Protection of Witnesses in International Criminal Procedures

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Introduction

Although the Nuremberg and Tokyo Trials had a great influence on the development of substantive international criminal law, they did not pay attention to the protection of witnesses. Provisions concerning witnesses were limited to the procedural aspects of the respective Military Tribunals (to summon witnesses; to require their attendance and testimony; and to administer oaths to witnesses) and of the Prosecution and Defence (to interrogate and cross-examine witnesses).[1] As a matter of fact, these multinational Tribunals saw more value in the "document books" accompanied by explanatory briefs presented to the court, than in witness testimonies which had to be avoided whenever possible.[2] It had resulted in a rather small number of witnesses called by the Nuremberg Tribunal: in trials against all twenty-four first-tier defendants only thirty-three witnesses were called for the Prosecution and sixty-one for the defendants.[3] In the post- Second World War period, during the work of various international fora on the issue of institutionalization of individual criminal responsibility the protection of witnesses proved to be one of the major problems.[4] The complexity of the issue and the variety of problems involved made it difficult to deal with. Therefore it can be freely said that the progress achieved in that respect by the creation of the two UN *ad hoc* Tribunals, on the former Yugoslavia (ICTY) and Rwanda (ICTR)), and especially by the creation of the permanent International Criminal Court (ICC), can be considered revolutionary. Being in existence for longer than a decade, the ICTY and ICTR have developed until now an extensive practice with re-

1 See relevant provisions in the Nuremberg Charter of the International Military Tribunal and the Charter of the International Military Tribunal for the Far East and their Rules of Procedure and Evidence.

2 Patricia M. Wald, "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal", *Yale Human Rights and Development Law Journal*, Number 5, January 2002, p. 217.

3 Patricia M. Wald, "Dealing with Witnesses..., p.217.

4 Ruth Wedgwood, "Prosecuting War Crimes", *Conference Nuremberg and the Rule of Law: A Fifty-Year Verdict*, University of Virginia, 17-18 November 1995.

gard to witnesses and witness protection.[5] After ending their work by 2010 as envisaged in the completion strategy adopted by the Security Council for both Tribunals[6] their rich jurisprudence and practice will continue to serve as a useful source to the ICC and other international bodies dealing with international crimes. With regard to the ICC it should be noted that it just started considering the first cases and has no practice in the interpretation and implementation of the rules relating to witnesses. However, as pointed out by the President of the ICC, Philippe Kirsch, from the very first moment of the ICC activities it became clear that the extent of the challenges facing the Court is unlike anything experienced by other courts and tribunals. "Security concerns and the challenges of protecting victims, witnesses and others at risk had [already] caused delays in Court activity."[7] This paper will look only briefly at the current institutional and normative framework which has been more frequently discussed elsewhere in the existing publications. Its purpose is to indicate to some of the problematic aspects of witness protection in the ICTR, ICTY and ICC and to discuss some of the factors which might affect the efficiency and credibility of the existing system(s) of protection of witnesses. The mixed or hybrid tribunals, such as the Special Court for Sierra Leone, will be excluded from the consideration. The discussion will start from the basic premises that the current international criminal procedures: (a) *must* rely on witnesses and (b) *cannot* be carried out without a proper protection of witnesses.

Current International Criminal Procedures Must Rely on Witnesses

In criminal cases witnesses are important even essential factor in determining the truth. The special role of witnesses in criminal proceedings has been recognized on both national and international level by various international bodies.[8] In international criminal procedures a great significance attached to witness testimonies lies in the fact that most of international

5 Neither ICTY and ICTR nor ICC have provided a definition of a "witness". For the purpose of this paper "witness" means any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. It includes experts as well as interpreters (*See*: Appendix to the Recommendation No. R(97) 13 of the Committee of Ministers of the Council of Europe, adopted on 10 September 1997).

6 *See*: Statement by the President of the Security Council, UN Doc. S/PRST/2002/21 of 21 July 2002 and Security Council Resolution 1503,of 28 August 2003.

7 UN Doc. GA/10511, 61st General Assembly, 9 October 2006.

8 See: for example, Recommendation No. R(97) 13 of the Committee of Ministers of the Council of Europe, adopted on 10 September 1997, Preamble.

crimes take place in a distant past and/or at a distant place from which important proofs have disappeared or are unavailable. Therefore, in some cases witness testimonies are the only source of information and the only manner in which evidence can be produced. The former ICTY Judge, Patricia M. Wald, emphasized with regard to the former Yugoslavia that in the period following the adoption of the Dayton Peace Agreement in December 1995, certain areas, such as Serbia, Croatia and Republika Srpska in Bosnia-Herzegovina, became practically inaccessible to the ICTY investigators, who could not obtain critical documents held by entities unsympathetic to the Tribunal's existence or goals. As the workload of the ICTY rapidly escalated from 1997 onward prosecutors needed substantial numbers of eyewitnesses to prove crimes had occurred, as well as expert witnesses to justify or impugn the defendant's acts. "Witnesses thus became the lifeblood of ICTY trials",[9] and in general are considered to present "building blocks" upon which the prosecution directly bases its case.[10] The situation in the former Yugoslavia is not much different from any other situation involving international crimes. This proved to be the case in the trials before ICTR as well, and it will definitely be the case in the future ICC proceedings.

The need for witness testimonies is imposed also by the adversary aspects of the international criminal procedures. Adversary i.e. accusatory procedure is typical for the common law systems. It consists of reaching the conclusions regarding liability by the process of prosecution and defence putting forward their respective viewpoints, while the judge acts as an impartial umpire who allows facts to emerge from this procedure. "In an adversarial system of law that respects modern procedural safeguards for criminal defendants, the testimony of witnesses in open court is of chief importance."[11] However, due to the fact that international criminal law has built upon the principles and rules of the major national legal systems, the international procedural law as established by the Tribunals is not purely adversarial but presents a mix of elements of both common and civil law systems criminal law. As pointed out by the ICTY, even the common law

9 Patricia M. Wald, "Dealing with Witnesses..., pp. 218-219.

10 ICTR Fifth Annual Report for the period 1 July 1999-30 June 2000, dated 2 October 2000 (UN Doc. A/55/435-S/2000/972 (2000), para. 134).

