



*Ending Torture. Seeking Justice for Survivors*

**ENDING THREATS AND REPRISALS AGAINST  
VICTIMS OF TORTURE AND RELATED  
INTERNATIONAL CRIMES:  
A CALL TO ACTION**

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87 Vauxhall Walk  
London, SE11 5HJ  
United Kingdom

Tel: +44 (0)20 7793 1777 Fax: +44 (0)20 7793 1719

Web: [www.redress.org](http://www.redress.org)

Registered Charity No.: 1015786

This Report was researched and written by Paulina Vega Gonzalez and Carla Ferstman.  
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Without witness protection there can be no fight against impunity. Without witness protection, victims of human rights abuses who complain and seek justice must face serious threats leading to physical harm and possibly death of themselves or their loved ones. This violence is brought onto them by powerful people, whose power invariably comes from the uniforms they wear.

A legal system that promotes justice but does not set in place the means to protect witnesses is a fraud. When victims of human rights abuses understand this, they do not come forward to assert their rights against the perpetrators. No attempt is even begun to make complaints and assert rights. The victims remain silent, inert and fearful.

A justice system depends upon evidence being collected and brought before the courts. If fear prevails, evidence cannot be collected. When evidence is not collected, the courts either do not take up cases or dismiss the charges against the accused, as the judge can only consider what is brought before the court. In this manner, the perpetrators of torture, extrajudicial killings and forced disappearances routinely escape justice. ...

In human rights cases especially, the determining factor between one outcome and the other is protection.<sup>1</sup>

## Introduction

Since its establishment in 1992, REDRESS has worked with countless survivors of torture and related international crimes throughout the world. Each of these cases evinces often unimaginable human suffering and man's capacity for cruelty against fellow human beings. While many of the survivors with whom REDRESS has worked want justice, sharing their experience with their lawyer – let alone publicly – can in and of itself be a deeply challenging and daunting process. Survivors are often so ashamed by what was done to them; they can feel dehumanised and so small that they feel they cease to exist, or cease to want to exist. These feelings make it incredibly difficult for survivors to complain about what happened, regardless of how much they want – and often need – justice in order to have a chance at recovery. Even if they are able to recount what happened to them, as torture is usually perpetrated behind closed doors, torture survivors often feel that no one will believe them if they complain. This is particularly the case as there are often few witnesses other than those carrying out the torture

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<sup>1</sup> B. Fernando, 'The Importance of Protecting Witnesses', in *Special Report: Protecting Witnesses or Perverting Justice in Thailand, Article 2*, Vol. 5 No. 3, June 2006, at: [www.article2.org/pdf/v05n03.pdf](http://www.article2.org/pdf/v05n03.pdf), pp. 2-3.

and the survivor him or herself and there are not always visible scars. As torture is usually carried out by or with the authorisation of the state, torture survivors often feel in a powerless situation; that 'it is their word against mine' and that even if they do complain, no-one will take them seriously. As a result, survivors will not always come forward to complain about the treatment that was meted out against them either because they wish to forget the painful events and/or because of a sense of futility in raising the issue, particularly in countries where impunity is entrenched.

Often though, this failure to come forward is driven by fear: fear that the perpetrators are still in positions of power and there will be reprisals against them or members of their family if they even talk about what happened, let alone try to seek justice. This fear is not abstract or ill-conceived; it is very real and ever-present. This Report focuses on this 'fear'. It considers the countless incidents in which victims, their families and their representatives have been threatened or reprisals have actually been taken against them in an attempt to prevent them from speaking about what happened to them. Where victims have attempted to assert their rights by lodging a formal complaint or pursuing some kind of legal action, reprisals have included killings and physical attacks on them, their families, legal counsel, human rights defenders who take up their cause and key witnesses in addition to the making of death threats, intimidation and constant harassment, defamation, arrests and re-arrests, fabricated charges, loss of jobs, forced relocation and attacks and burning of houses. Threats and reprisals can often result in victims withdrawing their case and key witnesses failing to testify. They can also have the broader effect of deterring other victims and witnesses from bringing complaints out of the fear that they too will be subjected to similar action.

Silencing victims through fear is one of the worst forms of impunity. It maintains the illusion of the rule of law and a legal system capable of following up wrongdoing, but somehow – even in the countries, in which torture is thought to be endemic – very few, if any, complaints are made and if they are, they rarely result in prosecutions or convictions. Silence denies the existence of the problem; the problem may be known but is never spoken about. Victims' experiences become shadowy, unacknowledged reflections of practice that does not officially exist. Such a state of denial maintains victims' isolation and typically entrenches their psychological trauma and provides an enabling environment for the torturers to continue unchecked and with complete impunity. The protection of victims from threats and reprisals is a necessary condition precedent to justice. Without it, the torture becomes a double torture; the experiences are simply relived day in and day out. As such, robust and effective victim and witness protection measures are of central importance to ensure that the absolute prohibition of torture and torture survivors' right to an effective remedy and full and adequate reparation are ensured in practice.

This Report has been written by REDRESS to draw attention to the continuing threats and reprisals faced by victims, their family members, witnesses in their case, their legal representatives and human rights defenders and the accompanying serious inadequacy of protection measures available to victims of torture and related international crimes. Recently, the United Nations highlighted the problem when the Human Rights Council resolved to

request ‘the Office of the United Nations High Commissioner for Human Rights to prepare a report, to be presented to the Council at its 15<sup>th</sup> Session, on the basis of information, including from States on programmes and other measures for the protection of witnesses implemented within the framework of criminal procedures related to gross violations of human rights and serious violations of international humanitarian law with a view to determine the need to develop common standards and promote best practices that would serve as guidelines to States in protecting witnesses and others concerned with providing cooperation in trials for gross human rights violations and serious violations of international humanitarian law.’<sup>2</sup> In September 2009, the United Nations Office of the High Commissioner for Human Rights convened an expert meeting on witness protection for successful investigation and prosecution of gross human rights violations and international crimes. In her introductory speech, the High Commissioner Navanethem Pillay noted the need to ‘refine the effectiveness of witness protection methods through the provision of adequate financial, technical and political support for programs at the national level’. She posited that ‘in view of the overarching objective of combating impunity, the consideration of common standards and the evaluation of best practices that would serve as guidelines may also be useful to enhance human rights protection in trials concerning gross violations.’<sup>3</sup>

Both at the international level and in a number of national jurisdictions, there has been quite a lot of work done to address the particular issue of the protection of witnesses. For example, in 2008 the United Nations Office on Drugs and Crime (UNODC) produced a seminal manual entitled ‘Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime’<sup>4</sup> and a model witness protection bill.<sup>5</sup> In addition, international criminal tribunals have established specialised victim and witness protection units and have developed extensive expertise in handling the protection needs of witnesses, including witness relocation, structures for ensuring confidentiality and systems to protect witnesses prior to and post trial. Just recently, the International Criminal Court convened an expert meeting in which some of this best practice was explored.<sup>6</sup>

Often, the ‘victim’ and the ‘witness’ will be one and the same person although this is not always the case. The emphasis of this Report is on the protection of ‘victims’ and those supporting

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<sup>2</sup> Human Rights Council, Council Resolution on the Right to the Truth, UN Doc. A/HRC/12/L.27 of 25 Sept. 2009, para 8.

<sup>3</sup> UN High Commissioner for Human Rights, Introductory Remarks by Navanethem Pillay at the OHCHR Expert meeting on witness protection for successful investigation and prosecution of gross human rights violations and international crimes, Geneva, 29 Sept. 2009.

<sup>4</sup> UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (Hereinafter ‘UN Good Practices Study’), Feb. 2008, available at: [www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf](http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf).

<sup>5</sup> Available on the website of UNODC: [http://www.unodc.org/pdf/lap\\_witness-protection\\_2000.pdf](http://www.unodc.org/pdf/lap_witness-protection_2000.pdf).

<sup>6</sup> See, ICC, *Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing before the International Criminal Court*, 29-30 Jan. 2009, available at: [www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf).

them, the distinction being that the victim who is not a ‘witness’ in a particular legal case will, experience shows, have less access to and support from prosecutors, police and judges. It is hoped that this Report will contribute to the efforts of the United Nations to ‘develop common standards and promote best practices that would serve as guidelines to States in protecting witnesses and others concerned with providing cooperation in trials for gross human rights violations and serious violations of international humanitarian law.’<sup>7</sup> It is also hoped that the Report will be helpful to governments contemplating the development of protection systems and civil society groups advocating for such systems to be adopted.

This Report begins by considering the nature of the problem as to why victim and witness protection is a necessary condition precedent to justice. It notes the various contexts in which victims have been subjected to threats and reprisals; explains the nature and consequences of the practices; the various protection needs that emerge and the consequences flowing from the failure to protect. It then turns to an analysis of the nature and legal characterisation of victim protection through consideration of the nature of the obligation to protect and an identification of the different right-bearers and duty-holders. The Report then considers the different methods of protection that have been employed by judicial and non-judicial bodies as they relate to different categories of persons and circumstances. It looks at who is deciding on protection-related matters and how such decisions are taken, and analyses the challenges inherent to the implementation of protection measures by international judicial or quasi-judicial bodies, and in particular their relationship with the territorial state where the crimes giving rise to the original victimisation took place.

The Report concludes by finding that a number of gaps exist, both at the normative and practical level. In particular, these gaps include lack of clarity as to the content of the right to protection, the absence of suitable structures at the domestic level to afford protection to victims of crime, the inability of states to afford protection in a context of conflict or protracted instability, the failure of governments to establish appropriate mechanisms to deal with allegations of state abuses, insufficient implementation of precautionary or provisional measures ordered by international bodies and a failure by international bodies and courts to appreciate and respond to the specificities of the risks posed. Many of the challenges relate to a lack of resources but part of the problem is also the narrowness of the approach taken by authorities when dealing with protection, and the lack of will to afford protection and at times the active sabotaging by states of victims’ and witnesses’ security. Protection measures should be designed with regard to the particular problems that present themselves, having regard to the specific circumstances of the individuals in need of protection and the security environment in which they live. Flexibility as to who may qualify for protection and flexibility on the range of measures that may be afforded is essential if progress is to be made. Policymakers should be consulting with victims themselves in all their diversity about what measures may be necessary, and including them in decision-making processes.

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<sup>7</sup> Council Resolution on the Right to the Truth, A/HRC/12/L.27, para 8.



The Report recommends a number of measures that should be taken by states and others to improve protection to victims and witnesses.

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## **Part I. Identifying the Problem**

This Part considers the crimes typically giving rise to a need for protection and the related issue of the types of individuals or groups that will usually require protection.

### **I.1 The Crimes**

Modern protection schemes became known through their use in high profile organised crime cases linked to narcotics and drugs trafficking, extortion and murder and have been popularised in a number of American movies and television crime dramas. They have also been used by international criminal tribunals in conflict or post-conflict cases, to shield witnesses from the scorn of supporters of the accused, who still might wield power in a particular location or region of a country.

There is no definitive list of crimes which pose a particular protection risk or clear-cut ways in which to foresee when a protection risk will arise. To a certain extent, factors potentially indicative of a protection need include the seriousness of the offence; the potential that the victim's pursuit of justice could reveal the commission of other crimes or damaging information about the perpetrator; the commission of the offence during times of political upheaval or sensitivity (such as around the time of elections); the profile of the perpetrator and/or the victim and the potential to implicate other potential perpetrators and/or victims; the type of proceedings pursued against the alleged perpetrator; and the resources, power and authority held by the perpetrator and his/her access to persons who could carry out threats and/or attacks. However, whether a protection risk will arise, to whom and in what form, is also quite unpredictable and does not appear to necessarily operate on a logical or rational basis. As particularly egregious crimes, therefore, it is perhaps more useful to conceive of complaints of

torture and other international crimes as potentially involving protection risks and to ensure that systems are in place to respond effectively and expeditiously to any threats posed.

As noted in the introduction, victims of torture and related crimes perpetrated by state officials have been subjected to harassment, intimidation, physical abuse and killings. The nature of the problem is diverse and widespread in the range of countries where torture is regularly practised. The climate of fear generated by the practice of intimidation can be so great that victims and witnesses are often reluctant to publicly discuss or even be privately interviewed about the threats they receive for fear of retribution from those who make the threats or their allies, including those in powerful positions in the government, military or police. The following examples of cases in which threats and actual reprisals have been carried out highlight the nature of the problem and the need for protection:

**Nishanta Fernando** was killed in Negombo, Sri Lanka on 20 September 2008, after having lodged complaints relating to his torture against twelve police officers. Subsequently, his wife and two children were threatened. The family told the Magistrate's Court of Negombo that they thought the police officers who were respondents in the Supreme Court case were responsible for Nishanta's murder and requested protection from the court and the police. They requested 'special protection', insisting that the officers of the same police station could never provide protection for them but instead would aggravate their problem. The Supreme Court ordered the 'special protection', however, no action was taken. This was not an isolated incident, but part of a disturbing pattern of threats, harassment and killings of victims and witnesses in cases of torture and other serious human rights violations in Sri Lanka, such as the widely reported case of Gerard Perera who was ostensibly killed for pursuing remedies in a criminal case against those responsible for his torture. The UN Special Rapporteur on Torture, following his visit to Sri Lanka in 2007, noted that: 'Intimidation of victims by police officers to cause them to refrain from making complaints was commonly reported, as were allegations of threats of further violence, or threatening to fabricate criminal cases of possession of narcotics or dangerous drugs.'<sup>8</sup>

**Ekkawat Srimanta** was tortured by Thai police to force him to confess to a robbery. He was left with burns all over his testicles, penis, groin, and on his toes, and a range of other injuries from beatings all over his body. All the accused police officers retained their posts. Shortly before his lawsuit against the police was due to start, he withdrew from the case, apparently as a result of police coercion and threats.<sup>9</sup>

On 13 January 2009, **Umar Israilov**, a Chechen torture victim and refugee in Austria, was shot dead in the streets of Vienna, apparently the victim of a politically-influenced

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<sup>8</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Sri Lanka, UN Doc. A/HRC/7/3/Add.6, 26 Feb. 2008, para. 73.

<sup>9</sup> *Special Report: Protecting Witnesses or Perverting Justice in Thailand, Article 2*, Vol. 5 No. 3, June 2006, at: [www.article2.org/pdf/v05n03.pdf](http://www.article2.org/pdf/v05n03.pdf), p. 31.

contract murder.<sup>10</sup> Previously, Israilov had served as a chief witness in a court proceeding against Russia, held before the European Court of Human Rights in Strasbourg, and in another proceeding led by the European Centre for Constitutional and Human Rights (ECCHR) against Ramzan Kadyrov, the sitting president of the Republic of Chechnya.<sup>11</sup>

## I.2 The Individuals and Groups Usually in Need of Protection

In relation to ‘ordinary’ crimes, the most typical manifestation of the need for protection arises in relation to the witness of a crime. The witness can be the actual victim of the crime or a simple bystander. He or she can also be an insider or collaborator, sometimes responsible for the commission of other offences, who may him or herself be detained on suspicion of committing a crime or serving a sentence. The witness can also be an asylum seeker or refugee, at times with the asylum claim brought about by his or her status as a witness.<sup>12</sup> The protection need may arise as a result of the witness communicating information about the crime to the police or prosecution services or later being called as a prosecution witness in criminal proceedings or where the perpetrator and/or his/her associates fears that the witness will make a complaint.

Although many protection programmes were designed to protect insiders and collaborators in their capacity as witnesses, many more actors beyond the traditionally conceived witness may require protection due to their involvement in the complaint or association with the victim, particularly the measures relating to physical security and freedom from harm or intimidation. In cases of torture and other international crimes, protection risks not only arise in relation to a witness but also regularly extend to family members, legal representatives and human rights defenders.

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<sup>10</sup> The murder has been widely reported in the media. See, e.g., L. Harding, ‘Austrian police investigate Kremlin link to Chechen dissident’s murder: Russian agents suspected in shooting of outspoken critic of Grozny regime’, *The Guardian*, 15 Jan. 2009, at: [www.guardian.co.uk/world/2009/jan/15/chechen-murder-austria-russia](http://www.guardian.co.uk/world/2009/jan/15/chechen-murder-austria-russia); C.J. Chivers, ‘Slain Exile Detailed Cruelty of the Ruler of Chechnya’, *New York Times*, 31 Jan. 2009, at: [www.nytimes.com/2009/02/01/world/europe/01torture.html](http://www.nytimes.com/2009/02/01/world/europe/01torture.html); N. Abdullaev & C. Schreck, ‘Austria Arrests Shooting Suspect’, *The St. Petersburg Times*, 16 Jan. 2009, at: [www.sptimes.ru/index.php?story\\_id=28016&action\\_id=2](http://www.sptimes.ru/index.php?story_id=28016&action_id=2).

<sup>11</sup> See, the website of ECCHR at: [www.ecchr.eu/kadyrov\\_case.html](http://www.ecchr.eu/kadyrov_case.html).

<sup>12</sup> See, ICTR, Prosecutor v. Elie Ndayambaje, Case No. ICTR-96-8-T, Defence Motion for Protection of Witnesses, 27 Jan. 1997. In this case, twenty Rwandan nationals who were seeking refugee status in Kenya were identified as potential defence witnesses and protective measures were requested. The ICTR has been reluctant to interfere. See also ICTR, Prosecutor v. Ntagerura, Case No. ICTR-96-10-I, Decision on the Defence Motion for Additional Protective Measures, 4 Feb. 2000, paras. 2, 3.

Legal representatives of victims of torture and other human rights abuses have regularly received threats and in some instances have been killed for their work defending the rights of their clients. The UN Special Rapporteur on the Independence of Judges and Lawyers has noted that 'It is a matter of concern that despite the legal guarantees provided by each State and the many international instruments intended to preserve their independence, lawyers, judges, prosecutors and court officers in all regions are frequently subjected to pressures, harassment and threats that may result in their enforced disappearance, assassination or extrajudicial execution, simply because they are doing their job'.<sup>13</sup> For example, Pat Finucane, a human rights lawyer from Belfast, was murdered in front of his wife and children on 12 February 1989 after having received numerous death threats. Pat had successfully challenged the British Government over several important human rights cases.<sup>14</sup> In Sri Lanka, Amitha Ariyaratne and Mr. Weliamuna, two of the lawyers involved in the case of Nishanta Fernando referenced above (who was killed in Negombo on 20 September 2008 after having lodged complaints about his torture) subsequently received threats. After they complained about the threats, two grenades were thrown at Mr. Weliamuna's house. Mahmut Sakar, the lawyer for the Human Rights Association in Diyarbakır, Turkey and lawyer for a number of applicants before the European Court of Human Rights, was charged, *inter alia*, with submitting an application with the intention of degrading the State and making propaganda in favour of the PKK. For over a year he was the subject of criminal investigation and trial proceedings and lived under the deterrent and intimidatory effect of those proceedings, and consequently, the European Court considered this to be an interference with the applicant's right of individual petition.<sup>15</sup>

Human rights defenders assisting victims to progress complaints about their treatment have also regularly faced attack. In Guatemala, for example, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that 'from 2000 through mid-August 2006, at least 64 human rights defenders have been murdered. Those defenders most frequently assassinated, such as trade unionists, peasant workers (*campesinos*), indigenous leaders or environmental activists, have been upholding economic, social or cultural rights. Defenders seeking truth and justice for human rights violations committed during the internal armed conflict have also been particularly targeted.'<sup>16</sup> The UN Special Rapporteur on the Situation of Human Rights Defenders, Dr. Hina Jilani, further noted that:

The sophistication of some attacks [against human rights defenders in Guatemala] indicates the likely use of State intelligence in their perpetration. The number and intensity of the attacks have increased since 2004 and tend to intensify at critical moments, when a case is about to be submitted to the public

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<sup>13</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/4/25, 18 Jan. 2007, para. 61.

<sup>14</sup> Case of Finucane v. The United Kingdom, (Application no. 29178/95), 1 July 2003.

<sup>15</sup> See, *Şarlı v. Turkey*, (Application no. 24490/94), 22 May 2001.

<sup>16</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum\* Mission to Guatemala (21-25 Aug. 2006), UN Doc. A/HRC/4/20/Add.2, 19 Feb. 2007, para. 35.

prosecutor, a court decision is awaited, or when witnesses are preparing to testify with the help and support of defenders. The continuity of attacks over time is intended to dissuade defenders from pursuing justice at the different stages of judicial proceedings.<sup>17</sup>

In India, Jaswant Singh Khalra was murdered in October 1995. Members of the Punjab police abducted, tortured, and murdered Khalra because of his work in exposing the disappearances, custodial deaths, and secret cremations of thousands of Sikhs in Punjab.<sup>18</sup> Human rights defenders working to assist victims to participate in proceedings before the International Criminal Court have equally been targeted, particularly in Sudan, Eastern Democratic Republic of Congo and Central African Republic.

