

### (c) Case Analysis

## The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC

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#### Keywords:

**Abstract:** Thus far, witnesses have played a crucial role in most proceedings before the International Criminal Tribunal for the former Yugoslavia. It can be expected that this will also be the case in the proceedings before the future International Criminal Court. The author of the note focuses on the position of witnesses and compares the rules, practices, and experiences of the Tribunal with the Rome Statute in this respect. In particular, the support and protection of witnesses and the role of the Victims and Witnesses Units of the respective courts will be discussed.

### 1. INTRODUCTION

Unlike the Nuremberg prosecutors who had access to the Nazis' carefully kept documentation of the atrocities committed during World War II,<sup>1</sup> the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (Tribunal or ICTY) must rely heavily on the testimony of eye-witnesses. Most of these witnesses still live in volatile areas and have a reasonable fear of retaliation.<sup>2</sup> Witnesses have played and will continue to play a crucial role in most proceedings before the Tribunal. The protective measures developed and granted to witnesses at risk are thus not only important for the safety of the witnesses but also for the work of the Tribunal in general. Given this, it should be expected that the position of witnesses and issues relating to witness protection will be crucial also in the future International Criminal Court (ICC).

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1. M.C. Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 *Fordham International Law Journal* 1191 and 1206 (1995).
2. M. 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 *Howard Law Journal* 155, at 157 (1997).

The purpose of this note is to compare the rules, practices, and experiences of the Tribunal with the Statute of the ICC (Rome Statute)<sup>3</sup> and to look at possible developments with regard to the protection of the interests of witnesses. As a result of the energetic work of NGOs and interested states, the Rome Statute contains a number of articles concerning witnesses and victims.<sup>4</sup> The Rome Statute provides for a framework concerning witnesses and their protection which makes the purpose of the comparison useful, in spite of the fact that the Rules of Procedure and Evidence of the ICC are not yet enacted. In this note, I will focus on eye-witnesses and victim witnesses, leaving expert witnesses, detained witnesses, or the accused as a witness aside. I will compare the relevant differences between the Tribunal and the ICC, explain what assistance the respective Victims and Witnesses Units can provide, and conclude with a survey regarding the protection measures that can be granted in the interest of a witness.

## 2. GENERAL DIFFERENCES BETWEEN THE ICTY AND THE ICC

### 2.1. Basis of existence

The Tribunal is an *ad hoc* Tribunal that was established by the Security Council, acting under Chapter VII of the Charter of the United Nations, in its Resolution 827 of 25 May 1993.<sup>5</sup> It was established as a response to the continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia.<sup>6</sup> In its Resolution, the Security Council adopted the Statute of the International Tribunal,<sup>7</sup> as proposed in the

3. See Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court of 17 July 1998, UN Doc. A/CONF. 183/9 (Rome Statute of the International Criminal Court).
4. See R.S. Clark & D. Tolbert, *Toward an International Criminal Court*, in Y. Danieli *et al.* (Eds.) *The Universal Declaration of Human Rights: Fifty Years and Beyond* 99, at 111 (1998).
5. The Tribunal was established by the Security Council in its Resolution 827 of 25 May 1993, UN Doc. S/RES/827 (1993), following its consideration and approval of the Report of the Secretary-General of 3 May 1993, UN Doc. S/RES/25704 of 3 May 1993, submitted pursuant to paragraph 2 of Security Council Resolution 808 of 22 February 1993, UN Doc. S/RES/808.
6. The Security Council expressed its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in Bosnia and Herzegovina, "including reports of mass killings, massive, organized and systematic detention and rape of women and [...] 'ethnic cleansing'" constituted a threat to international peace and security, Security Council Resolution 827 (1993), *supra* note 5. The Tribunal was established because an international tribunal would contribute to ensuring that such violations would be halted and effectively redressed.
7. See Statute of the International Criminal Tribunal for the Former Yugoslavia as annexed to the Report of the Secretary General, *supra* note 5. The Statute can only be amended by the Security Council. It has been amended once, in Security Council Resolution 1166 of 13 May 1998, which provides for one additional Trial Chamber, UN Doc. S/RES/1166 (1998).

Report by the Secretary-General.<sup>8</sup>

The ICC on the other hand, is a treaty-based organ that was established by the adoption of the Rome Statute on 17 July 1998.<sup>9</sup> The Rome Statute, which will enter into force following the deposit of the 60th instrument of ratification with the Secretary-General of the United Nations,<sup>10</sup> provides for a permanent court with jurisdiction of a wider range of crimes over the territories of any of the state parties.

The difference in basis of the two institutions has resulted in differences in promulgation of the Rules of Procedure and Evidence. The Statute of the Tribunal (ICTY Statute), which was adopted very quickly by the Security Council, entrusted the power to the judges of the Tribunal, within certain limits, to promulgate procedural and evidentiary rules.<sup>11</sup> The ICC on the other hand, is a treaty-based organ which is the result of long negotiations between the state parties, whose Statute provides that the Rules of Procedure and Evidence shall be adopted by a two-thirds majority of the Assembly of the States Parties.<sup>12</sup> Thus, when considering the rules and measures discussed below, the following should be borne in mind. The Rules of Procedure and Evidence (Rules)<sup>13</sup> applicable to the Tribunal can, after careful consideration by the judges, be amended to meet the needs of the Tribunal, as they become apparent. In contrast, the rules applicable to the ICC can not be changed or fine-tuned as easily, since the amendment procedures of the ICC appear to be somewhat cumbersome. However, the drafters of the Rome Statute and the future Rules have, and will have, the advantage of being able to benefit from the precedents and experiences of the two *ad hoc* Tribunals; the ICTY and the International Criminal Tribunal for Rwanda.<sup>14</sup>

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8. Security Council Resolution 827 (1993), *supra* note 5, approved the Secretary-General's Report and adopted the ICTY Statute which was annexed to it, *supra* note 5.
  9. The Rome Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, *supra* note 3. The Rome Statute can only be amended after seven years from the entry into force of the Statute, on proposal by a State Party, by a two-thirds majority. *See* further Art. 121 of the Rome Statute.
  10. Art. 126(1) of the Rome Statute, *supra* note 3, provides: "[t]his Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."
  11. Art. 15 of the ICTY Statute, *supra* note 7, delegates to the judges of the Tribunal the power, within certain limits, to promulgate procedural and evidentiary rules, including the protection of victims and witnesses. The Rules, which can be amended if agreed by not less than nine judges at a plenary meeting, or otherwise adopted if unanimously approved by the judges, have been amended a number of times, the last time being 17 December 1998.
  12. *See* further Art. 51 of the Rome Statute, *supra* note 3. In addition, Art. 52 of the Rome Statute provides that the judges, by absolute majority, shall adopt the Regulations of the Court.
  13. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32, Rev. 14 (1998).
  14. The International Criminal Tribunal for Rwanda was established by the Security Council in its Resolution 955 of 8 November 1994, UN Doc. S/RES/955 (1994).

