



11-13 JULY 2014

**UN HUMAN RIGHTS COUNCIL
BACKGROUND GUIDE**

Letter from the Executive Board

Honourable Delegates,

Welcome to the Human Rights Council of the Delhi Public School Ghaziabad Model United Nations conference, the Executive Board would like to, first of all, make clear that it is you, the delegates, who are of utmost importance in the council and that your actions are responsible for the success of the committee.

The Human Rights Council at Delhi Public School Ghaziabad MUN will discuss:

- **Protection of Witnesses in International Crime Tribunals.**

The Executive Board expects the delegates to be well versed with all aspects and dimensions of the agendas, this background guide shall serve as a foundational beginning for your research, also this background guide might help you to ascertain a particular pattern in which you can go about your research. However, the delegates must not restrict their research to what is mentioned in this background guide. The Executive Board hopes that each delegate follows the rules of procedure strictly and makes good and judicious use of the time allotted.

Well, on a lighter note, The Executive Board wishes to give you a small piece of advice, a delegate should look at the problem/issue from a wider perspective, from every angle, propose constructive solutions, negotiate and interact, make judicious use of time, be well versed with the rules of procedure and the correct way of using them in the most apt situations. A delegate is also expected to try, work out and understand each country's opinion on a particular agenda and work accordingly, here a thing which becomes very important is the foreign policy. The ability to negotiate and to lobby also plays a vital role in cementing a delegates' position in the committee.

With these words, The Executive Board would like to wish everyone for a great researching period and an even better session at Delhi Public School Ghaziabad MUN 2014; we hope to experience a memorable conference!

Regards,

Mohith Gauri
President

Parth Gauri
Vice - President

Committee Background

Creation

The Council was created by the United Nations General Assembly on 15 March 2006 by resolution 60/251. Its first session took place from 19 to 30 June 2006. One year later, the Council adopted its "Institution-building package" to guide its work and set up its procedures and mechanisms.

Among them were the Universal Periodic Review mechanism which serves to assess the human rights situations in all United Nations Member States, the Advisory Committee which serves as the Council's "think tank" providing it with expertise and advice on thematic human rights issues and the Complaint Procedure which allows individuals and organizations to bring human rights violations to the attention of the Council.

The Human Rights Council also works with the UN Special Procedures established by the former Commission on Human Rights and now assumed by the Council. These are made up of special rapporteurs, special representatives, independent experts and working groups that monitor, examine, advise and publicly report on thematic issues or human rights situations in specific countries

Structure

The members of the General Assembly elect the members who occupy the UNHRC's 47 seats. The term of each seat is three years, and no member may occupy a seat for more than two consecutive terms. The seats are distributed among the UN's regional groups as follows: 13 for Africa, 13 for Asia, six for Eastern Europe, eight for Latin America and the Caribbean (GRULAC), and seven for the Western European and Others Group (WEOG). The previous CHR had a membership of 53 elected by the Economic and Social Council (ECOSOC) through a majority of those present and voting.

The General Assembly can suspend the rights and privileges of any Council member that it decides has persistently committed gross and systematic violations of human rights during its term of membership. The suspension process requires a two-thirds majority vote by the General Assembly. The resolution establishing the UNHRC states that "when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto", and that "members elected to the Council shall uphold the highest standards in the promotion and protection of human rights".

Sessions

The UNHRC holds regular sessions three times a year, in March, June, and September. The UNHRC can decide at any time to hold a special session to address human rights violations and emergencies, at the request of one-third of the member states. To date there have been 20 Special Sessions.

Agendum: Protection of Witnesses in International Crime Tribunals.