In addition, there are categories of individuals who may require greater and more particularised forms of protection due to their vulnerability. For example, this is so in cases in which children have been the victims and/or witnesses to crimes such as abuse, domestic violence, sexual and economic exploitation, abduction, recruitment into armed forces or groups and trafficking. In cases when a child is a witness of a crime, courts have recognised the need to provide special measures of protection to avoid re-traumatisation.<sup>19</sup> Child-specific guidelines such as the *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*,<sup>20</sup> recognise that '[w]here 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.'<sup>21</sup>

Women can also be a vulnerable category of witness. Witness protection is crucial in relation to women because of the stigma that often goes hand in hand with violence against them and the

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<sup>17</sup> Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, Addendum, Mission to Guatemala, UN Doc. A/HRC/10/12/Add.3 of 16 Feb. 2009, para. 38.

<sup>18</sup> The Times of India, 'Khalra murder case: HC grants life imprisonment to 4 cops', 16 Oct. 2007 at: [http://timesofindia.indiatimes.com/Khalra\\_murder\\_Life-term\\_to\\_4\\_cops/articleshow/2464188.cms](http://timesofindia.indiatimes.com/Khalra_murder_Life-term_to_4_cops/articleshow/2464188.cms).

<sup>19</sup> See, e.g., the measures issued by the Serbian War Crimes Chamber in the *Podujevo massacre case* where the survivors who testified were children. See also, Special Court for Sierra Leone, *Prosecutor v. Sesay, Kallon & Gbao*, Case no. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004. In both cases the courts adopted special measures for child witnesses. See, S. Beresford, 'Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable', 3 J. Int'l Crim. Just. 721 (2005). The ICC's first trial focuses on the recruitment of children into rebel forces, and a number of children have testified to date.

<sup>20</sup> UN Economic and Social Council Resolution 2005/20 of 22 July 2005, annex, available at: [www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf](http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf). See also the UN Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, UN General Assembly doc. A/52/635 of 12 Dec. 1997.

<sup>21</sup> See paragraph 32 of the Guidelines on Justice in Matters involving Child Victims, *ibid*.

risk of re-victimisation. This recognition is well reflected in national laws,<sup>22</sup> particularly criminal laws, which include special protections in cases of domestic violence and sexual crimes.<sup>23</sup> In some states several 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.<sup>24</sup> International criminal courts also have a number of provisions reflecting the need to protect this group of victims and witnesses.<sup>25</sup> Nowadays, the international community recognises that protection of victims and witnesses should be granted 'especially in cases of rape or sexual assault',<sup>26</sup> a view which has been reflected in a number of the decisions of the international courts and tribunals.<sup>27</sup>

Finally, not only individuals but also groups of individuals may require protection in certain circumstances. This category might include a community, a village, a group of persons such as detainees in a certain facility, or any group which could be identified due to a special characteristic which is shared among them. International human rights bodies have recognised group protection needs through the use of interim measures. For example, the Inter-American

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<sup>22</sup> Bangladesh, Guatemala, Nicaragua, Mexico, Sri Lanka and South Africa are a few examples of countries that have introduced special protection measures, particularly in court procedures to protect victims and witnesses of sexual related crimes including domestic violence.

<sup>23</sup> E.g. According to s. 31 of the *Suppression of Violence against Women and Children Act, 2000* of Bangladesh (Act No. VIII of 2000), the Tribunal charged to try offences under this Act may send a victim to a protective home/ 'safe custody' (which is a place other than the prison) after considering 'the views and choice' of the victim. Section 28 of the *Suppression of Acid Crimes Act, 2002* contains similar provisions on 'safe custody', giving the Tribunal absolute power to decide the necessity of safe custody irrespective of the consent of victims.

<sup>24</sup> Some of the measures mentioned are: Protection for victims of domestic violence and/or stalking through JurisMonitor -a unit in the victim's home that signals the victim, local law enforcement, and a centralised operations centre when an offender, who is wearing an electronic monitoring device, comes within a certain perimeter of the victim's home; Cell phones and panic buttons automatically programmed to dial emergency numbers when a victim feels threatened; Inmate phone systems that only allow pre-approved telephone contacts that can preclude the victim; and the monitoring of inmates' outgoing correspondence. See, National Center for Victims of Crime, *The Promising Practices and Strategies for Victim Services in Corrections* (2004). Available at: [www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentAction=ViewProperties&DocumentID=32565&UrlToReturn=http%3a%2f%2fwww.ncvc.org%2fncvc%2fmain.aspx%3fdbName%3dAdvancedSearch](http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentAction=ViewProperties&DocumentID=32565&UrlToReturn=http%3a%2f%2fwww.ncvc.org%2fncvc%2fmain.aspx%3fdbName%3dAdvancedSearch).

<sup>25</sup> See Rule 34(A)(ii) of the ICTY Rules of Procedure and Evidence, which notes that the Victims and Witnesses Section shall: 'provide counselling and support for [victims], in particular in cases of rape and sexual assault.' Rule 34(A)(ii) of the ICTR Rules of Procedure and Evidence notes that the Victims and Witnesses Section shall 'Ensure that [victims] receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault.' Rule 17 (a) (iv) of the ICC Rules of Procedure and Evidence provides that: '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: ... (iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality.' Rule 17(b)(iii) specifies that the Victims and Witnesses Unit shall 'Tak[e] gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.'

<sup>26</sup> See, UN Doc S/25704, Report of the UN Secretary-General of 3 May 1993, para. 108.

<sup>27</sup> E.g. ICTY, Prosecutor v. Dusko Tadic, IT-94-1, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, 10 Aug. 1995. para. 45.

Court of Human Rights agreed to afford provisional measures for an entire Colombian village in the Peace Community case.<sup>28</sup> It noted that: ‘while it is true that, on other occasions, the Court has considered [it] indispensable to individualize the people who are in danger of suffering irreparable harm in order to provide them with protective measures, this case has special characteristics that make it different from the background considered by the Court. Indeed, the Community of Paz de San Jose de Apartadó, ... constitutes an organized community, locate[d] in a determined geographic place, whose members can be identified and individualized and who, due to the fact of belonging to said community, all its members are in a situation of similar risk of suffering acts of aggression against their personal integrity and lives.’<sup>29</sup>

The failure to provide physical protection to particular groups has also led to findings of the violation of human rights, including the right to life and freedom from torture and other cruel, inhuman or degrading treatment or punishment.<sup>30</sup>

As set out above, protection risks may arise in a variety of contexts and in relation to a wider range of actors than only the direct victim or witness to the event. However, as discussed in this Report, there are substantial gaps in responding to the range of actors potentially at risk. For example, despite the risky and exposed work undertaken by intermediaries who work with victims interested in participating in proceedings before the International Criminal Court (ICC), efforts to include such individuals in the ICC’s protection programme have only had limited success to date.<sup>31</sup>

## Part II. The Right of Protection

This Part considers the ‘right’ of victims to be protected. It reviews the nature of the right to protection, looking in particular at how it has been framed in human rights terms. It then considers the content of the right as it has developed in the practice and jurisprudence of national and international courts and treaty bodies.

The obligation to afford protection can be considered in a number of different ways: a) protection as a right in and of itself; b) protection as a condition precedent to the realisation of other rights; and c) protection as a remedy, i.e. one of the ways in which to guarantee non-repetition.

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<sup>28</sup> Peace Community of San Jose de Apartado Case, Inter-Am. Ct. H.R. (Ser. E) (2000).

<sup>29</sup> *Ibid.* para. 7.

<sup>30</sup> *Hajrizi Dzemajl et al. v. Yugoslavia*, CAT/C/29/D/161/2000, UN Committee Against Torture (CAT), 2 Dec. 2002, available at: [www.unhcr.org/refworld/docid/3f264e774.html](http://www.unhcr.org/refworld/docid/3f264e774.html).

<sup>31</sup> See, Part III.3(a) of this Report.

## II.1 Protection as a Right in and of Itself

### Human rights references

Despite the importance of victim protection to the realisation of many fundamental human rights, a cursory review of the key human rights treaties and standard-setting instruments reveals very few clear and unambiguous references to the right of victims to be protected from threats and reprisals, and to respect for their inherent dignity in the pursuit of justice. The Universal Declaration of Human Rights speaks of ‘inherent dignity’ and ‘equal and inalienable rights’, and includes among its enumerated rights, ‘the right to life, liberty and security of person’ and the right to ‘equal protection of the law’,<sup>32</sup> though it includes no specific reference to the right of victims to security or protection from reprisals. The International Covenant on Civil and Political Rights (ICCPR) refers to the ‘inherent dignity of the human person’ and notes that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation’, however its explication of fair trial rights, refers mainly to the obligations to safeguard defendants’ rights, making no clear reference to the rights of victims of crime.<sup>33</sup> Regional human rights treaties, such as the African [Banjul] Charter on Human and Peoples’ Rights,<sup>34</sup> American Convention on Human Rights<sup>35</sup> and European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>36</sup> similarly do not contain specific references to the obligation to protect victims and witnesses.

The international human rights instruments that do set out a right of protection relate to torture and disappearances. For example, Article 13 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) provides that:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

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<sup>32</sup> Proclaimed by the UN General Assembly in Paris on 10 Dec. 1948, the preamble, arts. 3 and 7, respectively.

<sup>33</sup> Adopted by GA res’n 2200A (XXI) of 16 Dec. 1966, entered into force 23 March 1976, the preamble, arts. 17 and 14, respectively.

<sup>34</sup> Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct 1986.

<sup>35</sup> OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978.

<sup>36</sup> (ETS No. 5), 213 UNTS 222, entered into force 3 Sept. 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 respectively.



The UN Committee Against Torture has regularly deplored the lack of victim and witness protection legislation and mechanisms to ensure protection, and has often called upon states to ensure that measures are adopted to afford adequate protection to all persons who report acts of torture or ill-treatment.<sup>37</sup>

The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) provides that:

Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.<sup>38</sup>

The new Disappearances Convention makes the clearest reference to the obligation of states to afford protection. It provides that:

Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.<sup>39</sup>

Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.<sup>40</sup>

Other declarative examples include the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,<sup>41</sup> which provides that ‘The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by ... (d) Taking measures to ... ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.’ The Updated *Set of principles for the protection and promotion of*

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<sup>37</sup> See, e.g., Report of the Committee against Torture, 39<sup>th</sup> sess. (5-23 Nov. 2007) A/63/44, regarding Benin (para. 32 (10)); regarding Uzbekistan (para. 37(6)(d)); Costa Rica (para. 40(12)).

<sup>38</sup> Recommended by GA res’n 55/89 of 4 Dec. 2000, para. 3(b).

<sup>39</sup> International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 Dec 2006, not yet in force, art. 14(1).

<sup>40</sup> *Ibid.*, art 18(2).

<sup>41</sup> Adopted by GA res’n 40/34 of 29 Nov. 1985, Para. 6(d).

*human rights through action to combat impunity*, provide that ‘All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings.... In exercising this right, they shall be afforded protection against intimidation and reprisals.’<sup>42</sup> Several of these principles highlight the need for confidentiality of sources, and special measure to ensure that record-keeping does not put victims and witnesses at risk.<sup>43</sup>

## Criminal law treaty references

Most references to protection are found, at the international level, in criminal law treaties. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (*Trafficking Protocol*) and the *Protocol against the Smuggling of Migrants by Land, Sea and Air*<sup>44</sup> (*Smuggling Protocol*) supplementing the United Nations *Convention against Transnational Organized Crime*<sup>45</sup> address protection of victims of organised crime. Article 24 of the Convention against Transnational Organized Crime obliges States parties to take appropriate measures to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and, as appropriate, for their relatives and other persons close to them. The Preamble to the Trafficking Protocol recognises that: ‘effective action to prevent and combat trafficking in persons, [...] requires a comprehensive international approach [...] that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights’. Article 2(b) also states that one purpose of the Protocol is to ‘protect and assist the victims of such trafficking, with full respect for their human rights’. Article 6 details the need for psychological assistance as well as physical protection, and emphasises the importance of engagement with protection issues in the domestic sphere,<sup>46</sup> whilst other articles impose specific duties on states

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<sup>42</sup> Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher\*, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 of 8 Feb. 2005. Principle 32.

<sup>43</sup> *Ibid.*, Principles 8(f), 10(d) and 15.

<sup>44</sup> See, UN Doc A/RES/55/25 Annex III.

<sup>45</sup> UN Doc. A/RES/55/25, Annex II.

<sup>46</sup> Art. 6 provides: ‘3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities. 4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory. ....’

aimed at ensuring the comprehensive protection of victims.<sup>47</sup> While the Smuggling Protocol addresses the issue of protection in a less comprehensive way, Article 16 deals with protection and assistance measures, including the provision of special measures for women and children.<sup>48</sup>

### **International criminal tribunals and courts**

The right to protection also occupies a prominent place in the jurisprudence of international criminal tribunals. The Rules of Procedure and Evidence of both ad hoc international criminal tribunals for Rwanda and the former Yugoslavia contain specific provisions on the protection of victims and witnesses,<sup>49</sup> as do the equivalent rules of the International Criminal Court,<sup>50</sup> Special Court for Sierra Leone,<sup>51</sup> and Extraordinary Chambers in the Courts of Cambodia.<sup>52</sup> The practice of these tribunals demonstrates that ‘the trials depend on the willingness of the witnesses to testify.’<sup>53</sup> As has been acknowledged by a former Registrar of the ICTY:

[...] without witnesses, there would be no trials. [...] It should be noted here that these witnesses have shown incredible courage, strength and determination to come and tell their stories, and the ICTY owes them not only respect, but also profound gratitude.<sup>54</sup>

Underscoring this unique notion of an ‘affirmative obligation’ to protect victims and witnesses, the Yugoslav tribunal has indicated in its earliest decision on witness protection that:

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<sup>47</sup> Article 9(b) details that states should establish comprehensive policies, programmes and other measures to protect victims of trafficking in persons from re-victimisation; article 10(2) imposes the duty to train law enforcement officials in the protection of victims’ rights.

<sup>48</sup> Article 16 provides: ‘2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups... 3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol. 4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children. ....’

<sup>49</sup> See Rules 69, 75 and 81(B) of the Rules of Procedure and Evidence of the ICTY, Rev. 43, 24 July 2009; Rules 34, 65(C), 69, 75, 77 of the Rules of Procedure and Evidence of the ICTR, adopted on 29 June 1995; as amended on 14 March 2008.

<sup>50</sup> See Rules 17, 19, 74(5), 76, 87 and 88 of the Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3, New York, 3-10 Sept. 2002. See also, Articles 54(3)(f), 57(3)(c), 64(2) and (6), 68 and 93(1)(j) of the ICC Statute, A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002.

<sup>51</sup> See Rules 26*bis*, 34, 65(D), 69 and 75 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 7 March 2003.

<sup>52</sup> See Rules 29 and 65(1) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.4) as revised on 11 Sept. 2009.

<sup>53</sup> See, D. Tolbert, ‘Reflections on the ICTY Registry’, *Journal of International Criminal Justice*, 2004 2(2):480, at p. 481.

<sup>54</sup> See, D. de Sampayo Garrido, ‘Problems and Achievements as Seen from the Viewpoint of the Registry’ *Journal of International Criminal Justice*, 2004 2(2):474, at pp. 477-8.

This affirmative obligation to provide protection to victims and witnesses must be considered when interpreting the provisions of the Statute and Rules of the International Tribunal. In this regard it is also relevant that the International Tribunal is operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses. These considerations are unique: neither Article 14 of the ICCPR nor Article 6 of the ECHR, which concerns the right to a fair trial, lists the protection of victims and witnesses as one of its primary considerations.<sup>55</sup>

### **National law references**

The 'right' to protection has also been recognised by national legal systems. In *Moore v Clarke of Assize Bristol*, Lord Denning said: 'The court will always preserve the freedom and integrity of witnesses and not allow them to be intimidated in any way, either before the trial, pending it or after it.'<sup>56</sup> A number of national constitutions, such as that of Colombia, Mexico and certain US states, specifically mention the right of victims to be protected in the context of criminal trials. The requirement to protect victims and witnesses features in many criminal codes and procedural regulations, such as in Argentina and the United Kingdom. Also, increasingly, states are adopting specialised victim and witness protection legislation to set out in detail domestic requirements.<sup>57</sup>

## **II.2 Protection as a Condition Precedent to the Realisation of other Rights**

In practice, protection is most often invoked as a condition precedent to the fulfilment or realisation of other, arguably more deeply entrenched rights such as the right to an effective remedy or to access justice. Victim and witness protection is essential to the investigation of human rights abuses, and successful investigations and prosecutions are required if the right to an effective remedy or to justice is to be fulfilled.

Courts and treaty bodies have taken this approach when considering the implementation of the following rights:

- Protection as a guarantee of the right to security of the person and the right to life;
- Protection as a guarantee of the right to justice (incorporating the right to individual petition; the right to be heard; a condition to fulfil the obligation to investigate)

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<sup>55</sup> Prosecutor v. Dusko Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (IT-94-1), 10 Aug. 1995, para. 27.

<sup>56</sup> [1972] 1 All ER 58 (CA, 1970).

<sup>57</sup> Some of these laws are discussed in the UNDOC Good Practices Study.

## a) Protection as a guarantee of the right to security of the person and the right to life

The right to liberty and security of the person is a fundamental right in international law and is reflected in the major human rights instruments.<sup>58</sup> While not specifically referred to in the text of the human rights instruments, the UN Human Rights Committee (HRC) has interpreted Article 9(1) of the ICCPR (on liberty and security of the person) to encompass a right to protection in order to ensure the enjoyment of the right to security.

In *Rajapakse v. Sri Lanka*, the HRC found a violation of article 9(1) of the Covenant due to the failure of the state to take 'adequate action to ensure that the author was and continues to be protected from threats issued by police officers' as a result of filing a fundamental rights petition.<sup>59</sup> In this case, the state did not provide witness protection and Mr. Rajapakse went into hiding due to his fear of reprisals. The HRC found that article 9(1):

does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the current case, it would appear that the author has been repeatedly requested to testify alone at a police station and has been harassed and pressurised to withdraw his complaint to such an extent that he has gone into hiding. The State Party has merely argued that the author is receiving police protection but has not indicated whether there is any investigation underway with respect to the complaints of harassment nor has it described in any detail how it protected and continues to protect the author from such threats. In addition, the Committee notes that the alleged perpetrator is not in custody.<sup>60</sup>

In finding a violation, it determined that Sri Lanka was obliged 'to take effective measures to ensure that ... the author is protected from threats and/or intimidation with respect to the proceedings. ... [and] to ensure that similar violations do not occur in the future'.<sup>61</sup>

Similarly, in *Delgado Paez v. Colombia*, Mr. Paez complained following his dismissal from his position as a teacher. He then received anonymous phone calls threatening him to withdraw the complaint and was subsequently physically attacked, causing him to flee the country. The HRC found a violation of Article 9(1), again emphasising that the right to security of person does not only apply to 'the formal deprivation of liberty' by way of arrest or detention;<sup>62</sup> states

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<sup>58</sup> Article 9(1) of the ICCPR provides that 'Everyone has the right to liberty and security of person'. See also Article 3 of the Universal Declaration of Human Rights, Article 7(1) of the American Convention on Human Rights, Article 5(1) of the European Convention on Human Rights and Article 6 of the African Charter on Human and Peoples' Rights.

<sup>59</sup> UN HRC, UN Doc. CCPR/C/87/D/1250/2004, 5 Sept. 2006, para. 9.7.

<sup>60</sup> *Ibid.*, para. 9.7.

<sup>61</sup> *Id.*, para. 11.

