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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>3</b>
<b>ABBREVIATIONS</b>	<b>4</b>
<b>1 INTRODUCTION</b>	<b>5</b>
1.1 Purpose of study	5
1.2 Research Question: Which are the main challenges of witness protection measures in International Criminal Court nowadays and further protective measures which will be taken in the future	5
1.3 Limitation and Delimitations	6
1.4 Outline	6
1.5 Methodology	7
<b>2 LEGAL FRAMEWORK OF THE WITNESS PROTECTION MEASURES</b>	<b>8</b>
2.1 The Protection of Witnesses in the Rome Statute of the International Criminal Court	8
2.1.1 <i>Principle of Protection in the Rome Statute</i>	10
2.2 Protection of Witnesses in the Statute of the International Tribunal for Former Yugoslavia	12
<b>3 ORGANISATION OF WITNESS PROTECTION IN THE INTERNATIONAL CRIMINAL COURT</b>	<b>14</b>
3.1 Court measures to protect witnesses	14
3.2 Protective Measures taken by the Prosecutor	17
3.3 Role of the Victim and Witnesses Unit in the protection of witnesses	18
3.4 Decision on granting protective measures	20
3.4.1 <i>Application for protective measures</i>	21
3.4.2 <i>Limitation of protective measures</i>	23
3.4.3 <i>International Criminal Court approach regarding anonymous witnesses</i>	23
3.5 The effectiveness of witness protective measures	25
3.5.1 <i>Problems in the implementations of the witness protection measures</i>	25
3.5.1.1 Overlapping of Roles between the organs of the Court	25
3.6 International and National Cooperation	28

<b>4</b>	<b>WITNESS PROTECTION MEASURES AND INTERNATIONAL HUMAN RIGHTS</b>	<b>33</b>
4.1	Right to testify freely and without intimidation, the rights of the accused and fair trial	33
4.1.1	<i>Reasons not to testify?</i>	33
4.1.2	<i>Balance to the rights of the accused and rights of witness in respect to a fair trial</i>	34
<b>5</b>	<b>THEORITICAL AND PRACTICAL APPLICATION OF WITNESS PROTECTION MEASURES</b>	<b>42</b>
5.1	Methods of Protection. International and National Programmes	42
5.2	Cases of Witness Intimidation in International Criminal Court and Special Tribunals	46
<b>6</b>	<b>CONCLUSION AND RECOMMENDATIONS</b>	<b>53</b>
	<b>ANNEX</b>	<b>58</b>
	<b>BIBLIOGRAPHY</b>	<b>63</b>
	<b>TABLE OF CASES</b>	<b>67</b>

# Summary

The witness is universally considered to be one the most instruments to ascertain the truth in criminal proceedings or as Bentham says “*Witnesses are the eyes and the ears of justice.*”<sup>1</sup> Under the International Criminal Court (ICC)’s legal framework, witnesses who testify before the Court, persons at risk and their interaction with the Court because of testimony at the ICC are entitled to the protection of the Court not as a party, rather than an instrument to produce evidence. The witness protection remains a challenging issue at the ICC with the potential to seriously jeopardize the efficiency of the Court’s proceedings.

Protection of witnesses is a complex and demanding task for any criminal jurisdiction especially for the international jurisdictions. One of the reasons is that neither the Rome Statute nor RPE give an official definition of the term “*witness*”. Apart from a great reliance upon live evidence, the nature of the crimes and the fact that the Tribunals are international and highly public necessitated the development of the witness protection regimes.<sup>2</sup> In contrast to national regimes, the international jurisdictions do not have their own police forces and are dependent upon State authorities, peacekeeping forces or others in order to offer the more robust forms of protection.

We are all aware that there is growing recognition of the special role of witnesses in criminal proceedings and that their evidence is often crucial to securing the conviction of offenders, especially in respect of the core crimes provided in the Rome Statute. The witness protection measures should be taken only when they are necessary in order to satisfy the legitimate aim of protection.<sup>3</sup>

The effect of protective measures depends mostly on the respecting of those measures implemented in practice. An important element here is that, ICC’s orders need to be respected in general but, additionally, witnesses must be able to count on the protection provided for. Among the problems in protecting witnesses in other Special Tribunals such as International Criminal Tribunal of Former Yugoslavia (ICTY) and International Criminal Tribunal of Rwanda (ICTR), the concern falls upon if the identity of the witnesses becomes known to more people than the Judges, Registrar and the parties to the proceedings, this may result in negative consequences for the

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<sup>1</sup> C. Kress, ‘Witness in Proceedings before the International Criminal Court: An analysis in the light of comparative criminal procedure’, in Fischer, Horst (red.), *International and national prosecution of crimes under international law: current developments* (Berlin: Berlin-Verl. Spitz, 2001) 309-383, at 333.

<sup>2</sup> Vermeulen, Gert, *EU standards in witness protection and collaboration with justice*, Antwerpen ; Apeldoorn: Maklu, 2005, p. 73.

<sup>3</sup> S. Trechsel & S. Summers, ‘*Human rights in criminal proceeding*,’ Oxford University Press, Oxford, 2005, p. 313.

witness and/or his or her family. Disclosure of information still remains in vain.

Less is written about the witness protection measures as a comparative approach between ICC and the *ad hoc* tribunals. Hence, my research will provide that the Statute of ICC also contains regulations concerning the protection of the witnesses appearing to the Court, based on the experiences from other International Criminal Tribunals (ICTR and ICTY) which have shown the importance of the protection and assistance of witnesses in order to contribute in the establishment of the truth about the most serious crimes committed. Since the ICTY is the most experienced international criminal tribunal regarding witness protection, I will analyze its Statute, Rules of Procedure and Evidence, especially 'The Victims and Witnesses Section' (VWS).

# Preface

I would like to thank my supervisor Professor Karol Nowak for his support and for being very helpful with his suggestions.

Special thanks to my family for all their love and encouragement during these two years of living in Sweden.

Dedikuar dajave te mi Besnik dhe Astrit.

# Abbreviations

ASP	Assembly of States Parties
CAR	Central African Republic
DRC	Democratic Republic of Congo
DSS	Defence Support Section
EU	European Union
GTA	General Temporary Assistance
ICC	International Criminal Court
ICCPP	ICC Protection Program
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IRS	Initial Response System
NGO	Non-governmental organization
OTP	Office of the Prosecutor
SCSL	Special Court for Sierra Leone
UN	United Nations
VWU	Victims and Witnesses Unit

# 1 Introduction

## 1.1 Purpose of study

This thesis concerns the problems that surround the implementation and enforcement of witness protection measures in the International Criminal Court. The protection of witnesses and decline of their testimony because of their fear to be threatened is a new challenge to International Criminal Court. *New challenges should bring to new measures* in the future. My research focuses on a special area of international criminal law, yet very narrow and problematic to put into practice. My aim is to take a very active approach to give recommendations in solving the problem. The court has an obligation under its founding document, the Rome Statute, to protect witnesses even though witnesses are not treated as ‘a part’. At trial, the judges have the power to take all “necessary steps” to protect witnesses and their families from any threat and risk they maybe confront because of their testimony. Difficult cases regarding the witnesses’ intimidation and the non-impunity of the perpetrators were *Sesejl* case and *Haradinaj Case* in ICTY. The ICC’s protection programs (ICCP), however, have yet to face the real test: risks are likely to mount as trials get underway and as witnesses and victims face increased exposure through their association with the court. Human Rights Watch’s research indicates recently, that threats increased in the Democratic Republic of Congo (DRC) following the hearing confirming charges against *Thomas Lubanga*. Due to the situation of the court, its lack of funding, lack of experience and lack of workable precedent, the task of obtaining testimony in open court, as required by the adversarial system of criminal justice, was nearly insurmountable. Regarding the problems of the Rome statute and the measures of the special tribunals, I will discuss which are the solutions to develop witness protection in comparison with European Council recommendations, European Union Recommendations, European Court of Human Rights, other international and national cooperation.

## 1.2 Research Question: Which are the main challenges of witness protection measures in International Criminal Court nowadays and further protective measures which will be taken in the future

The main obstacles surrounding the implementation of the witness protection measures in ICC are of various natures. Since these problems are various and not easily dealt with under the provisions of the Rome Statute, Rules and Regulations, the main issue is to clearly define their role and the

protection measures. Their role in the proceedings is aimed at the establishment of truth. However, as a consequence, several witness and their families have experienced intimidation and some of them have been killed. The primary aim of is to explain the protection system as it exists at the ICC, to highlight the problems faced and to discuss alternative arrangements in the conclusions.

### **1.3 Limitation and Delimitations**

On the bases of a complicate issue of the witness protection measures in the International Criminal Court, my focus will be only in the evident problems of the ICC, relating also to the witness intimidation of the Special Tribunals. I will analyse only the provisions of the Rome Statute, Rules and Regulations of the ICC and give an example of ICTY Statute of witness protection measures. Due to lack of time and space, this research will be an overview of the witness protection failure in the provisions of ICC and the future prospective learning from the problems of intimidation of Special Tribunals. Also I will elaborate into the Recommendation (97) 13 concerning the intimidation of witnesses and the rights of defense Recommendation (2005) 9 on the protection of witnesses and collaborators of justice of the Council of Europe as a successful example of international cooperation between Member States in the harmonization of Rome Statute with regional legal instruments.

### **1.4 Outline**

This study will begin with a general background emphasizing the legal framework of witness protection measures in the Rome Statute. It will focus more in Article 68 of the Rome Statute, Rules and Regulations in particular. Also it will provide the legal framework of the ICTY. In the third Chapter, I elaborate more in understanding the responsibility of the Court in giving provisional and special measures, the Prosecutor and the Registrar toward witnesses that pertain to their anonymity at trial. Article 57(c) of the Rome Statute requires the Pre-Trial Chamber to provide for the “protection and privacy of victims and witnesses,” and Article 64(7) like similar provision in the Statute of the ICTY balances the right of the accused (listed in Article 67) to confront witnesses against him with regard for the protection of victims and witnesses. Article 68 announces the mechanisms to support witnesses during the trial. Nevertheless, such mechanism in practise is very difficult to achieve. Since there are operational problems, these problems are originated from both a lack of operational funding and a lack of experience and precedent. Victim-witnesses are the soul of war crimes trials at the ICTY, but their involvement in the proceedings presents challenges, especially in the ICC cases, .i.e *Lubanga* Case, and ICTY cases: *Haradinaj, Sesejl*.

The subject is approached from the prospective of the ICC, whereby the experiences of the ICTY and ICTR have been taken as a reference. The

forth Chapter deals with the rights of the witnesses to testify freely as a principle of a fair trial within the ICC Statute and International Conventions of Human Rights, the right of the accused and the duty of the State to protect. Also it explains that the right of the accused to a fair trial is as much important as the witness right to protection. Chapter five describes the articles of the ICC Statute where they have the obligation to cooperate with the Court for the protection of witnesses. It is taken as a reference the Recommendation No. R (97) 13 and explanatory memorandum of the Council of Europe for the “Intimidation of witnesses and the rights of the accused” and the rulings of ECtHR. At the end, Chapter six provides recommendations and conclusions.

## **1.5 Methodology**

This research is based on a *classical legal method*. The methodology will be relying on library-based research engaging also *empirical research*. My research methods include international legal instruments such as the Rome Statute, Rules of Procedure and Elements, Rules of the Court of the International Criminal Court, Regulations of the Court,. Also my aim is to analyse cases from the Special Tribunals of ICTY and ICTR and clearly enumerate the effectiveness of their witness protective measures and the problems in witness intimidation is special cases such as in Haradinaj and Sesejl from the ICTY and Lubanga and Katanga from the ICC . A comparative research is taken into consideration from the Council of Europe, EU, and ECtHR approach.

## 2 Legal Framework of the Witness Protection Measures

### 2.1 The Protection of Witnesses in the Rome Statute of the International Criminal Court

The Rome Statute contains important provisions for the protection and support of victims and witnesses. Measures and support are a responsibility of the Court, the Prosecutor and the Registry.

Witness presence in the court is indispensable for the good proceedings. Thus, the protection of witnesses is a key responsibility for the court.<sup>4</sup>

With respect to protection of victims and witnesses, there are a number of particular concerns, including the threat of reprisals, and ensuring that the investigation and trial themselves do not constitute further victimization of those who have already suffered of the crimes committed.<sup>5</sup>

At the investigation stage, *the Prosecutor* required to 'protect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7 (3), and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'.<sup>6</sup> The Prosecutor is entitled to withhold disclosure of evidence if this may lead to the 'grave endangerment' of a witness or his or her family.<sup>7</sup> Article 54(3)(f) provides further that the Prosecutor shall take necessary measures, or request that necessary measures be taken, in order to ensure the protection of any person.

Similar responsibilities are imposed by *Trial Chamber*. It should take 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.' The Court takes into consideration all relevant factors, including age, gender, 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'.<sup>8</sup>

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<sup>4</sup> Rome Statute, Arts. 57 (3)(c), 64(2), 64(6)(e) and 68; Rules of Procedure and Evidence, Rules 87-88.

<sup>5</sup> Schabas, William A, *An introduction to the International Criminal Court*, 3rd Ed. Cambridge University Press, 2007, p. 334.

<sup>6</sup> Rome statute Art. 54(1)(b).

<sup>7</sup> See in the annex Art. 68(5) Rome Statute (RS)

<sup>8</sup> *Ibid.*, Art 68(1).

As a matter of fact, the Trial Chamber may derogate from the principle of public hearings<sup>9</sup> as an exceptional provision. It may hold proceedings in camera or permit evidence to be presented by electronic means. This refers to testimony where the witness testifies by video and cannot see the perpetrator, this is a practice that is widely used in national justice systems involving children. The views of the witness are taken into consideration by the Court in making such determination.<sup>10</sup>

Also *the Registrar* gives to Victims and Witnesses Unit (VWU) a statutory mandate dedicated to protecting, supporting and providing other appropriate assistance to victims and witnesses.<sup>11</sup> Article 43(6) requires the Registrar to set up the Victims and Witnesses Unit (VWU)<sup>12</sup> within the Registry and in consultation with the Office of the Prosecutor (OTP) to provide protective measures, security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by witnesses. The Rules of Court take these provisions into details. Rules 16–19 cover the responsibilities of the Registrar and the VWU. Rules 87 and 88 provide that protective and special measures may be granted by the Chamber.

If the prosecution and the defence are necessary parties to the Court's process, witness are "*potential*" parties, because their participation is not *strictu sensu* essential.<sup>13</sup> This does not mean that the witness do not have the right (not only an interest)<sup>14</sup> to be protected and participate in the ICC proceedings. In the Statute on the procedural matters, it is clear that the *search of the truth* – not the retribution or punishment of given individuals – is the most significant goal of the ICC proceedings.

The Registry of ICC is responsible for the non-judicial aspects of the administration of the Court's work and for 'servicing of the Court'. This article examines three instances in which the Registry of the ICC has specific obligations with respect to: (1) victims' and witnesses' protection and support; (2) legal aid for defendants and victims; and (3) the organization of family visits to detained persons.<sup>15</sup> Under the motto of 'servicing of the Court', one of the tasks of the Registry is serving as 'the

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<sup>9</sup> Ibid., Art. 68(2), art. 69(1).

