

The Protection of Victims and Witnesses: Jurisprudence and Courtroom Measures for the International Ad-hoc and Hybrid Tribunals

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Objectives

- Discuss the relevance of witness and victim protection in criminal trials
- Share best practices from jurisprudence of the the ICC, ICTR, and other Courts as deemed necessary, including the Extraordinary Chambers in the Courts of Cambodia (ECCC) .
- Recommendations

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Definition of Witnesses and Victims

- According to Gert Vermeulen, a witness is defined as: ... a person, other than the defendant, having knowledge of a fact (possessing information) to be ascertained in criminal proceedings or summoned by the judicial authority to provide testimony on that fact.
- Rule 85(a) and (b) of the ICC Rules of Procedure and Evidence define Victims as any 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. Victims include institutions or organizations that have suffered harm of their property dedicated to religion, art or education. Therefore, it extends protection to companies and other bodies as opposed to a single individual.
- In my view the Victim can be categorized in three ways:1) the international community as a victim because the crimes affect humanity as a whole and 2) the victim as an individual who suffers physical, emotional or economic harm and of course the unnatural persons as described by the ICC Rules.

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Rationale for Witness and Victim Protection

- Legal obligation enshrined in international treaties .
- Safeguards the integrity and success of a judicial process.
- Fear of intimidation and retaliation. Most victims and witnesses live in volatile and insecure environments where their human rights could be violated.

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Guiding Principles in Granting Protection Measures

- The primary reference point for protection of witnesses is drawn from the ICTY jurisprudence .
- Protective measures is only made available to witnesses who are at a serious risk of intimidation or harm, taking into account the nature of the alleged crime, the nature of the threat, the relationship between the witness and alleged perpetrator, the criminal record of the alleged perpetrator and the importance of the testimony to be given by the witness.
- Mere statement that witnesses need protection is not acceptable . See Kajelijeli decision on protection of defence witnesses (ICTR-98-44A-T of 23rd April 2001)
- Equal protection for all victims and witnesses, whether they are for the defence or the Prosecution (See e.g. Article 21 ICTR).
- Balance due process rights of the accused vis-à-vis protection of victims. Articles 20 and 21 of the ICTR and ICTY and Article 68 ICC enjoin Chambers to establish the most equitable balance of the rights of the accused with the physical and psychological wellbeing of witnesses. If the rights of the accused were to be seriously compromised by protective

Guiding Principles in Granting Protection Measures cont'd

- Case law on balancing due process rights of the accused vis-à-vis protection of victims.
- See Decision of the Trial Chamber, ICTR vs Gatete Jean Baptise, Decision on the prosecution request for protection of witnesses.

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Guiding Principles in Granting Protection Measures cont'd

- In the Tadic case, the Trial Chamber of the ICTY emphasized that any protective measures ordered should not go beyond the level required to achieve the appropriate level of protection for that particular witness.

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Duties of the Court on Witness and Victim Protection

- The Trial Chamber of the ICTY in the Tadic case explicitly sets out the duties of the court under five broad categories:
 - (1) prevent the identification of victims and witnesses to the public and media. [See also Rule 75(B) SCSL and Rule 87 (3) of the Rules of Procedure and Evidence of the ICC provides for different protective measures including non-disclosure of information to third parties, information leading to identification of the witness or victim is expunged from the public orders of the chamber, alteration of voice and facial distortion, use of pseudonyms. [see r 75 ICTR]
 - (2) See Dylo Lubanga Voice distortion
 - (3) Nahimana case – witness x testimony via 2 way closed circuit, facial distortion at the Hague
 - (4) Prosecutor Vs Norman Hinga and 2 others (SCSL-04-14-T) (8th June 2004) (Decision on modification of protective measures for witnesses-facial distortion ordered.