<sup>62</sup> *Delgado Paez v. Colombia*, UN HRC, UN Doc. CCPR/C/39/D/195/1985 (23 Aug. 1990) at para. 5.5.

cannot 'ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained'<sup>63</sup> as this would 'render totally ineffective the guarantees of the Covenant'.<sup>64</sup> Accordingly, the HRC set out that states are 'under an obligation to take reasonable and appropriate measures' to protect individuals against whom threats to their lives have been made.<sup>65</sup>

In addition, the right to protection has been identified as part of the right to life. In *Kiliç v. Turkey*, the European Court of Human Rights (ECtHR) concluded that Turkey had not done enough to protect a pro-Kurdish journalist who had been harassed, received death threats, and was ultimately shot to death.<sup>66</sup> The ECtHR held that there is a 'positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual,'<sup>67</sup> and found that the State violated the right to life and indicated that a state must take positive operational measures when: 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'<sup>68</sup>

## **b) Protection as a guarantee of the right to justice**

Witness protection should ... not be seen as a favour to the witnesses who are in fact often making immense personal sacrifices on behalf of society. The provision of adequate assistance to witnesses, family members, and others, against whom retaliation is feared, is thus a necessary condition for breaking the cycle of impunity.<sup>69</sup>

If a country's justice system is unable to secure convictions because of failures in the production of witness evidence, its capacity to deal effectively with past abuses as well as the confidence of its people in the justice system are compromised. Thus, the

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<sup>63</sup> *Id.* at para. 5.5.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* See also, *Bwalya v. Zambia*, UN HRC, UN Doc. CCPR/C/48/D/314/1988 (27 July 1993); *Bahamonde v. Equatorial Guinea*, UN HRC, UN Doc. CCPR/C/49/D/468/1991 (10 Nov. 1991).

<sup>66</sup> *Kilic v. Turkey*, (App. No. 22492/93), ECtHR 128 (2000).

<sup>67</sup> *Ibid.*, para. 62.

<sup>68</sup> *Id.*, para. 63; Cf. *Osman v. UK*, (App. No. 23452/94), ECtHR 101 (1998).

<sup>69</sup> Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, A/63/313, 20 Aug. 2008, para. 14.

failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth.<sup>70</sup>

The right to individual petition and to be heard by a court of law is a fundamental component and inherent prerequisite to the exercise of the core right to justice as explained in the 2005 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.<sup>71</sup> Principle 12 sets out that, 'A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law'. In order to 'secure the right to access justice and fair and impartial proceedings' the Principles provide that States should, among other things, 'ensure [victims'] safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims'.<sup>72</sup> As noted above, Article 13 of the UNCAT similarly requires states to take steps 'to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given'.<sup>73</sup>

The ECtHR has dealt with the intimidation of victims and witnesses in the context of an interference with Article 34 (formerly Article 25(1)) which sets out the right of individual petition and requires the contracting parties to 'undertake not to hinder in any way the effective exercise of this right'. In one of the first cases on this issue, the Court considered the duty to protect in *Aksoy v. Turkey*. In this case, Zeki Aksoy was allegedly killed as a result of his decision to file a claim with the former European Commission on Human Rights. According to his representatives, Mr. Aksoy had been threatened with death in order to make him withdraw his application to the Commission, the last threat being made on 14 April 1994. It was contended that his murder two days later was a direct result of his decision to continue with the application. The Commission expressed deep concern about Mr Aksoy's death and the allegation that it was connected to his application to Strasbourg and reiterated 'that it is of the utmost importance for the effective operation of the system of individual petition ... that applicants or potential applicants are able to communicate freely with the Commission without

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<sup>70</sup> Annual Report of the UN High Commissioner For Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the truth, UN Doc. A/HRC/12/19 of 21 Aug. 2009, para. 32.

<sup>71</sup> UN Resolution 60/147, adopted by the UN GA on 16 Dec. 2005, at: <http://www2.ohchr.org/english/law/remedy.htm>, Principle 24.

<sup>72</sup> *Id*, Principle 12(b).

<sup>73</sup> See, also, Conclusions and recommendations of the Committee against Torture, Sri Lanka, UN Doc. CAT/C/ LKA /CO/1/CRP.2 (2005), para. 15, in which the Committee expresses its concern 'about alleged reprisals, intimidation and threats against persons reporting acts of torture and ill-treatment as well as the lack of effective witness and victim protection mechanisms', and recommends that Sri Lanka protect such persons from intimidation and reprisals, inquire into all reported cases of intimidation of witnesses and set up programmes for witness and victim protection. Similarly, see Conclusions and recommendations of the Committee against Torture, Peru, UN Doc. CAT/C/PER/CO/4 (2006), para. 20.

being subjected to any form of pressure from the authorities to withdraw or modify their complaints.’<sup>74</sup> However, in this case, the Court did not find evidence of state involvement in the murder. The ECtHR has found a violation of former Article 25 in a number of other cases, including *Kurt v. Turkey*, in which pressure was put on the applicant to withdraw the application and the domestic lawyer was threatened with criminal prosecution should the case continue. The Court noted:

[i]t is of the utmost importance for the effective operation of the system of individual petition ... that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.

The expression “any form of pressure” must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or potential applicants or their families or legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy.

... whether or not contacts between the authorities and an applicant or potential applicant are tantamount to unacceptable practices ... must be determined in the light of the particular circumstances at issue. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities. In this connection, the Court, having regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure, which hinders the exercise of the right of individual petition, in breach of Article 25 of the Convention.<sup>75</sup>

The Inter-American Court of Human Rights (IACtHR) has similarly addressed protection as a prerequisite for the fulfillment of other rights, including the right to be heard (Article 8) and the right to an effective recourse (Article 25). Read together with Article 1 which requires states to guarantee the rights provided in the Convention, Articles 8(1) and 25 require states:

to guarantee to all persons access to the courts, and, in particular, to a simple and rapid recourse so that, among other things, those responsible for the human rights violations may be tried and reparations obtained for the damages suffered.<sup>76</sup>

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<sup>74</sup> *Aksoy v. Turkey* (Appl. No. 21987/93), 18 Dec. 1996, paras. 104, 105.

<sup>75</sup> *Kurt v. Turkey*, (Application No. 15/1997/799/1002), 25 May 1998, para. 160. See also, *Şarli v. Turkey*, (Application no. 24490/94), 22 May 2001.

<sup>76</sup> See, e.g., *Castillo Paez v. Peru*, Case No. 43, IACtHR, OEA/ser. C, para 106 (1998), available at <http://www.corteidh.or.cr>.



The IACtHR has found that a failure to provide protection to victims and witnesses impedes effective access to justice under Articles 1(1), 8 and 25 in both criminal and civil proceedings. Thus, in relation to the duty to investigate, the IACtHR in *La Rochela Massacre v. Colombia* held that ‘in order to comply with the obligation to investigate within the framework of the guarantees of due process, the State must take all necessary measures to protect judicial officers, investigators, witnesses and the victims’ next of kin from harassment and threats which are designed to obstruct the proceedings, prevent a clarification of the events of the case, and prevent the identification of those responsible for such events.’<sup>77</sup> Similarly, in *Kawas-Fernández v. Honduras*, the IACtHR interpreted Articles 8 and 25 in a case involving a violation of the right to life to provide that, ‘the State should adopt ex officio and immediately sufficient investigation and overall protection measures regarding any act of coercion, intimidation and threat towards witnesses and investigators’.<sup>78</sup> In this case, the IACtHR found that by failing to provide protection to the witnesses, the state had ‘not guaranteed true right to justice for the relatives of the deceased victim’.<sup>79</sup> Likewise, in *Myrna Mack Chang v. Guatemala*, harassment, threats and murder pervaded the criminal proceedings, affecting ‘the production of evidence and independence of the judiciary, has delayed the criminal proceeding, and has a negative impact on the development of this proceeding’.<sup>80</sup> This led the Court to find a violation of Articles 8 and 25 together with Article 1(1). The IACtHR has also emphasised the need for expeditiousness as delays, particularly in the execution of arrest warrants, can result in the perpetuation of harassment, intimidation and acts of violence against prosecutors, the judiciary, lawyers and witnesses.<sup>81</sup>

In addressing protection within the context of Article 1(1), 8 and 25, the Court has not only highlighted the duty of the state to provide protection but has also framed protection as a necessary condition precedent to the effective enjoyment of the right to participate and to be heard. Thus, in *Mapiripán Massacre v. Colombia*, the Court found a violation of Articles 8 and 25 and reasoned that ‘During the investigative and judicial processes, the victims of human rights violations, or their next of kin, must have ample opportunity to participate and be heard, both regarding elucidation of the facts and punishment of those responsible, and in seeking fair

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<sup>77</sup> Case of the Rochela Massacre v. Colombia (11 May 2007) at para. 171. See also, para. 155 finding a violation in this case due to, among other things, ‘the failure to adopt the necessary measures to protect against the threats which arose during the investigations’. See also, *Myrna Mack Chang v. Guatemala* (25 Nov. 2003) at para. 199 (finding that ‘the State, to ensure due process, must provide all necessary means to protect the legal operators, investigators, witnesses and next of kin of the victims from harassment and threats aimed at obstructing the proceeding and avoiding elucidation of the facts, as well as covering up those responsible for said facts’).

<sup>78</sup> Case of Kawas-Fernández v. Honduras (3 April 2009) at para. 107

<sup>79</sup> *Id.* at para. 118. See also, *Ituango Massacres v. Colombia* (1 July 2006) at para. 322

<sup>80</sup> At para. 216.

<sup>81</sup> *La Rochela* at para. 175 (finding that, the Court has stated that the delay in executing issued arrest warrants contributes to the repetition of acts of violence and intimidation against witnesses and prosecutors connected to the determination of the truth of the events, particularly when it is demonstrated that the survivors and several of the next of kin and witnesses were harassed and threatened, and that some even had to leave the country). See also, *Ituango* at para. 322.

compensation ... In this case ... , limited participation of the next of kin in the criminal proceedings, whether as civil parties or as witnesses, is a consequence of the threats suffered during and after the massacre, of their situation of displacement and of fear of participating in said proceedings'.<sup>82</sup>

In *La Rochela*, the Court articulated the integral connection between the duty to investigate, the right to the truth, impunity and the protection of all those involved in the criminal proceedings, including judicial officers, victims and witnesses. It stated that,

due diligence in the investigations implies taking into account the patterns of operation of the complex structure of individuals who executed the massacre because this structure remained in place after the massacre had been committed, and because, precisely to ensure its impunity, it operates by using threats to instil fear in investigators and in possible witnesses, or in those who have an interest in seeking the truth, as in the case of the victims' next of kin. The State should have adopted protective and investigative measures in order to confront this type of intimidation and threats.<sup>83</sup>

The Court finds that the pattern of violence and threats that occurred in this case against judicial officials, the next of kin of the victims and witnesses had the effect of intimidating and frightening them so that they would not collaborate in the search for the truth. As a result, the progress of the proceedings was hindered. This situation was aggravated because safety measures were not adopted to protect some of the threatened officials, the next of kin of the victims and the witnesses. In addition, it has not been demonstrated that there was an investigation into or punishment for these acts of harassment and violence, which intensifies the context of intimidation and defencelessness created by the actions of the paramilitary groups and State agents. Thus, the proper function of the judiciary and the administration of justice has been affected in the terms of the obligations of the State to act as guarantor as established in Article 1(1) of the Convention. Furthermore, the fact that all of those responsible for the events have not been punished makes the intimidation permanent and, to some extent, explains the grave negligence in furthering the investigation.<sup>84</sup>

### **II.3 Protection as a Remedy, i.e. As a Guarantee of Non-Repetition**

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<sup>82</sup> *Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. 15 Sept. 2005.

<sup>83</sup> At para. 165.

<sup>84</sup> At para. 170.

Protection measures have also been envisaged as the fulfilment of the right to a remedy through the guarantee of non-repetition that some measures may afford. Here, courts have specifically recognised the importance of guaranteeing the safety and security of victims and witnesses and the need to set up official structures within the police or other bodies to ensure that protection can be achieved.

Reparations awards aimed at guarantees of non-repetition have included a variety of measures, including the requirement to take positive measures to combat impunity, reform laws and institutions,<sup>85</sup> strengthen institutions,<sup>86</sup> provide human rights training,<sup>87</sup> as well as the need to include and consult with civil society and victims, and to ensure an adequate representation of women and minority groups in such consultations.<sup>88</sup>

In respect of protection measures in particular, in a number of cases before the IACtHR, the Court has ordered states to provide effective protection of witnesses and others potentially at risk, as part of the reparations award. The IACtHR took this approach in the *Kawas-Fernández case* against Honduras, which related to the killing of an environmentalist in her home, and the lack of appropriate investigation and follow-up and the threats made against various witnesses. In its final judgment and award for reparations, the Court ordered that Honduras must, in addition to protecting the witnesses in the instant case (to ensure the ability to comply with its obligation to investigate),<sup>89</sup> undertake ‘a national campaign to create awareness and sensitivity regarding the importance of environmentalists’ work in Honduras and their contribution to the protection of human rights, targeting security officials, agents of the justice system and the general population.’<sup>90</sup> Similarly, in the *Rochela Massacre case*, which related to the murder of judicial officials while they were carrying out an investigation into the role of civilians and army personnel for a massacre of 19 tradesmen, the IACtHR ordered Colombia, as a means to guarantee non-repetition, to

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<sup>85</sup> E/CN.4/2005/102/Add.1 of 8 Feb. 2005.

<sup>86</sup> Basic Principles 23 (a) – (d). See also, HRC, concluding observations: Argentina, CCPR/CO/70/ARG, para. 9 (2000).

<sup>87</sup> Basic Principles, 23 (e), (f). See also, See, e.g., Interim Resolution CM/Res DH (2007) 107 concerning the judgments of the ECtHR in the case of Velikova and 7 other cases against Bulgaria relating to the ill-treatment inflicted by police forces, including three deaths, and the lack of an effective investigation (Adopted by the Committee of Ministers on 17 Oct. 2007); Interim Resolution Res DH (2005) 21 concerning the issue of conditions of detention in Greece, raised in the cases of Dougoz v. Greece (Judgment of 6 March 2001, final on 6 June 2001) and Peers v. Greece (Judgment of 19 April 2001) (adopted by the Committee of Ministers on 7 April 2005); Interim Resolution CM/Res DH (2008) 69 on the execution of the judgments of the ECtHR of cases concerning the Actions of the security forces in Turkey - Progress achieved and outstanding issues (General measures to ensure compliance with the judgments of the ECtHR in the cases against Turkey concerning actions of members of the security forces) (listed in Appendix II) (Follow-up to Interim Resolutions DH [99] 434, DH [2002] 98 and Res DH [2005] 43) (Adopted by the Committee of Ministers on 18 Sept. 2008).

<sup>88</sup> Updated set of principles, principles 32 and 35. See also, Nairobi Declaration Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 19-21 March 2007, 1(D). See also, 2(A), (B), (G).

<sup>89</sup> *Kawas-Fernández v. Honduras*, 3 April 2009 (Merits, Reparations and Costs) Para. 193.

<sup>90</sup> *Ibid.*, para. 214.

provide its judicial officers, prosecutors, investigators and other justice officials with recourse to an adequate security and protection system that takes into account the circumstances of the cases under their jurisdiction and their places of work so that they may perform their duties with due diligence. Furthermore, the State must ensure effective protection of witnesses, victims and relatives in cases of serious human rights violations...<sup>91</sup>

## II.4 The Right to be Protected and the Rights of the Accused: Balancing Different Interests

The right to a fair trial is a fundamental right well-established in international treaties and developed in its scope by the case law of a range of national and international human rights bodies and international courts. Article 14 of the ICCPR provides a clear explanation of fair trial rights relevant to all legal proceedings, including criminal trials, administrative and civil proceedings, though its emphasis is on criminal proceedings. It indicates that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,’ and includes the accused person’s right to be presumed innocent until proven guilty, the right to know the nature and cause of the case against him or her and the right to examine, or have examined, witnesses against them.<sup>92</sup> The right to fair trial has itself been recognised as non-derogable.<sup>93</sup>

Human rights bodies and courts have regularly found violations of fair trial rights when the accused was tried in ‘secret’ proceedings,<sup>94</sup> or had not been informed of the reason for arrest or the identity of the witnesses making the accusations.<sup>95</sup> The question arises as to how these fundamental defence rights relate with the rights of victims and witnesses to be protected – these recognised to be vital in their own right but also, as described in earlier sections, fundamental for securing other rights such as the right to security of the person and the right to justice.

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<sup>91</sup> Rochela Massacre, para. 297.

<sup>92</sup> See, Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the ECHR, Article 8(2)(f) of the American Convention, Article 21(4)(e) of the ICTY Statute, ICTR Statute 20(4)(e), Article 67(1)(e) of the ICC Statute. See, e.g., Saïdi v. France, (33/1992/378/452), 20 Sept. 1993, at 17.

<sup>93</sup> HRC, General comment no. 29, States of emergency (art. 4), CCPR/C/21/Rev.1/Add.11, 31 Aug. 2001, para. 16.

<sup>94</sup> See, Case 9755, Chile, Inter-American Commission, 132, 137, OEA/Ser.L/V/I.74, doc.10, rev. 1 (1988); Concluding Observations by the HRC, UN Doc. CCPR/C/79/Add.75, 9 April 1997, paras. 21, 40; Inter-American Commission, Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, doc. 39 rev.1993, at 96, 98 and 249.

<sup>95</sup> See, e.g., HRC, Kelly v. Jamaica, (253/1987), 8 April 1991, para. 5.

There is extensive jurisprudence on the ‘balance’ that must be struck between the victim’s right to be protected from threats and reprisals and the accused’s right to know the case against him/her. The ECtHR has explained that ‘principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses and victims called upon to testify,’<sup>96</sup> though has cautioned that measures restricting the rights of the defence must be carefully limited and strictly necessary.<sup>97</sup>

International criminal tribunals have gone to great lengths to set out the protections for victims and witnesses and how these must interact with defence rights. The general view has been that in ‘balancing’ the rights it should be understood that there is no implied hierarchy of rights with respect to victims and the accused, or that the rights of either party can be violated, dismissed or subsumed by the rights of the other.<sup>98</sup> A number of victim and witness trial protections have been employed,<sup>99</sup> under the proviso that the measures shall not be prejudicial to or inconsistent with the rights of the accused, including i) confidentiality from the public (explaining that where justice permits, the court can limit the role of the public and the media); ii) protection from face to face confrontation with the accused (where this can cause witnesses undue trauma and psychological stress); iii) preventing the disclosure of the witness’s whereabouts.

Recourse to anonymous witnesses has tended to be more controversial. This practice arguably prevents the accused from conducting background searches of the witness, and from properly preparing for and effectively conducting cross-examination. Anonymity also precludes the accused from challenging the reliability of the witness’ testimony based on the accused’s personal knowledge of the situation and the person involved, and based on monitoring the witness in court.

Human rights courts have generally indicated that the use of testimony from an anonymous witness (where the defence is unaware of the witness’s identity at trial) not only violates the accused’s right to examine witnesses, but may render the trial as a whole unfair.<sup>100</sup> In general, witnesses that are completely anonymous are understood to deprive the accused of the necessary information to challenge the witness’s reliability. Yet, in *Doorson*, the ECtHR has not

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<sup>96</sup> *Doorson v. The Netherlands*, 26 March 1996, 2 Ser.A 470, para.70.

<sup>97</sup> *Van Mechelen and others v. The Netherlands*, (55/1996/674/861-864), 23 April 1997, paras. 51, 54 and 58. See also, *Rowe and Davis v UK*, where the ECtHR stated that ‘[i]n any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused’ ((2000) 30 E.H.R.R. 1).

<sup>98</sup> *Prosecutor v. Tadic*, ICTY Case No. IT-94-1-T, Decision in the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug. 1995, paras. 25 and 33.

<sup>99</sup> See, e.g., Arts. 68(1) and (2) and 69 (2) of the ICC Statute, Rules 87 and 88 of the ICC Rules of Procedure and Evidence; Art. 75(A) of ICTY Rules.

<sup>100</sup> *Kostovski v. The Netherlands*, 20 Nov. 1989, Application No. 11451/85; *Windisch v. Austria*, 27 Sept. 1990, Application No. 12489/86; and *Lüdi v. Switzerland*, 15 June 1992, Application No. 12433/86.

completely ruled out this practice, but has advised that use of anonymous witnesses must be strictly limited.<sup>101</sup>

In the Tadic case,<sup>102</sup> the ICTY used a five prong test to determine whether anonymous witnesses could be used at trial. The test to be met was: (1) the existence of a real fear for the safety of the witness; (2) the testimony of the witness must be sufficiently relevant and important to the case; (3) there must be no prima facie evidence of the witness's unworthiness in any way; (4) the non-existence of a witness protection program; (5) the unavailability of less restrictive protective measures.<sup>103</sup>

The ICTY's subsequent jurisprudence shows discomfort with the allowance of anonymous witnesses. For example, in Blaskic,<sup>104</sup> the Trial Chamber distinguished the periods before and after the commencement of the trial, indicating that 'the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.'<sup>105</sup>

At the national level there is a similar debate over the way in which protection measures for victims and witnesses may impact upon defence rights. In a ruling of the UK House of Lords, *R v Davies*, Lord Bingham concluded that: 'the protective measures imposed by the court in this case [anonymity of witnesses] hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair.'<sup>106</sup>

## Part III. Methods of Protection (Problem Areas and Best Practice)

This Part explores the different methods of protection that have been employed, and highlights challenges and gaps as well as examples of good practice.