<sup>10</sup> Art. 68(2)

<sup>11</sup> Art. 43(6) RS; Regulations of the Registry, Reg. 83.

<sup>12</sup> The VWU currently has 38 permanent staff and four positions funded through General Temporary Assistance (GTA). Seventeen of the staff are based in The Hague, while 25 are located in Central African Republic, DRC, Chad, and Uganda.

<sup>13</sup> Their presence is not *strictu sensu* essential just because the Trial can take place without them: this does not exclude, *latu sensu*, the fundamental importance of victims participation for the development of fair, effective and comprehensive proceeding.

<sup>14</sup> Preparatory Committee Decisions Aug. 1997, reprinted in: M.CH Bassiouni (ed.), International Criminal Court, Compilation of the UN Documents and Drafts ICC Statute before the Diplomatic Conference, (Consolidated) Draft, p. 108.

<sup>15</sup> Arbia, Silvana *The International Criminal Court: witness and victim protection and support, legal aid and family visits*, Commonwealth Law Bulletin, 36: 3, 2010, p. 520.

channel of communication of the Court',<sup>16</sup> in particular in order to notify cooperation requests issued by the Chambers, and assisting States in implementing such as in witness protection.

The Registry of the ICC has specific obligations with respect to the victims' and witnesses *protections* and *support*. The adequate protection of victims and witnesses plays a key role in the successful functioning of the Court, aiming to ensure that witnesses participate and testify freely and truthfully without fear of retribution or further harm. The statutory framework of the Court makes it clear that the Court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

One of the biggest challenges for the Court during its operations have been that the provision of appropriate protective measures, as stipulated in Article 68(1) of the Statute. The Court's operations are mainly conducted in demanding conflict or post-conflict areas, where the law-enforcement structures are generally weak and the overall security situation is often subject to sudden changes. The establishment and implementation of a comprehensive, appropriate and adequate system of witness protection aims the addressing of these challenges in the best possible manner.

During the trial of *Thomas Lubanga Dyilo*, the first for the International Criminal Court, challenges to effective witness protection have become apparent.<sup>17</sup>

## **2.1.1 Principle of Protection in the Rome Statute**

The role of witnesses and the evidence they provide in criminal proceedings is often crucial in securing the conviction of offenders, in respect to the crimes alleged in the Rome Statute: crimes against humanity, war crimes and genocide. The VWU has considerable responsibility for the security and support of victims and witnesses at trial.<sup>18</sup> The key principles with respect to witness protection are :

*1. Physical protection.* In respect to physical protection, the VWU is mandated to provide "counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk

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<sup>16</sup> Ibid.

<sup>17</sup> Online article: Jennifer Easterday "Witness protection: Successes and Challenges in the Lubanga Trial" Legal analysis, June 29, 2009. [www.lubangatrial.org](http://www.lubangatrial.org)

<sup>18</sup> Regulations of the Registry, Regs.: 79 (general obligation to limit further trauma of witnesses); 81 (travel);82 (accommodation); 83(2) (round-the-clock support); 89(1) (health care); 90 (dependent care); 91 (accompanying support person); 92 (security arrangements).

on account of testimony given by such witnesses”.<sup>19</sup> This is particularly important when witnesses are testifying against the accused they already know. The measures taken can vary from simple and affordable measures to more intensive measures (such as domestic or foreign relocation of witnesses or changing the identity of a witness). Criminal prosecution of offenders or their accomplices for intimidating or threatening witnesses is another means of protecting witnesses. Types of physical protection that should always be considered on the basis of individual circumstances are: Police escorts from and to court, Security in the hotels they stay, keeping the victim informed of proceedings, protection for the witness’s family.

2. *Psychological protection.* This includes the stabilization of the victim’s psychological situation and the avoidance of further stress (e.g. through revictimization or relapse into trauma as a consequence of legal proceedings). But many forms of psychological protection depend on national rules and proceedings. Types of psychological protection which should always be considered are: keeping the witness fully informed of what to expect in the courtroom, allowing expert counsellors to accompany the witness to court.

In the *Lubanga case*, Trial Chamber I put the VWU in charge of organizing in-court assistants —psychologists and other professionals— who can be made available to accompany vulnerable witnesses in the courtroom.<sup>20</sup> The in-court assistants have the duty to ensure the witness’s sense of “emotional security” and assist the Chamber of ICC, in taking any measures necessary to minimize the trauma of giving testimony.<sup>21</sup>

3. *Protection from unfair treatment.* It is very important to ensure that victims are treated in a manner that respects their rights and their dignity. The value of witnesses is essential in successfully prosecuting perpetrators of serious crimes in the ICC, but there is always a danger that they will be regarded as tools in the process. This can lead to unfair treatment of witnesses, including repeated interrogation, invasive medical examination and incarceration. Fair treatment means treating witnesses primarily as individuals entitled to dignity and protection of their rights.

The provision of adequate legal advice and services can assist in protecting witnesses from unfair treatment from an early stage, even before they have agreed to serve as witnesses.<sup>22</sup>

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<sup>19</sup> RS, Art. 43(6); Regulations of the Registry, reg. 83.

<sup>20</sup> *Prosecutor v. Lubanga*, ICC, Case No. ICC-01/04-01/06, Decision on various issues related to witnesses’ testimony during trial, January 29, 2008, para. 39 (“January 2008 Witness Testimony Decision”); VWU Recommendations on Psycho- Social Assistance, paras. 9-10, 12-15.

<sup>21</sup> VWU Recommendations on Psycho-Social Assistance, para. 10.

<sup>22</sup> Law enforcement and prosecution “*Toolkit to combat Trafficking in persons – Tool 5.17 Witness protection*”, p. 246.

## 2.2 Protection of Witnesses in the Statute of the International Tribunal for Former Yugoslavia

On the Witness Protection Measures, the ICTY Tribunal has at its disposal a number of protective measures ranging from expunging names and identifying information from Tribunal records through testimony under a pseudonym, electronic facial distortion, voice distortion and closed session.<sup>23</sup> Further measures such as testimony by way of video-link and testimony from a remote witness room are available in the Rule 75 of the Rules of Procedure and Evidence.

Thus, 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. Wherever necessary, the Chamber has the duty to control the manner of questioning to avoid any harassment or intimidation.

Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures<sup>24</sup>:

(i) shall continue to have effect mutatis mutandis in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

The Victims and Witnesses Section (VWS) of ICTY was established pursuant to Article 22<sup>25</sup> of the Tribunal's Statute and Rule 34<sup>26</sup> of the Tribunal's Rules of Procedure and Evidence as a neutral and impartial body within the Registry. It works to ensure that all witnesses can testify in safety and security, and that the experience of testifying does not result in further harm, suffering or trauma to the witness.

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<sup>23</sup> Rule 75(B)(ii): "Measures for the Protection of Victims and Witnesses" ICTY

<sup>24</sup> Ibid, Rule 75(F)

<sup>25</sup> Article 22 of the ICTY Statute states: "*The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.*"

<sup>26</sup> Rule 34 of the Rules of Procedure and Evidence states: that Victims and Witnesses Section consist in recommending protective measures for victims and witnesses in accordance with Article 22 of the Statute; and providing counseling and support for them, in particular in cases of rape and sexual assault.

*(B) Due consideration shall be given, in the appointment of staff, to the appointment of qualified women."*

It provides protection and support to all witnesses who appear before the Tribunal, whether called by the Prosecution, the Defence, or the Chambers. The Section:

- provides victims and witnesses with counselling and assistance;
- ensures that the safety and security needs of witnesses are adequately met;
- recommends measures and takes action to protect witnesses who have or will be heard by the Tribunal;
- informs them of the proceedings and their rights;
- makes travel, accommodation, financial, and other logistical and administrative arrangements for witnesses and accompanying persons; and maintains close contact with the trial teams regarding all aspects of the witnesses' appearance before the Tribunal.

One major technological advantage in the ICTY's protection measure is that the broadcast is released after a delay of 30 minutes. This allows the parties to seek redaction of any inadvertent reference to a protected witness or to potentially identifying information.<sup>27</sup>

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<sup>27</sup> Colin T. McLaughlin: "Victim and Witness Measures of the International Criminal Court: A Comparative Analysis" *The Law and Practice of International Courts and Tribunals* 6 (2007) p. 197, See also *The International Criminal Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection*, 10 *Leiden J. Int'l L.* 179, 181 (1997)

# 3 Organisation of Witness Protection in the International Criminal Court

## 3.1 Court measures to protect witnesses

According to Article 34, the term Court is referred to all judicial organs of the ICC. Appropriate measures shall be interpreted, inter alia, as entailing all those enlisted in Rules 87 (Protective measures), 88 (Special measures) and 112.4 (Recording of questioning particular cases) of the Rule of the Procedure and Evidence,<sup>28</sup> in Regulations 21, 41, 42, 101 of the regulations of the court, and in Regulations 79 and 100 of the Regulations of the Registry.<sup>29</sup>

Safety, physical and psychological well-being, privacy and in particular dignity of the individual witness or victim cover all areas of inalienable human rights defined in international and domestic legal instruments. In the definition of protection for victims and witness in Article 68 (1), the Rome Statute has set a standard for the progressive development of the law relating to effectively functioning systems international criminal justice. It gives to the Court jurisdiction over witness intimidation and tampering as an offense against the administration of justice.<sup>30</sup> The second sentence of paragraph 1 claims on protection towards certain categories of witness who are in extreme danger because:

1. Of the nature of the crimes and
2. Their status, including their age, gender and health.

In this respect, the elements above help us to identify a particular “group” of vulnerable witness, who are at risk of victimisation.

Rome Statute provides protection for witnesses to all the proceedings taken by the Court: pre-trial, trial and in the appeals. Thus on the bases of Article 57, which provides functions and powers of the *pre-trial Chamber* “where necessary, the pre-trial Chamber of the ICC provides measures for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information.”<sup>31</sup> At the request of the Prosecution, the pre-trial Chamber may take measures to ensure the integrity and efficiency of any proceedings as a “unique investigative opportunity” to take testimony or a statement from a witness, to examine, collect or test evidence, with may not be available

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<sup>28</sup> Ambos K, *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* ( 2nd Edition, Beck, 2008), p. 1281.

<sup>29</sup> Ibid., p.1281.

<sup>30</sup> Rome Statute, art. 70(1)(c).

<sup>31</sup> Ibid, Article 57(3)(c)(pre-trial chamber).

subsequently for the purposes of a trial”. If the Prosecutor fails to request such measures and they are “unjustified”, the Pre-Trial Chamber takes these measures *proprio motu*<sup>32</sup> for protecting witnesses’ rights.<sup>33</sup> Thus “protective measures” include expunging the individual’s name or identifying features from the public record; prohibiting the parties and participants in a proceeding from disclosing the same; and using electronic presentation of evidence, identity-altering technologies, pseudonyms, and in camera proceedings.

In comparison to the *ad hoc* Tribunals’ Statutes, the States Parties have erected a fortress of restrictions upon the powers of the judges to control the proceedings. The judges of the ICTY and ICTR were given the responsibility of adopting and amending their own rules of procedure and evidence.<sup>34</sup> Apart from the Court, these measures may be taken also at the request of the victim or witness, his or her legal representative, the prosecution, or defense counsel.<sup>35</sup>

Rule 87 specifically claims for the protection from public or media of any victim, witness or “other person at risk on account of testimony given by a witness.”<sup>36</sup> Under this rule, a Chamber may provide five different protection mechanisms.<sup>37</sup> *First*, the Court may decide to expunge the name or any identifying information of a witness from the public records.<sup>38</sup> *Second*, the Court may prohibit the prosecution, the defense or any other participant in the proceedings from disclosing identifying information to a third party.<sup>39</sup> *Third*, testimony may be given via electronic or other special means. This includes the use of voice and/or picture alteration, videoconferencing, closed-circuit television, and exclusive use of the sound media.<sup>40</sup> *Fourth*, the Court may provide a pseudonym to be used instead of the person’s actual name.<sup>41</sup> *Fifth*, the Court may decide to hold part of its proceedings on camera.<sup>42</sup>

The Court can apply a number of *operational protective measures*.

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<sup>32</sup> Article 56(1)(a),(b),(c), Rome Statute.

<sup>33</sup> Under Regulation 48 of the Regulations of the Court, the Pre-Trial Chamber “*may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the re-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c)*”.

<sup>34</sup> Article 15 of the ICTY Statute provides: ‘*The Judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.*’ (The content of Art. 14 of the ICTR Statute is identical.)

<sup>35</sup> Human Rights Watch Report 2010.

<sup>36</sup> ICC RPE, Rule 87(3).

<sup>37</sup> See note 29, Colin T., p. 196.

<sup>38</sup> ICC RPE, Rule 87(3)(a).

<sup>39</sup> *Ibid.*, Rule 87(b)(3).

<sup>40</sup> *Ibid.*, Rule 87(3)(c).

<sup>41</sup> *Ibid.*, Rule 87(3)(d).

<sup>42</sup> *Ibid.*, Rule 87(3)(e).

In addition to operational protective measures, *procedural in-court measures* can be granted by a Chamber under article 68 of the Statute and rule 87 of the Rules. Articles 57(3)(c) and 64(6)(e) of the Statute provide the Court with a more general legal basis for ensuring the protection of witnesses and victims. Such measures may include face and voice distortion or the use of a curtain to shield the witness. They involve the redaction of information which could identify a witness from public documents, closed sessions, measures to conceal the identity of a witness from the public (voice or image distortion).

Hearings in the ICC may be held in one of three ways:<sup>43</sup>

*a. open session* - that means that the hearing is open to the public and there is an audiovisual stream broadcast outside the Court with a 30 minute delay (Regulation 21(2) of the Regulations of the Court). This is the default unless the Statute, Rules, Regulations or an order of the Chamber provides otherwise (Regulation 20(1) of the Regulations of the Court);

*b. private session* – hearing is not open to the public and there is no audiovisual stream broadcast outside the Court (Regulation 94(d) of the Regulations of the Registry); or

*c. closed session* - hearing is held in camera (Regulation 94(e) of the Regulations of the Registry).

Most of the above measures are set out in rule 87 of the Rules of Procedure and Evidence. The Chamber also asked the VWU to conduct analyses on the security conditions for witnesses or victims.<sup>44</sup>

The observations filed by the Registry in the Lubanga case, which included detailed analysis about hearings, the case file/filings and the use of protective measures, were particularly instructive. The Registry conducted an analysis of the hearings for two protected witnesses: P-279 and P-280.<sup>45</sup>

Contrary to the public perception of this issue, the actual record of the Court confirms that in fact the majority of the proceedings (over 84 per cent) have been conducted in open session. On the other hand, a significant portion of the documents were filed confidentially.<sup>46</sup>

The Chamber can also order *Special Measures* under rule 88 of the Rules, which usually cover measures to facilitate the testimony of a vulnerable victim or witness, such as permitting a psychologist, family member, or other individual to attend the testimony of the victim or witness and

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<sup>43</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07) Transcript, 7 June 2010, p 2 lines 1, 21 and 24, p. 3 line 3. available at <http://www.icc-cpi.int/iccdocs/doc/doc902904.pdf>. (accessed May 2011)

<sup>44</sup> Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, 29-30 January 2010, p. 1-2.

<sup>45</sup> Registry observations, para 4.