This background guide consists of the following sections for better understanding of the agendum:

- ☒ About the Agendum
- ☒ United Nations Mechanism for International Criminal Tribunals
 - 1. Mandate
 - 2. The Arusha Branch
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 - a. Protection
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- ☒ Witness Protection Mechanism Under the Rome Statute of the International Criminal Court
 - 1. Key Principles of Protection
 - 2. Court Measures to Protect Witnesses
 - 3. Protective Measures taken by the Prosecutor
 - 4. Role of Victim and Witnesses Unit
 - 5. Application of Protective Measures
- ☒ Problems and Challenges
- ☒ Measures which can be considered by member states
- ☒ Reference links
- ☒ Annexe

About the Agendum:

The Topic Area requires us to discuss the witness protection mechanism under different International Criminal Tribunals and under other international institutions. The idea is for us to discuss the problems and challenges within the witness protection mechanism worldwide and how can we overcome such challenges. A detailed section regarding the mechanism under International Criminal Court has been made a part of this background guide to be treated as a sort of a case study to help us delve deeper into how must such mechanisms be improved under Criminal Tribunals.

United Nations Mechanism for International Criminal Tribunals:

The successes of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have depended greatly on the willingness of victims and witnesses to testify and to cooperate with the two Tribunals. The Mechanism, responsible for safeguarding the legacies of the two Tribunals, gives paramount importance to the continuity of the services related to the protection, safety and well-being of victims and witnesses under its competence.

Each branch of the Mechanism has an independent Witness Support and Protection Unit (WISP), responsible for providing protection and support to witnesses, taking into account the nature of the conflict, geographical location, and cultural setting in which the respective WISP Unit operates.

The WISP branch in Arusha assumed its task of providing protection and support to witnesses from 1 July 2012, while the WISP branch in The Hague began operations on 1 July 2013.

Both WISP branches operate through their respective field offices, in Rwanda for the Arusha branch and Bosnia and Herzegovina for the Hague branch.

1. Mandate

Article 20 of the Statute of the Mechanism charges the Mechanism with the protection of victims and witnesses in relation to the ICTY, the ICTR and the Mechanism. While the ICTY and the ICTR remain responsible for providing protection to witnesses in ongoing cases at each Tribunal, the Mechanism assumes all functions pertaining to the protection of victims and witnesses in completed cases from the two Tribunals as well as ongoing cases before the Mechanism.

The Mechanism is committed to ensuring the security of victims and witnesses under its competence by continuing to use a number of protective measures. Such protective measures include non-disclosure of the identity of the witnesses, closed court sessions, and other appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as the use of one-way close circuit television during testimony. In exceptional cases, the Mechanism may also deploy extrajudicial protective measures, such as the temporary or permanent relocation of witnesses, in cases where either the parties to the case or the witness themselves make such a request.

The Mechanism carries out its mandate, and provides continuous protection and support for all the victims and witnesses, through its Witness Support and Protection Unit, which is established under Rule 32 of the Rules of Procedure and Evidence and is guided by the Policy for the Provision of Support and Protection Services to Victims and Witnesses, adopted on 26 June 2012.

WISP is charged with providing services related to the assessment and implementation of judicial and, where necessary, extrajudicial protective measures, in accordance with Article 20 of the Statute. WISP considers all requests for protection independently and undertakes a series of steps to address the assessed level of risk to which a witness may be exposed as a result of his or her testimony. WISP then deploys innovative risk reduction strategies, which may include providing the witness with advice regarding the management of their personal security or facilitating the assistance of national and local security organs and authorities in their countries of residence to address the witness's concerns.

Fundamental to the protection mandate, WISP provides support services to victims and witnesses under the competence of the Mechanism before, during and after the

witnesses' testimony. To the extent possible, WISP strives to ensure that the experience of testifying does not result in further harm, suffering or trauma to the witness. To this end, WISP establishes and maintains regular contact with witnesses and provides witnesses with essential information regarding their testimony, as well as their rights, obligations and entitlements. As testifying can be a difficult experience for many victims and witnesses, support includes psychosocial counselling in order to ensure, to the extent possible, the psychosocial and physical well-being of victims and witnesses who have appeared before the Tribunals or the Mechanism. WISP is also responsible for the movement of witnesses from their countries of residence to the respective seats of the Mechanism and helps facilitate the appearance of witnesses before the Mechanism by assisting witnesses in making all arrangements related to their availability to testify, including travel arrangements.

