute meaningfully, through the modalities of their participation, to the recognition of such harm

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<sup>84</sup> *Prosecutor v Salih Mustafa*, KSC-BC-2020-05, 27 November 2020, para 46.

<sup>85</sup> *ibid*

<sup>86</sup> *ibid* para 49

<sup>87</sup> KSC RPE, Rule 114

<sup>88</sup> *ibid*; The role of victims at the KSC resembles those ascribed to participatory victims in *prosecutor v Lubanga*, see: Victim Participation Trial Decision, 18 January 2008

and of the responsibility of those at the origin of it."<sup>89</sup> This provision ensures that victims have a direct and active role in the judicial process, enabling them to influence the acknowledgment of the harm inflicted upon them and the accountability of the perpetrators.

When it comes to procedural witness protection measures itself, both the KSC RPE and ICTY RPE include extensive protective measures. Unlike the ICTY RPE, the KSC RPE uniquely authorizes the court to impose full anonymity in exceptional cases, provided that necessary safeguards are in place.<sup>90</sup> Notably, the KSC RPE also distinguishes between non-disclosure of witness identity to the accused<sup>91</sup> and non-disclosure to all parties.<sup>92</sup> Only the latter is exempt from eventual disclosure obligations, ensuring that the defense receives the information in time to prepare adequately for trial.<sup>93</sup> Moreover, this distinction is crucial because it ensures that both the prosecutor and the defense are in the same position when examining an anonymous/non-disclosed witness, preventing either side from gaining an advantage. This is important, because the essence of the equality of arms appears to relate to its relative aspect: equality is maintained as long as neither party is allowed an advantage over the other, such as in presenting evidence, making submissions, questioning witnesses or attending hearings.<sup>94</sup> This implies that any disadvantage relative to the opposing party would breach the equality of arms. Conversely, if both parties experience the same/equal disadvantages, the principle of equality of arms is technically maintained. Therefore, by stating that the non-disclosure of witness identities until the trial only applies under Rule 80 (4)(e), which affects both parties,

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<sup>89</sup> KSC-BC-2020-04, Decision on Victims' Procedural Rights During Trial and Related Matters, para. 25.

<sup>90</sup> KSC RPE Rule 80 (4)(e)(ii)

<sup>91</sup> KSC RPE Rule 80 (4)(d)

<sup>92</sup> KSC RPE Rule 80 (4)(e)(i)

<sup>93</sup> KSC RPE 105(3)

<sup>94</sup> Maria Igorevna Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (7 September 2012) ISBN 978-1-78068-111-5, 437

the panel procedurally ensures that even this high level of protection does not disadvantage the defense or violate the principle of equality of arms.

Meanwhile, the ICTY does not specify conditions for non-disclosure to the parties nor does it address anonymity, but it allows for judicial discretion in implementing such measures. In practice, the ICTY granted full anonymity only once, in a controversial Tadic Ruling, when the majority determined that the identities of witnesses could be withheld from the defense and the accused indefinitely.<sup>95</sup> The KSC contrasts with the ICTY, where the Tadic case faced criticisms for infringing on the right to a fair trial due to, among other things, lacking explicit procedural grounds for granting anonymity.<sup>96</sup> With the KSC RPE explicitly allowing such measures while enunciating that it may only be granted under necessary safeguards to balance it with the fair trial rights, it is relieving itself from some of the criticisms. Consequently, while the ICTY's procedural approach is more open to judicial interpretation, the KSC provides greater procedural clarification by detailing non-disclosure rules and witness protection measures, which enables them to create a better balance between protecting witnesses and ensuring the accused's right to a fair trial.

Although no one has yet been granted anonymity at the trial stage at the KSC, the RPE outlines a clear protocol for how the examination of anonymous witnesses should be conducted, a “guideline” which was absent in ICTY’s RPE.<sup>97</sup> This provision ensures that all necessary measures are in place to balance witness protection with the rights of the accused, preparing the tribunal for situations where anonymity may become necessary during trial

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<sup>95</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, paras 84-85.