<sup>46</sup> International Bar Association Human Rights Report supported by the John D and Catherine T MacArthur Foundation: “Enhancing efficiency and effectiveness of ICC proceedings: a work in progress” January 2011, p. 27.

controlling the manner in which vulnerable witnesses are examined during proceedings. One of these is applied in the areas of the Court's operation where witnesses reside: we call it the Initial Response System (IRS). It is a 24/7 emergency response system which enables the Court to extract to a safe location in the field witnesses who are afraid of being imminently targeted or who have in fact been targeted. Other local protective measures aim at enhancing the personal security situation of witnesses by educating them on the importance of confidentiality and cover stories, giving clear instructions on how to activate the IRS, providing access to communications, agreeing on an emergency back-up plan and regular contact and improving the physical security of the places where the witnesses reside.

An operational protective measure of last resort is entry into the Court's Protection Programme (ICCPP) and through this the relocation of a witness and his or her close relatives away from the source of the threat. *Relocation* is always a measure of last resort, as it significantly impacts on and disrupts the life of the individual. The ICCPP was established following international best practices and it offers the Registrar the possibility of independently conducting risk and psycho-social assessments of individuals referred to the ICCPP and, based on such assessments, determining whether participation in the ICCPP is warranted. By accepting individuals for participation in the ICCPP, the Court is able to relocate and resettle individuals who are at risk.

## **3.2 Protective Measures taken by the Prosecutor**

In the ICC Statute, the Office of the Prosecutor has specific obligation for witness protection and take such measures particularly during the investigation and prosecution. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In Article 54 "Duties and powers of the Prosecutor with respect to investigations", the Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children". Also the Prosecutor may collect and examine evidence and request the presence of and question persons being investigated, victims and witnesses. In addition, the OTP must take measures during investigations and at trial to provide for victim and witness well-being<sup>47</sup> in consultation with the VWU on protective measures and making referrals for protection and support.<sup>48</sup>

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<sup>47</sup> RS, Article 68(1).

<sup>48</sup> Ibid., Article 43(6).

Even though the OTP has developed some of the policies, its approach to working within the larger framework of the court's protection programs is proving problematic.<sup>49</sup>

First in the Lubanga case, the late referrals and pending decisions by the registrar as to the necessity of protection measures were a factor in delaying the start of the trial.<sup>50</sup> And second, the OTP relocated witnesses on its own initiative outside of the structures provided for by the VWU, because of the disagreement with the VWU over determination of whether participation in the ICCPP is merited. Litigation of this disagreement as a factor in delays has directed to different approaches by Trial Chamber I and Pre-Trial Chamber I the Lubanga trial<sup>51</sup> and in the Katanga and Ngudjolo confirmation of charges hearing.

Regardless to disagreements, Article 51 para 2, of the ICC Statute gives the right to the Prosecutor to adopt amendments or provisional Rules *in urgent cases* where the Rules do not provide for a specific situation before the Court. These amendments or provisional Rule have to be consistent with the Statute and whether there is a conflict between the Statute and the Rules of Procedure and Evidence, the Statute prevails.<sup>52</sup> The Judge shall respect the same procedure in the adaptation of new provisional regulation.<sup>53</sup> Still the roles are not well defined and further developments should be done.

### **3.3 Role of the Victim and Witnesses Unit in the protection of witnesses**

As I stated before in the Second Chapter, the Victims and witness Unit, is a requirement of the Rome Statute<sup>54</sup> and its duty is to provide protective measures and security arrangements. Counselling and other appropriate assistance for the witnesses who appear before the Court and other who are at risk on account of testimony given by them.<sup>55</sup> The responsibilities of the Unit and its functions are given in Rule 17 of the RPE. The Victims and Witnesses Unit with respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

- (i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;
- (ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;

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<sup>49</sup> Human Rights Watch Report, July 2008

<sup>50</sup> *Prosecutor v. Lubanga*, ICC, Case No. ICC-01/04-01/06, Decision suspending deadline for final disclosure, January 30, 2008, paras. 1-4 (“Decision Suspending Deadline for Final Disclosure”).

<sup>51</sup> *Ibid*, Hearing Transcript, October 1, 2007, p. 27, lines 15-25 (unofficial translation).

<sup>52</sup> RS, Article 51, para 5.

<sup>53</sup> Article 52, “Regulations of the Court”.

<sup>54</sup> See note 7, Schabas W., p. 339.

<sup>55</sup> *Ibid*.

- (iii) Assisting them in obtaining medical, psychological and other appropriate assistance;
- (iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;
- (v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organizations acting at the request of the Court, as appropriate;
- (vi) Cooperating with States, where necessary, in providing any of the measures stipulated in this rule.<sup>56</sup>

Also the Unit has specific duties with respect to witnesses:

- (i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
- (ii) Assisting them when they are called to testify before the Court;
- (iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.<sup>57</sup>

In fulfilling its functions, the Unit have to give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings.<sup>58</sup> The Unit is required to include staff with expertise in trauma, including trauma related to crimes of sexual violence.<sup>59</sup>

The Unit must remain independent of the other organs of the Court. According to Judge Steiner, the single judge in Lubanga case, ‘ the Victims and Witnesses Unit can properly discharge its support functions vis-à-vis the Chamber only by distancing itself from the specific positions of the parties in any given matter and by providing the Chamber with objective information regarding the factual circumstances of the relevant witnesses and also specialised advice in respect of their needs in terms of protection; and that the Victims and Protection Unit must do so and, to date, has done so, irrespective of whether its conclusions are different from those advanced by the parties’.<sup>60</sup>

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<sup>56</sup> ICC RPE, Rule 17(2)(a).

<sup>57</sup> Ibid., RPE Rule 17(2)(b).

<sup>58</sup> Ibid., RPE Rule 17(3).

<sup>59</sup> See note 7, Schabas W., p. 340.

<sup>60</sup> *Lubanga* (ICC-01/04-01/06), Decision on Third Defence Motion for the Leave to Appeal, 4 October 2006. p.8 also see note 7 Schabas W., p. 340.

### 3.4 Decision on granting protective measures

The granting of protective measures is primarily a responsibility of the Court and the Prosecutor. The Registrar and the Registry share the responsibility at the ICC too. The protection may be motivated by *security* or *privacy reasons*.<sup>61</sup> The decisions on granting protective measures are taken on the bases of these factors such as the victim's age, gender, health, and the nature of the crime, particularly sexual crimes. In practice, the need for protective measures goes far beyond that. Most of the crimes and circumstances within the Tribunals and the Court are such that the witnesses and victims are anxious and may refuse to collaborate unless various protective measures are taken. In the proceedings, it can be employed measures in order to prevent disclosure to the public (screening, voice or image distortion, pseudonyms and photo prohibition), postponed disclosure, closed sections and testimony by video-link. Apart from the actual witnesses, family members and even potential witnesses may also be afforded protection.<sup>62</sup> By an extensive interpretation of non-disclosure provisions, the ICC Appeals Chamber extended the application of protection measures to '*persons at risk on account of the activities of the Court*' and thus to identification of '*innocent third parties and Court staff*'.<sup>63</sup>

Protective measures outside the court are possible only to a limited extent; witness protection programmes, including relocation, require assistance by the states and others and must be used carefully and occasionally.<sup>64</sup>

Protection programmes must be available to both the prosecution and the defence and be perceived as *neutral*. Regarding to this, to avoid any problem of overlapping of roles, the responsibility for these matters, including relocation, is placed upon special units with the Registry. As stated before in the "Protective measures taken by the Prosecutor" the ICC Appeals Chamber in *Katanga Case* rejected the Prosecutor's attempt to 'preventively relocate' witnesses unitarily and concluded that the relevant Chamber was the final arbiter in case of disagreement between the Prosecutor and the Registry Unit<sup>65</sup> in granting protective measures. It stated that all these measures infringed on important fair trial principles if not granted and a careful balancing of the interests required<sup>66</sup>.

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<sup>61</sup> See Robert Cryer, p. 482.

<sup>62</sup> Cryer, Robert., Friman Hakan., Robinson, Darryl., Wilmschurst, Elizabeth., "*An Introduction to the International Criminal Law and Procedure*" 2<sup>nd</sup> Edition, Cambridge University Press, 2010, p. 483.

<sup>63</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, ICC Case No. ICC-01/04-01/07 Appeal Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First decision on the prosecution request for authorization to redact witness statements', ICC-01/04-01/07-47, 26.11.2008 (Judge Pikiis dissenting).

<sup>64</sup> Ibid.

<sup>65</sup> See note 46 Summary Report .

<sup>66</sup> Sluiter, Goran: "*The ICTR and the Protection of Witnesses* Journal of International Criminal Justice, Vol. 3, Issue 4, September 2005 pp. 962-976,.

In the precedent cases of *Lubanga* trial and in the confirmation of charges hearing in the *Katanga and Ngudjolo* case, it was obvious that the delays in taking decisions on the admission of a witness to the ICCPP created *protection gaps and uncertainty for witnesses*. This caused delays also in court proceedings that depend on protection measures for witnesses and victims.

### 3.4.1 Application for protective measures

The measures of protection under Article 68 are granted at the request of the witness, defense or the prosecutor, and can also be ordered by the Court. In principle, the measures of protection are being requested and granted only if the witness requests them having regard to all the circumstances, particularly the views of the witnesses.

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses on the bases of all relevant factors, including age, gender as defined in Article 7 (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 such 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 respecting the principles of a fair and impartial trial.

Regulation 42 of the Court<sup>67</sup> exactly explains that application and variation of the protective measures taken by the Court or by the Prosecutor. Protective measures once ordered in any proceedings in respect of a witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, thus the duration of the protective measures can change (end or extension) only when the Chamber finds it necessary the revision. This provision made by the Court should be respected by the Prosecutor who has the obligation to inform the Defence for any discharge of the disclosure of information.

The variation of the application of protective measures for a witness is requested before the Chamber that issued the order. On the bases of the regulations 42 the Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered. It is important that the Chamber shall seek to obtain the *consent* of the person to whom the application is made to abolish, change or augment protective measures<sup>68</sup>.

Basing in the ICTY jurisprudence, the Tribunal in the Tadic case held that "*the obligation of the international tribunal to protect witnesses must not*

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<http://ssrn.com/abstract=915742> (assessed May 2011) ( similar criticism can be raised against the ICTY and ICC as well . )

<sup>67</sup> Subsection 5 "Protective measures" Regulations 41, 42

<sup>68</sup> Ibid., para. 4.

*exceed the level of protection that they do indeed seek.*”<sup>69</sup> The Prosecutor or the Defence will ask the Court protection measures at a special session of the Chamber, through a written or oral request. Section of Victims and Witnesses play in principle an important role in the application of safeguards. The ICTY section's mandate is to recommend protective measures: Article Section Victims and Witnesses (Adopted February 11, 1994).

Relevant application on the protective measures are taken by the ICTR too. The measures that can be taken to accommodate the objections of the reluctant witness can be divided into:

- (i) measures to be taken by the judicial branch in relation to the taking of testimony and
- (ii) measures to be taken prior to and after the taking of testimony by other organs, in particular the Victims and Witnesses Unit (VWU), acting under the Registry.

The first category consists of various protective measures applicable to the testimony in the courtroom. The scope of application of these measures and their legal effect are generally confined to the courtroom, and need to be in accordance with Chamber's overall duty to respect the rights of the accused and the fairness of the trial.<sup>70</sup> As the ICTR Trial Chamber ruled in Nteziryano:

The Chamber recalls that the determination of the need to order protective measures for witnesses cannot be made purely on the subjective basis of either fear expressed by witnesses or their willingness to testify at trial if their security is guaranteed. Rather, the Chamber must be satisfied that an objective situation exists whereby the security of the said witnesses is or may be at stake, which accounts for such a fear. Only in this case would protective measures be warranted.<sup>71</sup>

Mention should also be made of well-known case law where the Trial Chamber has ruled that the applying party has failed to satisfy the Chamber that the fears of its proposed witnesses are well founded, but has nevertheless adopted protective measures *proprio motu* due to the overall security situation in Rwanda.<sup>72</sup>

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<sup>69</sup> *Le Procureur v. Tadic*, Décision relative à l'exception préjudicielle soulevée par le Procureur aux fins d'obtenir les mesures de protection pour les victimes et les témoins, affaire n°IT-94-1-T, Ch. 1<sup>ère</sup> instance, 10 août 1995

<sup>70</sup> *Ibid.*, note 66, p. 966.

<sup>71</sup> *Prosecutor v. Nteziryayo* (ICTR-97-29-T), Decision on the Defence Motion for Protective Measures for Witnesses, Trial Chamber II, 18 September 2001, para. 6.

<sup>72</sup> *Prosecution v. Simba* (ICTR-01^76-I) Decision on Defence Request for Protection of Witnesses, Trial Chamber I, 25 August 2004, para. 6.

### 3.4.2 Limitation of protective measures

Rule 67 of the ICC specifically provides that the accused shall have the right “to examine, or have examined, the witnesses against him.”<sup>73</sup> Critics may argue that the right to cross-examine witnesses cannot be effectively conducted without the knowledge of the identity of the witness.<sup>74</sup> Others argue that allowing anonymous testimony may give the appearance of guilt instead of affording presumption of innocence.<sup>75</sup> Moreover, Article 68 of the Rome Statute states that protection measures must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. By allowing witnesses to testify anonymously, it is argued, the accused will be prejudiced by not knowing the identity of the witnesses.

Knowledge of witness identity is important for many reasons. First, it allows the accused to mount a complete defense to the testimony given by conducting background searches of the witness. Second, the accused will be better able to specifically refute testimony made by the witness if the accused has personal knowledge of the situation and the person involved. This can be done on cross-examination of the witness as well as through the testimony of the accused. Also, knowledge of a witness’s identity gives more legitimacy to the specific trial.

Besides these considerations, the ability of the Court to ensure the legitimacy of the witness’s statement is vital to a proper trial. The best way to ensure the truthfulness of the witness’s testimony is by allowing the accused, his or her counsel, as well as the judges, to monitor the witness. In this state, the Court may decide the limitation of the witness protection measures for the sake of the fair trial and the rights of the accused.

### 3.4.3 International Criminal Court approach regarding anonymous witnesses

Under the ICC system, anonymous testimony is not subjected to an exclusionary rule.<sup>76</sup> The Rome Statute seems to rely upon the *Tadic* Trial Chamber. Article 67 in conjunction with Article 68 (5) entitle protection of the victims and witnesses and their participation in the proceedings, thus admitting the anonymous testimony. Article 68 (5) states that:

“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

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<sup>73</sup> ICC Rules of Procedure and Evidence, Rule 67.

<sup>74</sup> Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am. J. Int’l L. 235, 236 (1996).

<sup>75</sup> Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 How. L.J. 155, 163 (1997).

<sup>76</sup> Knoops, Geert-Jan Alexander (2003). *An Introduction to the Law of International Criminal Tribunals*. New York: Transnational Publishers, p. 145.

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”.

This provision gives the possibility that a witness’ testimony may be presented in summary form by the prosecution and not be subject to cross-examination by the defence. But here arise a problem that can bring into confusion the application of these two articles. Article 67 and 68 seem to be in direct conflict with each other, because article 67 protects the defendant’s right to confront witnesses against him/her, and article 68 allows for no cross-examination.<sup>77</sup> As long as the Statute can not change, the RPE provide specific protection towards anonymous witnesses.