In all its activities, WISP undertakes a gender sensitive approach for all supportive and protective measures applied to victims and witnesses, including providing counselling and medical support to victims and witnesses, particularly in the case of victims of rape or sexual assault.

The success of the protection and support services at the two Tribunals and the Mechanism can be gauged by the recent statistics on the number of witnesses who have benefited from such protection at the respective Tribunals, and who have successfully received medical and psychosocial support to help them overcome the trauma of war and genocide.

2. The Arusha Branch

The WISP branch in Arusha ensures the continuity of functions related to the protection and support of witnesses who have testified before the ICTR as well as those who may testify before the Mechanism, Arusha branch. At the ICTR, approximately 3,400 witnesses have testified and assisted the Tribunal in carrying out its mandate to prosecute persons responsible for genocide and serious violations of international humanitarian law committed in and around the territory of Rwanda in 1994. Almost eighty-eight per cent of the witnesses are currently in the age range of 35-70 years. Twenty-three per cent of the witnesses are female. Currently, the WISP branch in Arusha provides assistance to about 3,300 witnesses of the ICTR and the Mechanism, as some of the witnesses are now deceased.

Protection

Eighty-three per cent of the witnesses, including detainees, have benefited from protection measures as ordered by Trial Chambers and testified through various procedures. For instance, 77 witnesses have testified via video link, eleven witnesses have testified through statements given under *Rule 92 bis* of the ICTR Rules of Procedure and Evidence and several witnesses have benefited from relocation measures. These measures were deployed in order to reduce the risks associated with testifying and to help ensure that the experience of testifying caused the least possible trauma or harm to the witness. The remaining seventeen per cent of the witnesses, who

were not provided protection, consisted of experts, non-protected detainees, and witnesses who otherwise waived protection.

Medical and Psychosocial Support

To further its mandate of providing witness support and protection services prior to, during and after testimony, the WISP Unit in Arusha provides witnesses residing in and outside of Rwanda with essential medical and psychosocial support services. Such services reinforce protection measures, which alone cannot address the trauma experienced by victims and witnesses, and also foster an environment in which testifying can be a positive and strengthening experience. Counselling, particularly for victims of sexual assault serves as a tool towards more general healing and reconciliation.

In Rwanda, where a large majority of the witnesses reside, the WISP Unit is supported by its field office based in Kigali. Formerly under the ICTR, the Kigali Field Office, which was established in 2004, continues to provide essential support to witnesses who suffer from psychological or physical ailments caused as a result of the genocide, including female witnesses who contracted HIV/AIDS as a result of rape. In its first year, the Kigali Field Office provided treatment to 211 victims and witnesses, and in the seven years of its existence it has provided an estimated 35,000 consultations. Currently, the Office supports 106 victims and witnesses living with HIV/AIDS.

During the tenure of the ICTR, the Kigali Field Office was the first stop for all victims and witnesses living in Rwanda who appeared before the ICTR. The Office assessed the readiness and fitness of the witnesses to travel 470 miles from Kigali to the Tribunal or the Mechanism branch in Arusha, Tanzania. It will continue to serve this function for the MICT.

3. The Hague Branch

The WISP Unit in The Hague ensures the continuity of functions related to the protection and support of witnesses who have testified before the ICTY as well as those who may testify before the Mechanism. Approximately 7,700 witnesses, including multiple and video-linked testimonies and support persons, have testified and assisted the ICTY in carrying out its mandate to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991, established by the Security Council resolution 827 of 25 May 1993. Approximately seventy (70) per cent of the witnesses are currently in the age range of 41 – 70 years and thirteen per cent of the witnesses are female.

Protection Services

Approximately thirty per cent of the witnesses, including detainees, have received protection measures as ordered by Trial Chambers, and have testified through various procedures. For instance, 187 witnesses have testified via video link, and 545 witnesses have testified through statements given under *Rule 92 bis* of the ICTY Rules of Procedure and Evidence. A small percentage of witnesses have benefited from

relocation measures. These measures were deemed necessary to facilitate the testimony of vulnerable victims and witnesses and for their privacy and protection.