11 Brad Loberg, "The Witness Protection Measures of the Permanent International Criminal Court Are Superior than Those Provided by its Temporary Ad Hoc Contemporaries", Independent Research, 2006, http://www.kentlaw.edu/perritt/courses/seminar/brad-loberg-witness%20protection.final.htm .

aspects are not purely adversarial: there are, for example, no technical rules for the admission of evidence meaning that Judges bear the sole responsibility for weighting the probative value of evidence, and a Chamber may *proprio motu* order the production of additional or new evidence.[12] Being in the past considered to be inconsistent with the purpose and functions of the ICTY plea-bargain[13] which is a practice fundamental to the common law system of criminal justice was also absent in the procedure,[14] however it has changed. In the course of time plea-bargain has slowly been accepted in the usage of ICTY. This means that the strengthening of adversarial aspects of the procedure and its open nature increase the significance of witness testimonies in producing evidence.

Current International Criminal Procedures cannot be Carried Out Without the Proper Protection of Witnesses

The ICTY and ICTR have in their practice until now heavily relied on witness testimonies. It is estimated that in 2000 about 600 witnesses testified before the ICTY and 180 before the ICTR. On average, 105 witnesses testified in each completed case before the ICTY and 47 before the ICTR.[15] According to the official web site of the ICTY until November 2006 more than 3,500 witnesses gave their testimonies and in the same period the Prosecution interviewed more than 1,400 potential witnesses.[16] There are notably a smaller number of witnesses which appeared in ICTR,[17] while for the time being there are no statistics on the issue of witness testimonies in the ICC.

There are various reasons and incentives for witnesses to testify. Some of them feel that they should speak for the dead i.e. the loved ones who lost their lives as a result of war; some of them want to contribute to the app-

12 *See*: Prosecutor v. Dusko Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 22.

13 There is no single definition of "plea bargain", however it is understood to mean an agreement between the prosecution and the defence by which the accused agrees to plead guilty in return for an offer by the prosecution, which can be reduction of sentence, dropping or reducing some of the charges, conceding certain facts or providing cooperation in another criminal case.

14 *See*: Prosecutor v. Dusko Tadic..., para. 22.

15 Thordis Ingadottir, Françoise Ngendahayo and Patricia Viseur Sellers, "The International Criminal Court: The Victims and Witnesses Unit", ICC Discussion Paper 1, March 2000, p. 16

16 See: http://www.un.org/icty/glance-e/index.htm

17 For statistics *See*: http://69.94.11.53/default.htm

ropriate treatment of the offenders who are responsible for atrocities and look for justice for what has happened; a lot of witnesses aim to tell the world the truth of what they have experiences and there is also a believe that by testifying they will contribute that such crimes do not happen again.[18]

However, there are also witnesses which hesitate or refuse to testify. As a matter of fact in many cases it appeared that obtaining testimonies is a difficult and complex task to accomplish. Witnesses such as eyewitnesses and victim witnesses often hesitate or refuse to testify because of the risk to be subject to intimidations, threats or killings. Some though incomplete statistics on incidents of this kind confirm that the fears on the part of potential witnesses are well-founded.[19] This has been noted in various cases in the former Yugoslavia in which a number of the ICTY witnesses experienced intimidation, threats and harassment. The same happened with a number of ICTR witnesses who faced different kinds of intimidation, received death threats, were attacked and even killed before or after they testified. One form of intimidation aimed at slowing down or interrupting presentation of prosecution evidence is leaking of identities or witness statements to the media. However, much more serious are concrete threats to witnesses, their families and especially their children.[20]

The above-said applies also to the members of the families and dependants who can be at risk of retaliation or can experience increased distress because of the witness's testimony, or they can be simply dependent of the witness's presence.[21] Under special pressure are put witnesses against of high-profile i.e. high-level political and military leaders accused for international crimes which in some cases have a large number of supporters at home. The ICTY has faced serious problem with witness intimidation in Kosovo of witnesses who decided to testify against former members of

18 Hogher- C. Rohne, "The Victims and Witnesses Section at the ICTY, An Interview with Wendy Lobwein", Max-Planck Institut für ausländisches und internationals Strafrecht, 2003, pp. 10-11.

19 Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence, The ICC and the Practice f the ICTY and ICTR*, Intersentia, 2005, p. 231-233

20 Taken from: Mirko Klarin, "Protected Witnesses Endangered", Institute for War & Peace Reporting (IWPR), January 31, 2003, http://www.globalpolicy.org/intljustice/tribunals/yugo/2003/0131witness.htm .