Neither the Statute nor the RPE explicitly authorise the possibility of anonymous witnesses, that is a witness for one party whose identity is not disclosed to the other party. Art. 68 (1) begin with the general rule that “the Court shall take privacy of victims and witnesses’, and this might theoretically permit the practice.<sup>78</sup> But the paragraph concludes with a restriction: “these measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’ And here lies the difficulty. In the ICTY, one of its rulings authorized non-disclosure of the names of witnesses. The judgment of the European Court of Human Rights suggested this was impermissible, but the majority of the Trial Chamber, with Judge Stephen dissenting, said the jurisprudence of the ECHR only applied to ‘ordinary criminal’ jurisdictions.<sup>79</sup> But this decision was much criticised and discussed.

The implication of Rule 87(3) RPE<sup>80</sup> makes it clear that the anonymous witness does not fall within the ‘special measures’ permitted by Article 68(1) of the Rome Statute. Whereas Rule 88<sup>81</sup> provides that special measures can be taken upon the motion of the Prosecutor or the defence, or upon the request of a witness after having consulted with the Victims and Witnesses Unit. The Court, when it sees appropriate and taking into account the views of the victim or witness orders special measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2.

But the Judges of ICC should be ‘vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation’ thus they should take into consideration that violations of the privacy of a witness or victim may create risk to his or her security.

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<sup>77</sup> Ibid., p. 146.

<sup>78</sup> See Schabas (note 7), p.335.

<sup>79</sup> Tadic (IT-94-1-T), Decision on the Prosecutor’s Motion Requesting Protective measures for the Victims and Witnesses, 10 August 1995, para. 28.

<sup>80</sup> See in the Annex.

<sup>81</sup> Ibid.

## **3.5 The effectiveness of witness protective measures**

The effect of protective measures mostly depends on their implementation in practice. An important element is that court orders should be respected in general but, additionally, witnesses must be able to count on the protection provided for. An important concern is that if the identity of the witnesses becomes known to more people than the Judges, registrar and the parties to the proceedings, this may result in negative consequences for the witness and/or his or her family.

In practice of the ICTR, as well as the ICTY, more and more attention is paid to ensuring the respect for protective measures. This is done by repression of violations, by means of contempt proceedings, and, at the same time, extending the scope of application of protective measures, hereby seeking to prevent as much as possible the violation of protective measures. ICTR case law, as well as ICTY case law, demonstrates, however, that both avenues are laden with significant legal and practical obstacles. The conduct and results of contempt proceedings have been greatly unsatisfactory for both ad hoc Tribunals.<sup>82</sup> This has partly to do with legal problems pertaining to the regulation and prosecution of instances of contempt of court. It is perfectly understandable that in light of the limited resources concerning all participants in the ICTR criminal proceedings, contempt proceedings do not rank as a priority.

### **3.5.1 Problems in the implementations of the witness protection measures**

#### **3.5.1.1 Overlapping of Roles between the organs of the Court**

During these years of existence, the ICC has faced problems to implement the witness protection measures due to the *overlapping of roles*, one of the problems issued in the Report of the Court 2010.<sup>83</sup> This vision encompasses all areas of the Registry's activities and adds clarity to the distinction between the Court's administrative and judicial functions. On these bases, the Registry's activities are related to the judicial functions of the Court, the Presidency has a strategic role, which enables it to maintain oversight of the administration of the Registry as a whole, and Chambers may deal with specific issues. For example, a decision on the relocation of a particular

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<sup>82</sup> See G. Sluiter, 'The ICTY and Offences against the Administration of Justice', 2 Journal of International Criminal Justice (2004), 631-641.

<sup>83</sup> Report of the Court on measures to increase clarity on the responsibilities of the different organs, Committee on Budget and Finance, Fourteenth session, The Hague 19 - 23 April 2010 ICC-ASP/9/CBF.1/12, para. 30.

witness would fall within the competence of the relevant judicial Chamber, whereas the maintenance of the witness relocation system as a whole would fall under the Presidency's competence.

The Rome Statute established Victims and Witnesses Unit within the Registry in order to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. At the same time, the other organs, including the OTP, have statutory responsibilities to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

Here, there is a potential for overlapping or conflicting measures. In a judgment of 25 November 2008, the Appeals Chamber clarified one specific aspect of the witness protection responsibilities. This judgment was limited to that issue and did not further clarify the roles and responsibilities of the organs regarding witness protection. The operation of the VWU and the Pre-Trial Chamber, while encouraging and necessary, provides no real basis to understand how witness protection will operate in practice or if the ICC will be capable of succeeding where its ad hoc contemporaries have failed. The description of its witness protection mechanisms is remarkably similar to the ad hoc tribunals, most likely because those mechanisms are the only means of contemplating securing witnesses.

Problems arise in the *compliance with judicial orders*. The development in *Lubanga case* of the compliance with the Chambers' orders were very significant for the role of the Prosecutor and Chamber. The Prosecutor failed to comply with the order of Trial Chamber – to disclose information concerning an intermediary to the defence in the case.<sup>84</sup> The Judges considered that the non-compliance with the Chamber's order was an abuse of the process of the Court but the Prosecutor asserted that his non-compliance was not an indication of disrespect or disregard for the Chamber's inherent power to control the proceedings, but was due to his independent and autonomous obligation to ensure the protection of witnesses and other persons at risk pursuant to Article 68 of the Rome Statute.<sup>85</sup>

The issue was resolved by the the Appeals Chamber, who made it clear that even if there is a conflict between the orders of a Chamber and the Prosecutor's perception of his duties, the Prosecutor is obliged to comply

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<sup>84</sup> *Prosecutor v Lubanga*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of I-143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517- Red, 8 July 2010 (Decision to stay proceedings).

<sup>85</sup> Urgent Prosecution's Application for Leave to Appeal the Trial Chamber I's decision of 8 July 2010 staying the proceedings for abuse of process, ICC-01/04-01/06-2520-Red, para 25. See also: An International Bar Association Human Rights Report supported by the John D and Catherine T MacArthur Foundation: "*Enhancing efficiency and effectiveness of ICC proceedings: a work in progress*" January 2011, p. 20.

with the Chamber's orders. But the problem, yet not fully in the Appeal Chamber's decision was the scope of the respective obligations of the OTP, the Victims and Witnesses Unit (VWU) and the Chambers concerning the protection of witnesses and other persons at risk before the Court under Article 68 of the Rome Statute.<sup>86</sup>

Such disagreements between the OTP and the VWU has come before both Trial Chamber I in the *Lubanga case* and Pre-Trial Chamber I in the *Katanga and Ngudjolo case*. The decisions of the Chambers largely rejected the prosecutor's arguments in extending witness protection measures. In the Lubanga case, Trial Chamber I characterized the prosecutor's proposed approach of eliminating all risks as amounting to assuming that "any witness living in the relevant areas of the Democratic Republic of Congo who is not in the protection programme is at risk of harm," whereas determination of risk ought to be "fact-sensitive rather than mechanical or formulistic." The Court simply provided that VWU should apply its criteria in a "sufficiently flexible and purposive manner to ensure proper protection".<sup>87</sup>

Over the dissent of Judge Blattman, the trial chamber in Lubanga case "stressed that if the [VWU] properly assesses and rejects referrals to its protection programme, thereafter it is for the referring party to decide to secure any other protective solution it considers appropriate."<sup>88</sup>

The matter was determined by the Appeals Chamber. The Appeals Chamber agreed with the Pre-Trial Chamber that in light of its neutrality and expertise, the responsibility for witness relocation should be vested in the VWU.<sup>89</sup> Yet this judgment did not further clarify the roles and responsibilities of the organs regarding witness protection. More recently in the case of Thomas Lubanga, the issue of witness protection arose again, albeit differently, and the Appeals Chamber again did not elaborate on the scope of the respective responsibilities under Article 68.<sup>90</sup>

Article 68(1) does not give to any organ of the court "the power to take whichever protective measure the relevant organ may consider necessary to protect a given witness," but rather it "plac[es] on every organ of the Court the obligation to pay particular attention to the needs of the witnesses in

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<sup>86</sup> Ibid.

<sup>87</sup> Decision on Disclosure Issues, paras. 77-79.

<sup>88</sup> Ibid., para. 80.

<sup>89</sup> Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' (Decision on Witness Relocation) of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776 at para 91-93, available at <http://www.icc-cpi.int/iccdocs/doc/doc602198.pdf>.

<sup>90</sup> Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', ICC-01/04-01/06-2582.

performing their functions and to cooperate, whenever necessary, with those organs of the Court that are competent to adopt specific protective measures such as the relocation of witnesses.

### 3.6 International and National Cooperation

As a general principle, the Rome Statute depends upon cooperation of States for the purposes of the investigation. A footnote in the draft provision provided at the Rome Conferences states:

Some delegations expressed the view that, given the absence of enforcement powers, the Prosecutor would, in most cases contemplated by the article, be unable to act upon the authority conferred by the Pre-Trial Chamber. Other delegations expressed the opposite view. It was moreover, noted that the draft Statute did not confer any authority for the use of military force<sup>91</sup>.

Specifically, Article 86 provides a general obligation to cooperate:

“States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

The Court has the right to make a request for cooperation to a member state for assistance and take measures, including measures related to the protection of information, necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under Part 9 of Rome Statute shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.<sup>92</sup>

In the ICTR State Cooperation,<sup>93</sup> a remarkable element in its jurisprudence on protective measures, exactly on the appearance of witnesses, relates to the Trial Chambers’ reluctance to impose legal assistance obligations on states. The Tribunal actively seeks state cooperation, e.g. in the relocation of witnesses, but generally refrains from imposing obligations on states pursuant to Article 28 of the Statute.

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<sup>91</sup> Schabas, W. *“The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone”* Cambridge University Press; 1 edition (August 20, 2006) p. 700.

<sup>92</sup> Rome Statute, Article 87(4)

<sup>93</sup> Sluiter G. *“The ICTR and the Protection of Witnesses”* Journal of International Criminal Justice 3 (2005), p.

However, if a witness's appearance is of substantive significance for the trial, the Statute, specifically in Articles 18 and 28, offers sufficient tools to oblige states to ensure a witness's appearance, even if this would require that an alien may not be expelled. The problem arose in the question: Since Article 28 of the Statute may infringe on several areas of state sovereignty, why not this one? I am also not convinced that ordering a state to assist in the appearance of witnesses amounts to a material interference with domestic immigration laws. The fear of prosecution was considered by the Trial Chamber in the framework of 'protective measures', as set out in Rule 75<sup>94</sup>.

There is no doubt that ICC is experiencing the same problems frustration felt at times by the ad hoc Tribunals challenging the stubborn non-cooperation of certain States.<sup>95</sup> The provisions of the ICC Statute state the duty of states to cooperate with the Court. The ICC Statute devotes a whole section of 17 articles to this subject (*Part 9. International Cooperation and Judicial Assistance*).<sup>96</sup> The Statute lists the obligations of states to cooperate, and the scope of the cooperation required. However, the Statute contains a number of exceptions to this general obligation to cooperate, and they will have the effect of denying to the Court the benefit of Part 9 when seeking to overcome a state's lack of cooperation.

Pursuant to Article 93(3), another restriction on the Court's powers is to be found in Article 93(1)(l), by which a state may refuse to give assistance where it has not been expressly identified in the Statute if such assistance is 'prohibited by the law of the requested State'. A state may refuse to execute a particular measure of assistance requested by the Court if its execution 'is prohibited in the requested state on the basis of an existing fundamental legal principle of general application'. Whatever the expression 'fundamental legal principle of general application' may mean in that context, that article also provides that if, after consultations, the matter cannot be resolved, 'the Court shall modify the request as necessary'. Moreover, Articles 72 and 93(4) allow a State Party to deny a request for assistance if the request concerns the production of documents or disclosure of evidence which relates to its 'national security'. When a state raises an issue of national security, Article 72 denies to the Court the power to order the state to produce the material for the Court's own inspection, and the Court has power only to refer the matter back to the Assembly of States.

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<sup>94</sup> *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-T), Decision on the Motion for the Protection of Defence Witnesses, Trial Chamber II, 6 October 1997.

<sup>95</sup> The Hon. David Hunt, "High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges" *Journal of International Criminal Justice* 2 (2004), p. 69.

<sup>96</sup> Whereas Article 29 of the ICTY Statute merely provided, in the most general terms, that states shall cooperate with the International Tribunal in the investigation and prosecution of accused persons Paragraph 2 of that article provides a non-exhaustive list of matters in relation to which states are obliged to comply with any request for assistance or an order of the Tribunal.

Protection of victims and witnesses is a difficult and demanding task for any criminal jurisdiction, and particularly so for the international criminal jurisdictions<sup>97</sup>. Apart from the great reliance upon live evidence, the nature of the crimes and the fact that Tribunals are international and highly public necessitated the development of thorough witness protection regimes.

In addition, the ICC conducts its first investigation during ongoing violent conflicts, which makes the question of protection even more important and challenging. But these institutions have a more limited range of possible protective measures than national authorities; the international jurisdiction do not have their own police forces and are dependent upon state authorities, peacekeeping forces or others in order to offer the more robust forms of protection.<sup>98</sup>

Some have suggested that the witness protection needs of international tribunals could be handled through appeal to U.N. member countries to “grant political asylum and supply new identities to victims and witnesses, since they fall under the category of persecuted ethnic minorities and thus could arguably qualify for refugee status.”<sup>99</sup> In the case of the ICC, specifically created through the already extant jurisdiction of its member states, mechanisms like this will be easier to employ. Part of the task of cooperating with ICC prosecutions will necessarily be to lend the powers of the nation-state to the Court, which lacks similar mechanisms. While the current ICC formulations of witness protection mechanisms appear very much in line with its *ad hoc* contemporaries, it is the permanence of the Court as well as its reliance on treaty power that will make its witness protection modes superior.

In addition, it remains unclear whether, outside the exceptions expressly provided for in the Statute, States Parties are in fact under a general obligation to cooperate with the Court.<sup>100</sup> States will not have to give priority to their obligation to cooperate with the Court over their bilateral or multilateral obligations to cooperate with other states which are not parties to the Statute. But one of the lacks of the Statute is that it does not contain any obligation placed upon non-States Parties to cooperate with the Court.<sup>101</sup> The power of the ICC to impose obligations upon individuals directly has been made dependent upon the domestic law of the state on whose territory such individual may be residing, while the Statute does not provide for express power to issue binding orders upon such individuals. Article 93 ICC (*Other Forms of Cooperation*) merely imposes a general, and very loose, duty upon states to facilitate the voluntary appearance of

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<sup>97</sup> See Cryer, Robert, pp. 481-4.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> B. Swart, ‘General Problems’, at A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds). *The Rome Statute of the International Criminal Court*, (3 volumes, Oxford: Oxford University Press, 2002), p. 1595.