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Duties of the Court on Witness and Victim Protection cont'd

- (2) preventing the re-traumatisation caused by confronting the accused, Article 43 of the ICC provides for powers of the Registrar to set up the Victim and Witness Protection Unit. The ICTR has a Registry on Witness and Victims Support Section (WVSS) which was established to ensure that witnesses receive relevant support including physical and psychological rehabilitation as well as protection as they testify. This has been exercised by judges in various cases notable of which is the case of *Akayesu* which involved witnesses/victims of rape.
- In *Akayesu*, the Judges exercised their statutory powers by allowing a psychologist / counselor to be recruited by the Registrar within the ICTR Rules of Procedure and Evidence. The Counsellor stayed in the dock throughout with the witnesses in order to mitigate trauma during cross examination.

See also Dylo Lubanga's case

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Duties of the Court on Witness and Victim Protection cont'd

- (3) ensure anonymity from the accused and defence counsel mainly during pre-trial and later in a limited way, prior to the witness's testimony (delayed disclosure of witness identify prior to trial)e.g. the ICTR cases
- (5) general measures concerning the protection of witnesses and victims in and around the premises of the Tribunal - Article 68 (2) of the ICC and Rule 87 of the Rules of Procedure and Evidence of the ICC Statute
- Articles 14 and 21 of the ICTR Statute provide that the rules of procedure and evidence shall provide measures adopted for the protection of victims and witnesses.
- Note: In the ICC Rules, consent of the person to be protected is sought, while in the ICTR, general protection is issued but no consent is obtained from victim although this is done on a case by case basis. Consent needed to rescind protective measures

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Duties of Court cont.

- The Extraordinary Chambers in the Courts of Cambodia [ECCC] were established in October 2004 following the ratification and approval of the 'Agreement between the United Nations and the Royal Government of Cambodia.'
- The mandate of the ECCC is to prosecute crimes committed during the period of the Democratic Kampuchea, dating from 17th April, 1975 to 7th January, 1979.
- The new Internal Rules of the ECCC are aimed at ensuring effective victim participation and reparations. To this end, the Victims' Unit which was set up under Rule 12 is charged with assisting victims to lodge complaints and submitting *Civil Parties* applications. It also provides victims and civil parties with information concerning lawyers and Victims' Associations, or any other such information necessary to facilitate effective participation.
- In addition, the VU also facilitates the participation of victims and common representation of *civil parties*, and assists the Public Affairs Section of the ECCC in outreach activities related to the victims.

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Duties of Court Continued

- As such, Rule 29 empowers the Court to guarantee the security of the victims who participate in the proceedings before it, whether as complainants or civil parties and witnesses.
- To this end, the Court may make orders for non disclosure of a witness' identity either on its own motion or at the request of one of the parties or their lawyers. All decisions are made in consultation with the Victims' Unit or the Witnesses / Experts Support Unit.

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How Are Victims and Witnesses Protected

- Protection of the identity of witnesses
- Confidentiality in handling the evidence
- Protection for vulnerable groups (e.g women, children, insiders, victims of sexual offences; physically challenged witnesses(disabled)
- Protection after testimony

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Protection of the Identity of Witnesses

- **Rationale for granting protective measures** (blanket vs case by case basis). ICC- Case of **Prosecutor vs Lubanga** looks at rationale for granting protection measures within and outside court room . ICTR ; Defence application for protective measures; See. Kayishema- Ruzindana case-must prove alleged threats or intimidation and demonstrate that a witness who is a refugee is not seeking protection as a way of escaping prosecution.
- Rule 87 (3) of the Rules of Procedure and Evidence of the ICC and Rule 75(B) of the Rules of Procedure and Evidence of the SCSL and ICTR. A Judge may hold in camera proceedings to determine whether to order Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or witness or of the persons related to or associated with him/ her such means as; expunging names and identifying information from the public records; non-disclosure to the public of any records identifying the victim or witness (identifying information contained in the existing records of the Tribunal shall be removed from the public record of the Tribunal and placed under seal and shall not be disclosed to the public or the media) ; giving testimony through image – or voice-altering devices or closed circuit television, video link or other similar technologies; and assignment of a pseudonym.