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<sup>101</sup> Doorson v. The Netherlands, 26 March 1996, Application No. 20524/92, para.69.

<sup>102</sup> Prosecutor v. Tadic, Prosecutor's motion Requesting Protective Measures for Victims and Witnesses 10 Aug. 1995.

<sup>103</sup> *Ibid.*

<sup>104</sup> Prosecutor v. Blaskic, Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 Nov. 1996.

<sup>105</sup> *Ibid.*, para. 24.

<sup>106</sup> See, *R. v. Davis*, [2008] UKHL 36, para. 35. The full text of the ruling is available at: [www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080618/davis-1.htm](http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080618/davis-1.htm).

Methods of protection have included efforts to minimise risks through general institutional safeguards and good practice, responses to identified risks, as well as the imposition of legal and institutional consequences following a failure to protect. The availability of these methods, and their capacity for success, will also depend on who has ordered and who is carrying out the protection and in particular, their skill, resources, good intentions, degree of authority and acceptance within the community as well as their ability to understand the sources of security threats and the particularities of victims' contexts and situations. The 'protectors' typically comprise different state agencies and bodies specifically or more generally mandated with protection tasks. They may also be international courts or governmental or nongovernmental organisations that have a protection mandate but lesser levels of access and authority in local communities. Often, they will be the victims themselves and their families, communities or supporters, forced to take their own security measures in the face of threats or past incidents and a de facto or de jure absence of other formal systems of protection.

### III.1 Domestic Protection Measures

One Rwandan genocide survivor who testified in Arusha and also before the local gacaca courts, noted, in relation to the absence of effective protection measures in Rwanda,

We don't feel safe simply because we talked about what we saw with our own eyes. Things have become worse these days, with a lot more abuse. We know the reason, to undermine our morale so that we stop accusing *genocidaires*. We are terrified of the *genocidaires* who are in Arusha and in Rwanda, and we have to take a lot of precautions that are often beyond our capacities. ... We will not fall into their trap. I hope our security will be guaranteed because those who want to silence us want to eliminate the evidence. For our part, we will strive to always have the courage to testify, despite the serious consequences this entails.<sup>107</sup>

Vitaliy Knyazev was serving his sentence in the Lgov prison, in the Kursk region of Russia. He was severely beaten with rubber truncheons and as a result, he complained to the Prosecutor's Office. He was severely beaten and set upon by a vicious dog as a reprimand for his complaint, and was forced to eat the paper on which he had written the complaints. As a protest, he and other inmates self-inflicted themselves with wounds. Knyazev complained to the ECtHR, and in response, officials forced him under duress to write a statement on withdrawal of his complaint, which was later sent to the Court by the Russian Government.<sup>108</sup>

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<sup>107</sup> Witness interviewed in Rwanda, 14 Feb. 2008, reported in African Rights and REDRESS, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes*, Nov. 2008, pp. 14-15.

<sup>108</sup> See, Case of Knyazev v. Russia (Application no. 25948/05), 8 Nov. 2007.

## a) National Protection Structures

Victim and witness protection programmes are formal systems designed to provide a full range of physical protection and psychosocial support to beneficiaries. There are a variety of states with victim or witness protection programmes, including countries as diverse as Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Chile, China, Colombia, Croatia, El Salvador, Germany, Guatemala, Hungary, Indonesia, Ireland, Italy, Kenya, Latvia, Macedonia, Mexico, Montenegro, the Netherlands, New Zealand, Norway, Philippines, Romania, Russia, South Africa, Thailand, Turkey, United Kingdom, and United States of America.<sup>109</sup> States have included protection provisions in their constitutions, penal codes, or in specific witness protection laws. There are also a number of countries with special witness protection legislation under draft.<sup>110</sup>

Many of these programmes have problematic track records. In some countries, the laws offer little more than a paper protection to victims. On Indonesia, for example, the UN Committee against Torture expressed its concern about ‘the absence of implementing regulations, the mistreatment of witnesses and victims, and the insufficient training of law enforcement officials and allocation of Government funds,’ and encouraged Indonesia to ‘without delay, establish a witness and victim protection body, ... , including the allocation of necessary funding for the functioning of such a new system, the adequate training of law enforcement officials, especially in cooperation with civil society organizations, and an appropriate gender-balanced composition’.<sup>111</sup> Similarly, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston noted that in the Philippines, ‘witness protection remains grossly inadequate’ and indicated that ‘Failure to reform the witness protection programme is one of the most significant causes of continued impunity in the Philippines. In 2007, one expert suggested to the Special Rapporteur that the absence of witnesses results in 8 out of 10 cases involving extrajudicial killings failing to move from the initial investigation to the actual prosecution stage. Unfortunately, no information that the Special Rapporteur has received since then indicates any improvement in the system.’<sup>112</sup> The Thai witness protection legislation has been criticised by the Asian Legal Resource Centre as having vague and highly discretionary

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<sup>109</sup> Many of these protection programmes are explored in the UNODC Good Practices study.

<sup>110</sup> For example, Costa Rica, East Timor, Slovenia, Sri Lanka.

<sup>111</sup> Report of the Committee against Torture, Thirty-ninth session (5-23 Nov. 2007) A/63/44, para. 31.

<sup>112</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston\*, Addendum, Follow-up to country recommendations – Philippines, A/HRC/11/2/Add.8 of 29 April 2009, paras. summary and 31. Furthermore, the Asian Legal Resources Centre has reported that ‘a person can only be admitted into the Witness Protection Programme if the person has “witnessed or has knowledge or information on the commission of a crime and has testified or is testifying or about to testify before any judicial or quasi-judicial body, or before any investigating authority. There is no provision for the interim protection of persons making complaints [prior] and complainants can be exposed for lengthy periods of time to reprisals, which is a serious deterrent for victims of torture wishing to register complaints and seek justice.’ ALRC, Alternative report to the UN Committee Against Torture, The situation of torture in the Philippines, 42<sup>nd</sup> Session (April 27 to May 15, 2009), para. 7.2.



provisions, with ‘a lack of regulations laying down clear guidelines on how witness protection is to be conducted’. It further notes that:

The Office of Witness Protection lacks real power to enforce its instructions; in practical terms it relies upon the police and other pre-existing agencies to carry out the work of protection. Where these agencies are not cooperative there is little that the Office can do.

The Office is understaffed and underfunded: ... Staff of both the office and their partner agencies are lacking in training to perform their tasks.

The Office is little-known in Thailand; however, to obtain protection a person must ordinarily approach the Office and request assistance. As most persons needing protection are not likely to have ever heard of the agency, it is difficult for them to exercise this right.<sup>113</sup>

Most programmes are limited to ‘high-value’ witnesses, which can be a subjective evaluation. In many countries the legislative basis for protection is rooted in the attempts by states to respond to the rise of organised crime, and as such most protection programmes remain structured around the witness in his or her role of an insider<sup>114</sup> rather than around the needs of victims or witnesses more broadly. This problem was noted in Russia, where ‘no cases were recorded by human rights organizations when protection measures were applied with respect to victims of torture, including minors and women, who applied to the prosecution bodies, even when there were sufficient grounds therefore.’<sup>115</sup>

The roots of witness protection programmes have also influenced their content, both in terms of the criteria for inclusion to them and the services or measures they provide. Often, the programmes have limited remits, are difficult to access,<sup>116</sup> underfunded and ill-equipped to deal with threats emanating from the state.

The body in charge of administering protection programmes can vary, though in most countries power rests with the police, often through the establishment of a special unit or units for that

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<sup>113</sup> Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity, Written statement\* submitted by the Asian Legal Resource Centre (ALRC), UN Doc. E/CN.4/2006/NGO/67 of 28 Feb. 2006.

<sup>114</sup> See Article 26(4) of the UN Convention against Transnational Organized Crime.

<sup>115</sup> Russian NGO Shadow Report on the Observance of the UNCAT by the Russian Federation for the period from 2001 to 2005, Moscow, May 2006, para. 13.44, available at: <http://www2.ohchr.org/english/bodies/cat/docs/ngos/joint-russian-report-new.pdf>.

<sup>116</sup> In respect of the Ukraine’s witness protection programme which is focused on trafficking victims, the UN Committee on Economic, Social and Cultural Rights has noted that, it has received reports about limited access to witness protection programmes. Concluding observations of the Committee on Economic, Social and Cultural Rights, Ukraine, E/C.12/UKR/CO/5 of 23 Nov. 2007, para. 20.

purpose. For example, in Australia, Austria, Canada, Germany, the Hong Kong Special Administrative Region of China, New Zealand, Norway, Slovakia and the United Kingdom, victim and witness protection falls under the police.

The UNODC Good Practices study notes that it is important for there to be an autonomous authority to oversee the implementation of protection programmes as well as the allocation of funds.<sup>117</sup> This is important for general independent scrutiny purposes but also to facilitate coordination with judicial and other state authorities engaged in law enforcement and intelligence, prison administration, public housing, health and social security services.<sup>118</sup> This good practice has been taken on board by some countries such as Italy, where the Central Protection Service is responsible for the implementation and enforcement of protection measures, and admission to the programme is decided by the Under-Secretary of State at the Ministry of the Interior, two judges or prosecutors, and five experts in the field of organised crime. In other countries such as Colombia, the Netherlands, the Philippines, South Africa and the United States, protection programmes are separated organisationally from the police force and placed under the equivalent of the Ministry of Justice, the Ministry of the Interior or the State Prosecutor's Office.<sup>119</sup> The creation of a National Authority for the Protection of Victims of Crime and Witnesses, with the participation of the Ministry of Justice, is also envisaged in the Sri Lankan Bill for the Protection of Victims of Crimes and Witnesses, currently under consideration by Parliament.<sup>120</sup>

While police or specifically established units or commissions tend to administer entry into and the operation of most witness protection programmes, the judiciary plays an important role in the majority of countries in deciding on the use of special procedures, often aimed at protecting the identity of the individual,<sup>121</sup> and decides on in-court or procedural protection measures. Where protection measures extend to foreign relocation, such measures often require ministerial approval.

National protection systems have nearly always been based on the interest of the state and the prosecution services to ensure the availability of prosecution witnesses for testimony at trial. Decisions on when protection is available are therefore typically based on the importance of the testimony to secure a conviction.<sup>122</sup> Eligibility for protection can vary between states though there are a number of common characteristics. In most states a threat assessment is

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<sup>117</sup> See UNODC Good Practices Study.

<sup>118</sup> *Ibid.*, p. 94.

<sup>119</sup> *Id.*, p. 45.

<sup>120</sup> The text of the Bill is available at: [www.alrc.net/doc/mainfile.php/documents/435](http://www.alrc.net/doc/mainfile.php/documents/435).

<sup>121</sup> This can be seen in South Africa, where the Witness Protection Act 112 of 1998 equips judges with the ability to suspend civil proceedings against a protected witness to prevent disclosure of the identity or whereabouts of the witness, or to achieve the aims of the Act.

<sup>122</sup> UN Good Practices Study. p. 9.

carried out in order to determine the necessity, or otherwise, of protection. Generally this analysis is based on:

- a) The origin of the threat;
- b) The patterns of violence;
- c) The level of organisation and culture of the threatening group; and
- d) The group's capacity, knowledge and available means to carry out threats.<sup>123</sup>

Victim witnesses are subject to the same inclusion criteria as regular witnesses, in that they 'may also be included in a witness protection programme, if all other conditions are fulfilled (value of testimony, absence of other effective means of protection, existence of serious threat, and personality of the witness)'.<sup>124</sup> Many risk assessments also take into account the likelihood of the threat materialising, and an assessment of how it can be best mitigated.

In practice, these criteria require a high threshold for acceptance into the programme, and the programmes themselves are focused on the most severe protective measures such as identity change and permanent witness relocation.<sup>125</sup>

Ideally, protection services should coordinate with government agencies, private sector, non-governmental and international sectors to provide witnesses with the wide range of services required for a comprehensive protection.<sup>126</sup> It is important to ensure that the admissions test for entry into a national protection programme is adequate in ensuring the programme does what it is designed to do – protect victims and witnesses of all types of crime.

Protection systems must also be impartial, conform to law, and run in such a way as to inspire public trust and respect. Regarding the Philippines protection programme, Amnesty International recently reported that: 'Most witnesses are reported to lack confidence in the current witness protection program, and fear that, given prolonged delays in criminal proceedings, it will not be able to offer protection to them or their families which may be needed to extend over a number of years.'<sup>127</sup>

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<sup>123</sup> Ibid., p. 62.

<sup>124</sup> Id., p. 21.

<sup>125</sup> Id., p. 94.

<sup>126</sup> The Victim and Witness Protection programme in Brazil has built extensive links with civil society groups, and to a certain extent relies on them for implementation. Whilst the collaboration has been seen as positive, this reliance on NGOs for functioning has been criticised. See, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, Addendum, Mission to Brazil, UN Doc. A/HRC/11/2/Add.2, paras. 61-63, 94.

<sup>127</sup> See, AI, 'Witness protection needed to ensure justice for Philippines massacre victims', 27 Nov. 2009 at: <http://www.amnesty.org/en/news-and-updates/news/witness-protection-needed-ensure-justice-philippines-massacre-victims-20091127>.

## b) Protective Measures offered

The witnesses ... are a harassed lot. ... Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him.<sup>128</sup>

As indicated, the majority of national protection programmes focus on identity change and relocation, however this is beginning to change. Below is a summary of the types of measures typically offered by victim and witness protection programmes.

### i) Efforts To Minimise Risks Through General Institutional Safeguards And Good Practice

- a) Advising witnesses when a convicted perpetrator is going to be released: Many states have tracking systems which ensure that witnesses are notified prior to the release of a convicted perpetrator, when there is an assessment of risk.
- b) Confidentiality: Many states have systems in place to minimise public contacts with uniformed police. There is also some practice of using discrete premises to interview and brief victims and witnesses to avoid undue scrutiny, and discrete correspondence, e.g., unmarked letters and other correspondence, as well as confidential filing systems in which access to names and other identifying details of complainants is restricted to a limited pool of personnel. However, in most countries, maintaining confidentiality of initial complaints and follow up investigations remains a distinct problem, particularly when the complaints relate to members of the police or other security service and there is no independent complaints service.

### ii) Responses to Identified Risks

- a) Relocation: Most witness protection programmes include measures to relocate witnesses. Relocation is a difficult option, owing to its permanence<sup>129</sup> and the fact that the witness will typically be forced to sever all personal ties, and at times will be forced to live in a different cultural environment. This will be difficult for many witnesses, particularly unaccompanied children and persons coming from very rural or traditional cultural environments.<sup>130</sup> Most

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<sup>128</sup> Swaran Singh v. State of Punjab, (2000) 5 SCC 68 at 678.

<sup>129</sup> Although temporary resettlement is not a common practice, some countries such as Australia, New Zealand and the United States are considering such measures, particularly to address protection for gang-related crimes. UNODC Good Practises Study, p. 89.

<sup>130</sup> *Ibid.*, p. 79.

programmes allow for the less intrusive option of in-country ‘resettlement’ to larger cities prior to pursuing international relocation.

The UN Good Practices Study recognises certain elements to achieve a successful integration: a) Compatibility of ethnic and cultural background, b) Language; c) Living standards (financial assistance for medical cover and schooling for any minors or dependents of the witness<sup>131</sup>; and d) Ability to become self-sufficient, in terms of gaining and maintaining employment within a reasonable period, among others.<sup>132</sup>

- b) Identity Change:** Some witness protection programmes will change witnesses’ identity. This is an exceptional measure taken with relocation and is generally used after the end of the trial.<sup>133</sup>
  
- c) Monitoring / Special Police Protection:** Most witness protection programmes have a range of options for increasing witness security, which are less intrusive than relocation or identity change. These include: temporary change of residence (to a relative’s or friend’s house or a nearby town) or use of ‘safe houses’;<sup>134</sup> ‘close protection’ such as regular patrolling around the witness’s house, 24hr security, escort to and from the Court; provision of emergency contacts; change of the witness’s telephone number or assign him/her an unlisted telephone number; monitoring of mail and telephone calls; Installation of security devices in the witness’s home (such as security doors, alarms, close circuit or special fencing); provision of electronic warning devices and mobile telephones with emergency numbers.<sup>135</sup> Also, if the witness is serving a prison sentence, transfer to a special unit within the same or different prison.<sup>136</sup>
  
- d) Courtroom measures:** The most common courtroom measures include: Hearings closed to public, use of pseudonyms, redaction of documents and expunging victim/witness identity from public records; shielding testimony through the use of a screen, curtain or two-way mirror; testimony via closed-circuit television or audio-visual links, voice and face distortion); use of pre-trial statements (either written or recorded audio or audio-visual

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<sup>131</sup> These services had been provided by the Special Court for Sierra Leone as part of its total protective care programme. See, SCSL, *Best-Practice Recommendations for the Protection & Support of Witnesses*, June 2008, p. 6, available at: <http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqzcrMc%3d&tabid=176>.

<sup>132</sup> In the United Kingdom, protected witnesses and their accompanying family members are provided with a service called “schooling” in order to facilitate their transition to a new life. UNODC Good Practices Study, p. 86.

<sup>133</sup> *Ibid.*, p. 77.

<sup>134</sup> The UN Good Practices Study found that the use of safe houses was one of the most used measures to protect witnesses-victims. *Id.*, p. 30.

<sup>135</sup> See, the range of options mentioned in the Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, A/63/313, 20 Aug. 2008, para. 39.

<sup>136</sup> The UN Special Rapporteur on Torture has indicated: ‘In cases where current inmates are at risk, they ought to be transferred to another detention facility where special measures for their security should be taken.’ See General Recommendations of the Special Rapporteur on Torture, E/CN.4/2003/68, para 26(k).

statements) as an alternative to in-court testimony; change/deferral of the trial venue or hearing date; and presence of an accompanying person as support for the witness.<sup>137</sup> As has been indicated, these and other protective measures must be considered in light of the rights of the accused.<sup>138</sup>

- e) Pre-Trial Detention of suspects/Suspensions: The potential for defendants to intimidate witnesses has been taken into account by certain courts when deciding on pre-trial detention. For example, the Co-Investigating Judges of the Extraordinary Chamber of the Courts of Cambodia justified the need for the provisional detention of indictees partly on the grounds of the need to secure the safety and well-being of victims and witnesses.<sup>139</sup> For similar reasons, it is common in Uruguay for accused police officers to be detained pending trial.<sup>140</sup> A further protective measure consists in the suspension of the alleged perpetrators pending the results of investigations provided the allegation of torture is not manifestly ill-founded.<sup>141</sup>
- f) Financial or other assistance for self-help measures: In recognition of the difficulty many will have in passing the threshold set to be admitted to witness protection programmes, some states have arranged for informal measures which provide assistance to witnesses without any assumption of responsibility or formal agreement with the witness. These measures may include self protection training and other self executing tactics in order to increase the security of the witness.<sup>142</sup>

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<sup>137</sup> On measures adopted in Bosnia and Herzegovina, see HRW, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Feb. 2006, Volume 18, No. 1(D).

<sup>138</sup> See Part II.4 of this Report, above, 'The Right to be Protected and the Rights of the Accused: Balancing Different Interests'.

<sup>139</sup> See, e.g., ECCC, *Order on the Provisional Detention of NUON Chea*, 19 Sept. 2007, 002/14-08-2006, para. 6: 'Consequently, considering that provisional detention is necessary to prevent any pressure on witnesses and victims; that it is also necessary to ensure the presence of the charged person during the proceedings; and finally, that it is necessary to preserve public order and protect his safety; because furthermore, no bail order would be rigorous enough to ensure that these needs would be sufficiently satisfied and therefore detention remains the only means to achieve these aims.' See also ECCC, *Pre-Trial Decision on Appeal against the Provisional Detention Order of NUON Chea*, 20 March 2008, in which the Chamber notes that 'in the first place this statement suggests that the Charged Person might utter threats against witnesses ... certain influence is necessarily attached to such a senior position, influence which can still be applied today. ... this incident, if known by the victims, could adversely affect the willingness of the witnesses to testify if the Charged Person were released. ... provisional detention is a necessary measure to prevent the Charged Person from exerting pressure on witnesses or destroying any evidence.' (at paras. 62-64).

<sup>140</sup> See, Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, A/63/313, 20 Aug. 2008, para. 29.

<sup>141</sup> See Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, 3 July 2001, para 39(j).