<sup>101</sup> Article 90.1 of the ICC Statute (*Competing Requests*); see A. Ciampi, ‘The Obligation to Cooperate’, in Cassese *et al.*, *supra* note 5, 1607, at 1631.

witnesses or experts and to assist in the transfer of those persons to the Court, by permitting the states to follow their local procedures.<sup>102</sup>

Among the international cooperation of the ICC is with the *United Nations* based on the Relationship Agreement. Such cooperation continues to be essential to the Court institutionally and in the different situations and cases. A number of United Nations departments and offices, as well as funds, programmes and specialized agencies, have been key partners for the Court. For instance, the Office of the United Nations High Commissioner for Refugees, OHCHR and the United Nations Office on Drugs and Crime have provided support with respect to the protection of witnesses and victims, including in their relocation.

The ICC made numerous requests to States for cooperation or assistance pursuant to part IX of the Rome Statute. Pursuant to article 87 of the Statute, the content of such requests and related communications is often confidential in nature. In addition to specific requests for cooperation and assistance made pursuant to parts IX and X of the Rome Statute, the Court continued to develop its bilateral exchanges and arrangements for cooperation with States, especially with respect to analysis and investigative activities, asset tracking and freezing, victim and witness protection, arrest operations, the enforcement of sentences and the provisional release of accused persons pending trial.

No new witness relocation agreements were entered into force with States during the reporting period, although there are negotiations at an advanced stage with a number of States in respect of such agreements. In order to increase the options of the Court for relocating witnesses internationally, the Court opened a new special fund for witness relocation for States to donate funds to finance cost-neutral relocations to third States. The Court has already received a substantial donation to the special fund. The Court is now approaching States parties to see whether they would agree to enter into a cost-neutral witness relocation agreement with the Court, financed by the special fund. In addition, States parties may also support the establishment of witness protection capabilities in other States where capacity is lacking. This could be done either bilaterally or through multilateral institutions. A number of countries have already indicated their keen interest in this modality, the development of which would further the principle of complementarity that is central to the Rome Statute system.<sup>103</sup>

No doubt that in the ‘cooperation section’ between ICC and State Parties to RS, what makes the difference between the failure of the ad hoc tribunals to protect witnesses and the possibility for ICC success does not lie in the structural mechanism of the protection but basically in the national methods

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<sup>102</sup> Ibid B. Swart, ‘General Problems’, in Cassese pp. 1589-1598.

<sup>103</sup> Report of the International Criminal Court to the United Nations for 2009/10 A/65/313 [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) (accessed May 2011)

of member States to ICC, which have the duty to protect ICC witness within their national protective programmes. The ICC's effectiveness depends also on *political support* from States Parties, and the issue that is more serious is the responsibility of the non-State Parties to the Rome Statute and their duty to cooperate. This is also a challenge to the Court's effort to remain efficient.

At its 6<sup>th</sup> session, the ASP appointed a focal point to continue the work on cooperation in close coordination and dialogue with the Court. Also it decided to revisit the issue of cooperation in full in two to three years, depending, inter alia, on the needs of the Court.<sup>104</sup> The states' cooperation over the witnesses protection can play a *positive role* in fostering cooperation and support by helping to bridge the gap between the court's needs and states parties knowledge of and capacity to respond to them with higher responsibility.

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<sup>104</sup> ASP, "*Strengthening the International Criminal Court and the Assembly of States Parties*," Resolution-ICC-ASP/6/Res.2, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP6-Res-02-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP6-Res-02-ENG.pdf) (accessed 23 May 2011) para. 40

# 4 Witness Protection Measures and International Human Rights

## 4.1 Right to testify freely and without intimidation, the rights of the accused and fair trial

The Rome Statute requires that proceedings before the Court be carried out fairly and impartially, with full respect for the rights of the parties in the proceedings. With regard to fair trial rights, the ICC takes into account specifically: the right to a public hearing, the right to be present at the trial, the rights to equality of arms, the right of the accused to call and examine witnesses etc.

On the bases of Article 67(7) of Rome Statute, the trial shall be held in public. Although this is a function or power of the Trial Chamber, it is also a fundamental right of the accused. There are instances where there will be restrictions to obtaining witness testimony in open court. Some cases do not present obstacles that would prevent an individual from testifying, or offer the witness no reason to fear of his or her testimony in ICC. Yet, the nature of a public trial, even where the testimony may not be of great importance, creates a stressful atmosphere that may make difficult the issuance of testimony for the witness.

In other circumstances, a witness has good reason to be hesitant to testify. Where the witness fears the threat of violence to himself or his family, or where the testimony will bring public shame, the witness will feel conflicted by his personal interest in refusing to testify and the duty he is likely to feel toward society and in the interest of justice. For this reason, witnesses whose testimony may cause them physical violence, or serve as an unpleasant experience, are granted a number of services to ensure that their crucial testimony is not thwarted by the fear of delivery in open court.<sup>105</sup>

### 4.1.1 Reasons not to testify?

*Is there any reason not to testify?* This is a question I ask contrary to the ordinary answers in which a witness has a reason to testify in order to 'lighten' the facts and for the establishment of the truth. Under the

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<sup>105</sup> Loberg, Brad, "The Witness Protection Measures of the Permanent International Criminal Court Are Superior Than Those Provided By Its Temporary Ad Hoc Contemporaries", Independent research, spring 2006.

provisions of the Rome Statute, there is no obligation of the witnesses to appear and testify in the Court because of the principle of voluntary appearance. Rules 65 and 66 of the RPE deal with the duties to speak, to speak the truth and make a solemn declaration to this effect.

Still there is a controversial argument in Article 64(6)(b) RS, the Court 'Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute'. Apparently, this is a denial of the existence of an international obligation of a witness to appear before the Court despite the use of the word 'require' as long as the Court lacks the power to enforce this obligation.<sup>106</sup> As a result, the appearance of the witness before the ICC will be voluntarily only and no obligation to testify.

Nevertheless, there are reasons that limit a witness not to testify on the bases of special circumstances. A first important reason not to testify concerns the fear of victims of crimes with the status of "a witness", of being traumatized by the testimony and the confrontation with the accused. The fear of traumatising applies in particular to the victims of and witnesses to rape and sexual assault. In addition, the proceedings before the ad hoc Tribunals offer numerous examples of such situations.<sup>107</sup> The experiences of the *ad hoc* Tribunals demonstrate that a witness's fear for his or her own safety, as well as for his or her family's safety, is often a real one. As far as the ICTR is concerned, Morris and Scharf mention reports detailing killings and other attacks against genocide survivors during 1996.<sup>108</sup> In particular, two witnesses testifying before the ICTR in *Akayesu and Ruzindana* were killed.<sup>109</sup> However, the other face of the coin is that the refusal to give testimony means the expulsion from the protection programme.

#### **4.1.2 Balance to the rights of the accused and rights of witness in respect to a fair trial**

In order to make a fair balance to the rights of the accused and the prosecutor, it is important to adhere to the highest standards of international

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<sup>106</sup> See Clauss Kress, pp. 323-324.

<sup>107</sup> For example, in *Tadic*, the ICTY Trial Chamber paid considerable attention to and acknowledged the retraumatization of victims and witnesses in cases of sexual assault: Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Tadic* (IT-94-1-T), Trial Chamber II, 10 August 1995, pp. 45-52.

<sup>108</sup> UN High Commissioner for Human Rights Field Operation in Rwanda, Killings and Other Attacks Against Genocide Survivors and Persons Associated With Them From January Through December 1996, Status Report as at 24 January 1997, UN doc. HRFOR/STRPT/33/24 Jan. 1997/E, as cited in V. Morris and M.P. Scharf, *The International Criminal Tribunal for Rwanda* (Irvington-on-Hudson, New York: Transnational Publications, 1998) p. 535.

<sup>109</sup> See Second Annual Report of the ICTR, UN doc. A/52/582 and UN doc. S/1997/868, 2 December 1997, p. 51.

criminal justice, particularly to the fair trial rights provided in the human rights treaties such as ICCPR and ECHR.<sup>110</sup>

The balance of rights has to be interpreted carefully as long as there is no general privilege protect fundamental human rights of the witness.<sup>111</sup> While the right to a fair trial should be guaranteed, war criminals would never be tried before the ICTY and before national courts if it was not for the witnesses to testify. If the interest of justice, both rights – the defendant’s right to a fair trial and the witness’ right of protection – have to be safeguarded.

The Statute and Rules of ICC have developed the notion of a fair trial and have also enforced the fair trial rights in the international area in comparison with the Special Tribunals. Due to the need to protect witnesses, ICC and Special Tribunals are allowed by their Statutes to restrict the accused’s right to a public trial and the right to the accused to examine or have examined witnesses against him. The need to balance the right of the accused against the protection of witnesses is justified by the ‘*extreme danger*’,<sup>112</sup> to which they are exposed in the situation of armed conflict that existed and endures in the communities where the alleged crimes were committed. The Tribunals don’t provide guidelines in how to balance these rights but a lot is left to the discretion of judges.<sup>113</sup> This will continue to challenge existing Tribunals and ICC.

The general right to a ‘*fair trial*’ is enshrined in the Universal Declaration of Human Rights,<sup>114</sup> and the regional human rights conventions,<sup>115</sup> as well as in humanitarian law instruments.<sup>116</sup> It is also established in the *chapeau* of Article 67 of ICC Statute. It requires from the Court to respect the rights of the accused and keep it in a *progressive development of human rights law*.<sup>117</sup> A Trial Chamber is obliged to ensure that the trial is fair and expeditious, that it is conducted in accordance with the Statute, RPE, as with

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<sup>110</sup> Chile Eboe-Osuji, *Protecting humanity : essays in international law and policy in honour of Navanethem Pillay*, article of Segun Jegede ”*The right to a fair trial in International Criminal Law*” Martinus Nijhoff, 2010, p. 547.

<sup>111</sup> See Claus Kress, p.333.

<sup>112</sup> Ibid note 112 , Segun Jedege, p. 548.

<sup>113</sup> Ibid.

<sup>114</sup> G A Res. 217 A (III), UN Doc. A/810 (1948) See Annex.

<sup>115</sup> American Convention of Human Rights, (1978) 1144 UNTS 123, Art. 8; ECHR (1955) 213 UNTS 221, Art. 6; African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev.5, Art. 7; Convention on the Rights of the Child, GA Res. 44/25, Art. 40, para. 2.

<sup>116</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Art. 84-87 and 99-108; Geneva Convention (IV) Relative to the Protection of Civilians, (1950) 75 UNTS 287, Art. 5, 64-76; Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts; (1979) 1125 UNTS 3, Art. 75; Protocol Additional II to the 1949 Geneva Conventions and Relations to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 3, Art. 6.

<sup>117</sup> See Ambos, Kai., p. 1253 (article by William Schabas)

the rights of the accused and witnesses have to be safeguarded.<sup>118</sup> Thus a fair balance between rights means a full respect to the rights of the accused and due regard for the protection of witnesses.

Article 57(c) of the Rome Statute requires the Pre-Trial Chamber to provide the ‘protection and privacy of victims and witnesses’ while Article 64(7) like similar provision in the Statute of the ICTY balances the right of the accused to confront witnesses against him with regard for the protection of victims and witnesses. On the application of a party or of its own motion a Trial Chamber could, *inter alia* require the attendance and testimony of witnesses, require the production of documentary and other evidentiary materials, relevance of evidence and protect confidential information. The Statute provides that the accused is entitled to fair and public hearing and lists the minimum guarantees of fair trial, generally following the provisions of Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14 of the ICCPR is the standard in terms of codification of the right to fair trial in international human rights law<sup>119</sup> and is one of the principal human rights treaties<sup>120</sup> which has similar provision in the Statutes of the three tribunals.<sup>121</sup>

ICC seems to have the same difficulties like ICTY regarding to the contestation of *anonymity of witness*. It was interpreted as an infringement of the right of the accused for a fair trial in order to provide the relevant information about the identity of the witnesses. The Justification for anonymity requires the Court to verify whether the reasons invoked for witness’s fear have to be convincing. The anonymous witnesses have to be in a real danger, and the threat must be real<sup>122</sup> in order to grant them protective measures. Must a real threat be established or is it sufficient that the witness is afraid of reprisals if he or she testifies?

Nevertheless, we have to keep in mind that ‘protection from the public identification deviates from the principle of a public trial’.<sup>123</sup> Above this, more criticised measure was the withholding of the witnesses’ identity from the accused. Rights such as having adequate time and facilities for the preparation of the defence and examining witnesses must be analysed and respected. The use of anonymous witnesses is a particularly *controversial measure*, which means: witnesses whose identity is not known to both parties. An early ICTY decision allowed this practice, said to influence the Tribunals’ impotence concerning physical protection, but it was also very

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<sup>118</sup> See note 2, 2nd Preparatory Committee, p.10.

<sup>119</sup> International Covenant on Civil and Political Rights, (1966) 999 UNTS 171.

<sup>120</sup> Schabas ”*An Introduction to the International Criminal Court*”, p. 206.

<sup>121</sup> Schabas,”*The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* p. 502.

<sup>122</sup> *Kostovski v. Netherlands*, Application No. 11454/85, 20 November 1989, para. 19.

<sup>123</sup> Willem-Jan F.M. van der Wolf, *The rights of parties and international criminal law*, International criminal law series, vol. 5, The Hague ICA, International Courts Association, 2011, p.75.

criticized, especially by proponents of adversarial procedures,<sup>124</sup> and the practice has not been repeated.<sup>125</sup> At the ICC it is clear that the identity of witnesses may be withheld from the disclosure to the defence, and different interpretations analyse whether witnesses may remain anonymous at trial. The better view, however, is that the identity may be withheld only ‘prior to the commencement of the trial.’<sup>126</sup> For example during the confirmation process, identities, although on an exception, may be withheld only on the bases of Article 67 and 68 of Rome Statute. This proves that a trial can still be fair with anonymous witnesses testifying, as long as the defendant and his counsel’s right to reveal the identity to the Court and prosecutor which provides the possibility of ensuring their reliability.<sup>127</sup>

The notion of ‘*fair hearing*’ derives from Article 10 of UDHR and it is also repeated in Article 14 of the ICCPR and ECHR. In the Rome Statute, the term ‘fair hearing’ that gives the right to the Court to exceed the precise terms of Article 67 in appropriate circumstances is confirmed by the reference within the *chapeau* to ‘minimum guarantees’. As Judge Steiner cited in *Lubanga Case* that ‘in reference to ‘minimum guarantees’ in Article 67(1), the Court will need to go beyond the terms of Article 67 itself, beyond the rights of the accused. And then she cited the case law of European Court of Human Rights in support to her argument.<sup>128</sup> Article 6(1) of ECHR<sup>129</sup> states: “in the determination of his civil rights and obligations or of any criminal charge against the accused, he is entitled to a fair and public hearing. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society... in special circumstances where publicity would prejudice the *interests of justice*.”

It is the interest of justice to protect witness in order to prosecute the individuals allegedly responsible for the most serious crimes of international concern as genocide, crimes against humanity and war crimes. Procedural equality, adversarial process and disclosure of evidence, thus the ‘equality of arms’ (*égalité des armes*) requires a fair balance between the parties. *The right to have an adversarial trial* means ‘the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.’<sup>130</sup>

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<sup>124</sup> Tadic ICTY T. Ch10.8.1995 (Judge Stephen dissenting). See also Ambos, Kai., p. 1253 (article by William Schabas)

<sup>124</sup> ECHR, Article 6(1). also see Natasha Affolder, “*In the determination Sources of International Procedural Law*” (1998) 19 Michigan Journal of International Law 445.

