Chapter 32Anonymous witnesses before the
International Criminal Court:
Due process in dire straits

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1. Introduction
The International Criminal Court (ICC) has started its first trials. Although most cases are still at the pre-trial phase, the Court has already had an opportunity to rule on some important issues concerning basic procedural rights of the defendant. The case against the former Congolese militia leader Thomas Lubanga1 has presented the Court with issues concerning due process guarantees. Among these is the scope of the participation and protection of victims and witnesses in the proceedings. In its decision of 18 January 2008, Trial Chamber I not only acknowledged but extended the rights of victims laid down in the Rome Statute2 to a questionable degree.3 In particular, the ruling on the possibility of witness anonymity during the trial4 is difficult to reconcile with the defendant’s due process rights as laid down in Article 67 of the Rome Statute.

The concept of due process has a long history and dates back to the English Magna Charta Libertatum of 1215.5 This principle, which has become synonymous with the right to a fair trial, is a key component of any form of adjudication. Due process

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1 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06. For a general first account of this case see M. Happold, Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007; (2007) 56 International and Comparative Law Quarterly 713.
2 See the International Bar Association’s (IBA) Monitoring Report on the ICC (November 2007), 33-42.
4 Trial Chamber I, Prosecutor v. Lubanga, Decision on Victims Participation, 18 January 2008, ICC-01/04-01/06, paras. 95-122. See also the contribution by S. Vasiliev in this volume, below Chap. 33.
5 Ibid., para. 131.
6 M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2004), Article 14, MN 1 with further references.
rights can be found in both national constitutions and in all major human rights treaties. Some of the key elements of the right to due process are: the presumption of innocence, the right to an expeditious trial, the equality of arms, the independence and impartiality of the judges, the right to counsel or the right to present witnesses on one's own behalf and to cross-examine the other side's witnesses. The European Court of Human Rights (ECtHR) has repeatedly pointed out that "[t]he right to a fair trial holds such a prominent place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 (1) of the Convention restrictively." Nonetheless, the exact scope of this right is still highly contested and the divergent jurisprudence by human rights bodies demonstrates that due process is characterized by significant ambiguity. The situation gets even more complicated when it comes to international criminal proceedings. The unaltered transposition of domestic legal practices and the application of the jurisprudence of the human rights bodies by international criminal courts has been questioned because of the unique overall context and purpose in which the international criminal courts operate. In the Tadić case, the Trial Chamber of International Criminal Tribunal for the Former Yugoslavia (ICTY) held by majority vote that the situation of armed conflict that existed in the former Yugoslavia was an exceptional circumstance par excellence which allowed some derogation from recognized procedural guarantees. This conclusion can be criticized on the grounds that international criminal law is mainly supposed to serve as a protection against any form of human rights violations. Not only the human rights of the victims have to be protected but also the human rights of anyone accused of even the most egregious crimes. It is vital to ensure

7 See, e.g., the 5th and 6th Amendments of the United States Constitution, Article 20 (3) of the German Basic Law, Article 45 (1) of the Polish Constitution or Article 11 of the Canadian Charter of Rights and Freedoms (Constitution Act 1982). The newly established Charter of Fundamental Rights in the European Union foresees such a guarantee in Article 47 (2).