<sup>142</sup> Self-protection measures are used in Colombia for human rights defenders and other that does not reach the high threshold to be included in the protection programmes.

### iii) Legal And Institutional Consequences Following A Failure To Protect

The consequences of the failure to protect victims and witnesses can be grave: these can include loss of life, serious and grievous bodily injury. The impact on the victim and/or witness and his/her family can be significant, even when there has been no physical attack. The stress caused by repeated acts of intimidation can be psychologically traumatising, entail a loss of privacy and degradation of family and personal life. Where the threats result in forcing the individual and/or his family to uproot, this will have serious and long-term financial repercussions including loss of employment, home, schooling and personal life.

- a) Witness Intimidation as a Crime: Several countries have adopted a special crime of witness intimidation. For example, in Ireland, the intimidation of witnesses is an offence pursuant to Section 41 of the Criminal Justice Act 1999, which specifies the offence as harming, threatening or menacing or in any other way intimidating or putting in fear another person who is assisting in the investigation of an offence by the Garda Síochána, with the intention of causing the investigation or course of justice to be obstructed, perverted or interfered with. The offence is punishable upon indictment by a fine or a term of imprisonment of up to ten years.<sup>143</sup> Similarly, in Rwanda, as part of the gacaca process (traditional courts charged with responding to genocide crimes) threats and pressure directed against witnesses or the seat of the gacaca court are punishable under the Gacaca legislation<sup>144</sup>. Article 30 provides that any person who exerts pressure, or attempts to exert pressure on witnesses or on members of the Seat of the Gacaca Jurisdiction, including blackmail, is liable to punishment by imprisonment of between three months and one year. If the offence is a repeat offence, the defendant may incur a prison sentence of between six months and two years. In practice though, the sentences have been lower, and the support the police have provided has been largely reactionary as opposed to preventative, and somewhat ad hoc.<sup>145</sup>
- b) Use of Regular Criminal Law Provisions: Most countries simply resort to regular criminal law provisions to investigate acts of intimidation and reprisals. The problems with this approach is that the nature of most acts of intimidation can be subtle – following the victims, phone harassment, threatening messages - ill-suited to regular forms of criminality. Here, police, to the extent that they are not involved in the acts of harassment, tend to wait until the harassment turns into something more sinister, such as actual assault or murder.
- c) Institutional Reforms: Most national reform efforts have come in the wake of incidents in which victims and witnesses were harmed.

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<sup>143</sup> UN Committee against Torture, First National Report by Ireland July, 2009, p. 68, available at: <http://www2.ohchr.org/english/bodies/cat/cats45.htm>.

<sup>144</sup> Rwandan Organic Law No 16/2004 of 19/6/2004, Art. 30.

<sup>145</sup> See, African Rights and REDRESS, *Survivors and Post-Genocide Justice in Rwanda, Their Experiences, Perspectives and Hopes*, November 2008, at p. 19.

## c) Specific Context of Crimes Perpetrated by State Officials (Torture and Related Human rights cases)

In the special case of crimes implicating police or other state agents, and in particular human rights crimes such as torture, extrajudicial executions and disappearances, the protection of victims and witnesses is a key condition precedent to justice and necessary if the overall goal of countering impunity is to be achieved. The fact that these crimes are perpetrated by or with the acquiescence of the state, means that victims will be fearful to come forward, and that many of the traditional approaches to victim and witness protection that have been employed in the context of organised crime, gang violence or trafficking will need to be rethought. As has been indicated, 'there are often State agencies or connected individuals with an interest in opposing prosecution and with the practical power to pervert the course of justice, including through abuse and intimidation of witnesses. As a result, it may become more difficult to prosecute perpetrators of gross human rights violations'.<sup>146</sup>

There are several areas of difference that are worth exploring:

**Investigations:** The willingness of victims to report incidents of state abuse requires special structures to facilitate victims to come forward. It is clear and has been regularly stated that special structures need to be in place to facilitate the receipt of complaints. These structures must be known, accessible, confidential and outside of the regular chain of command.<sup>147</sup> As previously indicated, most witness protection programmes are run by the police, and therefore such a model would need to be revised for the protection of witnesses of crimes involving the police. The investigation of complaints must proceed with care, without the intentional or unintentional revealing of the witness' identity. Case files should be kept confidential; meetings with witnesses should take place away from the view of the public or the regular police cadres.

**Decisions on access to protective measures:** The usual bodies deciding on whether protective measures should be employed will be the police or the prosecution services, or some combination of these. The decision will typically be based on criteria linked to the importance of the witness to securing a conviction, among other factors. In human rights cases, where the case is not necessarily brought by the police or prosecution services but by the victim him or herself, private lawyers or NGOs, even the most well-intentioned police and prosecutors will feel little ownership over the case and may be less inclined to press for protective measures, regardless of whether they may be needed. One solution may be to assign special prosecutors or prosecution units to work exclusively on human rights cases, in which case their ownership

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<sup>146</sup> Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the High Commissioner and The Secretary-General, *Right to the Truth, Report of the Office of the High Commissioner for Human Rights*, UN Doc. A/HRC/12/19, 21 Aug. 2009, para. 41.

<sup>147</sup> See, generally, REDRESS, *Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities*, September 2004, available at: <http://www.redress.org/publications/PoliceComplaints.pdf>.



would be strengthened over time.<sup>148</sup> Another would be to vest more power with the judges, to receive and consider requests for protective measures from victims and witnesses, directly, and to ensure that criteria on whether to provide protective measures are appropriate to the circumstances.

The UN Special Rapporteur on Extrajudicial Executions has posited the following types of criteria for admission to victim and witness protection programmes, in human rights cases:

- (a) the importance of the case in terms of ending a cycle of impunity for human rights abuse;
- (b) the importance of the witness's testimony to the case;
- (c) the level of threat to the witness;
- (d) the suitability of the witness for the programme, including whether he or she is genuinely willing to relocate and break ties with family and friends; and
- (e) the availability and adequacy of less onerous forms of protection.<sup>149</sup>

Several countries have started to address the lacunae of existing witness protection programmes, by developing special measures for human rights cases. Italy provides a good example, where, despite a long-standing witness protection programme, it was only in 2001 that the national protection programme created a special section for human rights justice collaborators.<sup>150</sup> In Argentina, a new witness protection bill is currently under consideration, which is designed to address the gaps of the previous witness protection laws and to counter the continuous threats received by human rights defenders and many of the victims and witnesses in trials against former military and police officers.<sup>151</sup> In the case of Colombia, only recently was a distinction made between the different types of beneficiaries of protection programmes.<sup>152</sup> Also, several national programmes have expanded the list of beneficiaries to foreigners due to implement state cooperation agreements and cooperate with international tribunals.<sup>153</sup>

***The nature of the protective measures:*** In human rights cases, the individuals in need of protection will not usually be criminal insiders. Rather, they will typically be regular people, sometimes from excluded or marginalised communities, at times human rights defenders or activists. Family members will typically also be at risk. Permanent relocation and identity

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<sup>148</sup> This approach has been suggested by the UN Special Rapporteur on Extrajudicial Executions, who mentions Brazil and The Philippines as countries in which this has had some success. See, Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, A/63/313, 20 Aug. 2008, paras. 17, 19.

<sup>149</sup> *Ibid.*, para. 35.

<sup>150</sup> UN Good Practices Study, p. 14.

<sup>151</sup> See, *Right to the Truth, Report of the Office of the High Commissioner for Human Rights*, UN Doc. A/HRC/12/19, 21 Aug. 2009, para. 46.

<sup>152</sup> Interview with Colombian human rights defender.

<sup>153</sup> See, e.g., the Australian Witness Protection Act of 1994, which was amended in 2002 to allow for the inclusion of witnesses in the protection programme if there is a request from the International Criminal Court.

change may be less appropriate for such categories of persons in most instances. It will be more important for protection services to work constructively with NGOs and communities to find local solutions. Temporary measures of protection such as funds for short-term relocation, added security detail or like measures may be appropriate.

**Whistleblower legislation:** It can be difficult for members of the police or other security services to come forward to say what they know about the perpetration of human rights abuses. Usually, such officials will feel a strong allegiance to their colleagues and will not wish to cause frictions. In order to encourage such witnesses to come forward, it is important that ‘whistle blowing’ legislation is in place, to prevent these individuals from suffering repercussions for coming forward. This was the view expressed by the Special Rapporteur on the promotion and protection of human rights while countering terrorism:

In order to enable effective investigations to take place, the Special Rapporteur is of the opinion that robust whistle-blower protection mechanisms for intelligence agents and other informers are crucial in order to break illegitimate rings of secrecy. Reliable factual information about serious human rights violations by an intelligence agency is most likely to come from within the agency itself. In these cases, the public interest in disclosure outweighs the public interest in non-disclosure. Such whistle-blowers should firstly be protected from legal reprisals and disciplinary action when disclosing unauthorized information. Secondly, independent oversight mechanisms must be able to give whistle-blowers and informants the necessary protections, which could be modelled on the witness protection programmes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court.<sup>154</sup>

**Non-criminal cases:** Human rights cases will not only or necessarily be criminal cases. They may also be civil claims for damages, fundamental rights or administrative cases, claims before ombudsmen,<sup>155</sup> national human rights commissions or specialised commissions of inquiry or truth commissions.<sup>156</sup> As indicated, witness protection programmes are typically run by police, sometimes with the involvement of prosecutors. It is important to consider how protection measures can be requested, decided upon and implemented when the legal case is not a criminal case, and the police and prosecution office is not already engaged. There are important

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<sup>154</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin\*; UN Doc. A/HRC/10/3 of 4 Feb. 2009, para 61.

<sup>155</sup> For example, in Mexico, the national Ombudsman Office, and most of the Local Ombudsmen have been given the authority to issue interim measures of protection.

<sup>156</sup> In Sri Lanka, for example, the International Independent Group of Eminent Persons faced concerns regarding the protection of witnesses and several allegations of threats were made. At one point, the father of a victim was testified through video conferencing from an undisclosed location due to threats made to his life. Interview with Sri Lankan activist.

practical considerations regarding process, the ability to establish risk, budget and overall responsibility for ensuring protection.

Many truth commissions have provisions to deal with victim and witness protection. The South African Truth and Reconciliation Commission had its own witness protection programme which protected those who wished to testify before the Commission, and more than 150 witnesses reportedly joined the programme.<sup>157</sup> Some of the problems associated with truth commission protection programmes relate to their temporary nature, the challenges of maintaining adequate protection, and unclear links to police/prosecution ordered protection. In some instances, closed hearings and confidentiality constituted the only forms of protection on offer,<sup>158</sup> making it difficult for the Commissions to deal with threats. In East Timor and Indonesia, for example, the Commission on Truth and Friendship protected victims and witnesses only for the duration of their evidence session, and failed to address ongoing threats after a hearing.<sup>159</sup>

### **III.2 Protection Measures Adopted by Regional and International Human Rights Bodies**

Regional and international human rights bodies have considered the issue of victim and witness protection in a number of ways. They have done so when:

- Considering state party compliance with treaty obligations, either through the review of state party reports or in finding a substantive violation stemming from an individual complaint, and in noting specific violations of convention rights.
- Assessing whether there is a need to exhaust domestic remedies, raising the possibility that the lack, or ineffectiveness, of victim and witness protection measures can be a basis for not needing to exhaust local remedies.
- Finally, such bodies have also considered the issue of protection as a procedural matter in the context of complaints made by victims and witnesses; e.g., when the regional or international body is being asked to intervene to assist the victim who is under threat.

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<sup>157</sup> P. Van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission', *Journal of International Affairs*, Spring 1999, 52, no. 2.

<sup>158</sup> ICTJ, *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year*, January 2004, p. 4.

<sup>159</sup> ICTJ, *Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste*, January 2008, p. 30.

As indicated in earlier sections, the jurisprudence of regional and international human rights bodies has considered the absence of victim and witness protection as a violation of mainly the right to security of the person and the right to life, and the right to justice (incorporating the right to individual petition, the right to be heard, and the obligation to investigate).<sup>160</sup>

### **a) Protection criteria in the exhaustion of local remedies**

The non-availability or insufficiency of victim and witness protection mechanisms has been used to demonstrate that local remedies are either ineffectual or impractical. In general, the ECtHR has recognised that there is no obligation to have recourse to remedies which are inadequate or ineffective, and, there may be special circumstances which absolve an applicant from the obligation to exhaust the domestic remedies at his disposal, a rule which must be applied with some degree of flexibility and without excessive formalism. In assessing such criteria, the ECtHR has taken into account available mechanisms to protect victims and witnesses, leading it to conclude that it ‘cannot exclude from its considerations the risk of reprisals against the applicants or their lawyers if they had sought to introduce legal proceedings.’<sup>161</sup> The Parliamentary Assembly of the Council of Europe has recently stated, in a resolution condemning acts of intimidation that have prevented victims from bringing their applications to the Court, or led them to withdraw their applications, that it believes ‘that the requirement of exhausting domestic remedies ought to be applied with considerable flexibility in the cases of applicants who are subjected to intimidation or other illicit pressure in order to prevent them from pressing charges against the perpetrators before the local courts or from exhausting all domestic remedies.’<sup>162</sup> It further recommends that the European Court ‘wherever possible continuing to process applications that have been withdrawn in dubious circumstances’ and apply ‘with considerable flexibility, or even waiving, the requirement of exhaustion of domestic remedies for applicants from the North Caucasus region (Chechen and Ingush Republics, Dagestan, North Ossetia) until substantial progress has been made in establishing the rule of law in this region.’<sup>163</sup>

The Inter-American Commission and Court of Human Rights have taken a similar approach. In the Inter-American Commission’s consideration of the admissibility of María Del Consuelo Ibarguen Rengifo’s petition, the ‘context of acts of harassment and intimidation against the

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<sup>160</sup> See, Section II.2 of this Report, ‘Protection as a Condition Precedent to the Realisation of other Rights’.

<sup>161</sup> *Akdivar and Others v. Turkey*, 16 Sept. 1996, para. 74.

<sup>162</sup> Parliamentary Assembly of the Council of Europe, ‘Council of Europe member states’ duty to co-operate with the European Court of Human Rights,’ Resolution 1571 (2007), 2 Oct. 2007. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1571.htm>. The Parliamentary Assembly has indicated that the incidents ‘concern mostly, but not exclusively, applicants from the North Caucasus region of the Russian Federation. Cases of intimidation concerning other regions of the Russian Federation, as well as from Moldova, Azerbaijan, and – albeit less recently – Turkey’. (at para. 7.)

<sup>163</sup> *Ibid.*, paras. 18.5 and 18.6.

family affected by the material facts of this case which have materialized into serious acts of violence' was taken into account in deciding that domestic remedies need not be exhausted.<sup>164</sup> The IACtHR has likewise noted that 'A remedy must also be effective - that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; *if it presents a danger to those who invoke it*; or if it is not impartially applied. (emphasis added)<sup>165</sup>

The African Commission on Human and Peoples' Rights has similarly noted that complainants should not be expected to exhaust local remedies which risk their lives. In *Sir Dawda K Jawara v. The Gambia*, the Commission noted that 'It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies. There is no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant.'<sup>166</sup>

Likewise, in the case of *A.T. v. Hungary*, the fact that no measures had been taken to protect the applicant, was taken into account by the Committee on the Elimination of Discrimination Against Women, in determining that the applicant's claim was admissible: 'the Committee takes account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.'<sup>167</sup>

## **b) Protection Measures Afforded by Regional and International Human Rights Bodies**

The ECtHR provides for the possibility of holding hearings *in camera*, as well as for restrictions on the publicity of the records, with some exceptions.<sup>168</sup> Applicants may also request that their identity remain undisclosed to the public, and in exceptional circumstances anonymity may be granted.<sup>169</sup> Similar provisions are envisaged for the African Court of Justice and Human Rights,

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<sup>164</sup> Report Nº 55/04, Petition 475/03, Admissibility, María Del Consuelo Ibarguen Rengifo *et. al.* V. Colombia, 13 Oct. 2004, para. 30.

<sup>165</sup> Velasquez Rodriguez Case, 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para. 66.

<sup>166</sup> ACHPR, 147/95 and 149/96 - Sir Dawda K Jawara / The Gambia, paras 36-7.

<sup>167</sup> CEDAW Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005), para. 8.4.

<sup>168</sup> See Rules of the Court 63(2) on exceptions to the publicity of the hearings and 33(2) on the exceptions to the publicity of the documents and records. Available at: <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-5AC8864BE4F/0/RulesOfCourt.pdf>.

<sup>169</sup> See Rule 47(3) of the Rules of the ECtHR.

which may hold *in camera* sessions if needed for the protection of witnesses,<sup>170</sup> and this is also the practice of the IACtHR, where hearings, judgments and court records<sup>171</sup> remain public unless otherwise decided by the Court.<sup>172</sup>

Interim measures –also termed *provisional* or *precautionary* measures- are commonly applied by international human rights bodies, both judicial and quasi-judicial.<sup>173</sup> Interim measures do not prejudge or make any finding on the substance of the complaint, rather they provide an important protective function until a final decision is reached,<sup>174</sup> and can be an effective way to prevent an irreparable harm. According to the International Court of Justice<sup>175</sup> these are measures intended to both, preserve the rights of the parties *pendente lite* and avoid the occurrence of an irreparable harm.<sup>176</sup>

Most human rights bodies are able to issue interim measures as part of their practice to protect rights, particularly the right to life and personal integrity. Currently, four UN treaty based committees can order interim measures to avoid an irreparable harm to victims. Generally, such measures are issued in cases involving the application of the death penalty or where an extradition or deportation is eminent and there is a risk to personal integrity. The Committee against Torture's decisions on interim measures are mainly related to allegations of violations to the principle of *non refoulement* established in article 3 of the Convention, though as demonstrated in the case below, measures relating to protection have been requested by parties and the UN has sought to respond accordingly.

In the case of *Fernando v. Sri Lanka*,<sup>177</sup> Mr. Fernando had filed a fundamental rights petition before the Sri Lankan Supreme Court alleging torture. He subsequently received death threats, so applied to the UN HRC for interim measures of protection. He requested that Sri Lanka adopt

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<sup>170</sup> See Article 10(1) and (3) of the Protocol establishing the African Court: '1. The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure. ... 3. Any person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.' Available at: [www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf) '.

<sup>171</sup> See Article 30 of the Rules of Procedure of the IACtHR.

<sup>172</sup> See Article 24 of the Statute of the IACtHR Court and Article 14 of the Rules of Procedure.

<sup>173</sup> See, generally J.M. Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization,' 38 Vand. J. Transnat'l L. 1, January, 2005.

<sup>174</sup> Pasqualucci, 'Interim Measures', p. 4.

<sup>175</sup> Article 41 of the ICJ Statute contemplates the possibility to order interim measures; see also Articles 73-78 *Rules of Court* of 14 April de 1978, modified 5 December 2000.

<sup>176</sup> See e.g., International Court of Justice, *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Request for the Indication of Interim Measures of Protection, Order of 17 Aug. 1972, para. 21; Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia And Herzegovina v. Yugoslavia (Serbia And Montenegro)), Request for the Indication of Provisional Measures, Order of 8 April 1993, para. 34.

<sup>177</sup> Communication No. 1189/2003, UN Doc. CCPR/C/83/D/1189/2003 of 29 April 2005.

all necessary measures to ensure his protection and that of his family, and to ensure that an investigation into the threats and other measures of intimidation be initiated without delay. Shortly thereafter, a request was made by the UN to Sri Lanka to adopt all necessary measures to protect the life, safety and personal integrity of Mr. Fernando and his family, so as to avoid irreparable damage to them, and to inform the Committee on the measures taken. About one month later, Mr. Fernando was attacked by an unknown assailant who sprayed chloroform in his face. As a result, the HRC issued a further request to Sri Lanka. Sri Lanka then replied to the Committee, indicating that they were investigating the incidents, and that police were ordered to patrol and survey his residence.

Regional human rights bodies have also used interim measures to protect human rights. The IACtHR frequently uses interim or provisional measures to avoid irreparable harm to litigants, and to ensure the safety and security of them and others who will testify. These measures have been issued mainly though not exclusively to protect the right to life and personal integrity of litigants, though more recently the Court has extended this protection to human rights defenders<sup>178</sup> as well as judges.<sup>179</sup> In cases of threats and attacks on victims and human rights defenders, the Court has ordered the investigation of such incidents as part of the precautionary measures taken to eliminate the risk. The Court can also issue provisional measures, even if the case has not been submitted to its jurisdiction, if the Commission requests it to do so.<sup>180</sup> In practice, although the provisional measures are temporary, the Court has often decided to maintain the measures for extended periods if the gravity and urgency of the situation so requires, or if the risk of irreparable harm persists.<sup>181</sup>

The Inter-American Commission is also able to issue precautionary measures under Article 25 of its Rules of Procedure, and in addition is mandated to request the Court to issue provisional measures.