<sup>96</sup> n 46

<sup>97</sup> See KSC RPE, Rule 147

proceedings. It ensures that the right to examination is preserved, even under stringent witness protection measures such as anonymity. The process involves a judicial panel that vets and transmits questions to the witness, adding a layer of oversight that ensures the appropriateness of the questions and balances the protective needs of the witness with the rights of the accused. Additionally, Article 224 (5.4) of the Criminal Code of Kosovo, which the KSC is bound to through the Law, mandates that anonymity can only be granted if a competent judge has reviewed and assessed the credibility of the anonymous witness in a closed session. KSC RPE Rule 140 further stipulates that a conviction cannot be based solely on the testimony of a witness who has not been examined and/or whose identity has not been disclosed to the defence.<sup>98</sup> This is in line with the ECHR, to which the KCS RPE bounds itself through Rule 4.<sup>99</sup> ECtHR has recognized that anonymity may be granted according to the convention, but in order to establish an “adequate equilibrium of conflicting rights between witness protection and defendant’s right to confrontation,” disadvantage placed upon the defence must be counterbalanced by judicial authorities through procedures.<sup>100</sup> These measures would be for the examining judge to know the identity of the witness, for the defence to be able to question the anonymous witness, and moreover, for the verdict to not be decisively based on an anonymous statement.<sup>101</sup> Thus, the KSC not only permits anonymity as a measure of witness protection but has also embedded in its Law and Rules specific guidelines that (1) counterbalance any disadvantages to the accused and (2) ensure the reliability and credibility of an anonymous witness are thoroughly evaluated by a judge. These enhancements in KSC RPE, which were absent in the ICTY RPE, ensure a better

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<sup>98</sup> KSC RPE, Rule 140

<sup>99</sup> KSC RPE, Rule 4

<sup>100</sup> ECtHR, *Doorson v. Netherlands*, App. No. 20524/92, Judgment of 26 March 1996, para. 76. ECtHR, *Luca v. Italy*, App. No. 33354/96, Judgment of 27 February 2001, para. 43. ECtHR, *Birutis and others v. Lithuania*, App. Nos. 47698/99 and 48115/99, Judgment of 28 March 2002.

<sup>101</sup> *ibid*



balance between safeguarding witnesses and upholding the accused's right to a fair trial, thereby supporting the principles of equality of arms and an adversarial process.

Furthermore, the KSC RPE's protective measures extend not only to victims and witnesses but also to anyone who might be impacted by witness testimonies. This mirrors the ICC's mandate to safeguard not only victims and witnesses but also "others who are at risk on account of the testimony given by such witnesses."<sup>102</sup> Although this provision isn't included in the ICTY's RPE, the Tribunal did develop a practice of granting protective measures to such individuals.<sup>103</sup> It is also noteworthy that the KSC RPE's approach to protecting vulnerable witnesses is highly structured, featuring specific lists of available protective measures with guaranteed minimum protection measures, unless they explicitly object, ensuring a standardized level of safety and support.<sup>104</sup> In contrast, the ICTY employs a more flexible approach, offering broad guidelines that permit tailored solutions according to individual circumstances. This allows for customization but may result in variability in the level of protection provided to different witnesses. Conversely, the KSC's emphasis on detailed procedural rules fosters predictability and consistency, particularly in cases involving numerous vulnerable witnesses. This ensures that all receive a guaranteed minimum level of protection and support, enhancing the effectiveness and fairness of the judicial process.

But this is not to say that the ICTY neglected the needs of vulnerable victims/witnesses. Indeed, the tribunal has consistently recognized the importance of shielding such individuals through necessary protective measures, tailored to the specific needs of each case.<sup>105</sup> An

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<sup>102</sup> *Rome Statute of the International Criminal Court*, Article 43(6), 1998.