21 Thordis Ingadottir, Françoise Ngendahayo and Patricia Viseur Sellers, "The International Criminal..., p. 18.

Kosovo Liberation Army (KLA).[22] A separate problem, not considered in this article, concerns witnesses which on the basis of plea-bargain are put under pressure by the Tribunals to testify against their former collaborators, political and/or military leaders. The pressure put on them to testify creates such an emotional distress that their health is seriously affected[23] and sometimes it can lead to fatal decisions.[24]

Needless to say that successful prosecution of international crimes "depends on the availability of credible witnesses, which in turn requires that witnesses are confident that they can testify truthfully without fear of retribution"[25].The instances of intimidation, threats, and even killings make it clear that international criminal proceedings have no big chance of success without a proper protection of witnesses. It proved to be true in a number of cases in ICTY and ICTR. In the first case to be considered by the ICC, *The Prosecutor* v. *Thomas Lubanga Dyilo,* the Pre-Trial Chamber was forced to initial postponement of the confirmation hearing in response to the need to implement measures for protection of victims-witnesses in the Democratic Republic of the Congo.[26] Having this kind of situation in mind it is not exaggeration to say that if because of intimidation witnesses refuse to testify the judicial process will be rendered ineffective and the tribunal's legitimacy will be significantly eroded.[27] Therefore it is in the interest of peace and justice to provide for protection of witnesses in order to ensure their cooperation to achieve a conviction. The (in)ability of the tribunal to prote-

22 Michael Farquhar, "Witness Intimidation a Serious Problem in Kosovo", Institute for War and Peace reporting, April 1, 2005, http://www.globalpolicy.org/intljustice/tribunals/yugo/2005/0401witness.htm .

23 For example, the former Bosnian Serb President, Biljana Plavsic, complained during her testimony in the ICTY case against Momcilo Krajisnik, which she was forced to give, that after she received the order to testify, her health condition seriously deteriorated. See: Institute for War & Peace Reporting, "Plavsic Testifies against Former Colleague", http://iwpr.net/?p=tri&s=f&o=322155&apc_state=henitri200607 .

24 So, for example, the first President of the Republic of Serbian Krajina, Milan Babic, committed suicide in the ICTY detention unit in The Hague, quite probably as a result of the pressure put on him to provide testimonies against Slobodan Milosevic and his successor, Milan Martic. In 2002 he was revealed as a witness as part of a plea bargain.

25 Human Rights Watch, "Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro", Vol. 16, No. 7 D, October 2004, p. 19.

26 ICC Newsletter Nr. 10, November 2006, p. 3.

27 Michael P. Scharf and Ahran Kang, "Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR and SCSL", Vol. 38 *Cornell International Law Journal*, No. 3, Fall 2005, p. 937.

ct witnesses directly affects its legitimacy and its image to the world.[28]

Basically, all persons have a civic duty to give sincere testimony as witnesses if so required by the criminal justice system. This duty is unconditional and only in exceptional cases a court may release a witness from testifying. In international criminal procedures it is "unacceptable for the criminal justice system to fail to bring defendants to trial and obtain a judgment because witnesses have been effectively discouraged from testifying freely and truthfully".[29] However it is at the same difficult if not impossible to "ignore the risk run by witnesses of exposing themselves to retaliation by the offender or his associates"[30] and it will be hard for any court to make a witness testify if s/he does not get sufficient guarantees that s/he will be properly protected before, during and after the trial. It is exactly this aspect which imposes the need to protect witnesses and to enable criminal procedures to take place.

However, there is also a "humanitarian" aspect attached to witness protection in international criminal cases. It is concerned with preventing risks to which witnesses and/or members of their families and other related persons might be exposed because of their testimonies and with assisting in avoiding serious incursions of their privacy and dignity.[31] It is also concerned with various (physical and psychological) health problems with which witnesses have to deal during and after their testimonies. This is especially important in case of victims-witnesses which are in need of specific protective measures aimed at reducing trauma(s) associated with giving testimony.[32] The last is particularly true for the victims of sexual assault. In most cases they suffer severe traumatization, feelings of guilt and shame which are accompanied by the fear of rejection [...] and by the fear of reprisals against themselves and their families,[33] and therefore they need specific

28 Michael P. Scharf and Ahran Kang, "Errors and Missteps..., p. 937.

29 Committee of Ministers of the Council of Europe in its Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, adopted on 20 April 2005 at the 924th meeting of the Ministers' Deputies.

30 Council of Europe Publishing, "Intimidation of Witnesses and the Rights of the Defence", September 1998, p. 29.

31 Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence, The ICC and the Practice f the ICTY and ICTR*, Intersentia, 2005, pp. 231-232.

32 Anne-Marie de Brouwer, *Supranational Criminal Prosecution...*, pp. 231-232.

33 Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Conse-

professional help and assistance in overcoming these problems.

1. Institutional and Normative Framework

Some of the main goals of the existing international criminal procedures are to bring repose to victims; to demonstrate fairness and highest standards of due process and to function with maximum transparency and public scrutiny.[34] The current international criminal law, as above-pointed out has found underpinnings in the national legal systems and has greatly benefited from them. It also includes the protection of witnesses which is broadly based on the rules adopted in national legal systems and which frequently employ a variety of protective measures for a great number of witnesses. Accordingly, national measures of protection provide for, *inter alia*, voice and/or face distortion, evidence given in closed session, video or telephone conference, exclusion of the accused and / or the public from the courtroom, full or partial anonymity, etc, while non-procedural measures include relocation, change of personal data and identity, etc. Apart from the measures of protection taken during judicial procedures, in some countries, like USA, Italy, Canada and UK witnesses benefit from special witness protection programmes which provide different kinds of standard or "tailor-made" services.

The legal framework establishing the system of protection of witnesses in international criminal procedures is fairly solid. It was the UN Secretary General who pointed out that in the light of particular nature of the crimes committed in the territory of the former Yugoslavia it would be necessary for the Tribunal to protect victims and witnesses in its rules of procedure and evidence.[35] Being the first *ad hoc* Tribunals of that kind, the provisions in the ICTY and ICTR Statutes are rather modest in that respect and almost identical. Only two provisions, Articles 20(1) and 22 of the ICTY Statute (in ICTR Statute these are Articles 19(1) and 21) are of a direct relevance for the protection of witnesses. According to Article 20(1) of the ICTY Statute the Trial Chamber ensures a fair and expeditious trial with "due regard for

quences, prepared by Ms. Radhika Coomaraswamy, 22 November 1994 (UN Doc. E/CN.4/1995/42, para. 281)

34 Minna Schrag, "Lessons Learned from ICTY Experience: Notes for the ICC Prosecutor", Contribution to an expert consultation process on general issues relevant to the ICC Office of the Prosecutor, 20 March 2003.