In the *Luis Uzcátegui* case, Venezuela failed to protect Mr. Uzcátegui from a variety of acts of threats and intimidation, including being followed and harassed, arbitrary detention, beatings, house searches and the filing of a malicious complaint for insult and slander, following his attempts to seek justice for his brother's murder by alleged para-police groups. Following the

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<sup>178</sup> E.g. IACtHR, Chunimá Case (Guatemala), Provisional Measures, Resolution of 1st Aug. 1991; Giraldo Cardona (Colombia), Provisional Measures, Resolution of 28 Oct. 1996; Álvarez and others (Colombia), Provisional Measures, Resolution of 22 July 1997; Digna Ochoa Plácido and others (Mexico), Provisional Measures, Resolution of 17 Nov. 1999; Human Rights Centre Miguel Agustín Pro Juárez and others (Mexico), Provisional Measures, Resolution of 30 Nov. 2001.

<sup>179</sup> E.g. IACtHR., Chunimá Case (Guatemala), Provisional Measures, Order of the President of 15 July 1991 and Constitutional Court (Peru), Provisional Measures, Order of 14 Aug. 2000.

<sup>180</sup> See article 25 of the Rules of Procedure of the IACtHR.

<sup>181</sup> Measures have lasted more than six years in cases such as Colotenango case (Guatemala) and Caballero Delgado and Santana case (Colombia); over five in Blake and Carpio Nicolle cases (Guatemala) and Cesti Hurtado case (Perú); over four in Giraldo Cardona case (Colombia) and over three in Alvarez and others case (Colombia).

intervention of the Inter-American Commission, the very police unit that Mr Uzcátegui had reported to be his persecutor and the author of the acts of harassment and intimidation, was assigned to 'protect' him. The IACtHR then ordered Venezuela to 'allow the applicants to participate in planning and implementation of the protection measures and, in general, to inform them of progress regarding the measures ordered by the Inter-American Court of Human Rights' as well as 'to investigate the facts stated in the complaint that gave rise to the instant measures, with the aim of discovering and punishing those responsible.'<sup>182</sup>

The Commission's decision on whether to issue precautionary measures as a result of a threat, is based on a range of factors, such as:

- 1) The nature of the threats received (messages in writing, oral or symbolic) and the actual attacks against an individual or a group of persons;
- 2) The general background surrounding the attacks and threats against persons in similar situations;
- 3) The nature of the aggression against the potential beneficiary;
- 4) The need to act in a preventive manner due to an increase in threats;
- 5) Other elements such as the incitation of violence against a person or a group of persons;
- 6) The broader context (the existence of an armed conflict, the state of emergency, the efficiency of the Judicial Branch; and
- 7) The proximity in time with the last or more recent threat.<sup>183</sup>

In death threat cases, the Commission has ordered the state to include the threatened person in a protection programme, provide personal guards, 24 hour surveillance of home and work places, and to carry out an investigation.<sup>184</sup> In cases of threats and attacks to life and personal integrity, the Commission has recommended that states hold meetings with the petitioners and the beneficiaries in order to decide over the best way to provide protection.<sup>185</sup>

Despite the generally positive results, there have been cases where beneficiaries of interim measures have been killed.<sup>186</sup> In practice, the most effective measures have proven to be those developed in consultation with the beneficiary, and when the State cooperates in good faith.<sup>187</sup> But, there is little that can be done when there is not good faith. As has been indicated by

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<sup>182</sup> Luis Uzcátegui Case, Order of the Court of 2 Dec. 2003, Inter-Am. Ct. H.R. (Ser. E) (2003).

<sup>183</sup> Interview with staff of the Commission.

<sup>184</sup> E.g. IACommHR, Precautionary Measures against Nicaragua in relation to Agustín Jarquín Anaya, Rafael Córdoba Álvarez and Eddy Stubbs Guillén, 12 Feb. 1999.

<sup>185</sup> Interview with staff of the Commission.

<sup>186</sup> E.g. IACtHR, Giraldo Cardona et al. (Colombia), Provisional Measures, 28 Oct. 1996.

<sup>187</sup> Interview with staff of the Commission.



Mersky and Roht-Arriaza, 'there are complaints about government implementation of the measures. Police tend to appear outside NGO offices when the Commission is in town, but not necessarily at other times; the government offers protection for witnesses but not for their families; it sends guards, but neglects to give them guns; and there is little close supervision of how the measures are implemented.'<sup>188</sup>

Within the European system the former Commission and the Court can afford interim measures. Most of the interim measures granted by the European system have been provided if the existence of an 'imminent danger to the applicant's life or of torture, or inhuman or degrading treatment or punishment' was proved.<sup>189</sup> The measures have usually been granted in cases involving the application of the death penalty and in extradition or expulsion cases where there was a fear that a person might be subject to torture, inhuman treatment if extradited. The ECtHR attaches high importance to compliance with these measures, considering them essential in making the final decisions of the Court effective.<sup>190</sup> In addition, the failure to comply with these measures could amount to a violation of article 34 of the Convention on the right to present individual complaints.<sup>191</sup> Recently, the Parliamentary Assembly of the Council of Europe has indicated that interim measures 'may have still wider potential uses for protecting applicants and their lawyers who are exposed to undue pressure', and encouraged the Court 'to examine the practice of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, which have used interim measures to enjoin the authorities to place applicants under special police protection in order to shield them from criminal acts by certain non-state actors.'<sup>192</sup>

The Rules of Court allow parties to the case and 'any other person concerned' to request interim measures. This provision opens the possibility for witnesses and others persons such as victim's relatives to request such measures. In addition, in recognition of the fact that 'the period between the registration of an application with the Court and its communication to the authorities of the respondent state may be particularly dangerous for applicants in terms of the exercise of pressure', the ECtHR has given priority to the scheduling of hearings on cases in which petitioners have faced pressure, and the Parliamentary Assembly of the Council of Europe has recently encouraged the Court to 'do its utmost to shorten this period.'<sup>193</sup>

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<sup>188</sup> M. Mersky and N. Roht-Arriaza, 'Guatemala: Victims Unsilenced', in *The Inter-American Human Rights System and Transitional Justice in Latin America*, Due Process of Law Foundation, 2007, p. 25.

<sup>189</sup> See *Mamatkulov & Abdurasulovic v. Turkey*, App. No. 46827/99, 46951/99, 6 Feb. 2003, p.55.

<sup>190</sup> In *Mamatkulov*, the Court decided that 'any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment'. *Ibid.*, at para. 110.

<sup>191</sup> *Mamatkulov*, *id.*, para. 111.

<sup>192</sup> PACE, 'Council of Europe member states' duty to co-operate with the European Court of Human Rights,' Resolution 1571 (2007), 2 Oct. 2007. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1571.htm>.

<sup>193</sup> *Ibid.*, para. 13.

Within the African system, Article 27 of the Optional Protocol allows the future African Human Rights Court to issue provisional protection measures,<sup>194</sup> while the African Commission can afford provisional measures as part of its mandate under Rule 111.

In general terms, when considering the efficacy of protection measures afforded by regional and international human rights bodies, one can note that these bodies:

- Do not have established units to deal with victims' and witnesses' protection needs. There is a lack of specialised skills to assess levels of risk and whether protection measures are required. Decisions on protection are therefore varied, contingent largely on the strength of submissions from the victims and witnesses themselves.
- Have no mandate or real ability to undertake protective measures directly, on behalf of victims and witnesses. They can only set out measures that they can recommend or require states to take.
- Have limited ability to control the successful outcome of protection. Success or failure of protection measures is predicated to a certain extent on the clarity and relevance of the recommendations or orders, as appropriate, though as indicated, these bodies have no specialised expertise in the area of protection. Moreover, whether a particular measure is effective will be contingent on the will of the state, mirroring more generalised problems with enforcement of international decisions – at times, the intervention of regional or international human rights bodies will help, at others, it will make matters worse. If a state fails to comply with the interim measures granted by a human rights mechanism, there are few actions that such bodies can take apart from exposing the failure. In most cases, this action takes the form of reporting to the political arm of the body, such as the Organisation of American States General Assembly or the Committee of Ministers of the Council of Europe. The recent efforts to incorporate a follow-up mechanism to review the implementation of interim measures have proved helpful in the Inter-American system.
- Have little ability to impact upon chronic failures of protection. Generally, these bodies have incorporated such failings into their substantive findings of human rights violations, and occasionally into their awards for reparation as a guarantee of non-repetition.

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<sup>194</sup> Article 27(2) on the Findings states that: 'In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.' Available at: [www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/africancourt-humanrights.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/africancourt-humanrights.pdf).

### III.3 Protection Measures Available to International Criminal Courts and Tribunals

Unlike the first international criminal tribunals in Nuremburg and Tokyo, which relied almost exclusively on documentary evidence, the later ad hoc and specialised international criminal tribunals and the International Criminal Court rely much more on witness testimony. Consequently victims and witnesses have had much more of a direct role with these newer courts, and the courts have struggled to put in place adequate and appropriate measures to facilitate such involvement.

International criminal tribunals have developed a range of measures to protect and support victims and witnesses involved in the proceedings. These include both in-court and outside of court measures such as protecting identities from the public and in limited situations, from the accused, developing and helping to implement risk mitigation strategies and responding to threats and security incidents linked to proceedings as and when they arise. These courts have provided such services through special victims and witnesses units that have been specifically established to deal with this constituency's range of protection and support requirements.<sup>195</sup>

Despite such measures, a range of exactions have been taken against victims and witnesses, particularly in the early days of the courts' establishment, both in the lead-up to their testimony and as a form of reprisal after their appearance in court. There have been several cases in the Yugoslav Tribunal (ICTY) where witnesses were harassed and intimidated, leading the Tribunal to prosecute a number of individuals for their role in witness tampering.<sup>196</sup> In Rwanda, many witnesses were killed and many more harassed and intimidated prior to being brought to Arusha to testify, and others were killed after having returned from testifying.<sup>197</sup> As one woman who had testified in Arusha indicated,

When I returned from [testifying in] Arusha, everyone knew I had testified. Everyone in my neighborhood had nicknamed me, 'Mrs. Arusha.' Shortly after returning from Arusha, I was chased from the house I had been renting in Kigali. The landlord asked me to leave because he knew I had testified in Arusha. At night, people would come and throw stones at my house. I was very scared.

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<sup>195</sup> See, e.g., Art. 43(6) of the ICC Statute; Rule 34 of the ICTY Rules of Procedure and Evidence; Rule 34 of the ICTR Rules of Procedure and Evidence; Rule 34 of the Special Court for Sierra Leone's Rules of Procedure and Evidence.

<sup>196</sup> See, e.g., R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford Univ. Press, 2004), p. 108.

<sup>197</sup> See, C. Walsh, *Witness Protection, Gender and the ICTR*, 1997, paras. 1-14, available at: [www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php).

... Because I had to move, I was unable to continue to run the small shop I had. I used to be able to make a living but this is no longer possible. I cannot survive. I feel like the ICTR is just bringing us problems for nothing.<sup>198</sup>

Over time there has been extensive cross-over between the victims and witnesses units of the tribunals, in terms of personnel, skills sharing and best practice, though the differences in contexts have made it important that each tribunal develop solutions appropriate to it.

### **a) The beneficiaries of protection**

Protection measures are available to prosecution and defence witnesses alike. Not only is this an equitable principle, it also reflects the nature and complexity of the risks facing individuals testifying about crimes of genocide, war crimes and crimes against humanity. In regards to the Rwanda tribunal (ICTR) in particular, defence witnesses have been reluctant to testify given the particular risks given the post conflict power dynamics and owing to their perceived associations with individuals responsible for the Rwandan genocide.<sup>199</sup> There have been cases in which the defence has requested the ICTR to grant immunity from prosecution as a protective measure, and to block extradition in cases where the witness, if returned to his/her country of origin would face prosecution and if found guilty face the death penalty before giving testimony.<sup>200</sup> However, so far it has refrained for granting such measures.<sup>201</sup>

Before the International Criminal Court (ICC), in principle such measures should also be available to victims independently participating in proceedings. Indeed, the mandate of its Victims of Witnesses Unit refers not only to witnesses, but also to victims appearing before the Court.<sup>202</sup> Similarly, the Extraordinary Chambers in the Courts of Cambodia is specifically mandated to protect 'victims who participate in the proceedings, whether as complainants or Civil Parties, and witnesses.'<sup>203</sup> This reflects the mandates of these courts which allow victims to participate in the criminal proceedings independently from the prosecution's case.

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<sup>198</sup> *Ibid.*, at paras. 5-7.

<sup>199</sup> See, e.g., The Prosecutor v. Pauline Nyiramasuhuko, Case No. *ICTR-97-21-T*, Decision on Nyiramasuhuko's Motion For Additional Protective Measures For Defence Witness WBNM, 17 June 2005. See also, G. Sluiter, 'The ICTR and the Protection of Witnesses', *Journal of International Criminal Justice* 3 (2005), 962-976.

<sup>200</sup> See ICTR, Prosecutor v. Bagosora, Case No. *ICTR-96-7-I*, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 Sept. 1999.

<sup>201</sup> See, ICTR, Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yusuf Munyakaz, Case No. *ICTR-97-36-T*, Decision on the Defence Motion for the Protection of Witnesses, 30 Sept. 1998; Prosecutor v. Andre Ntagerura, Case No. *ICTR-96-10A-I*, Decision on the Defence Motion for the Protection of Witnesses, 24 Aug. 1998.

<sup>202</sup> Art. 43(6) of the ICC Statute.

<sup>203</sup> Rule 29(1) of the Internal Rules of the Extraordinary Chambers, Internal Rules (Rev.4) as Revised on 11 Sept. 2009.

Article 43(6) of the ICC Statute, which refers to provision of protective measures to ‘victims appearing before the Court’ has been interpreted in the jurisprudence as entitling victims at risk to some measure of protection as soon as their completed application to participate has been received by the Court.<sup>204</sup> However, to date, the Victims and Witnesses Unit has put little in place to make this work in practice. It was conceded by the VWU that ‘since the decision of 18 January 2008, which specifically clarified the VWU’s mandate, this issue had to be a priority.’<sup>205</sup>

At the Extraordinary Chambers in the Courts of Cambodia (ECCC), victims may participate as civil parties with all the attendant rights associated with that status. As mentioned, the Internal Rules specifically obligate the Chambers to protect victims and civil parties at risk. At the time of writing, the judges were considering extensive changes to their Internal Rules, and in particular to significantly limit the access of civil parties to proceedings. As part of the proposed changes, it has been proposed by the Rules Committee to amend Rule 29(1) of the Internal Rules to obligate the ECCC to ensure the protection of victims who participate in the proceedings, whether as complainants or civil parties in the pre-trial stage, and witnesses at all stages of the proceedings.<sup>206</sup> This proposed amendment would, if adopted, eliminate protection for civil parties at the trial stage, a time when risks to their safety and security may be highest.

The ICC Statute recognises that the mandate of the Victims and Witnesses Unit extends not only to victims and witnesses, but also to ‘*others who are at risk on account of testimony given by such witnesses*’<sup>207</sup> [emphasis added]. This provision in principle reflects the range of individuals and groups that may be at risk as a result of their support to or relationships with victims and witnesses. For example, family members of victims and witnesses may be targeted to exert pressure indirectly to discourage testimony or other engagement with the Court. Lawyers of victims participating in proceedings may also suffer risks as a result of their support to the legal process. Many local organisations providing assistance to victims and witnesses on the ground, and helping them to interact with officials of the Court, have been put at risk by their involvement. Sudanese human rights defenders who were believed to have provided evidence to the Office of the Prosecutor have suffered recriminations, including arbitrary arrests and torture, requiring some to flee the country. In the Democratic Republic of Congo,

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<sup>204</sup> Prosecutor v. Lubanga, ICC, Case N° ICC-01/04-01/06-1119, Decision on victims’ participation, 18 Jan. 2008, para. 137: ‘In the view of the Chamber, the process of “appearing before the Court” is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of “appearing before the Court”, regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, in the view of the Chamber, “an appearance” for the purposes of this provision has occurred.’

<sup>205</sup> ICC, *Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court*, p. 5. Available at: [http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf).

<sup>206</sup> On file with the authors.

<sup>207</sup> Art. 43(6) of the ICC Statute.

members of civil society groups have been attacked by groups said to be linked with accused persons, forcing some to relocate.

As has been indicated, 'most intermediaries requiring help or advice in relation to their safety, are not asking to enter the Court's protection programme or to be relocated. Examples of measures that could be afforded to intermediaries are: to issue a (public) statement from the Court calling for their protection; to support their requests for passports or visas; to be referred to a list of telephones or addresses to which they can resort to in case of emergency. Victims' legal representatives, especially those coming from the situation countries, are in a similar situation.'<sup>208</sup>

Despite these risks, and the acknowledgement of many Court officials of the essential role these persons and organisations play in supporting the Court's work, to date, the position of the Court has essentially been that these 'intermediaries' do not fall within the provision of '*others who are at risk on account of testimony given by such witnesses*'. The Court has begun consultations on the issue of 'intermediaries' and recommendations have been made by some groups that they be entitled to protection in certain circumstances.<sup>209</sup> The ICC has so far taken a restrictive approach, thus far noting that 'Strategies will be developed for ensuring that individuals who are not staff of the Court but who have contact with victims or with information relating to victims, such as legal representatives or intermediaries, are also made aware of good practices'.<sup>210</sup>

However, in certain instances, the relevant Trial Chambers have recognised certain steps that can or should be taken. For example, Trial Chamber I in the Lubanga case has recognised that names of third parties may be redacted where the information itself is not relevant to the facts of the case.<sup>211</sup> The Appeals Chamber in the Katanga case held that 'protection should, in principle, be available to anyone put at risk by the investigations of the Prosecutor' and noted that

the specific provisions of the Statute and the Rules for the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of

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<sup>208</sup> M. Pena, 'Time for the ICC to take on protection of intermediaries and lawyers', VRWG Access Bulletin, Winter 2008, Issue 13, p. 4.

<sup>209</sup> See, e.g., Victims' Rights Working Group, 'Comments on the Role and Relationship of 'Intermediaries' with the International Criminal Court', 6 Feb. 2009, pp. 4-5, at: [www.vrwg.org/Publications/05/VRWG%20intermediaries%206%20Feb%2009%20FNL.pdf](http://www.vrwg.org/Publications/05/VRWG%20intermediaries%206%20Feb%2009%20FNL.pdf). See also, HRW, *Courting History: The Landmark International Criminal Court's First Years*, 10 July 2008, at Part VI. Victim and Witness Protection and Support.

<sup>210</sup> ICC, *Report of the Court on the strategy in relation to victims*, ICC-ASP/8/45, 10 November 2009.

<sup>211</sup> ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1835, Redacted "Decision on 'Prosecution's Application for Non-disclosure of Information' filed on 14 May 2008", 5 May 2009, para. 11.

the Court. It is clear that rule 81(4) enables the Chamber to authorise the non-disclosure of the identity of witnesses, victims and members of their families at the current stage of the proceedings for the purposes of protecting their safety. Other provisions, ... expressly provide for the protection of other persons at risk on account of the activities of the Court. In those circumstances, it would be illogical and would defeat the object and purpose of those other provisions if the Chamber were not able to authorise the nondisclosure of material ..., in appropriate circumstances, for the protection of such persons as well.<sup>212</sup>

## b) How to assess risk

International tribunals have outlined in their decisions criteria for assessing the level of risk posed to the victim or witness with a view to determining whether the individual should benefit from protective measures. Such criteria include the need to demonstrate an objective risk, rather than a subjective fear expressed by a victim or a witness.<sup>213</sup> There must also be a minimum threshold of risk before protective measures can be considered;<sup>214</sup> they are 'exceptional' measures. Other considerations include: the likelihood that prosecution witnesses will be identified and/or intimidated once their identity is made known to the accused and his legal counsel, but not to the public and the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused.

The ICC Victims and Witnesses Unit has indicated that it receives referrals for protection from parties to the proceedings. A detailed assessment is undertaken to determine whether a particular individual should be admitted into the protection programme. In particular, there must be a clearly documented and serious protection need for the person, the witness or victim must be crucial or vital to the case and that any risk to them must be as a result or direct relevance of their interaction with the Court. Furthermore, the decision to apply for the protection programme must be taken with the informed consent of the victim or witness.<sup>215</sup> It is unclear, however, how and to what extent victims participating in proceedings outside of the prosecution's case will be considered to play a role 'crucial or vital to the case'.