<sup>103</sup> n 6 (Kravetz 2013) 151

<sup>104</sup> KSC RPE, Rule 80(4)(c)

<sup>105</sup> Romina Beqiri, 'Review of Some Procedural Witness Protective Measures at the International Criminal Tribunal for the Former Yugoslavia' (2017) *European Scientific Journal* 13(34) 256

illustrative case from the ICTY is *Prosecutor v Janković and Stanković*, where the defendant Stanković was denied self-representation because the charges involved sexual violence, and the witnesses were victims of these crimes.<sup>106</sup> The Chamber deemed it inappropriate for the accused to cross-examine the witnesses himself, especially given his history of inappropriate behavior, concluding that self-representation had to be denied because it would obscure the interests of justice or a fair trial in that case.<sup>107</sup> However, Article 21 of the tribunal's statute upholds the right to counsel as a fundamental right of the accused, and this decision emphasizes that the tribunal prioritizes the interests and protection of vulnerable victims/witnesses. This was undisputedly in the interest of the witnesses, but such systemic decisions also show that when the tribunal had to weigh the balance between the rights of witnesses and the accused, their preference leaned towards the former. Moreover, while both tribunals aim to protect vulnerable witnesses, but the KSC's predefined procedures may provide stronger guarantees against judicial variability, enhancing the willingness and ability of victims to testify.<sup>108</sup> It is also noteworthy that the KSC RPE gives strong emphasis on protection beyond immediate physical safety, which ICTY RPE seems to be focused on, and instead also emphasizes psychological support, reflecting an understanding of the long-term impacts of trauma. Overall, while both the KSC and ICTY offer extensive procedural protection mechanisms for witnesses, the KSC's comprehensive approach significantly strengthens the protection framework while also offering more procedural guarantees for addressing maintenance of the accused's right to a fair trial.

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<sup>106</sup> ICTY *Prosecutor v Janković and Stanković*, IT-96-23/2-PT, Decision Following Registrar's Notification of Radovan Stanković's Request for Self-Representation, para 25.

<sup>107</sup> *ibid*

<sup>108</sup> As discussed in a previous section, vulnerable witnesses are given certain "guaranteed" protective measures under KSC Rule 80.

It might be difficult to understand the practical application of the KSC's anonymity rules. Under Rule 105, the only exception to the disclosure of identity is referenced to be Rule 80 (4)(e), which stipulates the non-disclosure of a witness's identity to both parties involved. This raises the question: how can an anonymous witness testify if even the party on whose behalf they are testifying is unaware of their identity? Here, the KSC distinguishes itself from the ICTY by not treating victims and witnesses as interchangeable. As previously noted, at the KSC, participating victims are represented through the Victims' counsel, and it is, so far, with these participating victims that anonymity measures pursuant to Rule 80 (4)(e) have been applied. In *Prosecutor v. Salih Mustafa* and *Prosecutor v. Thaci et al*, almost participating victims were granted anonymity protections.<sup>109</sup> The SPO's witnesses received protection from the accused, with their identities disclosed only a set period before their testimony, typically 30 days. The pre-trial judge's specified that even the SPO and the Victims' Counsel have restricted knowledge regarding the identities of dual-status witnesses due to the protective measures.<sup>110</sup> Hence, it ordered that for the Victims' Counsel and the prosecutor to be able to identify dual status witnesses, protection be temporarily varied as those with the SPO.<sup>111</sup> The identity of the 62 dual status witnesses were ordered to be disclosed to the accused when their respective protective measures as SPO witnesses ceased to apply, for example, 30 days prior to the testimony.<sup>112</sup> Furthermore, the panel determined that to preserve the accused's right to examine witnesses against him, and an overall right to a fair trial, it was necessary to disclose specific details from part 2 of the applications initially filled out by these dual-status individuals to become participating victims.<sup>113</sup> This section of

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<sup>109</sup> *Prosecutor v Thaci et al*, KSC-BC-2020-06, Decisions on Victim Participation. *Prosecutor v Salih Mustafa*, Case No. KSC-BC-2020-05, Decisions on Victim Participation

<sup>110</sup> *Prosecutor v Thaci et al*, KSC-BC-2020-06, Decision on Thaci Defence's Request for Disclosure of Dual Status Witnesses, para 36.

<sup>111</sup> *Ibid*, para 39.