Despite the differences in basis, it is quite apparent that in several respects, the drafters of the Rome Statute have drawn upon the experiences of the Tribunal. For purposes of this note, it should be pointed out that the Rome Statute is more elaborate concerning matters relating to witnesses than the ICTY Statute, which only establishes the broad parameters of witness protection.

## 2.2. Registry

The powers and functions of the Registry differ between the two institutions; the Rome Statute provides for a different arrangement than the ICTY Statute. The Registrar, the head of the Registry of the Tribunal, is appointed by the Secretary-General of the United Nations and “is responsible for the administration and servicing of the International Tribunal”,<sup>15</sup> including both Chambers and the Office of the Prosecutor (OTP). The Registrar of the ICC, as the head of the Registry, will be “responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor”.<sup>16</sup> As the Office of the Prosecutor of the ICC will act independently as a separate organ of the Court, the Prosecutor – and not the Registrar – will have full authority of the administration of his or her Office.<sup>17</sup> Moreover, in contrast to the Registrar of the Tribunal, who is accountable to the Secretary-General of the United Nations, the Registrar of the ICC shall exercise his or her functions under the authority of the President of the Court.<sup>18</sup> There is obviously a major difference in terms of area of servicing as well as accountability. It can be concluded that the powers and position of the Registrar of the Tribunal are a lot stronger than those of the future Registrar of the ICC. As will be seen below, the powers and position of the Registry will affect the standing and powers of the Victims and Witnesses Unit.

## 2.3. Victims and Witnesses Unit

### 2.3.1. Tribunal

Article 22 of the ICTY Statute provides that: “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.” In addition, Article 15 of the ICTY Statute states: “[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for [...] the

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15. Art. 17 of the ICTY Statute, *supra* note 7.

16. Art. 43(1) of the Rome Statute, *supra* note 3.

17. *Id.*, Art. 42(1), 42(2), and Art. 43(1).

18. *Id.*, Art. 43(1) and 43(2).

protection of victims and witnesses”.

During the preparation of the Secretary-General’s Report, consideration was given to the possibility of including a separate unit within the Office of the Prosecutor to handle cases of rape and assault. However, in adopting the Rules of Procedure and Evidence, the judges decided for a Victims and Witnesses Unit under the authority of the Registrar. According to the President of the Tribunal, the creation of the Unit in the Registry shifted the emphasis of its work from ensuring effective investigation and prosecution of a sensitive case to the more human concern of providing counseling and support services to victims and witnesses.<sup>19</sup> Rule 34 of the Rules begins:

- (A) There shall be set up under the authority of the Registrar a Victims and Witnesses Unit consisting of qualified staff to:
  - (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
  - (ii) provide counselling and support for them, in particular in cases of rape and sexual assault.

Thus far, the Tribunal’s and the Victims and Witnesses Unit relationship with victims has been limited to victims as witnesses.<sup>20</sup> The rules relating to restitution of property and compensation to victims have not yet been applied.<sup>21</sup>

It should be underlined that the Victims and Witnesses Unit is impartial in that it provides assistance to all witnesses, regardless of whether they will appear for the Prosecution or the Defence.<sup>22</sup> Thus, one of the advantages of placing the Unit within Registry is that it provides for a sufficiently neutral place, which can take the interests of the witness, regardless of his or her role in the trial, into consideration rather than the interest of the Prosecutor or the accused. As the Registrar of the Tribunal pointed out in her address to the Preparatory Committee on the Establishment of the ICC, the interests of a witness in his or her personal security and safety do not necessarily coincide with the interests of either party in protecting the witness. The interests of a party will usually be limited to a witness’ role in ‘winning’ the case.<sup>23</sup> For this reason, from a witness’ point of view,

19. Statement by the President of the Tribunal, Judge Antonio Cassese, UN Doc. IT/29 (1994), reproduced in V. Morris & M.P. Scharf, *An Insider’s Guide to The International Criminal Tribunal for The Former Yugoslavia* 2, 649, at 653 (1996).

20. Clark & Tolbert, *supra* note 4, at 106.

21. Rule 105, *supra* note 13, provides for restitution of property in certain cases. Rule 106 provides for the communication to states concerned the judgment finding the accused guilty of a crime which caused injury to a victim. Pursuant to the relevant legislation, a victim may bring an action in a national court to obtain compensation. When doing so, the judgment of the Tribunal is final and binding.

22. Secretary-General’s Second Annual Report, UN Doc. A/50/365 (1995), para. 113.

23. Address of the Registrar of the Tribunal, Mrs. Dorothee de Sampayo Garrido-Nijgh, to the Preparatory Committee on the Establishment of an International Criminal Court (March/April Session, 16 March – 3 April 1998, New York) on 19 March 1998. *See also* Clark & Tolbert, *supra* note 4, at 109.

it is also preferable to place a witness unit within the Registry rather than having a witness unit within the Office of the Prosecutor and a separate arrangement for defence witnesses.

In this connection it is worth noting that the Victims and Witnesses Unit of the Rwanda Tribunal is also located within the Registry. The Victims and Witnesses Unit has remained within the Registry, in spite of the 1997 report of the United Nations Office of Internal Oversight Services on the Rwanda Tribunal, which recommended that the Victims and Witnesses Unit should be placed within the Office of the Prosecutor. This recommendation was a consequence of the difficulties the Rwanda Tribunal had experienced in, *inter alia*, creating and staffing the Victims and Witnesses Unit in the Registry.<sup>24</sup>

Two recent decisions indicate that once the testimony begins, the difference between Defence and Prosecution witnesses becomes less distinct. In a decision in the *Kupreškić* case regarding communication between the parties and their witnesses, Trial Chamber II ruled that a witness, once he or she has taken the Solemn Declaration, is a witness of truth before the Tribunal and not strictly a witness for either party.<sup>25</sup> A similar position was taken by Trial Chamber I in its recent decision in the *Jelisić* case.<sup>26</sup>

A Chamber can also call a witness on its own initiative.<sup>27</sup> Considering that such a witness does not 'belong' to either of the parties, the advantage of having a neutral witness unit is again underscored. Another, rather obvious, advantage with one witness unit dealing with all witnesses is that it is more efficient and that both parties will be able to benefit from the expertise gained within the unit.

It should be stressed, however, that the Victims and Witnesses Unit maintains a strict separation between witnesses called by the Defence and those called by the Prosecution. Not only will Prosecution and Defence witnesses be housed in separate accommodation, there are also separate waiting rooms at the premises of the Tribunal.<sup>28</sup>

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24. Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, UN Doc. A/51/789 (1997), at 99; and V. Morris & M. P. Scharf, *The International Criminal Tribunal for Rwanda I*, at 404 *et seq* (1998).

25. Prosecutor v. Kupreškić *et al.*, Decision on Communication Between the Parties and Their Witnesses, Case No. IT-95-16-T, Tr. Ch. II, 21 September 1998.

26. Prosecutor v. Jelisić & Cesić, Decision on Communication Between Parties and Witnesses, Case No. IT-95-10-T, Tr. Ch. I, 11 December 1998. In this decision it was stated that a witness who makes the Solemn Declaration at the latest, the witnesses must no longer be considered witnesses of either of the parties to the trial but only as a witness of justice.