<sup>125</sup> See note 120, Willem-Jan F.M. van der Wolf, p. 75.

<sup>126</sup> Art. 68 (5) of the ICC Statute and R. 81 (4) of the ICC RPE.

<sup>127</sup> Arifi, Besa, “Human Rights Aspects of Witness Protection and its importance for the ICTY”, pp. 237-8. Article in the book

<sup>128</sup> *Lubanga* (ICC-01/04-01/06), Décision relative au système définitif de divulgation et à l’établissement d’un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15 May 2006, para. 97.

<sup>129</sup> See Annex.

<sup>130</sup> *Ruiz-Mateos v. Spain*, (App. 12952/87), 23 June 1993, Series A No 262, (1993) 16 EHRR 505, para. 63.

But when we talk about the accused rights and balance of rights to have a fair trial the question arises: Do the witnesses have rights? The ECHR does not directly express whether witnesses have rights under the European Convention even though some ECHR cases claim in that witnesses should be accorded rights.<sup>131</sup> As an example, in *Doorson* case, the Court stated that ‘article 6 does not explicitly require the interests of the witnesses in general... to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8.’<sup>132</sup>

In essence of ECHR, the witnesses enjoy the following rights:

- the right not to be subjected to inhuman or degrading treatment when giving evidence (Article 3)
- the right not to be detained without proper safeguards (Article 5)
- child witnesses and complainers have an implied right under the proviso to the requirement that the accused is entitled to a public hearing (Article 6)
- the right to respect for private and family life (Article 8).<sup>133</sup>

If we see Article 6(3) (d) of ECHR, obviously it grants a number of rights in the respect of defence witnesses, for example: to secure their attendance and to examine their evidence on the same basis as the witnesses against the accused. Even though it is the right of the accused to the principle for a fair trial, it does not give the accused or any parties in a trial to call witnesses without restrictions.<sup>134</sup> Thus paragraph 3 does not grant the accused an ‘unlimited right to secure the appearance of witnesses in the court.’<sup>135</sup>

The ICTY and ICTR are empowered, in evaluating the facts of the case, to set limitations to the accused’s fair rights in respect to protect other persons in risk of intimidation or threat. This was illustrated in *Prosecutor v. Delalic et al.*<sup>136</sup> in its interpretation of Article 21 (4) (e) of the ICTY Statute. This article has been interpreted as an ‘affirmation of the accused’s right to confront the witnesses against him, a right recognized in many jurisdictions, notably the “confrontation clause” of the Sixth Amendment to the US Constitution: “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour.”’<sup>137</sup>

In the *Delalic* case, it reemphasizes the general rule requiring the physical presence of the witness. This intended to ensure confrontation between the

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<sup>131</sup> Gert Vermeulen “Witness protection and Collaboration with justice”, p. 48.

<sup>132</sup> *Doorson v. The Netherlands*, judgement of 26 March 1996, Application No. 20524/92, Reports 1996-II, para. 70.

<sup>133</sup> Gert Vermeulen “Witness protection and Collaboration with justice”, p. 48.

<sup>134</sup> *Thomas v. United Kingdom*, (App. 19354/02).

<sup>135</sup> Dijk, Pieter van (red.), *Theory and practice of the European Convention on Human Rights*, 4. ed., Intersentia, Antwerpen, 2006, p.644.

<sup>136</sup> *Prosecutor v. Delalić*, ICTY Case No. IT-96-21-A.

<sup>137</sup> Knoops, p. 162.

witness and the accused, and to enable the judges to observe the demeanor of the witness when giving evidence.<sup>138</sup> But what is important to underline, in this decision, the Trial Chamber, acknowledged *expectations* to the general rule requiring the physical appearance of the accused, saying that "... there are expectations to this general rule where the right of the accused under Article 21(4) (e) is not prejudicially affected," including *videoconferences*:

".. It is, however, well known that video-conferences not only allow the Chambers to hear the testimony of a witness who is unable or willing to present their evidence before the Trial Chamber at the Hague, but also allows the Judges to observe the demeanour of the witness whilst giving evidence. Furthermore, and importantly, counsel for the accused can cross-examine the witness and the Judges can put questions to clarify evidence given testimony. Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that the testimony given by video-link conferencing is a violation of the right of the accused to confront the witness. Article 21(4)(e) is in no sense violated"<sup>139</sup>

Notably, Rule 90 (a) was amended on 25 July 1997 at the thirteenth plenary session to make explicit reference to "videoconference link."<sup>140</sup>

The international case law has developed the notion of "equality of arms" within the concept of the right to a fair trial.<sup>141</sup>

The concept of "equality of arms" has been invoked in some decisions of the ICC. For example, according to the Pre-Trial II fairness is closely linked to the concept of 'equality of arms', or of balance between the parties during the proceedings. It concerns the ability of the party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.<sup>142</sup>

Fairness is closely linked to the concept of "equality of arms", or of balance, between the parties during the proceedings.<sup>143</sup> As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case,

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<sup>138</sup> Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, IT-96-21-T, 28 May 1997, para. 15.

<sup>139</sup> Ibid., para. 14.

<sup>140</sup> Knoops, p. 163.

<sup>141</sup> For recognition of the principle of "equality of arms" by the ICTY, see: *Prosecutor v. Tadic*, case NO. IT-94-1-T, Separate opinion of Judge Vohrah on Prosecution motion for Production of Defence Witness Statements, 27 November 1996, pp. 4, 7.

<sup>142</sup> *Situation in Uganda* (ICC-02/04-01/05), Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, para. 30.

<sup>143</sup> See generally Salvatore Zappalà, *The Rights of the Accused*, in Cassese-Gaeta-Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (Oxford, 2000), 1319, at 1328.

with a view to influencing the outcome of the proceedings in its favour.<sup>144</sup> From the experience of the ad hoc tribunals, it appears in fact that the question of the possible impact of the issue on which interlocutory appeals is sought on the fairness of the proceedings is usually raised at a stage of the trial when both the Prosecutor and the defense have made their respective cases before the Chamber. In the instant situation, the Chamber is dealing with "ex parte" proceedings involving only the Prosecutor."

The principle of 'equality of arms' is closely connected to the right to adversarial proceeding.<sup>145</sup> The requirement of equality of arms in ECtHR case law, in the sense of a 'fair balance' between the parties, applies in principle, to criminal cases. 'Equality of arms' implies that each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."<sup>146</sup> Thus, fairness is a concept directly related to equality of arms and this can be fulfilled only by a fair balance between parties. The equality of arms can be paraphrased as the ability of a party to influence the outcome of the proceedings in its favour.

The Defence in *Tadic* Appeal Judgment cited: "... paragraph 530 of the Judgement to show that the Trial Chamber was aware that both parties suffered from limited access to evidence in the territory of the former Yugoslavia. The Defence acknowledges that the Trial Chamber, recognising the difficulties faced by both parties in gaining access to evidence, exercised its powers under the Statute and Rules to alleviate the difficulties through a variety of means. However, it contends that the Trial Chamber recognised that its assistance did not resolve these difficulties but merely "alleviated" them. The Defence alleges that the inequality of arms persisted despite the assistance of the Trial Chamber and the exercise of due diligence by trial counsel, as the latter were unable to identify and trace relevant and material Defence witnesses, and potential witnesses that had been identified refused to testify out of fear. It submits that the lack of fault attributable to the Trial Chamber or the Prosecution did not serve to correct the inequality in arms, and that under these circumstances, a fair trial was impossible."<sup>147</sup>

Even though the witnesses are not consider party to the proceedings, I fully support the argument that they should be a third party and have the same

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<sup>144</sup> See also ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgment of 15 July 1999, para. 48.

("[Equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case"); ICTR, Appeals Chamber, *The Prosecutor v. Clement Kayishema and Obed Ruzmdana*, ICTR-95-1-A, Judgment of 1 June 2001, para. 70. See also European Court of Human Rights, *Dombo Beheer BV v The Netherlands*, Judgment of 27 October 1993, Series A, No. 274, para. 33.

<sup>145</sup> Dijk, Pieter van (red.), *Theory and practice of the European Convention on Human Rights*, 4. ed., Intersentia, Antwerpen, 2006, p. 580.

<sup>146</sup> *Dombo Beheer BV v The Netherlands*, Judgment of 27 October 1993, Series A, No. 274, para. 33 (ECtHR)

<sup>147</sup> *Prosecutor v. Tadic Case No.*: IT-94-1-A, Judgment 15 July 1999, para. 32 in

"Appellant's Amended Brief on Judgement, paras. 1.4-1.6; T. 29-31, 40, 45-48 (19 April 1999)".

rights. In both the ECtHR case *Doorson v. Netherlands* and *van Mechelen v. Netherlands*, the Court took into account the importance of intimidated witnesses as an important category. It noted the following:

"It is true that Article 6 does not explicitly require the interests of witnesses to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."<sup>148</sup>

The use of special measures to assist intimidated witnesses in giving their testimony but no exceptional measure is a positive development and one that can be successfully implemented without compromising the rights of an accused to a fair trial.<sup>149</sup> It has considerable advantages for the witness and for the criminal process. However, successful implementation requires a commitment on the part of all the parties of the proceedings.

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<sup>148</sup> *Doorson v. Netherlands*, para. 70, mentioned also in *van Mechelen v. Netherlands*, para. 53.

<sup>149</sup> Moody, Sue. "Vulnerable witnesses rights and responsibilities", International Society for the reform of criminal law, 19<sup>th</sup> International Conference, June 2005, Edinburgh, p. 10.

# 5 Theoretical and Practical Application of Witness Protection Measures

## 5.1 Methods of Protection. International and National Programmes

One of the biggest challenges to providing adequate protection for victims and witnesses remains the cooperation of States Parties as provided in Article 86, and more specifically Article 93(1)(j) of the Rome Statute, and in Rule 17(2)(vi) of the RPE. As the Court does not have an army or police force of its own, it depends on States Parties to provide assistance and cooperation. Requests for cooperation have proven to be time and resource-intensive and have not always produced the desired and urgently needed result.<sup>150</sup>

On the bases of international and regional legal instruments on the witness protection measures, the ICC witness protection program should be developed, taking into account the experience of the EU and Council of Europe on bilateral basis. I strictly believe that a mutual application of the European Union Recommendations, Council of Europe Documents and successful national criminal procedures of State Parties regarding the witness protections will contribute to a more effective and approach of witness protection measures. The ICC Member States have the possibility to make use of the same protection programmes of the EU or Council of Europe, also the non member states of such recommendations will have to make a substantial approximation of their legislations which will make cooperation between the Member States easier, more acceptable and mutual recognition of each other decisions concerning these matters.<sup>151</sup>

The European Legislation for the protection of witnesses is compound by the European Union legislation and the Council of Europe Legislation, as follows:

*a. European Union:*

- 1-Resolution on the protection of witnesses in the fight against international organised crime.
- 2-Resolution on individuals who cooperate with the judicial process in the fight against international organized crime.
- 3-Strategy for the beginning of the New Millenium on Prevention and control of organised crime (Millenium Strategy)

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<sup>150</sup> Cited *Arbia, Silvana*, p. 520.

<sup>151</sup> Gert Vermeulen "Witness protection and Collaboration with justice" pp. 15-16.

*b. Council Of Europe*

- 1-Recommendation (97) 13 concerning the intimidation of witnesses and the rights of defense
- 2-Recommendation (2001) 11 concerning guiding principles on the fight against organised crime.
- 3-Recommendation relating the protection of victims
- 4-Committee of experts on the protection of witnesses and pentiti in relation to acts of terrorism
- 5-Committee of experts in the protection of witnesses and collaborators with the justice
- 6.Recommendation (2005) 9 on the protection of witnesses and collaborators of justice
7. Rulings of the European Court for human rights.

One of the most important documents related to witness protection is *Recommendation No. R (97) 13 of the Committee of the Ministers to Member States in the Council of Europe, concerning the intimidation of witnesses and the rights of the accused*. It was adopted to fulfill the need for member states to develop a common crime policy in relation to witness protection and aims the mutual cooperation of Member States in the investigation and prosecution of trans-border crime, particularly organized criminal activity, for a common policy regarding the developing of witness protection. It defines “a witness” as any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. While “intimidation” means any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind, either from the mere existence of a criminal organisation having a strong reputation of violence and reprisal, or from the mere fact that the witness belongs to a closed social group and is in a position of weakness”.

In *the Recommendation (2005) 9 on the protection of witnesses<sup>152</sup> and collaborators of justice*, “protective measures” are all individual procedural or non-procedural measures aimed at protecting the witness or collaborator of justice from any intimidation and/or any dangerous consequences of the decision itself to cooperate with justice. It defines also “protection programme” as a standard or tailor-made set of individual protection measures which are described in a memorandum of understanding, signed by the responsible authorities and the protected witness.<sup>153</sup>

The general principles of both Recommendations are similar to any international documents including ICC Statute, Rules and Regulations that

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<sup>152</sup> Witness definition: any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law), who is not included in the definition of ‘collaborator of justice’.

<sup>153</sup> Vermeulen, Gert, *EU standards in witness protection and collaboration with justice*, Antwerpen ; Apeldoorn: Maklu, 2005, p. 33.

provide appropriate legislative and practical measures to be taken to ensure that witnesses may testify freely and without intimidation.<sup>154</sup>

While respecting the rights of the defence, witnesses should be provided with alternative methods of giving evidence which protect them from intimidation resulting from face- to-face confrontation with the accused, for example by allowing witnesses to give evidence in a separate room.

Article 30 of the Recommendation No. R(97) 13, encourage international co-operation as well as national laws in order to facilitate the examination of witnesses at risk of intimidation and to allow witness protection programmes to be implemented across borders. It provides some measures which have to be considered by Member States:

- use of modern means of telecommunication, such as video-links, to facilitate simultaneous examination of protected witnesses or witnesses whose appearance in court in the requesting state is otherwise impossible, difficult or costly, while safeguarding the rights of the defence;
- assistance in relocating protected witnesses abroad and ensuring their protection;
- exchange of information between authorities responsible for witness protection programmes.

Member states should ensure sufficient exchange of information and cooperation between the authorities responsible for the protection programmes. To realize this, Article 32 of Recommendation (2005) 9 proposes a more developing measures:

- Providing assistance in the relocating of protected witnesses, collaborators of justice and persons close to them across borders and ensuring their protection; in particular in those cases where no other solution can be found for their protection;
- Facilitating and improving the use of modern means of telecommunication such as video-links, and the security thereof, while safeguarding the rights of the parties.
- Cooperating and exchanging best practices through the use already existing networks of national experts;
- Contributing to the protection of witnesses and collaborators of justice within the context of cooperation with international criminal courts.

Concerning the granting of anonymity, any decision will be made in accordance with domestic law and European human rights law, on the bases of the rulings of the ECHR. The Recommendation stresses that anonymity should be granted as an exceptional measure and can be taken when the life

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<sup>154</sup> Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the accused, Articles 1-6.

or freedom of the witness, or persons close to him or her, is seriously threatened.