35 Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 of 3 May 1993, para. 108.

the protection of victims and witnesses". Under this Article it may decide whether a session will be open or closed to the press and public. In deciding so the Chamber gives consideration to the interest of public order and morality, safety, security or non-disclosure of the identity of a victim or witness or to the protection of the interests of justice. Article 22 of the ICTY Statute envisages a detailed regulation of the issue and concrete measures of protection in the Tribunal's Rules of Procedure and Evidence and includes an open-ended provision with regard to the possible protective measures by saying that they "shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of victim's identity".[36] This provision is further worked out in Rule 34 (Victims and Witnesses Section), Rule 69 (protection of victims and witnesses), Rule 75 (measures for the protection of victims and witnesses), Rule 89 (general provisions), Rule 90 (testimony of witnesses), Rule 96 (evidence in cases of sexual assault) and Rule 106 (compensation to victims). Protective measures might encompass personal physical safety, or that of family and friends, attention to medical and psychological needs and legal guarantees of confidentiality, even of deferred or full anonymity, including with respect to the accused. There is a general impression, however, that in the ICTY and ICTR there is "no separate scheme or a comprehensive legal document which sets out the [...] witness protection rules".[37]

Apart from that, an important stipulation dealing with the rights of accused but also of relevance for witnesses is Article 21 (4) (e) of the ICTY Statute (Article 20 (4) (e) of the ICTR Statute). It establishes that the accused has the right to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". The implementation of this provision can be problematic and requires a continuous balancing by the Tribunal of the right of accused with the need to protect witnesses.

The ICC Statute has definitely benefited from the rules and experiences of the *ad hoc* Tribunals. However, it has gone a big step forward by introducing a sort of revolutionary role for victims by giving them the possibility directly to participate in the proceedings and to obtain reparations. In the ICC Statute of relevance are: Article 43 dealing with the Registry as the

36 Article 22 of the ICTY Statute and Article 21 of the ICTR Statute.

37 *See*: Gavin Ruxton, "The Treatment of Victims...

main administrative body of the Court, Article 68 on protection of the victims and witnesses and their participation in the proceedings; Article 75 concerning reparations to victims and Article 79 on trust fund for the benefit of victims of crimes under the jurisdiction of the Court and of the families of such victims. Under these provisions the most important are Rules 16-19 of the ICC Rules of Procedure and Evidence establishing responsibilities of the Victims and Witness Unit, Rules 85 and 86 containing the definition and general principle relating to victims, as well Rules 87 and 88 dealing with the procedure and for ordering protective measures and special measures. Further Rules 89, 90-93, 94-97 and 98-99 are concentrated on victims, their participation and legal representation in the proceedings, and on reparation issue and the procedure followed in cases of awards for reparation to the victims.

Article 67 (1e) the ICC Statute includes almost identical provision on the rights of the accused as the above-mentioned Statutes of the two *ad hoc* Tribunals which enables him/her to examine witnesses.

Needless to say, there are similarities and differences in the systems of protection of witnesses between the *ad hoc* Tribunals and the ICC. However, their common characteristic which is, also a characteristic of other semi-international i.e. mixed tribunals, such as Sierra Leone, is a dual framework established: (a) institutional (non-procedural / non-judicial) and (b) normative (procedural/judicial) one. A witness can be protected by one or by both types of measures as the same time. Which measures will be decided upon depends on the circumstances of each particular case and the capacity in which the witness appears before the court. A person can appear as a witness in a three-fold capacity: (a) as a witness i.e. eyewitness (including also experts and professionals working in relief or humanitarian organizations), (b) a victim-witness[38] or (c) as a detained witness. It goes without saying that different stages of procedure and capacities in which a person appears before the tribunal require different measures of protection. For example, the protection of an eyewitness cannot be the same as the protection of a victim-witness whose needs, as pointed out above, are rather

38 Unlike in the ICC in the two ad hoc Tribunals "the only formal category of victims in the terms of the Tribunal's proceedings is the victim *qua* witness". *See*: Gavin Ruxton, "The Treatment of ... Victims are defined as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court. See: Rule 85 (1) of the ICC RPE.

specific if taken into consideration the fact that giving a testimony might renew memories on physical and psychological traumas.

1.1. Institutional (Non-Procedural / Non-Judicial) Framework

The institutional framework consists of especially created departments that provide all-around support to witnesses inside and outside the Tribunals and ICC. These departments, called "Victims and Witnesses Sections", are under the responsibility of the Registry. The main responsibility of the Registry with respect to witnesses is to ensure that "all witnesses can testify in safety and security and that the experience of testifying does not result in further harm, suffering or trauma to them".[39] In that sense, the Registry has a neutral role vis-à-vis the Prosecution and the Defence and provides support to all witnesses that are in such need independently whether they are Prosecution or Defence witnesses. Basically the Victims and Witnesses Sections consist of three separate units: protection unit (assesses the security requirements for the witnesses and coordinates the safety measures); operational unit (in charge of logistical work, arrangements of formalities, etc); and, support unit (provides social and psychological counselling and assistance in the anticipatory stage of the procedure, during the testifying procedure and in the aftermath of the trials).[40] The units are equipped with experts in various specializations of victim protection for example those related to traumas caused by crimes of sexual violence and violence against women and children.[41]

Protective measures focus primarily on the needs of witnesses. They depend to a great extent on whether the witness is only an eyewitness or s/he is at the same time also a victim witness which suffered physical and psychological traumas. There is a wide range of possible protective measures starting from concealing a person's licence plate up to a relocation of the witness in or outside the country, a change of his/her personal identity or the identity of the family member, counselling, support, physical and psychological rehabilitation, the development of short and long term plans for protection and security arrangements, etc.[42] Briefly said, the units are sup-

39 *See*: Gavin Ruxton, "The Treatment of Victims...