27. Rule 98, *supra* note 13, provides that a Trial Chamber may *proprio motu* summon witnesses and order their attendance.

28. Secretary-General's Second Annual Report, *supra* note 22, para. 114.

### 2.3.2. ICC

The Rome Statute provides for a Victims and Witnesses Unit. Article 43(6) provides:

[t]he Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and 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 such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Thus, the Victims and Witnesses Unit of the ICC will also be placed within the Registry. As explained in section 2.2., the Registry of the ICC will not be as independent or strong as the Registry of the Tribunal, a fact that may have implications for the functioning of the Victims and Witnesses Unit.

The above quoted paragraph states that the Unit shall provide assistance “in consultation with the Office of the Prosecutor”. The fact that the paragraph makes a reference to the Office of the Prosecutor but not to the Defence is a result of a compromise during the negotiations in Rome. Whereas most states wanted a Victims and Witnesses Unit to be placed within the Registry, the United States of America and some other states insisted that such a Unit should be placed within the Office of the Prosecutor. David Scheffer, United States Ambassador at Large for War Crimes Issues, when insisting that the Victims and Witnesses Unit should be located within the Office of the Prosecutor, stated that the performance of the Victims and Witnesses Units of the two *ad hoc* Tribunals, where placed within the Registry, has not been satisfactory. Moreover, Scheffer noted, witness protection is not a bureaucratic function; it is very serious business that directly involves the Prosecutor, who needs the trust of witnesses and who has a very direct stake in protecting them.<sup>29</sup> In my view, the position of the United States neglects the interests of Defence witnesses. Furthermore, as noted in section 2.3.1., the interests of the party calling a witness and the interests of the witness do not always coincide.

Although the solution agreed upon is to be preferred to placing the Victims and Witnesses Unit within the Office of the Prosecutor, in my view, this compromise resulting in a reference to the Office of the Prosecutor is unfortunate. The fact that the Office of the Prosecutor should be consulted appears to undermine the neutral position of the Victims and Witnesses Unit within the Registry.

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29. Witness and Victim Protection in International Criminal Courts, address by D.J. Scheffer, US Ambassador at Large for War Crimes Issues, at Fordham University School of Law, New York, 28 January 1998, Witness and Victim Protection in International Criminal Courts, [http://www.state.gov/www/policy\\_remarks/1998/980128\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980128_scheffer_icc.html) (the official US Government source for information on www). Cf. The address by the Registrar of the ICTY, as referred to above in Section 2.3.1.

The consequences this may have for Defence witnesses will be discussed in section 3.2.1 *infra*.

### 3. ASSISTANCE PROVIDED BY THE VICTIMS AND WITNESSES UNIT

#### 3.1. Tribunal

The Victims and Witnesses Unit of the Tribunal was the first of its kind in any international context.<sup>30</sup> At an early stage, the Tribunal recognized that in giving testimony before it, victims and witnesses will have to relive their experiences in a country far away from their own and without support from relatives and friends which they normally would receive if testifying in an ordinary court of law in their own country, in time of peace. Moreover, it was also recognized that these victims and witnesses may be afraid of reprisals. The Victims and Witnesses Unit was therefore established in an attempt to alleviate these anxieties as much as possible and to create an environment in which witnesses could give their testimony with dignity and in safety.<sup>31</sup> More specifically, the assistance the Unit provides can be divided into two parts, support and protection.

##### 3.1.1. Support

The support provided by the Victims and Witnesses Unit concerns the administrative, financial, and practical arrangements required to bring a witness from his or her country of residence to The Hague to appear before the Tribunal. The Unit also provides the witness with basic information about the work of the Tribunal, the Victims and Witnesses Unit, the trial procedures, and the witness' stay in The Netherlands.<sup>32</sup>

The Victims and Witnesses Unit will, in accordance with Rule 34, provide emotional support and counselling to a witness, if needed. If so requested by a witness, specialist medical and psychological care will also be made available.<sup>33</sup> During the witness' stay in The Netherlands, the Unit provides a 24-hour, live-in support programme at the witness' place of accommodation. The witness assistants who work with this programme all speak Serbo-Croatian, but are not themselves from the areas involved in the conflict of the former Yugoslavia.<sup>34</sup>

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30. Secretary-General's Second Annual Report, *supra* note 22, para. 109.

31. *Id.*, paras. 109-110.

32. This information is also made available to the witness in the form of a leaflet, produced by the Victims and Witnesses Unit, Information on VWS. Secretary-General's Second Annual Report, *supra* note 22, para. 11.

33. *Id.*, para. 121.

34. Secretary-General's Fourth Report, UN Doc. A/52/375 (1997), para. 94.



The Victims and Witnesses Unit has developed a number of policies and programmes. These policies establish, *inter alia*, the criteria for: a witness to be accompanied by a support person when travelling to The Hague to testify; child care; compensation for lost wages and daily allowance, etc.<sup>35</sup> In developing these policies, the Unit has applied the relevant United Nations standards, such as the 1985 General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>36</sup>

The above mentioned support relates mainly to the time of the testimony as the Victims and Witnesses Unit does not have the possibility to provide continued support after the witness has returned to his or her country of residence. This was noted in the above-mentioned decision in the *Kupreškić* case, in which it was ruled that during the testimony the parties may not talk to the witness. It was stated that the Victims and Witnesses Unit

is mandated to treat all witnesses equally and to assist and accompany all witnesses during their stay in *The Hague*, and to manage the practical aspects of their appearance before the Tribunal.<sup>37</sup>

so that the Prosecution or the Defence would not need to be in communication with the witness during his or her testimony in order to provide him or her with psychological or moral support. However, the Victims and Witnesses Unit cooperates closely with non-governmental organizations which support its work by offering specialist care, legal expertise, and support for witnesses once they have returned to their countries of residence.<sup>38</sup> Some witnesses may, however, reside in areas where such facilities are not readily available.

It should be stressed that it is within the discretion of the Victims and Witnesses Unit, acting under the authority of the Registrar, to decide whether support, counselling, or specialist medical and psychological care is needed. As will be seen below, this will not be the case at the ICC.

### 3.1.2. Protection

The activities of the Victims and Witnesses Unit also include the protection of witnesses. Staff members of the Unit, when required, travel to the area where the witness is residing, in order to escort vulnerable witnesses to The Hague for

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35. See further leaflets issued by the Victims and Witnesses Unit: Information on VWS; Child Care Provisions; Compensation for Lost Wages; Daily Allowance Policy; Accompanying Support Person; Provisions for Dependants; and, Request for Medical Examinations.

36. Secretary-General's Second Annual Report, *supra* note 22, para. 116. General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34 (1985).

37. Prosecutor v. Kupreškić *et al.*, *supra* note 25; and Prosecutor v. Jelisić & Cesić, *supra* note 26 (emphasis added).