A very important role in the international legislation plays the *European Convention of Human Rights (ECHR)*. The ECHR specifically deals with procedural protection. The main difficulty is the balancing of the interest of the defence against arguments in favour of protecting the anonymity of the witness. The most important article in relation to witness protection is Article 6(3)(d) which stipulates that:

*“Everyone charged with a criminal offence has the following minimum rights to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.*

This article underlines the importance of equality of arms, that is, all parties should be treated equally in the same circumstances. The anonymity of the witness may deprive the defence of a fair trial enabling it to demonstrate that he or she is prejudiced, hostile or unreliable.<sup>155</sup> As a result, the defendant could be faced with great difficulties, due to the lack of information, to test the witness’s reliability or to doubt in his credibility. But on the other hand the anonymity of the identity of the witness, on the other hand, is sometimes the only way to avoid intimidation as well as to convince the witness to help the judicial authorities in their research of the truth. In this context, a choice must be made between a fair trial where parties are equally-treated, and a combative justice system that is able to react to avoid this phenomenon. The ECHR choice was as follows:

*“The right to a fair administration of justice holds so prominent a place that it can not be sacrificed to expedience”.*<sup>156</sup>

This means that only the provision of a reasonably strong additional guarantees will make the application of anonymous statements before a Court possible. The Court has often been asked to perform such process of “counterbalancing”.<sup>157</sup>

In the ECtHR has a lot on cases in the assessment of the reason to grant anonymity. The legitimate ground to grant or to keep the protection measure such as anonymity, is that the witness should therefore face a threat, which implies provisional procedural protection as an exceptional measure and be regulated by law. The ECHR made reference to the explanation of the term “threat” in the *Doorson* case<sup>158</sup> in which it stated that the witness must not be under an effective threat to be granted anonymity, as it could suffice that the witness feels threatened due to the circumstances he is in. thus:

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<sup>155</sup> Gert Vermeulen p. 37.

<sup>156</sup> *Kostovski vs. The Netherlands*, Application No. 1145185, Series A No. 166, para. 43

<sup>157</sup> Gert Vermeulen p. 38.

<sup>158</sup> *Doorson vs. The Netherlands*, judgement of 26 March 1996, Application No. 20524/92, Reports 1996-II.

“Although, as the applicant has stated, there has been no suggestion that Y.15 and Y.16 were ever threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable per se”.<sup>159</sup>

A common approach in international issues such as witness protection measures should aim at ensuring proper professional standards, at least in the crucial aspects of confidentiality, integrity and training<sup>160</sup> between the ICC and other international legislation especially European ones. Furthermore, the cooperation schemes of international protection programmes should provide *long-term relocation* in one of the member states of protected witnesses if requested by the ICC or member states. Due to the “young age” of the ICC practice, some aspects could be improved in the cooperation between the *various authorities* that manage the protection of protected witnesses.

## 5.2 Cases of Witness Intimidation in International Criminal Court and Special Tribunals

Disclosure of the information has always been one of the main issues of both ad hoc Tribunals and ICC. The disclosure of information to the public by the parties and witness protection measures many times have been contradictory until in that stage to cause witness intimidation.

Article 20 of fair trial and contrast of rights was first discussed by the ICTY in the *Tadic* case. The Prosecutor had requested various degrees of protection for several of its witnesses and for some of the testimony to occur in closed hearings. Witnesses should be a balanced process between the rights of defendants to fair trials against the rights of witnesses.<sup>161</sup> The Chamber took in to account interest of the public in open hearings.

As in the *Prosecutor v. Brdanin & Talic*, the Prosecutor asked the Chamber not to disclose any confidential or non – public materials to the media regarding the names of witness and their statements.<sup>162</sup> The Prosecutor asserted that it should be entitled to make redactions from the furnished materials because “Bosnia and Herzegovina continues to be a dangerous place, where each ethnic or political group is viewed as an enemy of

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<sup>159</sup> *Doorson Case*, para 71

<sup>160</sup> Recommendation (2005) 9 on the protection of witnesses and collaborators of justice, article 29.

<sup>161</sup> *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1, 10 August 1995.

<sup>162</sup> Ackerman, John and O’Sullivan, Eugene.: *Practice and procedure of the International Criminal Tribunal for the Former Yugoslavia: with selected materials for the International Criminal Tribunal for Rwanda*, The Hague, KLI, 2000, p. 123.

another, and where ‘much of the war is still being fought, with indicates or suspects and their supporters (as well as supporters of those detained in The Hague) still at large and where witness against them are considered “the enemy”’.<sup>163</sup> The Prosecutor also argued that such an order was justified by the circumstances prevailing in this case and for the future cases before the tribunal. The prosecutor argued:

“If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems. For both the individual witnesses and the Tribunal’s ability to accomplish its mission”.<sup>164</sup>

The Chamber concluded that that the actions of the Prosecutor in making redactions in every witness statement furnished under the language of Rule 69(A), were “both unauthorized and unjustified”.<sup>165</sup> This proposal of the Prosecutor was rejected<sup>166</sup> and the Chamber pointed out Article 20 the “*the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one*”.

The Chamber also emphasised that the Prosecutor should be able to demonstrate exceptional circumstances justifying the non-disclosure of the identity of any particular victims and witnesses at this early stage of the proceedings, then its obligations to disclosure under Rule 66(A)(i) will be complied with it if produces copies statements with the names and other identifying features of only those witnesses redacted.<sup>167</sup>

In the *Kolundzija* case, as long as the protective measures were instituted at the request of the Prosecutor<sup>168</sup>, the Chamber ordered to immediately provide the defense with unredacted copies of the witness statements that formed a part of the supporting materials when the indictment was submitted for confirmation. Neither the disclosure of any identifying information regarding these witnesses, nor the substance of their statements was to be made to the public, media or family members and associates of the defendant.<sup>169</sup> Also the Defence could only contact a witness or potential witness identified by the Prosecutor after reasonable prior written notice to the Prosecutor.<sup>170</sup>

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<sup>163</sup> *Prosecutor v. Brdanin & Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, Hunt, Mumba & Pocar, JJ para, 8.

<sup>164</sup> *Ibid*, para. 9.

<sup>165</sup> *Ibid*. Para 13.

<sup>166</sup> *Ibid*. Para. 16-18.

<sup>167</sup> *Ibid*. Para 21

<sup>168</sup> *Prosecutor v. Kolundzija, Order for Protective Measures*, IT-95-8-PT, 19 October 1999, May Bennouna & Robinson, JJ.

<sup>169</sup> Ackerman, J.E. and O'Sullivan, p. 125

<sup>170</sup> Ackerman, J.E. and O'Sullivan, p. 125.

One of the most problematic cases concerning the breach of protective measures was the case of *Prosecutor v. Vojislav Seselj*.<sup>171</sup> He was prosecuted for contempt under Rule 77(A)(ii) of the ICTY Rules and Procedure. Rule 77 of the Rules provides, in so far as relevant:

“(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who:

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness.

Disclosure of the information, within the meaning of Rule 77(A)(ii), is to be understood as revelation of the information the confidential status of which has not been lifted<sup>172</sup>, including the publication of witness’ identity where protective measures have been granted to avoid such disclosure.<sup>173</sup>

On 24 July 2009, the Trial Chamber found Seselj guilty of contempt for knowingly disclosing confidential information in his book regarding the Protected Witnesses (their identities) along with portions of the Confidential Statement in violation of the Seselj Trial Chamber's orders,<sup>174</sup> and sentenced Seselj to fifteen months imprisonment.<sup>175</sup> The Trial Chamber also ordered Seselj to "secure the withdrawal of the Book from his internet website and to file a report with the Registrar on the actions taken to this effect by 7 August 2009".<sup>176</sup>

Also the Appeal Chamber stated that when Seselj published the Book, he was aware of the Seselj Trial Chamber's order that explicitly prohibiting the publication of identifying details related to the Protected Witnesses and their witness pseudonyms and supported the Trial Chamber decision that “reasonably concluded that Seselj possessed the *mens rea* to disclose information in violation of Seselj Trial Chamber's orders”.<sup>177</sup> Thus these findings were sufficient to demonstrate that orders of the Seselj Trial Chamber granting protective measures for the Protected Witnesses were violated.

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<sup>171</sup> *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-R77.2, Judgment on Allegations of Contempt, 24 July 2009 (confidential; public version filed on the same day).

<sup>172</sup> *Prosecutor v. Baton Haxhiu*, Case No.: IT-04-84-R77.5, Judgment on Allegations of Contempt, 24 July 2008, para 10.

<sup>173</sup> *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile against Finding of Contempt, 30 May 2001, para 40; *Prosecutor v. Domagoj Margetic*, Case No.: IT-95-14-R77.6, Judgment on Allegations of Contempt, 7 February 2001, para 15.

<sup>174</sup> See Seselj Trial Judgment, paras. 31, 35, 41, 49 (confidential version); paras. 21-23, 30 (public redacted version).

<sup>175</sup> *Ibid*, para 59(confidential version) para 40 (public redacted version)

<sup>176</sup> *Ibid*.

<sup>177</sup> *Seselj*, Appeal Chamber Judgment (public redacted version) 10 May 2010, paras. 26, 29.

The Appeal Chamber noted that it was the established practice of the Tribunal to publish redacted public versions of documents that "[contain] information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness"<sup>178</sup> in this case the Trial Chamber stated that these identified factors have a potential impact on witnesses' confidence in the Tribunal, and for this reason the Chamber recognized the need to discourage future violations of protective measure orders.<sup>179</sup>

Redaction of information regarding the witness identities was an issue also discussed in the ICC too, especially in *Lubanga* Trial Chamber I, which indicated that 'witness identities may be withheld for the duration of trial proceedings in exceptional cases where late requests by the defense for their disclosure would make it impossible to put sufficient protective measures in place'.<sup>180</sup> In addition, Chambers authorized extensions in the time limits for disclosure (and permitted temporary redactions in the interim) and, consequently, had delayed the start of proceedings in order to ensure that adequate protection measures were taken before witness identities were provided to the defense.<sup>181</sup>

In the ICC *Katanga and Ngudjolo* case, as a remedial action for the prosecutor's "preventive relocation," the pre-trial chamber initially excluded the use of statements, interview notes, and interview transcripts of two of the three witnesses who had been relocated by the prosecution. The pre-trial chamber apparently determined that because no protective measures apart from those provided by the prosecutor were available for the two witnesses, their redacted statements could not be provided to the defense within the

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<sup>178</sup> Sesejl Appeal Chamber Judgment, para 32; *Prosecutor v. Milomir Staki*, Case No. IT-97-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 6. See, e.g., *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Order Issuing a Public Redacted Version of the Confidential "Decision on Motion for Provisional Release of Ivan Cermak" of 14 December 2009, 14 January 2010; *Prosecutor v. Idranko Prlic et al.* Case No. IT-04-74-AR65.19, Order Issuing a Public Redacted Version of the "Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release Accused Praljak" Issued 17 December 2009, 11 February 2010.

<sup>179</sup> Sesejl Trial Judgement, para. 56 (confidential version); para. 37 (public redacted version). Appeal Chamber Judgment, para. 41.

<sup>180</sup> *Prosecutor v. Lubanga*, ICC, Case No. 01/04-01/06, Corrigendum to Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, March 6, 2008, pp. 6-8.

<sup>181</sup> Decision Suspending Deadline for Final Disclosure, paras. 3-4 (*Lubanga* trial); December 13 Hearing Transcript, p. 15, lines 13-19 (permitting interim redacted statements or summaries to be served for witnesses awaiting outcome of VWU assessment); *Prosecutor v. Katanga*, ICC, Case No. 01/04-01/07, Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing, January 30, 2008, pp. 5-9 (pending requests for redactions, determination of which turned on outstanding requests to the VWU for protective measures, one of many factors for postponement of confirmation hearing).

time limits established for disclosure.<sup>182</sup> But as long as it was impossible to charge of sexual slavery Katanga and Ngudjolo without those witnesses, the prosecutor withdrew the arrest warrants<sup>183</sup>. Subsequently, the Registry agreed to admit the two witnesses into the ICCPP. The Registry's decision to admit the two witnesses to the ICCPP, was taken not from reconsideration of the original risk assessment but rather from new security concerns incurred following the prosecutor's "preventive relocations."<sup>184</sup>

One of the recent cases of the witness intimidation in the ICTY is the *Prosecutor v Haradinaj*.<sup>185</sup> In the Appeal Judgement, the central factual context of the Prosecution's appeal was "the unprecedented atmosphere of widespread and serious witness intimidation that surrounded the trial"<sup>186</sup> The Trial Chamber acknowledged this in the Trial Judgement, observing that:

"Throughout the trial, the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe. This was due to a number of factors specific to Kosovo/Kosova, for example Kosovo/Kosova's small communities and tight family and community networks which made guaranteeing anonymity difficult. The parties themselves agreed that an unstable security situation existed in Kosovo/Kosova that was particularly unfavourable to witnesses."<sup>187</sup>

In *Haradinaj* Appeal Judgment, the countering witness intimidation was a primary and necessary function of a Trial Chamber and it always required to "provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case".<sup>188</sup> This obligation was especially pressing when outside forces sought to undermine the ability of a party to present its evidence at trial. For the Tribunal to function effectively, Trial Chambers "must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*".<sup>189</sup>

Under Rule 54 of ICTY, the Trial Chamber has the power to issue such orders, subpoenas, warrants, and transfer orders as may be necessary for the

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<sup>182</sup> *Prosecutor v. Katanga and Ngudjolo*, ICC, Case No. ICC-01/04-01/07, Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, May 28, 2008, pp. 5-6 ("Decision on Prosecution's Urgent Application").

<sup>183</sup> *Ibid*, Prosecution's Submission of the Document Containing the Charges and List of Evidence, April 21, 2008, p. 3 ("Submission of Charges Document and Evidence List").

<sup>184</sup> VWU Considerations on Preventive Relocation, paras. 39-42.

<sup>185</sup> *Prosecutor v. Haradinaj et al.* Case No. IT-04-84-T

<sup>186</sup> *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Case No. IT-04-84-T, Appeal Judgment, 10 July 2010, para. 35.

<sup>187</sup> Trial Judgment, para. 6 (internal citations omitted).

<sup>188</sup> *Tadić* Appeal Judgement, para. 52.

<sup>189</sup> *Haradinaj* Appeal Judgment, para. 35

purposes of an investigation or for the preparation or conduct of the trial, which includes the power to: adopt witness protection measures; take evidence by video-conference link or by way of deposition; and summon witnesses and order their attendance. In addition, if such measures fail, upon the request of a party or *proprio motu*, a Trial Chamber can order that proceedings be adjourned or stayed.<sup>190</sup>

In this case, the witnesses called by the Prosecution faced particular difficulties in testifying, stating that “a high proportion of Prosecution witnesses in this case expressed a fear of appearing before the Trial Chamber to give evidence”.<sup>191</sup> More specifically, the Trial Chamber was aware that the main witness *Sh. Kabashi*<sup>192</sup> and the other witness were reluctant to testify.<sup>193</sup> Both Kabashi and the other witness were particularly important to the Prosecution case.<sup>194</sup> This witness raised in the court the problem of witness intimidation, stating “there were persons who were asked questions as witnesses and whose names don’t even appear on witness lists because they have been killed. I don’t want protective measures because such measures do not exist in reality; they only exist within the boundaries of this courtroom, not outside it.”<sup>195</sup>

The Appeal Chamber claimed that the Trial Chamber failed to appreciate the gravity of the threat that witness intimidation posed to the trial’s integrity because it also was on notice regarding the serious threat to witnesses from the very opening of the trial and yet manifestly failed to take sufficient steps to ensure the protection of vulnerable witnesses and safeguard the fairness of the proceedings. It concluded that the Trial Chamber erred when it “failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution’s requests to secure the testimony of Kabashi and the other witness” and that due to “the potential importance of these witnesses to the Prosecution’s case, [...] in the context of this case, the error undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice.”