40 *See*: Hogher- C. Rohne, "The Victims and..., pp. 6-10.

41 ICC Statute Articles 43(6), 44 (1-2) and 36 (8).

42 *See*: Rule 34 of the ICTY Rules of Procedure and Evidence of ICTY; Rule 34 of the ICTR Rules of Procedure

posed to take all measures necessary to ensure that witnesses feel safe and protected physically and psychologically, i.e. emotionally. And, while the main concern of the Victims and Witnesses Sections is the well-being of the victim and/or witness who testifies, it should not be forgotten that the Registry is a body "responsible for the non-judicial aspects of the *administration and servicing of the Court*"[43] (emphasis added) which means that its main concern focuses on providing the appropriate assistance to the Court in order to be able to carry out its functions.

1.2. Normative (Procedural i.e. Judicial) Framework

Unlike institutional the normative framework consists of procedural i.e. judicial measures. They can be ordered at pre-trial and/or trial stage of the proceedings. At the pre-trial stage protective measures consist of non-disclosure of the identity of a witness "who may be in danger or risk until such a person is brought under the protection of the Tribunal". In order to preserve the rights of the defendant the identity of the witness shall be disclosed in sufficient time prior to trial to allow adequate time for preparation. In the ICTY, as pointed out by the Trial Chamber, this Rule has always been interpreted as including the power to make non-disclosure orders which continue throughout the proceedings and thereafter.[44]

During the trial stage a Judge or a Chamber may order appropriate measures for the privacy and protection of victims and witnesses. Such measures can be ordered *proprio motu*, at the request of either party, of the victim or witness concerned or of the Victims and Witnesses Unit. There are different measures which the Chamber may order. Apart from controlling during the trial stage the manner of questioning to avoid harassment or intimidation of witnesses, one of the measures the Chamber may order is to prevent disclosure to the public or media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him. The disclosure of identity can be prevented and the witness' identity can be withheld from the public through different measures, such as the use of pseudonyms, screening of witnesses from the public gallery, the use of one-way

and Evidence and Article 43 (6) of the Rome Statute.

43 ICC Statute, Article 43 (1);

44 *Prosecutor* v. *Radoslav Brdjanin and Momir Talic* case, Decision of the Trial Chamber on Motion by Prosecution for Protective Measures, 3 July 2000, para. 22.

closed circuit television, facial or voice distortion, allowing testimony by way of video-link and the redaction of information from the broadcast and transcripts to testimony in closed sessions.[45] Closed sessions, as pointed out above, can be ordered under specific conditions one of them being the need to provide for safety, security or non-disclosure of the identity of a victim or witness. Special measures, such as placing of screens which prevent the witness to see the accused, can be taken in cases of sexual assault which take into consideration the vulnerable position of the witness and the need to avoid the re-traumatization caused by giving the testimony.

Like in the *ad hoc* Tribunals, the ICC can take at any stage of procedure a decision on protective measures in order to protect safety, physical and psychological well-being, dignity and privacy of both victims and witnesses.[46] The Court shall in particular take into account the needs of children, elderly persons, persons with disabilities and victims of sexual or gender violence.[47] Judicial measures can include *in camera* proceedings which bar the public from the Court or the hearing takes place in the private room of the judge, or allow the presentation of evidence by electronic or other special means. These measures shall be in particular implemented in the case of a victim of sexual violence.[48]

Usually in one case multiple measures of protection are requested either for one or for more witnesses. For example, in the *Tadic* case the ICTY has identified five categories of measures sought by the Prosecution: (a) those seeking confidentiality, whereby the victims and witnesses would not be identified to the public and the media; (b) those seeking protection from re-traumatization by avoiding confrontation with the accused; (c) those seeking anonymity, whereby the victims and witnesses would not be identified to the accused and his counsel; (d) miscellaneous measures for certain victims and witnesses; and (e) general measures for all victims and witnesses who may testify before the ICTY in future.[49] Similarly, in the *Prosecutor*

45 *See*: Gavin Ruxton, "The Treatment of Victims...

46 ICC Statute, Article 68 (1).

47 ICC Rules of Procedure and Evidence, Rule 86.

48 ICC Statute, Article 68 (2).

49 *See*: The Prosecutor v. Dusko Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (IT-94-1-T) of 10 August 1995, para.4.

v. *Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* case, the Prosecution sought eleven separate measures for the protection of twelve witnesses.[50]

2. Problematic Aspects of Witness Protection

While the victims and witness protection presents one of the basic pillars of functioning of the current international criminal structures, the implementation of the relevant provisions has brought to the light different problems, obstacles and difficulties of both legal and practical nature. Probably the biggest and the most complex practical problem which has also its legal dimension is to provide testimonies from hesitant witnesses who are intimidated or threatened and to provide guarantees that they and if needed their family members will enjoy protection during and after they have submitted their testimonies. In the legal sphere the most problematic aspect concerns the issue of balancing the need to protect witnesses with the right of accused to a fair and public trial.

2.1. Providing Testimonies from Intimidated and/or Threatened Witnesses

One of the major difficulties the *ad hoc* Tribunals have faced in their practice until now is the consent of the witnesses to give testimonies, especially those who are intimidated or threatened. The consent of threatened witnesses to testify is in most cases made dependent on the measures of protection to be provided for them and members of their families. In practice, the inability to provide adequate protection of witnesses has resulted in a failure of the prosecutions. For example, the ICTY Prosecutor in the *Tadic* case was forced to abandon the charges for rape because of the refusal of the witness to testify after the threats of her family.[51] The same happened in the ICTR. Similarly, the ICC is facing already now serious problem because of the absence of a "functioning and sustainable system" for victims and witness protection which prevents an "effective investigation inside Darfur".