38. Secretary-General's Third Annual Report, UN Doc. A/51/292 (1996), para. 125.

purposes of security and/or support. While the witnesses are in The Netherlands, the Dutch government is responsible for their safety.<sup>39</sup> To facilitate its work, the Victims and Witnesses Unit liaises closely with the government to provide the necessary data enabling it to take the appropriate protective measures.<sup>40</sup>

A Trial Chamber may consult the Victims and Witnesses Unit on which protective measures should be granted, or indeed disclosed. For instance, in two recent orders by Trial Chamber II, in the *Kupreškić* and *Furundžija* cases respectively, the Victims and Witnesses Unit was, *inter alia*, requested to make investigations and seek the consent of certain protected witnesses to have redacted transcripts or their closed-session testimonies disclosed to the accused and defence counsel in other pending and future cases before the Tribunal, and to report its findings to the Trial Chamber.<sup>41</sup>

It is submitted that when Rule 75 was amended to allow the VWU to also request a Judge or a Chamber to order appropriate measures for the privacy and protection of victims and witnesses,<sup>42</sup> the Unit's standing was made significantly stronger. The Victims and Witnesses Unit has not yet formally requested protective measures for a witness. This may seem surprising, but it is a result of the parties willingness to request protective measures and of the Trial Chambers' willingness to order them, *proprio motu*, after having consulted the Victims and Witnesses Unit. It is possible, however, that the need for the Victims and Witnesses Unit to avail itself of the possibility to formally request protective measures will increase in connection with future high profile cases.

The protection measures, just like the support measures, are mainly limited to the time during the testimony. As the Tribunal, or the United Nations in general for that matter, does not have a police force of its own, it can not guarantee the protection or safety of its witnesses or members of their families after the testimony.<sup>43</sup>

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39. Arts. XXIII and XXVI of the Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. S/1994/848.

40. Secretary-General's Third Annual Report, *supra* note 38, para. 123. However, at the premises of the Tribunal, it is the Chief of Security, acting under the authority of the Registrar, who is responsible for the safety of the witness.

41. Prosecutor v. Furundžija, Order, Case No. IT-95-17/1-T, Tr. Ch. II, 10 December 1998; and Prosecutor v. Kupreškić & others, Order, Case No. IT-95-16-T, Tr. Ch. II, 10 December 1998.

42. According to Rule 75: "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 Unit, order appropriate measures for the privacy and protection of victims and witnesses". See further, J.R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda 275 et seq.* (1997).

43. Trial Chamber II noted that the "Tribunal is in no position to protect the witnesses and or members of their family after they have testified". Prosecutor v. Tadić, Decision on the Prosecutor's Motion, Protective measures for Victims and Witnesses, Case No. IT-94-I-T, Tr. Ch. II, 10 August 1995, para. 77.

However, the Victims and Witnesses Unit is arranging witness relocation for witnesses who, as a result of their appearance before the Tribunal, can not return to their homes due to concerns for their safety.<sup>44</sup> For these rare cases, the Tribunal has sought the cooperation of states, to relocate to their territories, these witnesses and their close relatives, if any. The Tribunal has recently concluded a number of agreements with states that are willing to accept such witnesses.<sup>45</sup> In some cases, the witnesses can have their identities changed and be entered into the domestic witness protection programs in the country. In most cases however, the relocation of a witness to another country as such provides him or her with sufficient protection. It should be noted that the Victims and Witnesses Unit will, if deemed necessary, recommend relocation of a witness to the Registrar who will decide whether to make a request to a state to accept the witness for relocation or not. Thus, this is a security arrangement under the authority of the Registrar and not a protective measure that must be granted by a judge or a Trial Chamber.

### 3.2. ICC

#### 3.2.1. *Support and protection*

As noted above, Article 43(6) of the Rome Statute provides that the Victims and Witnesses Unit shall provide protective measures and 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 such witnesses. In addition, Article 68(4) of the Rome Statute provides: “[t]he 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.”<sup>46</sup> The words “may advise” appear to indicate that the decisions regarding these measures will be taken either by the Prosecutor or the Court. Considering that Article 43(6) clearly states the core tasks of the Victims and Witnesses Unit and the fact that Article 68(4) provides that the Unit may *advise* the Prosecutor and the Court regarding these measures, the conclusion must be that the drafters of the Rome Statute were not prepared

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44. The Victims and Witnesses Unit’s leaflet ‘Information on VWS’, at 3. *See also* Clark & Tolbert, at 106.

45. *Cf.* Secretary-General’s Third Annual Report, *supra* note 38, para. 124. As the agreements concern the safety and security of witnesses, the terms and details of these agreements are confidential. *See further* “United Kingdom becomes first state to agree to provide enhanced assistance to witness protection efforts of International Tribunal”, Press Release of the Tribunal, CC/PIO/258-E, 7 November 1997.

46. This provision is peculiar in that it refers to both the Court and the Prosecutor, considering that Art. 34 states that the Office of the Prosecutor is one of the organs of the Court. However, in this context the Court must be interpreted to mean a Chamber.

to provide the Victims and Witnesses Unit with decision-making power concerning the tasks it has been designed to provide.

With regard to protective measures in Court, I agree that it is appropriate to limit the role of the Unit to an advisory rather than a decision-making role. It should be kept in mind that protective measures usually affect the character of the trial and sometimes the possibility for the accused to defend him- or herself. Consequently, such measures should be granted by the Court. As explained in Section 3.1.2., the role of the Victims and Witnesses Unit of the Tribunal in this respect has been to advise and, if needed, to request a judge or a Chamber to grant protective measures.

On the other hand, an arrangement where the Victims and Witnesses Unit will advise the Prosecutor or the Court regarding most security arrangements, counselling, and other assistance, seems somewhat awkward, considering that the Unit, rather than the Prosecutor or the Court, will hold the expertise in this regard. It is possible that in practice, the Prosecutor and the Court will delegate their decision-making power regarding the regular day to day decisions to the Victims and Witnesses Unit, and that the Unit will only be required to 'advise' the Prosecutor or the Court, i.e., not be allowed to make the decision itself, when it concerns certain far-reaching measures. It is also noteworthy that the Rome Statute does not specify in which cases the Prosecutor shall have the decision-making power in these matters.

The experience of the Tribunal so far has clearly shown that also Defence witnesses have needed and been granted protective measures by the Trial Chambers.<sup>47</sup> In view of the experiences of the Tribunal in this regard, it should be expected that a number of Defence witnesses will require protective measures and further assistance when testifying before the ICC. As noted in section 2.3.2., the reference to the Office of the Prosecutor undermines the neutral position of the Victims and Witnesses Unit within the Registry. It may give the unfortunate impression that the Rome Statute is biased towards witnesses of the Prosecution. Even though the wording does not exclude protective measures and assistance for Defence witnesses, it is submitted that it creates an imbalance *vis-à-vis* witnesses called by the Office of the Prosecutor. The Rome Statute could be interpreted to read that the Office of the Prosecutor should be consulted regarding all measures, including protection, regardless of whether it concerns a witness for the Defence or the Office of the Prosecutor. In my view, such an arrangement would not be appropriate, as there is a strong possibility that a Defence witness, as well as the accused, might feel that these matters can not be treated independently within the Office of the Prosecutor. The best interpretation of the provision would be that the Office of the Prosecutor and the Defence should be consulted regarding their respective witnesses.