However, the majority opinion of admitting the problems in managing the trial regarding to witness protection, in the partially dissenting opinion of Judge Patrick Robinson “*blamed*” the Prosecutor and not the Trial Chamber,

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<sup>190</sup> Ibid., para. 36; See also Tadić Appeal Judgement, para. 52.

<sup>191</sup> Haradinaj T. Judgement, para. 22.

<sup>192</sup> Sh. Kabashi was a former KLA member and was to testify, *inter alia*, to specific acts of mistreatment by the defendants; these included ordering the killing and beating of specific individuals.

<sup>193</sup> See Haradinaj, Prosecution’s Application for Issuance of Subpoena (Confidential but referred to in the Trial Judgement), 25 May 2007, para. 2; Kabashi, T. 5438-5439 (5 June 2007) (Open Session), T. 10939-10941 (20 November 2007) (Open Session); see generally Trial Judgement, para. 28; Trial Judgement, Appendix A (Procedural History), paras. 20, 24.

<sup>194</sup> See T. 10120 (1 November 2007) (Open Session); T. 10956 (20 November 2007) (Open Session).

<sup>195</sup> Kabashi, T. 5439-5440 (5 June 2007) (Open Session).

on the failure of providing effective witness protection measures. Even though the Court gave extension to fulfil its duty the Judge questioned whether the Prosecutor “had abused its discretion, having regard to its duty to ensure that the trial is expeditious and to assist a party in securing the testimony of its witnesses for the presentation of its case. But it did grant three extensions of time, and then, following the inability of Kabashi to attend the video-conference link, it granted another, and finally, a third when the other witness failed to attend the video-conference link. Moreover, it indicated it was open to the possibility of granting a further extension upon the requisite showing by the Prosecution. How then, in those circumstances, can it be argued that the Trial Chamber “failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution’s requests to secure the testimony of Kabashi and the other witness?”<sup>196</sup>

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<sup>196</sup> Majority opinión A.CH, para 46; Partially Dissenting Opinion , Judge Patrick Robinson, para. 6.

## 6 Conclusion and Recommendations

The creation of the ICC seem to be necessary for these reasons give: to end impunity, to afford redress, to counter failure of national systems, to remedy the limitations of Ad Hoc Tribunals, to provide an enforcement mechanism and to serve as a model.<sup>197</sup> Yet as the French Professor of International Criminal Law, Claude Lombois stated “*Sur une base fragile, on n’édifie rien de solide*”<sup>198</sup>. By identifying the problems and failures, the ICC should take further measures and recommendations with the aim at improving the fairness and effectiveness of ICC operations.

The ICC has protection expertise, should retain sole responsibility for the witness protection program to protect witnesses, who come to give evidence at this court. Whatever the flaws in the ICC Statute may be, the story of the ICTY and other ad hoc Tribunals, with its rough start, its mistakes and its achievements, has shown that an international tribunal has a life of its own and that, ultimately, the ICC, just like any court before it, will be judged, not by the standard of the promises which its Statute contains, but upon the effectiveness of the witness protection measures in cooperation with the member states and upon the fairness of the trials which it has conducted towards both accused and witnesses’ rights.

As an ICC’s challenge it is clear that a more effective witness protection measure is the frequent use of *closed session*. Given the current poor reputation of the ICC in *Lubanga case*, fewer closed sessions would help promote the image of justice and transparency. but is it in disadvantage to witness protection in case they are threatened? Contrary to the public perception of this issue, the actual record of the Court confirms that in fact the majority of the proceedings (over 84 per cent) have been conducted in open session. Human Rights Watch’s Report emphasized different aspects of the ICC’s operation to improve the court’s effectiveness in its mandate particularly in relation to human rights issues.<sup>199</sup>

To ensure witness protection ( in case of intimidation and risk of retribution) and thus the administration of an adversarial and effective system of criminal justice, *a competent, long-standing body* within the VWU is required that can learn from its failures to accommodate its future needs. Assembly of States Parties to the Rome Statute should approve additional support staff within the VWU and in addition to other institutional resources support these services for a long term court’s mandate.

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<sup>197</sup> See note 2, 2nd Preparatory Committee, p.6-8

<sup>198</sup> English Translation: “On a weak foundation, we build nothing solid.”

<sup>199</sup> Human Right Watch Report “Courting History: The Landmark International Criminal Court’s First Years” 1-56432-358-7. July 2008, p.13.

<http://www.hrw.org/en/reports/2008/07/10/courting-history> (accessed May 2011)

The VWU should create *a framework basing on successful international, regional and national procedure practice* to help how to operate in practice providing witness protection as long as the Court itself will not carry a force with sufficient capacity to physically police areas where witnesses and their families are located. As long as there is a EU model agreement on the cooperation between Member States, The ICC should use the model of the Recommendation (97) 13 concerning the intimidation of witnesses, Recommendation (2005) 9 on the protection of witnesses and collaborators of justice (Council of Europe), the Rulings of the ECHR and the ICT cases as an example to achieve its objectives on the basis of the review of the existing legislation by making the process of witness protection programmes easier, effective and less expensive. Even though there are various national protection witness programmes and different criminal justice systems, the international recommendations of European and international level can be very helpful for the ICC for judicial and law enforcement to a '*a mutual recognition idea*'.

Yet, the ICC *has the advantage of time*. It can learn about the newest mechanisms required to protect witnesses in various circumstances and can present those needs to the State Parties to the Rome Statute. By performing new mechanisms of protection, the ICC will be capable of evolution. As long as the intimidation of the witnesses and their protection has not succeeded, it is necessary to adopt new vulnerable measures including: pseudonyms, gag orders on disclosure of the witness's identity to anyone other than the defense team, voiceovers and hidden screens to prevent public revelation of their identities, withholding their names in the final judgment or other public records, and even witness relocation programs. Rather, the needs of witness protection join a number of other rationales for establishing a permanent, well-funded court capable of creating a body of case law, institutional experience, and authority to bring human rights violators to justice. Tribunals that arise to meet the needs of a particular conflagration will be only as competent as the short-term requirements of that specific instance of justice. This includes the protection of witnesses. Like other aspects of justice, the ICC will have the time and support to create a legal institution capable of protecting witnesses enough to ensure the maintenance of an adversarial system of criminal law. One can only hope that the judges of the ICC will manage to escape from the shackles by which they have been confined by suspicious states and deliver the kind of justice we are entitled to expect from an independent court, which has the ambitions of the ICC<sup>200</sup>.

Apart from witnesses' physical protection, improving the court's programs of *psychological support* is a key opportunity to address these needs, meet the court's obligations under article 68(1), and by working through local

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<sup>200</sup> The Hon. David Hunt, 'High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' *Journal of International Criminal Justice* 2 (2004), p. 70.

partners, increase the long-term capacity of psychological services in ICC situation countries.

Assembly of States Parties to the Rome Statute should approve additional support staff within the VWU and in addition to other institutional resources support these services for a long term court's mandate. Recently the VWU explained that the ongoing nature of the threat was taken into account. An assessment conducted at a given time can always be reviewed if fresh information comes to light. In addition, certain *ad hoc measures* (IRS – immediate response system) could be turned into long-term measures (resettlement).<sup>201</sup> Projects funded by the Trust Fund for Victims, for example, can also insert witnesses and can help to develop local capacity and to attract other agencies to provide psychological services in areas where such services are few and far between.<sup>202</sup>

The statutory framework of the Court makes it clear that every organ of the Court has a positive duty to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses. Therefore as stated before, there is a potential *for overlapping or conflicting measures*. The interpretation of the protection obligation under the Statute has in the past led to tensions between the OTP and the VWU, with the former citing its overarching duty to protect its witnesses as the basis for unilaterally relocating witnesses. In this regard, the disagreements of OTP to take protection measures for witnesses after the VWU has rejected a referral taking seems to be one of the challenging of ICC. It should provide regulations to *increase clarity*.

Even though the Appeal Chamber in Lubanga case identified the risks of divisions between the organs and a lack of clarity in the roles and responsibilities, it suggested that this issue can be better managed through:

- the institution of a management control system;
- a common understanding of services;
- and more clarity on the roles and responsibilities of the organs in specific areas.<sup>203</sup>

On the bases of these reasons above, the ICC should give a direction to this issue and move away from encouraging the OTP to implement protective measures independent of those offered by the VWU.<sup>204</sup> It is essential that the VWU develop additional protection measures beyond the ICCPP that will equip the court with the flexibility to meet the very real protection needs of witnesses. The proper role of the VWR defined by the Court in the future will help to ensure consistency in the VWU's approach and that it is consonant with the Chambers' shared responsibility as an organ of the court for the well-being and security of witnesses.

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<sup>201</sup> See note 46, Summary Report, p. 2.

<sup>202</sup> Human Rights Watch Report, p. 175.

<sup>203</sup> Report of the Court on measures to increase clarity on the responsibilities of the different organs, ICC-ASP/9/34, para 39.

<sup>204</sup> Human Rights Watch Report, p.172.

Because ICC must rely on State cooperation to obtain evidence, late referrals and pending decisions, may harm the proceeding and make witnesses vulnerable to intimidation. A more effective and cheaper alternative is to develop prosecutorial investigation plan and practices where by contacts with vulnerable witnesses and victims are avoided to the greatest possible extent. By precedent, the delays in taking decisions on the admission of a witness to the ICCPP created *protection gaps and uncertainty for witnesses*.

Even though VWU is responsible of the ICCPP, still more is needed to adapt the court's protection programs to the diversity of existing protection needs. Many times the VWU indicated that refusal to admit an individual to the ICCPP does not leave that individual without protection, but rather reflects its assessment that "the person is adequately protected without the intrusion of the ICCPP."<sup>205</sup> As a precedent to *ad hoc* Tribunals cases and their witnesses intimidation, there are witnesses who do not face threats meriting protection through the ICCPP or who fall outside of the IRS's geographic reach but who, nonetheless, may face threats, which unaddressed, would put them at personal risk and would impede their interaction with the court. Such threats might be addressed by temporary protective measures, including bus fare to stay with relatives for a few days, a change of telephone number, or simply a point of contact within the VWU to discuss and evaluate the credibility of threats.<sup>206</sup>

The *redaction of the documents* regarding witnesses still is an issue to be solved. ICC Rules of Procedure and Evidence allow for appropriate protective measures to be taken to restrict disclosure of the identity of witnesses or persons who may be at risk on account of their testimony before the Court<sup>207</sup>. In order to preserve the security of witnesses, confidentiality of information and the ongoing investigations, the Court may redact relevant parts of transcripts, witness statements or witnesses' applications for participation prior to disclosure. But this seems to be still a challenge for the efficiency of the proceedings in ICC: firstly because the redacting documents are not carried out in a careful and thorough manner,<sup>208</sup> and secondly it is a waste of time and effort for the staying of proceedings. The Court should work on this issue.

There is currently no obligation for witnesses to appear and testify before the ICC.<sup>209</sup> While a Trial Chamber may *require* the appearance and testimony of witnesses and production of documents, strictly speaking it

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<sup>205</sup> VWU Considerations on Preventive Relocation, para. 22.

<sup>206</sup> Human Rights Watch Report, p. 174.

<sup>207</sup> RPE, Rule 81.

<sup>208</sup> An International Bar Association Human Rights Report supported by the John D and Catherine T MacArthur Foundation: "Enhancing efficiency and effectiveness of ICC proceedings: a work in progress" January 2011, p. 20.

<sup>209</sup> *Ibid*, p.24 (bar association)

cannot compel them to appear.<sup>210</sup> While the absence of subpoena powers at the ICC may frustrate the efforts of the judges to obtain all relevant evidence that would lead them to a determination of the truth,<sup>211</sup> even more troubling is the potential impact on the fairness of the proceedings – a clear example being circumstances where a witness who could give cogent potentially exculpatory evidence refuses to cooperate with the defence and to testify.

Although it is too early to assess impact<sup>212</sup> in effective witness protection measures the Court's Governance report is an important step in the right direction towards clarifying the respective roles and responsibilities of different organs of the Court and addressing overlapping functions. Lack of clarity concerning the scope of particular roles and obligations in certain areas, such as witness protection, has been a hindrance to efficiency in some aspects of the Court's operations. It is, however, too early to fully assess the impact of these efforts as a number of the measures are still at the initial implementation phase. Furthermore, the governance report addressed only the issue of internal coordination and overlapping roles, but did not attempt to clarify other important roles such as the respective management and oversight roles of the ASP and the ICC Presidency.

By achieving all these developments in witness protection, ICC have to be careful and balance the rights of the accused and protect the witnesses. Even though witnesses are not a party in the trial, both rights are equal and not absolute. For this reason they need to be balanced. This change should happen for 2 reasons: first in respect to principle to protect and second as a human right standard. In this context, the witness should be given the right of protection, the right to a legal assistance and the right to compensation as long as neither the Statute nor the RPE give the witness a right to compensation.

Still, the ICC has a lot of work and clarification to do, to succeed in the protection of witnesses and effectiveness of measures.

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<sup>210</sup> Under Article 93(1) of the Statute, the Court can request cooperation from States in this regard but only to facilitate the 'voluntary appearance of persons as witnesses or experts'. By contrast, Rule 54 of the Rules of Procedure and Evidence of the ICTY allows a Chamber to issue 'orders, summonses, subpoenas and transfer orders as may be necessary for purposes of an investigation or for the preparation or conduct of trial'.

<sup>211</sup> Article 69 of the Rome Statute.

<sup>212</sup> Ibid, p.33. (bar association)

# Annex

## Rome Statute

### Article 68

#### **Protection of the victims and witnesses and their participation in the proceedings**

1. 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 such 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.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. 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.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
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.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

## Rules of Procedure and Evidence ICC

### *Subsection 2 Protection of victims and witnesses*

#### **Rule 87**

##### **Protective measures**

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

(a) Such a motion or request shall not be submitted *ex parte*;

(b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;

(c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;

(d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and

(e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;

(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;

(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;

(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or

(e) That a Chamber conduct part of its proceedings in camera.

## **Rule 88**

### **Special measures**

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.
2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.
3. For inter partes motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis.
4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to inter partes motions or requests filed under seal shall also be filed under seal.
5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

## **Regulations of the Court ICC <sup>213</sup>**

### **Subsection 5**

#### **Protective measures**

#### **Regulation 41**

##### **Victims and Witnesses Unit**

The Victims and Witnesses Unit may, pursuant to article 68, paragraph 4, draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.

#### **Regulation 42**

##### **Application and variation of protective measures**

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to

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<sup>213</sup> Regulations of the Court ICC-BD/01-01-04, 26 May 2004.

any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.

2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.

3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

## **Universal Declaration of Human Rights.**

### **Article 10**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

## **European Convention of Human Rights.**

### **Article 6**

#### **Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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