50 *Prosecutor* v. *Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* case, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", 28 April 1997.

51 Michael P. Scharf and Ahran Kang, "Errors and Missteps: Key Lessons, Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR and SCSL", *Cornell International Law Journal*, Vol. 38, Number 3, Fall 2005, s. 937.

Obviously, the power of *ad hoc* Tribunals and the ICC to deal directly with the issue of intimidation of witnesses is very limited. They follow to a certain extent some national legal systems (Denmark, UK, Hungary and Japan) in which intimidation is made punishable,[52] however they do not have on their disposal any enforcement powers which make the implementation of any decisions in that respect problematic.

The only remedy which *the ad hoc* Tribunals can use in case of (a) a person that attempts to interfere with or intimidate a witness or (b) a person (which can be a witness or other participating party) that discloses information relating to the proceedings in violation of an order is to find that person in contempt. Also a witness which refuses to testify or fails to answer a relevant question can be found guilty of contempt. This is regulated by the Rules of Procedure and Evidence of both ICTY and ICTR.[53] The ICTY has had such cases in its practice. For example, in 2002 a protected witness K-12 came to The Hague to testify about the removal of evidence of crimes committed in Kosovo, however, s/he subsequently refused to testify and was initially found guilty of contempt. Several months latter the Tribunal changed its decision as it appeared that the potential witness was exposed to real and serious threats.[54] In case of contempt the Tribunals may impose a fine to a certain maximum amount.

Of course, it goes without saying that, since the international criminal tribunals have no enforcement powers they have to rely to a great extent on the readiness of national authorities to cooperate and provide assistance. The need for assistance is especially present in cases of implementation of summons or "binding orders" issued by the Tribunal(s).

The *ad hoc* Tribunals or the ICC can do very little to reduce intimidation as such. Probably one of the most effective ways to reduce intimidation is to minimise the risk of identification of witnesses by ordering the above-dis-

52 Council of Europe, "Intimidation of Witnesses and the Rights of the Defence, Recommendation No. R (97) 13, adopted by the Committee of Ministers of the Council of Europe on 10 September 1997 and Explanatory Memorandum, 1998, p. 31.

53 *See*: ICTY RPE, Rule 77A(i; iv); ICTR RPE (Rule 77 A(i; iv), ICC

54 *See*: for example, the indictment of Domagoj Margetic, the Croatian freelance journalist accused by ICTY of publishing protected witness information from the Blaskic case after he received an ICTY cease and desist order (case Nr. IT-95-14-R77.5).

cussed measures which are focused on protection i.e undisclosure of their identity. While the variety of possible measures is impressive their practical implementation suffers of different kinds of weaknesses. It happens sometimes that intentionally or unintentionally the identity of the witnesses is being disclosed. For example, Milan Babic who testified under number C-061 in a case, was (by accident) addressed by his own name by the judge and (probably intentionally) by the accused. In ICTR the prosecution claimed that via the defence the identity of protected witnesses is being disclosed. In order to prevent this kind of situations the disclosure of statements of protected witnesses is obtained on a rolling basis "which means that the time of disclosure is measured from the anticipated date on which a particular witness is expected to testify".[55] Göran Sluiter criticizes the introduction of "rolling disclosures" as a clear indication that protective measures lack the authority to induce a reasonable amount of respect which has to do with the absence of an adequate and direct enforcement mechanism in case of violations. In addition, the trials take too much time: reasonably expedient trials which require full participation of the parties to the proceedings would obviate the need for "rolling disclosures". [56]

Apart from the situations of intimidated or threatened witnesses, it frequently happens that victims and witnesses refuse to testify for some other reasons. As such can be mentioned the lack of familiarity with or of information relating to the proceedings. Sometimes practical arrangements, like travelling to the court or measures of protection which impose relocation of the witness and his or her family, seem to be inconvenient or unacceptable to the witnesses. So, for example, there are witnesses of the crimes committed in Darfur, Sudan, who are keen to participate [in the ICC procedures] and tell their stories, but insist of going back to their lives in Darfur which might in some situation be difficult to realize because of the reasons of their personal security.[57] As experienced by the ICTR it is difficult to ensure that witnesses are always available, even thou it can make use of additional witnesses present in Arusha, Tanzania. The use of additional witnesses causes delays in trials as there is a frequent situation occurring that Prosecution

55 Göran Sluiter, "The ICTR and the Protection of Witnesses", *Journal of International Criminal Justice*, 3, 2005, p. 972.

56 Göran Sluiter, "The ICTR and..., p. 973.

57 See:Katy Glassborow, "ICC Inquiries Jeopardised", Institute for War and Peace reporting, 6 July 2006, http://www.globalpolicy.org/intljustice/general/2006/0706jeopardized.htm .

and Defence counsel require additional time to prepare witnesses for examination-in-chief."[58]

Because of the difficulty to provide live testimonies the Tribunals are increasingly inclined to approve use of depositions and audio-visual presentations, as well as transcripts and written statements. Commenting on the situation in ICTY Patricia M. Wald emphasized that this happens with regard to peripheral or background aspects of the case while for "the core of the accused's role or conduct in so far as it demonstrated guilt" live testimony is still required. However, this appears to be vulnerable as well, which causes certain concerns as "it would seriously undermine the hard-fought respect for its process were the Tribunal to go further down this road."[59] While Rule 89 permits evidence that is 'probative' however to permit critical material to be admitted without the ability to directly view and question the witness goes to the heart of the process and threatens to squander the ICTY's most precious asset – its reputation for fairness and truth seeking."[60]

2.2. Balancing the Rights of Accused with the Need to Protect Witnesses

The bodies of law as established by the *ad hoc* Tribunals and ICC do not stand alone isolated from all other major rules of international law. It applies especially to the international norms and standards for protection of human rights. In carrying out criminal procedures the Tribunals must comply with the basic rights of accused which are established in international human rights documents. Article 21 of the ICC Statute explicitly confirms that the interpretation and application of the Statute must be consistent with international human rights. Basic human rights (of accused) in criminal proceedings include the right to a public hearing and the right to a fair trial.[61] Part of the fair trial is the right of accused to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The right to a fair trial is a minimum guarantee to which the accused is entitled and must fully be respected in all stages of (international) criminal procedures.