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<sup>212</sup> ICC, Prosecutor v. Katanga, ICC-01-04-01-07-475-ENG, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, paras. 44, 54-55.

<sup>213</sup> ICTY, Prosecutor v. Tadic, IT-94-1, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, 10 Aug. 1995, para. 62.

<sup>214</sup> See, ICTY, Prosecutor v. Brđanin and Talic, (IT-99-36 and IT-99-36/1), Decision on Motion by Prosecution For Protective Measures, 3 July 2000 in which it is held at para. 32: 'the Trial Chamber accepts that, where the likelihood that a particular victim or witness may be in danger or at risk has *in fact* been established, it would be reasonable, for the reasons already given, to order non-disclosure of the identity of *that* victim or witness until such time that there is still left, ... "adequate time for preparation of the defence" before the trial.' (emphases in original).

<sup>215</sup> Notes from ICC Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, January 2009, on file with REDRESS.

### c) Measures of protection

Generally speaking, victims and witnesses may be entitled to two types of protective measures. Firstly, there are those specifically related to the proceedings such as redactions, use of pseudonyms, face or voice distortion, closed hearings or other measures aimed at maintaining confidentiality from the public or media, and in limited circumstances, from the accused. Secondly, there are out of court measures such as emergency hotlines, temporary resettlement or relocation to another country. As the tribunals do not have their own law enforcement capacity, the units rely on the cooperation of states, including the countries in which the crimes are said to have taken place, to ensure protection measures in out-of-court situations.

Some of these measures can and indeed need to be in place during the investigation phase and up to and after the conclusion of the trial. In addition, in most instances a combination of measures may be required. The variety of protection measures that have been employed by international tribunals are summarised below:

**Limiting disclosure of identity:** Victims' and witnesses' identities can be protected through limiting the disclosure of information that will reveal their identity. The level of non-disclosure will vary from case to case, depending on the circumstances and the assessed security risks. Methods of limiting disclosure that have been used include redacting personal details (such as name, sex, address and other identifying characteristics) from court documents and hearing transcripts; using a pseudonym to shield the individual's real identity from the public and media; use of closed sessions; distortion of image and voice through the use of a screen, curtain or two-way mirror or testimony via closed-circuit television or audio-visual links.<sup>216</sup> For the

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<sup>216</sup> See, ICTY, Prosecutor v. Dusko Tadic, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on Giving Evidence by Video-Link, 25 June 1996, para. 22, 'The Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure the orderly conduct of the proceedings when testimony is given by video-link. First, the party making the application for video-link testimony should make arrangements for an appropriate location from which to conduct the proceedings. The venue must be conducive to the giving of truthful and open testimony. Furthermore, the safety and solemnity of the proceedings at the location must be guaranteed. The non-moving party and the Registry must be informed at every stage of the efforts of the moving party and they must be in agreement with the proposed location. Where no agreement is reached on an appropriate location, the Trial Chamber shall hear the parties and the Registry, and make a final decision. The following locations should preferably be used: (i) an embassy or consulate, (ii) offices of the International Tribunal in Zagreb or Sarajevo, or, (iii) a court facility. Second, the Trial Chamber will appoint a Presiding Officer to ensure that the testimony is given freely and voluntarily. The Presiding Officer will identify the witnesses and explain the nature of the proceedings and the obligation to speak the truth. He will inform the witnesses that they are liable to prosecution for perjury in case of false testimony, will administer the taking of the oath and will keep the Trial Chamber informed at all times of the conditions at the location. Third, unless the Trial Chamber decides otherwise, the testimony shall be given in the physical presence only of the Presiding Officer and, if necessary, of a member of the Registry technical staff. Fourth, the witnesses must, by means of a monitor, be able to see, at various times, the Judges, the accused and the questioner; similarly the Judges, the accused and the questioner must each be able to observe the witness on their monitor. Fifth, a statement made under solemn declaration by a witness shall be treated as having been made in the courtroom and the witness shall be liable to



purpose of non-disclosure to the public, “public” has been understood as not including those entities or persons who are assisting the accused, his counsel or the Prosecutor in the preparation of their cases,<sup>217</sup> though as indicated elsewhere in this Report,<sup>218</sup> in very limited circumstances, courts have shielded the identity of victims and witnesses from such parties as a protective measure. In order to limit the potential for wrongful release of data provided to defence teams, courts have ordered defence teams ‘to maintain a log with detailed information on who has received a copy of a witness statement and the date; instruct those persons that have received a statement not to reproduce them and return the documents as soon as not longer required and verify the compliance of these orders’<sup>219</sup> and to inform the relevant Chamber of the composition of the defence team and any change therein.<sup>220</sup>

The general rule remains that the Prosecutor must submit copies of the statements of witnesses before the courts, but this has been treated differently over the years, particularly if the disclosure of the witness’ identity could place them at risk. The decision not to require disclosure can be reassessed throughout the trial procedure, and in exceptional circumstances a non-disclosure order can be issued with the limitation that the identity of the victim or witness should be disclosed at some point in proceedings in order to safeguard the rights of the accused and the fairness of the trial.

**The use of pre-trial statements as an alternative to in-court testimony:** Courts can decide to take in writing the testimony of a witness rather than having it presented orally if it is deemed necessary.<sup>221</sup> This is another measure designed to protect the well-being of victims and witnesses, in this case through avoiding the need to testify in a courtroom. In some cases the use of previously recorded audio or video testimony, transcripts or other documented evidence of such testimony, are subject to the condition that the Prosecutor and Defence have the opportunity to question the witness at the moment of the recording or at a later stage of the proceedings if needed.<sup>222</sup> This measure can be supplemented with video technologies so as to allow the witnesses to testify at Court but not in the court room, at a court location in the field or other facility such as an Embassy or other safe place arranged by the Court’s services.

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prosecution for perjury in exactly the same way as if he had given evidence at the seat of the International Tribunal.’

<sup>217</sup> ICTY, Prosecutor v. Kunarac et al., IT-96-23 & 23/1, Decision on Prosecution Motion to Protect Victims and Witnesses, 29 April 1998.

<sup>218</sup> See, Part II.4 ‘The Right to be Protected and the Rights of the Accused: Balancing Different Interests.’

<sup>219</sup> See, e.g., Prosecutor v. Kunarac et al., above n. 218.

<sup>220</sup> E.g., See Special Court for Sierra Leone, Case No. SCSL-2003-06-PT, Decision on the Prosecutor’s motion for immediate protective measures for witnesses and victims and for non-public disclosure of 23 May 2003, Annex, para (g). Available at: [www.sc-sl.org/LinkClick.aspx?fileticket=EJNc7E23H2o=&tabid=157](http://www.sc-sl.org/LinkClick.aspx?fileticket=EJNc7E23H2o=&tabid=157).

<sup>221</sup> See ICTY Rules of Procedure and Evidence, rule 89 which allows witnesses to provide their testimony orally or in written form. See, also, Article 69(2) of the ICC Statute which allows for recorded testimonies of a witness by means of video or audio technology or by written transcripts. The ICTR has developed rules to guide the way that depositions should be taken. See ICTR Rules of Procedure and Evidence, rule 73 *bis*.

<sup>222</sup> See Rule 68 of the ICC Rules of Procedure and Evidence.

**Isolation of witnesses:** The practice of ‘sequestration’ of witnesses refers to the separation or isolation of witnesses to avoid contact with the public or to avoid having contact with the trial proceedings before they render their testimony. Although this practice has been used by courts to avoid contamination of the witness, it can also constitute a protective measure in some cases as they will be placed in security houses before they appear in court.

**On the ground temporary measures:** In relation to many of the ‘situation’ countries currently before the ICC, the Victims and Witnesses Unit and the Office of the Prosecutor have developed ‘response systems to ensure witnesses know whom to contact and what to do should their security be threatened. Mechanisms and policies have been put into place to ensure 24-hour protection and psychological assistance for victims and witnesses.’<sup>223</sup> In accordance with the ICC Regulations of the Registry, victims who require it are entitled to round-the-clock telephone access to Court officers for the purpose of initiating applications for protection and to be in contact about safety concerns.<sup>224</sup> The ICC has an Initial Response System<sup>225</sup> which enables the Court to provisionally remove witnesses who are afraid of being immediately targeted or who have already been targeted to a safe location in the field.<sup>226</sup> However, as has been noted to REDRESS, the system has been limited in many ‘situation’ countries as a result of limited personnel capacity and the lack of strong local counterparts.<sup>227</sup> As Human Rights Watch has indicated, there may be a gap in protection where there are no field-based protection measures in place. This is particularly evident where protection measures are needed on a temporary or emergency basis.<sup>228</sup> In the Katanga case, Trial Chamber II recommended that the Victims and Witnesses Unit develop ‘provisional measures’ to ensure there is the option of immediate protection whilst an assessment of the need for more extensive or permanent protection measures is ongoing.<sup>229</sup> The diversity of protection needs arguably warrants further adaption of protection programmes to ensure that those who are refused admittance to the formal protection programme (which is focused on relocation) have other forms of protection available to them.<sup>230</sup>

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<sup>223</sup> ICC, Report to the Assembly of States Parties on the Activities of the Court, ICC-ASP/4/16, 16 Sept. 2005, para. 69.

<sup>224</sup> R. 95 of the Regulations of the Registry, ICC-BD/03-01-06/Rev.1, of 6 March 2006, revised 25 Sept. 2006.

<sup>225</sup> For an explanation of how the ICC protection system works, see: ICC, *Victims and Witnesses Unit’s consideration on the system of witness protection and the practice of “preventive relocation”*, ICC-01/04-01/07-585, 12 June 2008.

<sup>226</sup> *Ibid.*, para. 10.

<sup>227</sup> Interview with VWU staff.

<sup>228</sup> HRW, *Courting History: The Landmark International Criminal Court’s First Years*, 10 July 2008, Part 10, available at: <http://www.hrw.org/en/node/62135/section/10>.

<sup>229</sup> ICC, *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules (Public Redacted Version), 25 April 2008 para. 36.

<sup>230</sup> HRW, *Courting History*.

**Use of Codes of Conduct:** Several international tribunals have adopted codes of conduct which include provisions requiring those subject to the codes not to put the safety or security of victims and witnesses at risk. These codes establish strict guidelines and a corresponding complaints procedure.<sup>231</sup> Also, the prosecutors of the ICTY and ICTR adopted Regulations on Standards of Professional Conduct of the Prosecution Counsel in order to better protect and prevent injury to victims and witnesses.<sup>232</sup> According to these Regulations, Prosecution Counsel shall serve and protect the interests of victims and witnesses<sup>233</sup> in the conduct of investigations, at the pre-trial stage, and during trial proceedings. Thus they are expected to ‘take any available measures, as required, to protect the privacy and ensure the safety of victims, witnesses and their families, to treat victims with compassion, and to make reasonable efforts to minimize inconvenience to witnesses’<sup>234</sup> and to ‘preserve professional confidentiality, including not disclosing information which may jeopardize ongoing investigations or prosecutions, or which might jeopardize the safety of victims and witnesses’.<sup>235</sup> Other codes of conduct such as the interpreter and translator code of ethics have been adopted with the aim of guiding a variety of persons involved in the proceedings and personnel working with international courts on how to avoid or prevent harm to victims and witnesses.<sup>236</sup>

**Contempt:** Criminal courts can also take measures to address a situation where a victim or a witness has been threatened, intimidated, offered a bribe, or if any other person suffered

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<sup>231</sup> See e.g., the ICTY’s Code of Professional Conduct for Counsel Appearing before the International Tribunal (As amended in July 2009) available at: [www.icty.org/x/file/Legal%20Library/Defence/defence\\_code\\_of\\_conduct\\_july2009\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_july2009_en.pdf) and ICTR’s Code of Professional Conduct for Defence Counsel [at: [www.ictr.org/ENGLISH/basicdocs/080314/04-Code%20of%20Conduct%20for%20Defence%20Counsel.pdf](http://www.ictr.org/ENGLISH/basicdocs/080314/04-Code%20of%20Conduct%20for%20Defence%20Counsel.pdf)]. Both texts define as clients a ‘witness or other person who has engaged counsel’ or has been assigned counsel by the Registry for his/her legal representation. See, also, the ICC’s Code of Conduct for counsel, available at: [www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf).

<sup>232</sup> See ICTR/ICTY Prosecutor’s Regulation No. 2 (1999) On Standards of Professional Conduct, Prosecution Counsel. See also ICC Code of Professional Conduct for counsel, Code of Judicial Ethics and Staff Regulations, all available at: [www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.1\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.1_English.pdf) and the Special Court for Sierra Leone Code of Professional Conduct for Counsel adopted on 14 May 2005 available at: [www.sc-sl.org/Documents/counselcodeofconduct.pdf](http://www.sc-sl.org/Documents/counselcodeofconduct.pdf).

<sup>233</sup> *Ibid.*, Para. 2(a).

<sup>234</sup> *Id.*, para. 2(g).

<sup>235</sup> *Id.*, para. 2(i).

<sup>236</sup> See as an example *The Code of Ethics for Interpreters and Translators Employed by The International Criminal Tribunal for The Former Yugoslavia* (IT/144) available at: [http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it144\\_codeofethicsinterpreters\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it144_codeofethicsinterpreters_en.pdf); and the *Code of Ethics for Interpreters and Translators Employed by the Special Court for Sierra Leone*, Adopted on 25 May 2004, available at: <http://www.sc-sl.org/Documents/interpreters-codeofethics.html>. Article 7(1) and (4) of the ICTY Code provide terms on confidentiality requirements regarding inter alia, interviews, documents or other facts coming to their attention in the course of their work, and specify a continuing professional duty of secrecy after the end of their employment.

coercion to produce an effect on the witness, during or previous to her/his testimony or an attempt to do so took place.<sup>237</sup> The disclosure of the identity of a victim or witness, or the failure to protect their anonymity, has been classified as contempt.<sup>238</sup> The courts have also envisaged that counsel could be suspended if they are proved to have acted against the interests of a victim or witness and where their protection has consequently been comprised.

## d) Relationships with states

States' cooperation is fundamental for the work of the tribunals and in particular for the implementation of protective measures in the state's territory. The obligation for states to cooperate with the tribunals stems, in the case of those tribunals established by Security Council resolution, from the resolutions themselves and the more generalised obligations of states to comply with Chapter VII resolutions. The ICC, as a treaty-based Court, has incorporated the obligation of states parties to cooperate with it directly into the ICC Statute, Part IX. If a state fails to comply with such a protection order, international courts have few ways to press for enforcement; they can expose the situation to the ICC Assembly of States Parties or the UN Security Council, as appropriate. Other 'internationalised' or internationally-backed tribunals, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia do not incorporate such obligations, though the framework for protection is somewhat clearer in that both those tribunals operate in the countries where the crimes took place.

A range of states have enacted implementing legislation to facilitate cooperation. These laws fall into three main categories: laws of the host state (location of the Tribunal);<sup>239</sup> laws of the country in which the crimes took place,<sup>240</sup> and laws of other countries.

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<sup>237</sup> See, e.g., Rule 77 and 77bis of the ICTY Rules of Procedure and Evidence; Rule 77 of the ICTR Rules of Procedure and Evidence; Rule 77 of the Special Court for Sierra Leone Rules of Procedure and Evidence; Arts. 37 and 40 of the Special Court Agreement (2002) Ratification Act; Art. 70(1)(c) of the ICC Statute; Rule 35 of the Internal Rules of the ECCC.

<sup>238</sup> See, S. D'Ascoli, 'Sentencing Contempt of Court in International Criminal Justice: *An Unforeseen Problem Concerning Sentencing and Penalties*', *Journal of International Criminal Justice*, 2007 5(3):735-756. See also ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-T, Finding of Contempt of the Tribunal, 11 Dec. 1998. In this decision the Trial Chamber found that the Defence Counsel Mr. Anto Nobile revealed information of a protected witness who testified for the Prosecution in a different trial.

<sup>239</sup> See e.g., the Headquarters Agreement between the UN and Tanzania concerning the ICTR, 24 Sept. 1996, available at: <http://69.94.11.53/ENGLISH/agreements/index.htm>; the Headquarters Agreement between the UN and The Netherlands concerning the ICTY and the Agreement between the UN and Sierra Leone on the Establishment of a Special Court for Sierra Leone of 16 Jan. 2002, Arts. 15 and 16.

<sup>240</sup> For example, neither the Democratic Republic of Congo nor Uganda have enacted laws implementing their obligations under the ICC Statute though both countries have draft legislation before Parliament. In order to enable the ICC to carry out in-country activities, each have signed agreements with the Court to such effect. For instance, the DRC signed an interim agreement on judicial cooperation on 6 Oct. 2004, whereby it undertook to cooperate in full with the ICC by establishing the necessary mechanisms for practical assistance. It also ratified on 3

While some of these laws provide a general clause on cooperation from which response to protection requests or orders can be inferred,<sup>241</sup> others include more specific clauses regarding victims and witnesses. Such cooperation legislation includes provisions on the identification of witnesses,<sup>242</sup> taking evidence and hearing or deposing witnesses,<sup>243</sup> transferring information,<sup>244</sup> procedures to summon witnesses<sup>245</sup> and on their remuneration,<sup>246</sup> on the need to provide legal assistance<sup>247</sup>; security<sup>248</sup>; free transit, transfer and immunities.<sup>249</sup>

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July 2007, the Agreement on the Privileges and Immunities of Members of the Court, which provides the latter with safeguards to ensure that they can carry out their mission on Congolese territory without interference. Uganda signed an agreement on protective measures on 20 August 2004, which addresses the provision of protective measures towards witnesses during the investigation and prosecution of crimes. Although the Registry is not a signatory to this agreement, the agreement references the Victims and Witness Unit and was negotiated in consultation with the Victims and Witnesses Unit. See, ICC, Situation in Uganda, Prosecutor's Submission of Authorities Relied Upon at Hearing Held on 16 June 2005, made public on 13 Feb. 2007, ICC-02/04-14, para. 4.

<sup>241</sup> See e.g., Art. 4(1) of the German Law on Cooperation with the ICTY: 'Upon request, other mutual assistance ... shall be rendered to the Tribunal for the purpose of prosecuting offences which fall within its jurisdiction.' See generally, D. Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', Max Planck UNYB (5) 2001 250.

<sup>242</sup> See e.g., Art. 11 of the Romanian Law No. 159/ of 28 July 1998 on cooperation with the ICTY: 'The Romanian judicial institutions must also resolve other requests of the International Tribunal, having as their subjects: the identification of persons who could act as witnesses or experts in current cases, the hearing of the witnesses specified in the requests, taking and keeping written documents, the seizure of items used for committing the crime, in order to send them to the International Tribunal.'

<sup>243</sup> See, e.g., s. 10 of the Swedish Act relating to the Establishment of the ICTY, regarding the taking of evidence. See, also s. 3 of the Norwegian Bill relating to the Incorporation into Norwegian Law of the UN Security Council Resolution on the Establishment of the ICTY (Law 1994-06.24 38 JD/31-1-1995): 'Norwegian courts and other authorities may, on request, provide the Tribunal with legal aid in connection with the consideration of matters that come under the jurisdiction of the Tribunal. Such legal aid may include the identification and tracing of persons, the examination of witnesses and experts, the procurement of other evidence, the serving of documents and the arrest and detention of persons. [...] The Tribunal may be given permission to question, inter alia, suspects and witnesses in Norway in connection with acts that come under the jurisdiction of the Tribunal, and to carry out other investigations in the realm.' See also, s. 7 of the Finnish Act on the Jurisdiction of the ICTY (5 Jan. 1994/12).

<sup>244</sup> See, e.g., Art. 8 on voluntary transmission of information and evidence to the international tribunals of the Swiss Federal Decree on cooperation with the International Tribunals: '1 Through the Office, the authority of criminal prosecution may voluntarily transmit to the international tribunal concerned information and evidence it has collected during its own investigation whenever it considers that the transmission may: a. permit the initiation of a criminal prosecution; b. facilitate the course of an investigation in progress; or c. permit the submission of a request for assistance to Switzerland.' See also, Art. 30(i) of the Swiss Federal Law on Cooperation with the ICC (CICCL) of 22 June 2001, which refers specifically to the protection of victims and witnesses.