<sup>112</sup> *ibid*

<sup>113</sup> *Prosecutor v Thaci et al*, KSC-BC-2020-06, Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses, para 20.

the application asks the applicants the nature of the crime that made them direct victims, the location, time, or scene of the incident, and the harm they suffered. Justifying this decision in the absence of specific guidelines from the Law and the Rules of Procedure and Evidence (RPE), the panel invoked KSC RPE Rule 4 (3), which stipulates that in cases where a matter is not settled by the RPE or the Law, the panel should resolve it by adopting the interpretation most favorable to the accused.<sup>114</sup> This approach ensures that the rights of the accused are prioritized in the absence of explicit legal guidance, maintaining the equality of arms.<sup>115</sup> This practice of interpretation in circumstances that call for directions not specified in the Laws or Rules to benefit the accused, contrasts with the ICTY's own practice as seen in the *Tadic* case, where interpretations tended to favor the opposite side of the balance.

This means that KSC distinguishes protective measures afforded to victims and witnesses, providing anonymity to participating victims unless they assume the role of a dual status witness. If the victim takes the role of an accuser, priority is given to the accused's right to examine witnesses against him and to have a reasonable opportunity to prepare their defense. The balance is managed by allowing a lifting of a protective measure close to the time of testimony, which seeks to protect witness safety for as long as possible while giving the defense a critical, albeit shorter, window to prepare effective cross-examinations.

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<sup>114</sup> *ibid*

<sup>115</sup> Equality of arms implies that in situations of uncertainty, the defense, typically the more disadvantaged party, should not be unfairly burdened to ensure the maintenance of equal footing between the prosecution and the defense. See, Maria Igorevna Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (7 September 2012) ISBN 978-1-78068-111-5.

## Discussion of Findings

Several trends emerge from the comparative analysis of the ICTY Rules of Procedure and Evidence and KSC Rules of Procedure and Evidence. These differences demonstrate the evolving procedural clarity in trials of transitional justice, particularly in balancing witness protection and the fair trial rights of the accused.

One notable trend is the shift from flexible, case-specific approaches to more structured and predictable procedural frameworks. In the early years of the ICTY, the tribunal adopted a flexible approach, allowing the trial chamber considerable discretion in setting timelines and applying protective measures.<sup>116</sup> While this flexibility was advantageous in managing diverse and complex cases, it also introduced a degree of unpredictability that could impact the defense's ability to prepare effectively.<sup>117</sup> In contrast, the KSC operates under a more structured framework, with detailed rules governing disclosure obligations, protective measures, and cross-examination protocols. This shift towards structured and predictable procedures reflects a growing recognition of the need for clear, detailed rules to ensure procedural fairness in trials. The KSC's approach minimizes the risk of arbitrary decisions and enhances the overall integrity of the trial process by providing a consistent and comprehensive legal framework. This emphasizes legal certainty and predictability which ensures that all parties involved – including witnesses, the prosecution, and the defense – operate within a well-defined legal framework. Such clarity is crucial for maintaining the legitimacy of the tribunal and the confidence of all parties in the judicial process.

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<sup>116</sup> Gideon Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility' (2001) 12 Criminal Law Forum 41-90..

<sup>117</sup> Sangkul Kim, 'The Witness Protection Mechanism of Delayed Disclosure at The Ad Hoc International Criminal Tribunals' (2016) 9(1) Journal of East Asia and International Law 60.

Another significant pattern is the increasing emphasis on balancing witness protection with the rights of the accused. Both the ICTY and KSC acknowledge the crucial role of protecting witnesses from harm, as their testimonies are vital for the prosecution of serious crimes. However, this protection must not come at the expense of the accused's right to a fair trial. The ICTY's approach, while effective in many respects, occasionally struggled to maintain this balance, as evidenced by cases where witness intimidation and failed protective measures compromised the integrity of the trial process. The widespread debate following the trial's granting of anonymity in the Tadić case, after which the ICTY never granted anonymity to any witness, highlights the consequences of uncertainty in court procedural rules. In response to these challenges, the KSC has developed more refined rules that are comprehensive, specific, and explicitly require counterbalancing measures whenever strong protective measures, such as anonymity, are applied. This ensures that while witnesses are protected, the defense retains the ability to challenge the evidence against him effectively, thus upholding the principles of trial fairness.