58 Completion Strategy of the ICTY, UN Doc. S/2006/358 of 1 June 2006, para. 46.

59 Patricia M. Wald, ICTY Judicial Proceedings – An Apprisal from Within", *Journal of International Criminal Justice*, 2, 2004, p. 473.

60 Patricia M. Wald, ICTY Judicial Proceedings ..., p. 473.

61 See: ICC Statute – Article 67; ICTY Statute – Articles 20-21; ICTR Statute – Articles 19-20.

It is contained in all major human rights instruments such as International Covenant on Civil and Political Rights (Article 14), the European Convention on Human Rights (Article 6(1)), the American Convention on Human Rights (Article 8(5)), etc. The Statutes and the Rules of Procedure and Evidence of the *ad hoc* Tribunals regulate the rights of suspects and accused in a rather sober way; they only regulate the essentials and most of the issues are left to the discretion of the judges.[62]

With regard to the right to a public hearing, the rules of procedure and evidence of all three judicial bodies clearly establish that in some situations it can be "qualified and curtailed" to accommodate other interests i.e. interests of justice which can impose the need to restrict this right and to hold closed sessions. This has been done frequently not only for the reason of sensitivity i.e. confidentiality of the issues discussed but also for the reason of protecting witnesses. It has been, however, severely criticized by some accused. For example, the former Yugoslav President Slobodan Milosevic who died in March 2006 in the ICTY detention unit in The Hague, protested strongly against "the medieval method of using secret witnesses in closed sessions" a practice which allowed "the witness to tell a bunch of lies".[63]

In 2005 the Trial Chamber while carrying out the procedure against Momcilo Krajisnik,[64] noted that an accused has a right to a fair and public hearing and that proceedings before the Tribunal must be public unless good cause is shown to the contrary. According to the Chamber a witness might be permitted to testify at trial with a pseudonym and with image and voice distortion under certain criteria.

"It is required that the party seeking the measures must demonstrate the existence of an objectively grounded risk to the security or welfare of the witness or the witness's family should it become publicly known that the witness gave evidence. It will be sufficient for a grant of protective measu-

62 Michaïl Wladimiroff, "Rights of Suspects and Accused", in: Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds.) Substantive and Procedural Aspects of International Criminal Law, Commentary, Vol. 1, Chapter 11, p. 450.

63 Taken from: Mirko Klarin, Protected Witnesses Endangered, IWPR, January 31, 2003 http://www.globalpolicy.org/intljustice/tribunals/yugo/2003/0131witness.htm .

64 Prosecutor v. Momcilo Krajisnik, IT-00-39-T.

res if a party can show that a threat was made against the witness, or, for example that there exist a combination of the following three factors: 1. the expected testimony of the witness might antagonize persons who reside in the territory where the crimes were committed; 2. the witness or his or her family live in that territory, have property in hat territory or have concrete plans to return to live in the territory; and 3. there exists an unstable security situation, which is particularly unfavorable to witness who appear before the Tribunal."[65]

Obviously in international criminal procedures one of the main concerns is how to maintain the necessary balance between the rights of the accused and the right of witnesses to protection. In case the two rights conflict, the protection of victims and witnesses must yield to the right to a fair trial[66] which is considered to be paramount to the right of victims and witnesses to protection.[67] A lot of controversies with regard to the right to fair trial occur in situations when the court allows anonymous testimonies. "Anonymity" means that the identifying particulars of the witness remain totally unknown to the defendant,[68] or in other words that the identity of the witness is withheld not only from the public, media but also from the accused and the defense counsel. It goes beyond the scope of this article to discuss in more detail various positions taken in national legal systems and on international level, in jurisprudence and doctrine, with regard to validity of anonymous testimonies. It suffices to say that prevailing view considers that the permission of anonymous witnesses violates directly the rights of the defendants, including the right to check the reliability of the witness. The Amnesty International has emphasized that the use of testimony from an anonymous witness where the defence is unaware of the witness's identity at trial, violates the right of accused to examine witnesses, because the accused is deprived of the necessary information to challenge the witness's

65 Contained in the Trascript (IT-00-39-T) at 127722, of 27 April 2005. Taken from Daryl A. Mundis and Fergal Gaynor, "Current developments at the Ad Hoc International Criminal Tribunals", *Journal of International Criminal Justice,3,* 2005, pp. 1134-1160, at pp. 1147-48.

66 Mohamed Othman, "The 'Protection' of Refuge Witnesses by the International Criminal Tribunal for Rwanda", *International Journal of Refugee Law*, Vol. 14, No. 4, 2003, p. 496.