<sup>245</sup> See Art. 11, para. 1 of the Greek Law No. 2665 on the Implementation of the ICTY Statute, of 15 Dec. 1998, on the summoning of witnesses and experts: 'Summons to witnesses and experts are forwarded by the International Court to the Ministry of Justice and served on the persons to whom they are addressed by the Public Prosecutor of the Court of First Instance of the place of said persons' residence.' See also, Art. 9(1) and (3) of the Austrian Federal Law on Cooperation with the International Tribunals; Art. 4(2) of the German Law on Cooperation with the ICTY; Art. 7(1) of the Spanish Law on Cooperation with ICTY (Organisation Act 15/1994 of 1 June 1994); Art. 10(7) of the Italian Law on Co-operation with ICTY (Decree-Law No. 544 of 28 December 1993) and Art. 6 of the Dutch Law on ICTY (Amended Bill of 9 March 1994).

One of the most significant challenges for international criminal courts and tribunals operating outside of the country in which the crimes are said to have taken place is the limits of their capacities to ensure protection. In some of the concerned countries, the security situation remains volatile (e.g., DRC, Sudan), access to the country for ICC personnel may be hampered (Sudan), officials may not be willing (Sudan) or unable (to a certain extent DRC) to protect victims and witnesses locally. Given the nature of the crimes before such tribunals – genocide, crimes against humanity and war crimes – often implicating state officials and at times the state apparatus in the commission of crimes, it will be difficult to rely on national structures of protection.

## **e) Relationships with intergovernmental organisations and humanitarian agencies**

In some such cases, international tribunals and courts might have the option to rely in part on offices and agencies present in the territory in order to provide protective measures or assistance in order to increase the security situation of victims and witnesses. However, the relationship between international courts and humanitarian agencies and other relevant bodies has not been so clear, and even if it were, it would be difficult for such courts to embark on formal, long-term arrangements for the protection of victims and witnesses, with such bodies.

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<sup>246</sup> See, s. 9 of the Finnish Act on the Jurisdiction of ICTY (5 Jan. 1994/12).

<sup>247</sup> *Ibid.*, s. 6.

<sup>248</sup> See Art. 12(3) of the Austrian Federal Law on Cooperation with the International Tribunals.

<sup>249</sup> See s. 10 of the Finnish Act on the Jurisdiction of ICTY (5 Jan. 1994/12): ‘A witness, an expert and a party as well as any other person summoned in a foreign State to appear before the Tribunal, shall in the territory of Finland be entitled to free transit and the right to immunity according to the provisions, where applicable, of the Immunities of Persons Participating in Proceedings or Pre-trial Investigations Act (11/1994). A defendant and a suspect summoned by the Tribunal may, however, be taken into custody as provided for by section 5.’ See, also, Art. 7(2) of the Dutch Law on ICTY (Amended Bill of 9 March 1994): ‘The transit of persons being transferred to The Netherlands by the authorities of a foreign State as witnesses or experts in the execution of a subpoena issued by the Tribunal shall be conducted on the instructions of Our Minister by Dutch officers and under their guard; and Art. 10 on immunities: ‘... witnesses or experts, regardless of their nationality, who come to the Netherlands in response to a summons or subpoena issued by the Tribunal, shall not be prosecuted, arrested or subjected to any measures to restrict their liberty, on account of offences or convictions which preceded their arrival in the Netherlands. 2. The immunity referred to in subsection 1 shall lapse if the witness or expert, despite being able to leave the Netherlands for fifteen consecutive days following the date on which his presence is no longer required by the Tribunal, remains in the Netherlands or returns there after his departure.’ See also Article XXII of the Headquarters Agreement between the United Nations and The Netherlands Concerning the Headquarters of the ICTY: ‘The Registrar shall notify the Government of the names and categories of persons referred to in this Agreement, in particular ... witnesses and experts called to appear before the Tribunal or the Prosecutor, and of any change in their status.’

Humanitarian agencies have been generally reluctant to get involved in activities related to the international tribunals and courts due to the perception that providing assistance will identify them as taking a side in a conflict, or compromise their neutrality. In practice such cooperation has worked much better on an informal basis than as a result of formal agreement or request.<sup>250</sup>

In practice, UN agencies have been more involved in cooperation, particularly regarding protection matters. In the Democratic Republic of Congo, the UN Mission 'MONUC' has worked closely with local civil society groups and with the ICC to provide assistance, though much of this has been through informal arrangements. A specific Memorandum of Understanding was agreed between the Court and the United Nations in November 2005 for cooperation in the Democratic Republic of Congo.<sup>251</sup> It provides that 'nothing in this MOU shall be understood as establishing or giving rise to any responsibility on the part of the United Nations or MONUC to ensure or provide for the protection of witnesses, potential witnesses or victims identified or contacted by the Prosecutor in the course of his or her investigations,'<sup>252</sup> underscoring that while arrangements may be made on a case-by-case basis, there is no obligation and no responsibility engaged.

The ad hoc tribunals have rendered decisions in which they have asked for the cooperation of UN agencies in giving effect to protective measures,<sup>253</sup> though it has always been clear that they are not empowered to order or require cooperation. The ICTR has noted that it is not incumbent on UNHCR or any State to grant refugee status to a witness, 'however [...] is of the opinion that it is mandated to solicit the cooperation of States and the UNHCR in the implementation of protective measures for witnesses'.<sup>254</sup>

## **f) Residual Protection Issues After the Closure of Ad Hoc or Temporary Tribunals (the 'Residual functions')**

Aside from the International Criminal Court, most other international criminal tribunals have limited time spans. Now that the Rwanda and Former Yugoslavia tribunals and other specialised

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<sup>250</sup> Interview with a protection officer.

<sup>251</sup> MOU between the UN and the ICC concerning cooperation between the UN organization mission in the DRC (MONUC) and the ICC, 8 Nov. 2005, available at: <http://www.icc-cpi.int/iccdocs/doc/doc469628.PDF>.

<sup>252</sup> *Ibid.*, para. 3.

<sup>253</sup> See e.g., ICTR, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Decision on the Extremely urgent Request made by the Defence for the talking of a Teleconference Deposition, 6 March 1997. In this decision the ICTR ordered that every effort should be made to localise the sixteen witnesses who were at a refugee camp and that 'to that end, the co-operation of States, the United Nations Organization [...] and any other organizations that could help in the matter, be solicited'.

<sup>254</sup> ICTR, Prosecutor v. Nsengiyumva, Case No. ICTR-96-12-I, Decision on Protective Measures for Defence Witnesses and their Families and Relatives, 5 Nov. 1997, para. 28.

tribunals are working to complete their mandates,<sup>255</sup> the question has arisen as to how certain functions of the tribunals which are necessarily long-term or even permanent, will be accomplished.<sup>256</sup> Some of the functions at issue relate to archives and enforcement of sentences, but the continued need of witness protection is also a central concern. As is clear, many witnesses will require life-long protection, so determining an appropriate response is crucial.

While the tribunals themselves are not responsible for all aspects of victims' protection – certain aspects may be managed by the state in which the victim is located, or by the state of relocation – the tribunals continue to play an essential role. These units have maintained regular contact with victims and witnesses, been involved in monitoring and requesting variances of protection orders as required, and in ensuring that measures regarding confidentiality of documents or records are maintained. In particular, looking forward, there will be a need to follow up on the protection and assistance currently granted to victims and witnesses. There may be new risks in the future, or other problems with existing protection orders. Also, there will be a need to address the protection and assistance that will be required in future trials undertaken by national courts or other mechanisms.

An initial concern is whether the protection that is provided will continue beyond the lifetime of the tribunals, and if so, by whom. There appears to be consensus that a framework for the continuation of protection services is required, though the nature of this framework and level of services is still under discussion. For example, the Special Court for Sierra Leone is exploring the possibility to insert within the national justice system of Sierra Leone a unit with similar functions of the Victims and Witnesses Unit at the Special Court, which would be able to take over the protection functions started by the Court and grant new protective measures if needed in the framework of future trials.<sup>257</sup>

Currently, Victims and Witnesses Units at the international tribunals are staffed by highly specialised professionals and in most instances, these skills are not present within the domestic police or other security services in the countries in question. Nonetheless, the legacy of international tribunals should ideally include the strengthening of national capacity on victim and witness protection; the specialised skills and accumulated experience should in principle be transmitted to national institutions. Problems will arise, however, in those instances in which conflict persists, or in circumstances in which the governments in the countries in question are not perceived as being neutral. Victims and witnesses currently under protection agreed to

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<sup>255</sup> Both the ICTY and ICTR have formalised completion strategies which detail the progressive close of operations. Each tribunal reports regularly to the Security Council on progress made in meeting the targets set in the strategies.

<sup>256</sup> See, generally, G. Oosthuizen and R. Schaeffer, 'Complete justice: Residual functions and potential residual mechanisms of the ICTY, ICTR and SCSL,' *Hague Justice Journal*, 2008. Available at: [http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol\\_3\(1\)/Residual\\_functions\\_EN.pdf](http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3(1)/Residual_functions_EN.pdf).

<sup>257</sup> Interview with Saleem Vahidy, Chief of the Witnesses and Victims Support Unit & Director of Protection Unit at the SCSL.



testify or otherwise contribute to the work of the international tribunals, on the understanding that they would receive protection from *such* bodies. They would not have foreseen that their protected personal details would be handed over to the state, particularly when the state may have been responsible in some way, directly or indirectly, for the crimes that led to their victimisation. As a result, it would seem important that some internationalised structure should remain, to deal with those protection aspects that cannot be dealt with by a local protection detail, for whatever reason.

Also, there is lack of clarity as to whether future protection measures will be provided, to at least the same level and extent, as with current arrangements. Current measures of protection benefit from a range of bilateral and multilateral working relationships, memoranda of understanding and formal agreements. These would not automatically ‘transfer’ to other parties taking over protective functions, and in this sense would need to be negotiated. Current measures also benefit from international financing, and arrangements would need to be made to ensure that new structures receive adequate support, at least until they develop a degree of self-sufficiency.

## Conclusions and Recommendations

This Report has sought to summarise some of the key protection problems facing victims of serious human rights violations who have had the courage to seek justice. The Report has analysed the range of circumstances which put these individuals at risk, whether it is as a result of their complaints to local authorities about the crimes they endured, their efforts to seek a measure of justice or to expose those responsible. The problems such individuals have faced, and continue to face are diverse, ranging from the absence of suitable structures at the domestic level to afford protection to victims of crime, the inability of states to afford protection in a context of conflict or protracted instability, the failure of governments to establish appropriate mechanisms to deal with allegations of state abuses, insufficient implementation structures and coordination for states to effectively respond to precautionary or provisional measures ordered by international bodies and a failure by international bodies and courts to appreciate and respond to the specificities of the risks posed.

Many of the challenges relate to a lack of resources – both personnel and financial, a lack of skill, and a failure to appreciate the gravity and scale of the problem. Part of the problem is also the narrowness of the approach taken by many states and international bodies when dealing with protection. Protection measures should be designed with regard to the particular problems that present themselves, having regard to the specific circumstances of the individuals in need of protection, their vulnerabilities, social, cultural and economic context, and the security environment in which they live. A one size-fits-all approach to victim and witness protection is nothing but an ill-fitting template that will provide only partial solutions to a very limited percentage of persons that require urgent assistance. Flexibility as to who may qualify for protection – whether it is the victim or witness him or herself, the families,

communities, or the legal representatives, human rights defenders, or others supporting them, and flexibility on the range of measures that may be afforded – whether formal or informal, is essential if progress is to be made. Protection should be about prevention – establishing transparent systems to ensure that victims are able to interact with the law in safety and dignity. Protection is also about sanction – ensuring that those who threaten and maim or kill victims and witnesses are appropriately prosecuted and punished, and that those who divulge confidential information that puts victims and witnesses at risk are sanctioned. Policymakers should be consulting with victims themselves in all their diversity about what measures may be necessary, and including them in decision-making processes.

More worryingly, in certain states where abuses are most rampant, the failure to protect victims and witnesses is a matter of design; it is a feature of the overall contempt shown for the rule of law and a triumph of autocracy. At the international level, much more needs to be done to respond to these particular challenges. By offering support and assistance to countries that need the help to develop workable systems, not only to curb organised crime, but also to tackle the specific challenges associated with serious violations of human rights. At the same time, much more needs to be done to condemn and sanction those states that show complete disregard for the need to protect victims and witnesses.

From a normative perspective, the right to protection is little understood and in need of clarification. There is a diversity of opinion as to what this right entails, to whom it applies and who are the duty bearers. The lack of clarity of the right is not only a problem of law but transfers into the domain of implementation, leading to the range of practical challenges already described.

## ***Recommendations to States***

### (i) Policies

- Coordinate at level of line ministries concerned (interior, justice) to assess the challenges faced by victims and witnesses and those engaged in the administration of justice in respect of protection
- Draw up policies on victim and witness protection following consultation with experts and victims/NGO representatives, taking into consideration international standards and best practices
- Establish a transparent review mechanism to assess efficacy of protection mechanisms
- Ensure training of police and prosecution services on best practices for the protection of victims and witnesses

### (ii) Legislation

- States that have not done so should take all necessary measures, including amending their national legislation in order to introduced protective measures – procedural and non-procedural
- Incorporate as an offence the threatening and intimidation of victims and witnesses; the fact that it was committed by an official should be an aggravating factor
- Make the threatening and intimidation of victims and witnesses a disciplinary sanction and provide a mechanism whereby (law enforcement) officials can complain to their superiors about any such acts anonymously (whistleblower legislation)
- Make it mandatory for police and prosecutors to inform and consult with witnesses and victims on the protection measures available and those applicable for their individual cases
- Provide national human rights institutions with the power to issue binding interim measures
- When drafting laws on cooperation with international human rights bodies and criminal courts, include as a offence of the administration of justice, the threatening, bribing or intimidation of victims and witnesses
- Adopt all national measures, including legal reforms, to facilitate implementation of the interim and protective measures requested by human rights bodies

(iii) Programmes

- Protection of victims and witnesses should be the responsibility of all officials engaged in the administration of justice and be streamlined throughout the legal system, in particular the criminal justice system
- Set up or designate a national body responsible for victims and witness protection in cases of serious crimes, expressly including human rights violations
- Provide a clear legal basis for the status of the body concerned
- Ensure independence of the body, either within the criminal justice system or separately
- Provide a clear mandate and furnish body with adequate powers to issue binding orders
- Bodies should be provided with adequate resources and subject to transparent external accounting and review
- Ensure publicity of work of protection body through outreach and accessibility throughout the country
- Develop an adequate admissions system, taking into account both the importance of the case and the victim's/witness' testimony, the level of threat and the suitability of the protection programme, taking into consideration victims' wishes. Admission should be open to others than the direct victims and witnesses who are at risk as a result of the original violation and subsequent attempts to seek justice and protect human rights, such as family members, community members, human rights defenders and journalists, as appropriate

- The body should have the full range of open-ended protection measures at its disposal. In choosing adequate measures of protection, the body should consult with the victim/witness, his or her lawyers, human rights defenders and others, as appropriate on the measures that are at the same time most effective and least disruptive. This should include temporary measures of protection and providing victims and witnesses with an allowance for self-help measures
- (iv) National Judiciary
- Develop national jurisprudence in line with international standards, taking into consideration best practices of victims and witness protection
  - Be mindful of the need of victims and witness protection and order adequate measures where requested or required, taking into account defence rights and fair trial standards. This should include hearings closed to the public, use of pseudonyms, redaction of documents and expunging victim/witness identity from public records; shielding testimony through the use of a screen, curtain or two-way mirror; testimony via closed-circuit television or audio-visual links, voice and face distortion); use of pre-trial statements (either written or recorded audio or audio-visual statements) as an alternative to in-court testimony; change/deferral of the trial venue or hearing date; and presence of an accompanying person as support for the witness; pre-trial detention of suspects; suspension from official duty of police or others accused of human rights abuses; contempt proceedings
  - Monitor the efficacy of protection measures and recommend changes in system where systemic failures become apparent
- (v) Other
- Encourage and enable NGOs or others to provide independent victim support and protection services;
  - Protect media in its work to expose threats and intimidations, and perpetrators of such acts through legislation as well as investigations and prosecutions
  - Engage with international criminal courts by signing relocation agreements where expedited processes are envisaged and with access to the national victim and witness protection programmes

### ***Human Rights Treaty Bodies and Courts***

- Respond to request for interim measures in protection cases with utmost urgency; use available powers to issue interim measures on own motion as required
- Consider best practices from other bodies when ordering interim measures for protection
- When issuing interim measures require the state to include the views of the victims and victims' legal representatives in the determination of the nature or modality of the protection measures to be offered where feasible

- Alert political bodies within which treaty bodies and courts function (e.g. UN Human Rights Council, Council of Europe Committee of Ministers, Organisation of American States, African Union) of systemic problems in country/region; undertake special fact-finding missions where required
- Set up a specialised body/unit with sufficient staff having the required expertise that is tasked with ensuring the protection of applicants and witnesses, which could be mandated to monitor the implementation and functioning of interim measures and look after the well-being of those participating in proceedings
- Assist with technical support to states to enable the adoption of the necessary measures to adequately follow-up the implementation of interim measures.
- Strengthen follow-up mechanisms when granting interim measures and their evaluation systems to determine the need to maintain, modify or lift them

### ***International Criminal Tribunals and Special and Hybrid Courts***

#### (i) Policy

- Develop victim/witness policy within mandate of tribunal
- Consult with wide range of stakeholders, in particular victims, victims' groups and NGOs, in developing policy

#### (ii) VWU Units

- Set up VWU units where they do not already exist
- Ensure that adequate structures, systems and financing is in place to protect victims participating in proceedings who are not prosecution or defence witnesses, both those whose participation status has confirmed and applicants, as required
- Extend protection to lawyers, civil society groups and others who may be at risk on account of their support to victims and witnesses
- Provide adequate budgetary funding to the VWU in order to allow them to fulfil their mandate at the seats of the court but also in the field
- Use the Special Court for Sierra Leone Best-Practice Recommendations as a guideline for adapting current practices
- Include a psycho-social perspective in the protection and assistance provided envisaging the inclusion of long-term plans which might involve the collaboration of states, international agencies and intermediaries
- Use resettlement or in-country relocation measures more often by making the necessary networks and agreements in order to provide protection and services to avoid international relocation when possible
- Strengthen the capacity of the VWU offices in the field by staffing them with specialised and skilled personnel in order to broaden the protection and support services directly provided by the courts

(iii) Other measures

- Use expedited contempt proceedings to punish those who violate protective measures
- In the context of completion strategies, consider the creation of a centralised body to keep a safe record of those persons under protection. Such a body could keep track of the protection and assistance already provided, serve as focal point for protected persons and conduct follow up analysis on the security situation in order to continue, modify or conclude the protection measures. Also, such a body could handle the documents and records, including the confidential documents and transcripts have been expunged or redacted as a protective measure, and liaise with states undertaking protective functions in the countries concerned.

(iv) Monitoring

- Set up regular monitoring systems which include ongoing presence in the field with well trained local staff to monitor the situation locally and address any security concerns on a daily basis
- Develop links with national counterparts or NGOs as appropriate to enable best possible assessment of security situation

(v) Capacity building

- Help building states' national capacity in protection and support services
- Share experiences with other national, regional, international, hybrid courts with a view to constantly developing best practices

### ***International Organisations, States and Donor Community***

- Provide adequate budgetary funding to address the protection mandate of human rights bodies as well as international criminal courts
- Ensure that thematic work on victim protection (UNODC, OHCHR, UNHCR) is well-coordinated and disseminated to all relevant actors. Establish a joint forum for continuous discussion
- OHCHR and UNDP and others should make victim and witness protection an integral part of their work on the administration of justice in field missions
- Special Rapporteurs should review their urgent action procedures and use best practices when engaging with states on victim and witness protection
- Develop the normative framework for the right to protection. OHCHR should establish a consultation process with relevant international, regional and national actors and experts to foster such a process

- The UN, Council of Europe and other regional organisations should translate into relevant languages and make available the Guidelines and Manuals currently available in order to facilitate knowledge transfer and implementation

### ***Nongovernmental organisations***

- Familiarise with standards and build own capacity
- Raise awareness about the need for victim and witness protection
- Monitor victim and witness protection in-country
- Advocate for changes in legislative and institutional set up where there is a failure to provide effective protection
- Engage with victim and witness protection programmes with a view to instituting best practices
- Advise victims, relatives and witnesses of potential risks and precautionary measures to be taken
- Use available domestic, regional and international legal avenues to seek protection in individual cases
- Provide direct assistance and protection where other avenues have been, or are bound to be, ineffective
- Seek to have incidents of threats, harassment or intimidation investigated, prosecuted and punished, and otherwise remedied locally, or before mixed or international bodies where possible.