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Protection of the Identity of Witnesses cont'd

- In **Prosecutor vs Gacumbitsi Sylvestere**, ICTR In the Decision, the Trial Chamber ordered the protection of the identity of all prosecution witnesses; the defence was ordered to avail to the Registry a designation of all persons working on the immediate Defence Team who will have access to any confidential information regarding witnesses. It was also ordered that the names , relations, addresses, whereabouts and other information tending to identify any protected prosecution witness be sealed by the registry and not included in any public or non-confidential records of the Tribunal .
- See also Taylor's case

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Protection of the Identity of Witnesses cont'd

- Principle of applicability of non-disclosure has been applied in many cases before the ICTR. In the ICTR case of **Prosecutor vs Nyamasuhuko Pauline & Anor** ; the decision sought to strike a balance between the Accused's right to a fair trial by availing him with the means necessary to adequately prepare his defence and the witness' right to information to remain anonymous to the public and media. Regarding the conditions that must be met before a witness can qualify for protection of his / her identity from disclosure to the public and media, the Tribunal held that there must be a real fear for safety of the witness and an objective basis to underscore the fear. The court also ordered the use of pseudonyms and ordered the disclosure of information leading to the identification of potential defence witnesses , at least 21 days before the witness's testimony would occur.
- Non-disclosure to the public of a witness's identity preserves the witness's right to return to his/her former life without the trauma of relocation or potential security risk

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Protection of the Identity of Witnesses cont'd

- The second and most commonly used is non-disclosure to the public through in-court protections but with disclosure to the defence. For example screens around the witness box or hold closed sessions.
- At some point before the trial, the real identity of the witness is revealed to either party to give full effect to the right to cross examination and also to help party in preparing their case.
- Enforcement of the protective measures ; non-contact of a protected witness without the consent of witness or guardian, where witnesses are young children below 18yrs (SCSL). In all Courts, liaison between either Defence or Prosecution and WVSS (Witness and Victim Support Section)is mandatory. Should they feel to agree, they can resort to the Chamber.Any breach of non-disclosure attracts contempt of court. Witnesses are housed at a secret location (safe house)

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Handling of Evidence

- *Principle of confidentiality.* Rule 81 (4) of the ICC Rules of Procedure and Evidence and 101.4(c) of the ICC staff rules requires staff to keep any information relating to victims and witnesses confidential. Regulation 88 of the Registry requires that all information relating to witnesses is kept in a secure electronic database that can be accessed only by designated Registry staff and, where appropriate, by the chambers and participants. This has been achieved by empowering Chambers to expunge the witnesses' names and personal details from the record (Articles 83(1) and 64(6)(c) of the ICC and rule 87 of the rules of procedure and evidence of the ICC).

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Handling of Evidence cont'd

- Many courts have addressed the aspect of confidentiality to preclude the disclosure of confidential and sensitive information.
- Closed hearings or other measures aimed at maintaining confidentiality from the public or media, and in limited circumstances, from the accused.
- Redactions; obliterating any details pertaining to witness. **Prosecutor vs Nzeyimana , ICTR-OO- 55c-T.**

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Handling of Evidence cont'd

- **Unique confidentiality measures in the Extra Ordinary Chamber of the Cambodian Court:** The ECCC ensures that at least one of the original recordings of proceedings is sealed in the presence of the witness and his/her lawyer, if present, under the signature of the Co-Prosecutors or Co-Investigating Judges. [see Rules 25(1)f), (2), 28(3-8).
- Pursuant to Rule 28(7)a), proceedings may be held in-camera in cases where a witness is likely to give self-incriminating evidence.

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Handling of Evidence cont'd

- Rule 28(7)b) allows the ECCC to order that the content of evidence given by a witness shall not be disclosed, and breach of such an order is subject to sanctions specified under Rules 35-38.
- In the SCSL, the Defence should return to the Registry, at the conclusion of the proceedings in the case, all disclosed materials and copied thereof, which have not become part of the public record.