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47. See e.g., the Tadić and Čelebići trials; Prosecutor v. Tadić, Case No. IT-94-I-T; and Prosecutor v. Delalić & Others, Case No. IT-96-21-T.

The fact that the term “consulting” has been used should imply that the Victims and Witnesses Unit would not be bound by the opinion of the Office of the Prosecutor. On the other hand, as discussed above, the Unit will nevertheless be depending on the opinion of the Office of the Prosecutor, as it will not have decision-making power with regard to these measures. While the position of Defence witnesses is likely to be addressed and remedied in the Rules of Procedure and Evidence and in practice, it must be concluded that the Rome Statute is weak in this respect.

Although it falls outside the scope of this note to discuss in detail the issue of the role of the victim in the process before the ICC, it must be stressed that in contrast to the ICTY Statute, the Rome Statute provides for a clear role of the victim. Article 68(3) provides that where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented.<sup>48</sup> Article 75 provides for reparations to victims; including restitution, compensation, and rehabilitation. The fact that the victim has been given a clear role in the proceedings, other than as a witness, will entail that the Victims and Witnesses Unit of the ICC will be faced with a vaster range of tasks than those presently performed by the Victims and Witnesses Unit of the Tribunal. For instance, it is possible that the Victims and Witnesses Unit will be charged with the appointment of legal representatives of victims as well as the dissemination of information and monitoring of claims for reparations by victims.

#### **4. HOW ARE THE INTERESTS OF WITNESSES PROTECTED?<sup>49</sup>**

##### **4.1. For whom and under what circumstances will certain measures be granted?**

###### *4.1.1. Tribunal*

Neither the Statute nor the Rules provide for much guidance regarding which witnesses should be considered to be in particular need of support or protection, or what factors should be taken into account when granting such measures. Rule

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48. Art. 68(3) reads in full: “[w]here 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.”

49. In this note I have chosen not to include safe conduct and the rule against self-incrimination as measures in the interests of a witness. Safe conduct provides for a different kind of protection in the interest of a witness, in that it restricts the powers of the Prosecutor by protecting the witness from being arrested as a suspect during his or her stay in The Netherlands. Likewise, the principle against self-incrimination protects the witness from being forced to admit guilt when testifying before the Tribunal.

75, which is the main provision regarding witness protection, is not very specific with regard to what factors should be taken into consideration when granting protective measures.<sup>50</sup> The general rule regarding witness protection is to be found in Sub-rule (A), which provides that a judge or a Chamber may order “appropriate measures” for the privacy or protection of victims and witnesses, provided that they are consistent with the rights of the accused.<sup>51</sup> Sub-rule (B)(iii) notes appropriate measures to facilitate the testimony of “vulnerable victims and witnesses”. In addition, Rule 69(A) provides that the Prosecutor may apply for certain protective measures in “exceptional circumstances” when a witness or a victim may be “in danger or at risk”. As we shall see below, certain requirements for some of the protective measures for witnesses have been developed in practice at the Tribunal. However, it should be kept in mind that in principle these protective measures are subject to change, as the Rules can be amended by the judges. Moreover, the main decisions on these matters have been delivered by Trial Chambers; the Appeals Chamber of the Tribunal have not yet delivered any decision relating to witness protection.

The Rules give special attention to witnesses and victims of sexual assault. Rule 34(A)(ii) provides that the Victims and Witnesses Unit shall provide counselling and support, in particular to victims and witnesses of rape and sexual assault. Rule 34(B) states that in the employment of staff of the Victims and Witnesses Unit, due consideration shall be given to the employment of women. These provisions have been drafted out of concern for female victims of sexual violence. In this connection it is also worth noting that Rule 96 provides, *inter alia*, that in cases of sexual assault, no corroboration of the victim’s testimony shall be required, and that prior sexual conduct of the victim shall not be admitted in evidence. This is essentially a rape shield rule,<sup>52</sup> which obviously has been

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50. Rule 75 reads in full: “(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (B) A Chamber may hold an *in camera* proceeding to determine whether to order: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (a) expunging names and identifying information from the Chamber’s public records; (b) non-disclosure to the public of any records identifying the victim; (c) giving of testimony through image or voice altering devices or closed circuit television; and (d) assignment of a pseudonym; (ii) closed sessions, in accordance with Rule 79; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed-circuit television. (C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.”

51. It should be noted that while some measures relate mainly to the privacy of a witness and others mainly to the security of a witness, a measure such as a closed session can be granted to protect the security and/or the privacy of the witness.

52. See further A.C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses’ Needs Against Defendants’ Rights*, 46 *Hastings Law Journal* 909, at 932 et seq. (1995).

drafted to protect the privacy and dignity of the victim when testifying as a witness.<sup>53</sup>

As noted in Section 3.1.2., the support and the protective measures provided to witnesses by the Tribunal relate mainly to the time of the testimony. The character of the protective measures granted so far have been influenced by the lack of possibility to directly protect witnesses after their testimony.<sup>54</sup> As a consequence, most of the protective measures granted at the Tribunal aim at minimizing the protection need of the witness in his or her country of residence, after having provided testimony. In addition, as described in section 3.1.2., the Tribunal can, in exceptional cases, provide for protection also after the completion of the testimony, in the sense that it can relocate witnesses to other states.

#### 4.1.2. ICC

The Rome Statute provides for a rather elaborate framework regarding witness protection. The key article on witness protection, Article 68, provides the Court with clear directions in its first paragraph; it shall provide for appropriate measures to protect the safety, psychological well-being, dignity and privacy of victims and witnesses.<sup>55</sup> In comparison with the rules applicable to the Tribunal, Article 68(1) is a novelty in that it states a number of factors that the Court must take into consideration when granting the “appropriate measures”. The Statute directs the Court to have regard to all relevant factors, including age, gender, health, and the nature of the crime, in particular where the crime involves sexual or gender violence or violence against children. Likewise, the Prosecutor is di-

53. In addition, Rule 75(C) provides that a Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

54. A. Klip, *Witnesses Before the International Criminal Tribunal for the former Yugoslavia*, 67 *International Review of Penal Law* 267, at 280 (1996).