67 Mohamed Othman, "The 'Protection' of..., p. 496.

68 Council of Europe, "Intimidation of Witnesses and the Rights of the Defence", Recommendation No. R (97) 13 and Explanatory Memorandum, 1998, p. 7.

reliability.[69] Therefore, the use of evidence from anonymous witnesses may render the trial as a whole unfair.[70]

Neither the Statutes nor the rules of procedure and evidence of ICTY, ICTR and ICC include provisions making anonymous testimonies possible. However, in its practice the ICTY has gone beyond the letter of its rules. For the first time anonymous testimony was introduced in the *Tadic* case[71] and thereafter the Tribunal was very careful and hesitant in using it. In any case, being aware of the notable tension between the need for anonymous testimonies and the right of the accused to due process and in order to eliminate this tension and to protect the rights of defendants to fair trial, the Tribunal has elucidated some criteria and safeguards for accepting a testimony of an anonymous witness. The criteria set are followed also by some national courts. These are: (a) the existence of a real fear for the safety of the witness or his/her family; (b) the testimony of the particular witness must be important to the Prosecutor's case; (c) the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy; (d) there does not exist or there is no effective witness protection programme; and (e) any measures taken should be strictly necessary and if less restrictive measure can secure the required protection, that measure should be applied.[72] It has also set clear guidelines to be followed in respect of anonymous witnesses.[73] According to these guidelines: (1) the judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony; (2) the judges must be aware of the identity of the witness in order to test the reliability of the witness; (3) the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts (such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable); and (4) the identity of the witness must be released when there are no longer reasons to fear for the security of the witness.

69 Amnesty International Fair Trial Manual, Section B., para. 22.2.1. http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm#22 .

70 Amnesty International Fair..., para. 22.2.1.

71 *Prosecutor* vs. *Dusko Tadic*...

72 *Prosecuter vs. Dusko Tadic*..., paras. 62-66.

73 *Prosecuter vs. Dusko Tadic*..., para. 71.

3. Conclusion

Behind the appearance of any witness in international criminal procedures there is a concrete human (hi)story and separate case to deal with. This article has touched upon basic issues of witness protection which merely constitute the tip of the iceberg. It is obvious that international criminal procedures have no chance of success without a proper protection of victims and witnesses. A big step forwards has been made by the introduction of institutional and normative framework providing protection of witnesses. However, some legal issues remain controversial and as such draw attention in both jurisprudence and doctrinal views. From practical issues only the problem with reluctant witnesses who refuse to testify because of intimidation and threats to which they are subjected has been briefly discussed. There are however many more practical problems. One of them is the security problem. It has been emphasized elsewhere that only in ICTR the appearance of witnesses increased the significance of security multifold. That is true to a certain extent also for the former Yugoslavia and will be problem in other cases which come under the consideration of international judicial bodies.

Cooperation is another problematic issue. International trials are dependent on the cooperation of bodies which have in their possession information and documents of relevance for a particular case, but also on the cooperation in practical arrangements. The relation between the ICTR and the Rwandian Government was in certain periods of time under strain because of the Tribunal's concern about the failure of the Rwandian Government to facilitate smooth travel of witnesses to Arusha in 2002. It is clear that developments in the field of international criminal law do not stand alone and isolated. Establishing cooperation between international judicial bodies on the one hand and national authorities, organs and organizations on the other hand, is of a great importance for all aspects of international criminal procedures. With regard to protection of witnesses such a cooperation includes, *inter alia*: exchanges of information regarding witness protection; the procedures to be followed when mutual assistance is sought; the use of advanced technical (tele)communication means to facilitate the transmission of witness testimony in cases where, for reasons of protection, the witness cannot appear in court; and mutual assistance in relocating witnesses in need of protection and in other practical matters concerning

the effective protection of those witnesses.[74]

One of the major factors which affect the efficiency of the existing system(s) of protection of witnesses is the lack of financial means for implementing necessary measures. There are no exact figures but it is clear that the protection of witnesses is costly. The annual reports of the *ad hoc* Tribunals do not include any information concerning the financial aspects of witness protection. However, it seems obvious that bringing witnesses from various parts of the world to the Tribunals[75] and providing them with protection requires significant financial resources. According to some sources only in 2001 Registry of the ICTR provided US $ 615.150,- for travel expenditure which included also travels of the witnesses (about 250 Prosecution and Defence witnesses) to Arusha from more than 15 African, European and American countries. In this figure expert witnesses coming from other parts of the world are not included. How much the protection of each individual witness will cost depends very much on the measures which should be taken. Apart from the regular costs covering the travel and subsistence costs[76], costs can be incurred on the part of witnesses for a specific medical and other care or the need to relocated him and his family to a third location or country. Costs include also the whole apparatus, meaning the employees and experts in Victims and Witnesses Sections. It is therefore clear that insufficient financial means might be one of the serious barriers in implementation of necessary protective measures. In case of *ad hoc* Tribunals the lack of adequate resources is well known as they work within the financial restraints endemic to the entire UN system.[77] This is also one of the reasons for the absence of long-term witness protection programme.[78]

74 See: Council of Europe "Terrorism: Protection of Witnesses and Collaborators of Justice", 2006, p. 33.

75 Taken from: Patrik Fullerton, "Costs of Trials", *Global Justice Program*, Vancouver, Canada: June 2003, published on-line.

76 For example, in ICTR three are categories of witnesses which can incur specific costs: (a) witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures, (b) witnesses who reside outside Rwanda in other African countries who have also not affirmatively waited their rights to protective measures and (c) witnesses who reside outside the African continent and ho have requested that they be granted protective measures (See: Prosecutor v. Eliezer Niyitegeka, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, of 12 July 2000, para. 1).

77 Christine Chinkin, "The Protection of Victims and Witnesses", in: Gabrielle Kirk McDonald and Olivia Swaak-Goldman (Eds.) *Substantive and Procedural Aspects of International Criminal Law, Commentary*, Vol. 1 2000, Chapter 12, p. 456.

78 *Prosecuter vs. Dusko Tadic...*, para. 65.

However, it seems that taking over of the cases by national jurisdictions in accordance with the completion strategy, the financial burden will not present a real problem in the *ad hoc* Tribunals.*

* For abstract and bibliography refer to Turkish translation.