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Special Protective Measures

- Children have been the victims and/or witnesses to crimes such as abuse, sexual violence, abduction, recruitment into armed forces or groups and trafficking.
- Child-specific guidelines such as those enunciated in Paragraph 32 of the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, recognize that where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.
- The SCSL recognized in **Prosecutor v. Sam Hinga Norman & 2 ors Order on Disclosure and Characterization of the Age of Witness TF2-080 , 14 April 2005** that in such cases when a child is a witness of a crime, there is need to provide special measures of protection to avoid re-traumatization. In this case Closed Circuit TV was ordered. In the same case , the Chamber made an 'Order on an Application by the Prosecution to hold a Closed Session Hearing of Witness TF2-223.' The witness was an insider witness.

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Special Protective Measures cont'd

- In the ECCC, when vulnerable witnesses such as children, elderly persons and persons with disabilities (e.g. deaf and mute witnesses) take the stand, special questioning techniques are used in order to mitigate any subsequent traumatization that may result from giving evidence. – Rules 25(4) and 27. Such measures include giving evidence without audio or video recording, and for deaf and mute witnesses, the questions are written down by the Chambers or co-Investigating Judges and the witness is asked to read them and answer in writing. If the witness is illiterate, an expert in that area is called in to help.

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Special Protective Measures cont'd

- Another category which should be accorded full protection are the women. We know that women all over the world suffer from incidences such gender and sexual based violence. Hence, witness protection is crucial in relation to women because of the stigma that often goes hand in hand with violence against them and the risk of re-victimization.
- This recognition is well reflected in national laws, particularly criminal laws, which include special protections in cases of sexual violence. e.g. Kenya, S. Africa, Ghana etc which have Sexual Offences Acts and the UK etc
- In Rule 34(A)(ii) of the ICTY Rules of Procedure and Evidence, Rule 34(A)(ii) of the ICTR Rules of Procedure and Evidence and Rule 17 (a) (iv) of the ICC Rules of Procedure and Evidence, notes that the Victims and Witnesses' provides that the Victims and Witnesses Section shall 'Ensure that [victims] receive relevant support, including physical and psychological rehabilitation, especially counseling in cases of rape and sexual assault in 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.

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Special Protective Measures cont'd

- In the ECCC, the **special questioning techniques** such as those that apply to vulnerable witnesses aforementioned also apply to female witnesses who have been victims of sexual or gender violence. Rules 25 and 27 allow the Court to use special questioning techniques when vulnerable witnesses such as victims of sexual or gender violence, children, elderly persons or persons with disabilities (e.g. the deaf and mute) take the stand. This ensures that such witnesses are not left out of the judicial process merely by virtue of their special conditions.
- These and other measures have been developed to protect women from violence including protective, restraining, or 'no contact' orders and even more technical protection measures linked to national emergency services. International criminal courts also have a number of provisions reflecting the need to protect this group of victims and witnesses.
- Nowadays, the international community recognizes that protection of victims and witnesses should be granted 'especially in cases of rape or sexual assault', a view which has been reflected in a number of the decisions of the international courts and Tribunals.

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Protection After Testimony

- **Relocation:** In special circumstances, in order to ensure their physical protection, the ECCC's co-Investigating Judges and the Chambers may order the relocation of a victim or witness in safe residence either within Cambodia or abroad. [see Rule 29(7)]. The ICC Rules also have provisions on these. SCSL and ICTR have relocated witnesses. The cost involved in the exercise of location will be enormous-ICD may not afford but perhaps in-country relocation may suffice.
- **Continued enforcement of the order protective measures:** an order stays in force unless vacated or lifted by Court; through parties request for modification; variation or waiver, reconsideration,
- In the ICTR case of **The Prosecutor vs Gregoire Ndahimana, Trial Chamber, ICTR-2001-68-T**, the defense witness waived protection and opted to testify under his own name. The Chamber also informed the witness that it would allow him to meet with the accused and directed the WVSS to make the necessary arrangement

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Recommendations

- There should be specific legislations to augment witness and victim protection systems.
- Conduct a needs assessment in respect to witness protection.
- There is need for States to develop national systems in line with international standards, taking into consideration best practices of victims' and witnesses' protection.
- The WVS should be set up in jurisdictions where it does not exist and the sensitization programmes about the same should also be considered.
- There is need for a separate body for the witness and victim protection.

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