55. The relevant paragraphs of Art. 68 of the Rome Statute, *supra* note 3, read as follows: “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 2, 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. [...] 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.”

rected to do the same, in particular during the investigation and prosecution. Article 68(1) also provides that the measures can not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>56</sup> In addition, the practical experience gained from the work of the Tribunal, and in particular the experience gained by the VWU, will probably prove to be invaluable for the future ICC in this regard.<sup>57</sup>

The Rome Statute provides for special attention for victims of sexual violence and children who are either victims or witnesses. Article 68(2) contains a very interesting feature. It states that for purposes of protection of witnesses and victims, *in camera* proceedings and the presentation of evidence by electronic or special means may be allowed and that "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". There is thus a presumption for protective measures in cases of testimony by a victim of sexual violence or when a child has been involved. This presumption also entails that in these cases, a party would not have to apply for e.g., an *in camera* hearing, as this will be automatically implemented, unless otherwise ordered by the Court. Article 68(2) also provides that, in these cases, the Court should have regard to all circumstances, particularly the views of the victim or witness. The presumption for witness protection in these particular cases is further reaching than the applicable rules of the Tribunal, where protective measures are the exception in all cases, including testimony regarding sexual assault and testimony by children.

In addition, Article 43(6) provides that the Victims and Witnesses Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

The measures provided for in the Rome Statute also appear to mainly relate to the time of the testimony. Probably these measures will, just like most measures granted at the Tribunal, aim at minimizing the risks, or the need for protection, when the witness returns to his or her country of residence. It should be noted that Article 93(1)(j) provides that in relation to investigations or prosecutions, state parties shall comply with requests by the Court to provide assistance for the protection of victims and witnesses. This provision should enable the Court to request a state party to provide various sorts of protection for witnesses

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56. In this regard it should also be noted that Arts. 57 and 64 which deal with the functions and powers of the Pre-Trial Chamber and Trial Chamber respectively, both note, *inter alia*, the *protection* and *privacy* of victims and witnesses. Art. 43(6) provides that the Victims and Witnesses Unit shall provide certain arrangements and measures to witnesses and victims who appear before the Court and others *who are at risk* on account of testimony given by such witnesses (*Italics added*). In addition, although Art. 54(1)(b) does not explicitly speak about protection, it provides that when the Prosecutor is taking appropriate measures to ensure an effective investigation and prosecution, he or she is under an obligation to respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and to take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.

57. Clark & Tolbert, *supra* note 4, at 106.



on its territory, including entering a witness into its domestic witness protection program. In fact, if used in a progressive way, this provision could prove to be very useful, particularly in relation to protection and support of witnesses before and after the testimony. If so, the ICC would, in contrast to the Tribunal, be in a position to provide protection and support for a longer period of time, if needed.

## 4.2. Testimony outside the Courtroom as a protection measure

### 4.2.1. Tribunal

As a general rule, the hearings of the Tribunal are held in public and televised with full disclosure of the identity and whereabouts of the witness.<sup>58</sup> Rule 90(A) provides that witnesses shall, in principle, be heard directly by the Chambers. However, under certain circumstances, a Chamber can allow for exceptions to the general principle that witnesses shall be physically present at the seat of the Tribunal.<sup>59</sup>

A Chamber may, as provided in Rule 90(A), in exceptional circumstances and in the interests of justice, authorise the receipt of testimony via video-conference link. Through the live video link, the Court will be able to examine the witness who was unable or unwilling to travel to The Hague to testify. In the *Tadić* case, the two following criteria were established for allowing video-conferencing: the testimony of the witness must be sufficiently important to make it unfair to proceed without it; and the witness must be unable or unwilling to come to the Tribunal.<sup>60</sup> A subsequent decision in *Delalić* applied the two criteria established in the *Tadić* decision and added a third criterion: the accused must not thereby be prejudiced in the exercise of his right to confront the witness.<sup>61</sup>

58. Art. 20(4) of the ICTY Statute, *supra* note 7, provides: “[t]he hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.” Rule 78 states: “[a]ll proceedings before a Trial Chamber, other than the deliberations of the Chamber, shall be held in public, unless otherwise provided.”

59. Rule 90(A), *supra* note 13, also provides for another exception to the general rule that witnesses shall be heard directly in that it states that a Chamber can order a witness to be heard by means of deposition as provided for in Rule 71. This rule provides that at the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial. It should be noted however, that deposition in contrast to videoconferencing, does not provide the accused with the possibility to confront the witness. In this connection Rule 94 *ter* regarding affidavit evidence should also be noted.

60. Prosecutor v. Tadić, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, Case No. IT-94-1-PT, Tr. Ch. II, 25 June 1996, para. 19. However, this was stated in relation to Rule 71(D) which was used for purposes of videoconferencing before Rule 90(A) was amended to allow for videoconferencing.

61. Prosecutor v. Delalić *et al.*, Decision on the Motion to Allow Witnesses K, L and M to give their Testimony by Means of Video-Link Conference, Case No. IT-96-21-T, Tr. Ch. II, 28 April 1997, para. 17.

For vulnerable witnesses, such as rape victims, a Chamber may order that evidence be given by one-way closed circuit television, so that the witness need not see the accused.<sup>62</sup> For this, the witness' testimony will be given in a separate room at the premises of the Tribunal. The Court, however, will be able to see and hear the witness on the television screens in the Courtroom.<sup>63</sup>

#### 4.2.2. ICC

Just like the ICTY Statute, the Rome Statute provides that the trials shall be held in public and that the testimony of a witness at trial shall be given in person.<sup>64</sup> However, Article 69(2) foresees some exceptions to this rule in the Rules of Procedure and Evidence. Article 69(2) also provides that the Chambers of the Court may, *inter alia*, permit the giving of *viva voce* (oral) or recorded testimony of a witness, by means of video or audio technology. In addition, Article 68(2) provides that a Chamber may, to protect victims and witnesses, allow the presentation of evidence by electronic or other special means.

Moreover, Article 93(1)(b) states that the Court can request the assistance of a state party for purposes of taking evidence, including, *inter alia*, testimony under oath. Thus, this provision allows for testimony before national authorities for purposes of ICC proceedings, if so requested by the Court.

These provisions appear to provide for a number of alternatives for the Court in case a witness is at serious risk or otherwise not in a position to testify in person in open court. These provisions would allow for the employment of remote location testimony and video-conferencing as above discussed, and probably other means not presently used at the Tribunal. However, Article 67(1)(e), concerning the right of the accused to examine witnesses against him or her, must not be forgotten in this regard.

### 4.3. Withholding certain identifying details regarding the witness as a means of protection

#### 4.3.1. Tribunal

For protection or privacy purposes, a judge or a Chamber may order that the names of witnesses be redacted from all existing public Court documents, such as transcripts, Orders, Decisions, and Judgments.<sup>65</sup> A Chamber may also order

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62. Rule 75(B)(i)(c), *supra* note 13, provides for closed-circuit television as a protective measure.

63. *Id.*, Rule 75(B)(1)(c). See *Prosecutor v. Tadić*, *supra* note 43.

64. Rome Statute, *supra* note 3, Arts. 67(1) and 69(2).

65. Rules of Procedure and Evidence, *supra* note 13, Rule 75(B)(i)(a).

that identifying information, such as the name, address, and whereabouts of the witness be sealed and not included in any of the Tribunal's public records.<sup>66</sup>

In addition, a Chamber may order image altering devices and voice distortion devices that will result in a scrambled appearance of the face and/or distortion of the voice of the witness on the Court television.<sup>67</sup>

#### 4.3.2. ICC

Although the Rome Statute does not specifically provide for any measures that correspond to the above-mentioned ones, such and similar measures are likely to be employed in the proceedings before the ICC. Measures like redaction, voice, and image distortion will either be seen as measures falling within the general provision on protection, Article 68(1), or be considered as the "presentation of evidence by electronic or special means", as provided for in Article 68(2). Moreover, it should be kept in mind that the Rome Statute only provides for the basic framework and that in due time, the measures will be developed in the Rules of Procedure and Evidence and in practice.