A further trend is the incorporation of psychological support and measures to address the long-term impacts of trauma. Early witness protection measures, including those at the ICTY, primarily focused on the immediate physical safety of witnesses. However, over time, it has become clear that psychological well-being is equally important for the well-being and integrity of witnesses, their testimonies and the overall judicial process. The KSC's comprehensive approach includes provisions for psychological support, recognizing that witnesses, particularly those who are vulnerable or have experienced severe trauma, need more than just physical protection when they are about to testify about their trauma and face their violators. By addressing the long-term impacts of trauma, the KSC not only protects the well-being of witnesses but also enhances their willingness to participate and the reliability of

their testimonies. This approach to witness protection showcases the evolving understanding of the needs of vulnerable witnesses and highlights the importance of supporting them throughout the judicial process.

The observed patterns emphasize the critical need for continuous legal evolution and adaptation in developing procedural frameworks within international criminal justice and transitional justice systems. The KSC's practices, informed by the experiences and challenges of earlier tribunals like the ICTY, illustrate how international judicial bodies can evolve to better meet the demands of justice and accountability. Ensuring strong witness protection is essential for securing testimonies that establish the truth and punish the guilty. Equally important is maintaining the defense's ability to effectively contest the accusations and establish the innocence of the accused. Balancing these two aspects is especially crucial given the unique context in which the KSC operates. Prosecuting KLA members, who are regarded as national heroes by some of the local population in Kosovo, presents a significant challenge for an internationalized court based in The Hague. The tribunal faces heightened risks of being perceived as illegitimate, prejudiced, or unfair. Under these circumstances, it is vital that the people of Kosovo, for whom the KSC seeks to deliver justice, to perceive the court as just and legitimate. For that, the KSC must ensure a proper balance between witness protection and the accused's right to fair trial. According to this analysis, the Chambers is relatively well-prepared to find such equilibrium.

## Conclusion

The comparative analysis of witness protection measures and fair trial rights within the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Kosovo Specialist

Chambers & Court (KSC) reveals significant procedural advancements. This thesis set out to explore whether the KSC has learned from the ICTY's experiences to better balance the protection of witnesses and the fair trial rights of the accused. The findings suggest that the KSC has indeed implemented more refined procedures that enhance both witness protection and the rights of the accused. The ICTY, established amidst the Yugoslav wars, faced considerable challenges in protecting witnesses while ensuring fair trials. Its reliance on witness testimonies highlighted the critical need for effective protection measures, yet it often struggled to find a balance with other rights, leading to criticism of compromised justice.

The KSC, benefiting from the ICTY's experiences, has developed a more structured and predictable framework. By incorporating detailed rules for witness protection and emphasizing psychological support, the KSC not only safeguards the well-being of witnesses but also maintains the integrity of their testimonies. One of the key improvements in the KSC's approach is the explicit inclusion of measures to counterbalance any potential disadvantages to the defense, such as protocols for questioning anonymous witnesses and ensuring that anonymity is granted only under strict conditions. This approach reflects a deeper understanding of the need for legal certainty, right to confrontation and equality of arms, ensuring that both the prosecution and defense operate on a level playing field.

The KSC's comprehensive procedural framework marks a significant evolution in international criminal law, addressing the procedural gaps identified in the ICTY. By striking a better balance between witness protection and fair trial rights in its RPE, the KSC not only enhances the credibility and effectiveness of itself, but also contributes to the broader mission of legal evolution. The KSC's refined approach offers valuable lessons for future tribunals, emphasizing the importance of balancing witness protection with the accused's right to a fair



trial even in cases of high turbulence. This research contributes to understanding how procedural frameworks can evolve to better meet the complex demands of justice in transitional contexts, ultimately supporting the establishment of more effective and legitimate judicial mechanisms in the pursuit of global justice.

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