Social and Psychosocial Counselling Services

The WISP Unit in The Hague continues to provide witnesses with tailored, practical and psychosocial support, including counselling. The office operates with the highest level of integrity, impartiality and confidentiality, and ensures all witnesses are informed about their rights and entitlements, and have equal access to the services of the unit. In addition to providing direct provision of a high standard of professional support to the witnesses, the WISP Unit advocates for the needs of witnesses within the legal institution by putting the rights of witnesses on the Court agenda.

The WISP Unit in The Hague is assisted by a field office based in Sarajevo. The field office is pivotal to the work of the main office by providing victims and witnesses from the Former Yugoslavia with easy and expanded access to the Hague Branch for support and protection services.

The WISP Unit has developed a number of tools in order to alleviate problems linked with witnesses' appearance after testimony. The Sarajevo Field Office, for example, has put into place a network of international and national agencies, including NGOs both in the region and in third countries, to which witnesses can be referred to for legal or social assistance. The identification and cultivation of new contacts within the region is an important factor that assists the WISP Unit in improving its efficiency and quality of work.

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.

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.

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. 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. 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'.

As a matter of fact, the Trial Chamber may derogate from the principle of public hearings 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 witnesses are taken into consideration by the Court in making such determination.

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. 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.

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.

1. Key Principles of Protection

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 This is particularly important when witnesses are testifying against the accused they already know.
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.
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.

2. 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, in Regulations 21, 41, 42, 101 of the regulations of the court, and in Regulations 79 and 100 of the Regulations of the Registry.

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. 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. 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 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* for protecting witnesses’ rights. 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. 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.

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. Under this rule, a Chamber may provide five different protection mechanisms. *First*, the Court may decide to expunge the name or any identifying information of a witness from the public records. *Second*, the Court may prohibit the prosecution, the defense or any other participant in the proceedings from disclosing identifying information to a third party. *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. *Fourth*, the Court may provide a pseudonym to be used instead of the person’s actual name. *Fifth*, the Court may decide to hold part of its proceedings on camera.

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

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:

- 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. 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. 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.

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 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. 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 in consultation with the VWU on protective measures and making referrals for protection and support.

4. Role of the Victim and Witnesses Unit

The Victims and witness Unit, is a requirement of the Rome Statute 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. The responsibilities of the Unit and its functions are given in Rule 17 of the Rules of Procedure. 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;

- (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.

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.

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. The Unit is required to include staff with expertise in trauma, including trauma related to crimes of sexual violence.

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'.

5. Application of 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 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. Basing in the ICTY jurisprudence, the Tribunal in the Tadic case held that "*the obligation of the international tribunal to protect witnesses must not exceed the level of protection that they do indeed seek.*"

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: 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).

(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. 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.

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.

Problems and Challenges

- Overlapping of Roles
 - International and National Cooperation
 - Right to testify freely and without intimidation, the rights of the accused and fair trial
 - Balance to the rights of the accused and rights of witness in respect to a fair trial
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Measures which can 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.
 - 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 tele-communication 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.
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Reference Links:

http://www.unmict.org/files/documents/misc/mict_witness_support_policy_en.pdf

http://download.springer.com/static/pdf/20/art%253A10.1007%252Fs10609-012-9173-5.pdf?auth66=1403098630_c11b3e3eff3ab85c07c73e73d8b98666&ext=.pdf

<http://www.icc->

[cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx)

<http://www.redress.org/downloads/publications/ENG13.pdf>

<http://www.unict.org/AboutICTR/ICTRStructure/WitnessesVictimsSupportSectionWVSS/tabid/106/Default.aspx>

Rome Statute - http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

Rules of Procedure - <http://www.icc->

[cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf#search=RPE](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf#search=RPE)

Annex

1. 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.

2. 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.

3. Regulations of the Court ICC

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 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.
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