### 4.4. Closed session hearings

#### 4.4.1. Tribunal

All proceedings before a Trial Chamber, other than the deliberations, shall be held in public, unless otherwise provided.<sup>68</sup> Rule 79(A)(ii) provides that "[t]he Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of: [...] (ii) safety, security or non-disclosure of the identity of a victim or a witness as provided in Rule 75; [...]."<sup>69</sup> A Chamber may consequently permit witnesses to give evidence *in camera*.

#### 4.4.2. ICC

Article 68(2) provides that as an exception to the principle of public hearings, a Chamber may, to protect victims and witnesses, conduct any part of the proceedings *in camera*. Such protection may be granted to any kind of witness, but

66. *Id.*, Rule 75(B)(i)(a-b). See e.g., Prosecutor v. Tadić, *supra* note 43; or Prosecutor v. Delalić *et al.*, *supra* note 61.

67. Rules of Procedure and Evidence, *supra* note 13, Rule 75(B)(i)(c). See Prosecutor v. Tadić, *supra* note 43; Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Facial Distortion of Broadcast Images of Witnesses, Case No. IT-94-1-PT, Tr. Ch. II, 2 August 1996, and Prosecutor v. Delalić *et al.*, *supra* note 61.

68. ICTY Statute, *supra* note 7 and Rule 78.

69. It should be noted that Rule 75(B)(ii) refers to the above mentioned Rule 79(A)(ii). The other reasons provided for in Rule 79(A) are: (i) public order or morality; and (iii) the protection of the interests of justice. Rule 79(B) provides that the Trial Chamber shall make public the reasons for its order.

as explained in section 4.1.2., the paragraph provides that *in camera* proceedings shall be used when victims of sexual violence are testifying or when children are involved, unless otherwise ordered by the Court. This presumption also entails that in such a case, unless otherwise ordered, a party would not have to apply for an *in camera* hearing, as this will automatically be implemented. The presumption for *in camera* proceedings in cases where a victim of sexual violence or where children are involved provides for a large exception to the general principle of public hearings. Needless to say, this provision will also have ramifications for the rights of the accused. This exception is further reaching than the applicable rules at the Tribunal, where the presumption for a public hearing is also valid in cases of sexual violence or where children have been involved.

#### 4.5. Confidentiality and anonymity

##### 4.5.1. Tribunal

Orders granting confidentiality form the majority of decisions relating to protective measures at the Tribunal.<sup>70</sup> A Chamber may allow for confidentiality by ordering that: a) the name, address, whereabouts, and other information which may identify the witnesses be withheld from the public and the media; b) the identity of witnesses shall not be disclosed to the public and the media. In this case, the witnesses will be assigned a pseudonym by a Chamber which shall be used in all trial proceedings and when all parties are discussing the trial; and, or, c) the public and the media be ordered not to photograph, video, record or sketch the witnesses while they are at the Tribunal. Although the legal basis for the measure is to be found in the general provision on witness protection in Rule 75(A), confidentiality is a measure that has been developed in practice by the Trial Chambers of the Tribunal. The main concern of the Trial Chambers granting confidentiality has been the need to balance matters of witness protection and the procedural rights of the accused.<sup>71</sup> This was considered in a decision in the *Tadić* case, where it was held that confidentiality was justified if special considerations were at hand, such as in cases involving sexual assault.<sup>72</sup>

The above-mentioned *Tadić* decision also granted witness anonymity, which, if granted, results in the name and other identifying data of the witness being withheld even from the other party to the proceedings.<sup>73</sup> Such an extreme meas-

70. Y.M.O. Featherstone, *The International Criminal Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection*, 10 LJIL 179, at 188 (1997).

71. The procedural rights include the right to a public trial and the right of an accused to examine witnesses against him or her, as provided in Art. 21(4)(e) of the ICTY Statute, *supra* note 7.

72. *Prosecutor v. Tadić*, *supra* note 43, para. 42. *See also* *Prosecutor v. Tadić*, *supra* note 60; and *Prosecutor v. Delalić et al.*, *supra* note 61.

73. *Prosecutor v. Tadić*, *supra* note 43. *See also* the Separate Opinion of Judge Stephen in the same case. For detailed commentaries on this particular decision, *see e.g.*, M. Leigh, *The Yugoslav Tribunal:*

ure will only be granted in highly exceptional circumstances. The controversial decision to allow for anonymous witnesses was not made lightly; Presiding Judge Kirk McDonald later stated that it was one of the most difficult rulings she has ever made in her career, as the decision required a painstaking weighing of the rights of the witnesses versus the rights of the accused.<sup>74</sup>

The requirements that have to be met as stated in the *Tadić* decision were, in short, the following: there must be real fear for the safety of the witness and his or her family; the testimony must be important to the Prosecutor's case; the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy; the availability of any witness protection programme must be considered; and, any measures taken should be strictly necessary.<sup>75</sup> The criteria for anonymity have subsequently been elaborated upon in a decision in the *Blaškić* case, where it was noted that the Trial Chamber would be willing to grant anonymity for certain witnesses according to the standards set out in the *Tadić* decision, provided that the Prosecution supported its assertions with relevant proof, especially with regard to the credibility of a witness.<sup>76</sup>

With regard to the fourth criterion for anonymity as provided in the *Tadić* decision, it has been submitted that the Tribunal's lack of a long-term witness protection programme was the most compelling reason to grant requests for anonymity.<sup>77</sup> As described in section 3.1.2, since the time of the decision, the Tribunal has concluded agreements with a number of states regarding witness relocation, a fact which might result in Chambers being less willing to grant witness anonymity in future cases.

#### 4.5.2. ICC

As measures like confidentiality have worked well in practice at the Tribunal, similar protective measures can be expected either in the future Rules of Procedure and Evidence, or in the practice of the ICC.

Whether witness anonymity will be allowed may depend on a number of circumstances. It is likely that the balancing between the procedural rights of the accused and the protection needs for the witness will, like at the Tribunal, be de-

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*Use of Unnamed Witnesses Against Accused*, 90 AJIL 235 (1996); C.M. Chinkin, *Due Process and Witness Anonymity*, 91 AJIL 75 (1997); M. Leigh, *Witness Anonymity is Inconsistent With Due Process*, 91 AJIL 80 (1997); and N.A. Affolder, *Tadić, the Anonymous Witness and the Sources of International Procedural Law*, 19 Michigan Journal of International Law 445 (1998).

74. Morris & Scharf, *supra* note 24, at 405.

75. Prosecutor v. Tadić, *supra* note 43.

76. Prosecutor v. Blaškić, Decision on the Application of the Prosecutor dated 17 October 1996, Requesting Protective Measures for Victims and Witnesses, Case No. IT-95-14-PT, Tr. Ch. I, 5 November 1996, para. 42.

77. Momeni, *supra* note 2, at 174.

cided in practice. The existence of a witness protection programme may very well be a decisive factor in this regard.<sup>78</sup>

#### 4.6. Contempt of Court

##### 4.6.1. Tribunal

Two sorts of contempt of the Tribunal have clearly been designed to protect witnesses. Rule 77(B) provides, *inter alia*, that any person who 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, commits a contempt of the Tribunal. In addition, Rule 77(A)(ii) provides that any person who discloses information relating to those proceedings, in knowing violation of an order of the Chamber, commits a contempt of the Tribunal.<sup>79</sup>

The Tribunal is not explicitly vested with jurisdiction over contempt proceedings in the Statute. However, in the Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 regarding an interlocutory appeal in the *Blaškić* case, the Appeals Chamber stated that this incidental or ancillary jurisdiction derives from the general object and purpose of the Statute, as well as the role the Tribunal is called to play thereunder.<sup>80</sup> It was also held that *in absentia* proceedings may be exceptionally warranted in cases involving contempt of the Tribunal, where the person charged fails to appear in Court, thus obstructing the administration of justice.<sup>81</sup>

So far, one person has been found in contempt of the Tribunal. In a recent Decision in the *Aleksovski* case, Trial Chamber I imposed a fine of Dfl. 10,000 on Mr Nobile, one of the Defence Counsel for General Blaškić, for contempt of the Tribunal.<sup>82</sup> The Trial Chamber established that Mr Nobile had disclosed information relating to the proceedings in knowing violation of an order of a Chamber, as he had disclosed in the trial the identity and occupation of a pro-

78. See the discussion on witness protection programme of the ICC in Section 4.1.2.; and *cf.* the fourth criterion in the *Tadić* Decision.

79. Sub-rule (D) provides that incitement to commit, and attempts to commit such acts are also punishable as contempt of the Tribunal. The latest amendments made to the Contempt rule changed the maximum penalty for contempt from a term of imprisonment not exceeding six months, to a term of imprisonment not exceeding seven years, or a fine not exceeding Dfl. 200,000, or both, on a person who is found in contempt of the Tribunal for e.g. interfering with a witness, as stated in Sub-paragraph (B).

80. See *Prosecutor v. Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108 *bis*. Appeals Chamber, 29 October 1997, paras. 46-48. This judgment concerned contempt of court for failure to appear as a witness before the Tribunal.

81. *Id.*, para. 59. *Cf.* Art. 21(4)(d), concerning the right of the accused to be tried in his presence.

82. *Prosecutor v. Aleksovski*, Finding of Contempt of the Tribunal, Case No. IT-95-14/1-T, Tr. Ch. I, 11 December 1998. It should be noted that the above mentioned amendments of Rule 77, were not applicable to this case, as they only entered into force on 17 December 1998.

tected witness, who had testified for the Prosecution in another trial. The Trial Chamber noted that decisions regarding the protection of witnesses are of primary importance, not only for the protection of the lives of the witnesses, but also for the functioning of the Tribunal. Therefore, it was stressed, all those involved in the work of the Tribunal, including lawyers, must take all necessary measures to guarantee the absolute respect of protective measures for witnesses.

#### 4.6.2. ICC

Although under a different name, the Rome Statute explicitly provides that the ICC has jurisdiction over offences against its administration of justice, when committed intentionally. This includes, as stated in Article 70(1)(c), corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence. Paragraph 2 provides that the principles and procedures governing the Court's exercise of this jurisdiction shall be provided for in the Rules of Evidence and Procedure and paragraph 3 provides that in the event of an conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine, or both. It is noteworthy that the maximum penalty for offences against the administration of justice of the ICC is less severe than the maximum penalty for contempt of the Tribunal, which in certain instances allows the Court to impose a term of imprisonment of seven years and a fine of Dfl. 200,000.

## 5. CONCLUSION

It is clear that the drafters of the Rome Statute have been influenced by the rules and practices of the Tribunal on matters relating to witnesses. Just like the Tribunal, the ICC will have a Victims and Witnesses Unit placed within the Registry. The Victims and Witnesses Unit of the ICC will not be as strong and independent as the Victims and Witnesses Unit of the Tribunal. The Rome Statute does not confer decision-making power to the Victims and Witnesses Unit with regard to the measures it has been designed to provide: protection, security, counselling, and other appropriate assistance to witnesses. Furthermore, the Victims and Witnesses Unit must consult the Office of the Prosecutor regarding such measures. In my view, this reference to the Office of the Prosecutor is unfortunate. It gives the impression that it is not as neutral as its position within the Registry would suggest. An independent Victims and Witnesses Unit, like the Victims and Witnesses Unit of the Tribunal, is able to advocate the security interests of a witness also in cases where these interests do not coincide with the interest of the party calling the witness. This particular advantage of placing the Victims and Witnesses Unit within the Registry is consequently lost in the Rome

Statute. Moreover, the experience of the Tribunal has shown that a number of Defence witnesses have needed and been granted protective measures due to their legitimate fears for retaliation. Given this, it should be expected that a number of Defence witnesses will be in need of such measures before the ICC. However, the Rome Statute neglects the interests of Defence witnesses in the sense that only refers to the Office of the Prosecutor. Even though the wording does not exclude protective measures and further assistance for witnesses called by the Defence, it is submitted that it creates an imbalance *vis-à-vis* witnesses called by the Office of the Prosecutor. This weakness of the Rome Statute will hopefully be remedied in the Rules of Evidence and Procedure and in practice.

Thus far, the Victims and Witnesses Unit of the Tribunal has only dealt with victims as witnesses. However, the tasks of the Victims and Witnesses Unit of the ICC must be expected also to encompass issues relating to the victim's role in the proceedings as well as matters relating to claims of reparation to victims.

In contrast to the rules applicable to the Tribunal, the Rome Statute provides for guidance for the Court and the Office of the Prosecutor in that it states for which purposes "appropriate measures" should be taken and which factors should be taken into consideration when doing so. In particular, the Rome Statute gives special attention to victims of sexual violence and children who are victims or witnesses. In fact, the Rome Statute quite remarkably provides for a presumption for protective measures, such as *in camera* proceedings or the presentation of evidence by electronic or other means, in these particular cases.

The protection measures of the ICC will probably not differ much from the ones presently employed at the Tribunal. The main difference may in fact concern the timeframe for the available protection and support. Under the Rome Statute, the State Parties are obliged to comply with requests for assistance with regard to the protection of witnesses. This provision appears valuable in that it should enable the ICC to provide support and protection that is not limited to the time of the testimony. It should also allow the ICC to request that a witness be put in a domestic witness protection program. This possibility may, in turn, influence the Court's willingness to grant witness anonymity, as the lack of such a program was one of the decisive factors to grant this protective measure before the Tribunal.