Workshop

on

Victim and Witness Protection

at the Ugandan International Crimes Division (ICD)

22 and 23 May 2017

Kampala, Uganda

Report

Contents

I. Introduction

The International Crimes Division (ICD) is the first domestic court in Uganda to try international crimes. Its procedural rules provide for a number of victim rights as recognised under international law and emphasises the right to protection.[1] As the first trial against Thomas Kwoyelo unfolds, it is of paramount importance that the ICD has the ability to provide protection measures to both victims and witnesses. The lack of domestic legislation and a national protection mechanism, however, proves to be a challenge to this imperative.

On 22 and 23 May 2017, **REDRESS** in partnership with **Avocats Sans Frontières (ASF)** convened a workshop on victim and witness protection with relevant actors at the ICD, including judges, registrar, prosecutors, and victims' counsel to discuss which measures can be put in place to ensure the safety and well-being of victims and witnesses throughout the process despite the lack of protection laws and a national protection mechanism.[2] National and international experts provided an insight into the developments of relevant domestic legislation and different models and concrete steps taken in other contexts.

This report summarises the proceedings and discussions of the stakeholder roundtable which was held under Chatham House rules.

The organisers would like to thank the John D. and Catherine T. MacArthur Foundation for its support of this initiative.

[1] For example Rule 22 allows for restricted disclosure; Rule 34 (3) allows the Registrar to develop plans for protection; Rule 35 allows for restriction on the presence of media and the public for purposes of protection; Rule 39(6) allows for remote testimonies via video-link.
[2] Defense counsel were invited but did not attend.

II. Action Points

Following presentations by national and international experts and discussions (see below), the participants identified practical steps that can contribute to victim and witness protection at the ICD.

1. Setting up of a victim and witness protection unit within the ICD Registry

Currently, there is no dedicated unit at the ICD to deal with victim and witness protection. The participants agreed that the most urgent task would be to set up such a unit within the ICD Registry in order to respond to protection requests, coordinate relevant measures, and take charge of facilitating witnesses' and victims' appearances at trial. Initially, such a unit could consist of a small number of staff, even only one person may suffice at the beginning.

3. Finalising guidelines for the Registry

The ICD is developing guidelines with support from ASF on the mandate and tasks of the Registry which includes a chapter on victim and witness protection. The participants agreed that these guidelines need to be finalised and implemented as a matter of priority. It was suggested to include clear guidance on how to handle victims and witnesses who are called to testify, including for instance by carrying out mandatory court familiarisation visits whereby the Registry has the obligation to arrange visits of the courtroom for victims and witnesses prior to their testimony to familiarise them with the settings.

4. Developing an operational budget for victim and witness protection

Participants raised the difficulty of funding for the Registry to implement measures to support witnesses and victims. In order to raise funds, it was recommended that the Registry as a first step develop an operational budget for measures that are necessary to ensure victim and witness protection.

5. Mapping available facilities for in-court protection measures

Certain in-court protection measures which intend to shield the identity of the witness or victim from the public or prevent direct eye-contact with the accused person require specific facilities and equipment, such as curtains, booths, video-link, etc. The participants recommended that the Registrar should map out the existing facilities in the courtrooms in Gulu and in Kampala, in particular the existence of video-link facilities. This could help all actors in gauging which forms of in-court protection are feasible, and what steps would be needed to improve the facilities.

6. Careful scheduling of witnesses' and victims' appearances

Ideally, witnesses should be required to spend as little time as possible to attend trial. Especially for victims and witnesses whose participation in the trial needs to be kept confidential, lengthy periods away from their home can raise suspicions in their

communities. In addition, their participation in a trial should disrupt their lives as little as possible.

The Registry should carefully schedule appearances of victims and witnesses at trial in order to minimise the time victims and witnesses need to be away from their homes. A clear schedule would also prevent unnecessarily re-calling victims and witnesses. Such scheduling calendars could be prepared between the Registry, e.g. the victims and witness unit, and a person designated by the Trial Chamber and eventually presented for approval by the judges. Such an approach would speed up the scheduling process as judges only need to be involved for the final approval.

7. Strengthening threat and risk assessment methodology

Before requesting or deciding on protection measures, a thorough threat and risk assessment must be done to determine if and which measures are necessary and adequate in regards to each witness. The participants recommend that the methodology used by the relevant actors, in particular prosecution, in assessing risks to victims and witnesses should be strengthened using existing models and guidelines. However, the current methods were not discussed.

8. Awareness-raising on rights of victims and witnesses

The participants were of the view that victims and witnesses are not sufficiently aware of their right to protection as it is laid out in the ICD Rules of Procedure. To enable them to exercise their rights, the Registry should raise more awareness through a public launch of the Registry Guidelines, dissemination of the ICD Rules of Procedure and regular open days for court users at the ICD.

III. Presentations

Guest speakers presented on relevant laws and practices with regard to victim and witness protection. These presentations are summarised below.

III.1. Introduction to Victim and Witness Protection

Mr **Simo Vaatainen**, an independent expert on protection issues, gave an overview of the objectives for victim and witness protection and relevant international legal instruments.

Objectives of victim and witness protection

Mr Vaatainen began by explaining why protection is essential for a successful criminal justice process. Criminal justice actors (e.g. prosecutors, police investigators, judges) need to create conditions where victims and witnesses can interact with them in order to facilitate the collection of evidence. The court needs to create conditions where any individual can contribute to the process by providing the best evidence possible, taking into account the nature of crime, level of risk, specific vulnerability or other individual circumstances. The final goal of protection is to improve the justice system and it is in the court's interest to create conditions where witnesses can come forward to testify.

Mr Vaatainen pointed out that victim and witness protection cannot compensate for social well-being. Any assistance provided is for the sole purpose of ensuring this person's testimony. Protection has the aim of shielding a witness from undue influence. At the International Criminal Court (ICC), such undue influence is defined as actions taken by a person or an organisation with malicious intent to have an impact on the process for example through threats or intimidation.[3]

However, it is equally important to protect witnesses from other adverse impacts which are linked to their participation, for example from re-traumatisation as a result of testifying. This is reflected in an emerging view of holistic protection which includes both physical as well as psycho-social well-being. Mr Vaatainen noted that any witness is entitled to protection whatever their motivation to testify may be.

[3] See ICC Trial Chamber IV, *The Prosecutor v. Jean-Pierre Bemba et al.*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13, 19 October 2016, para. 43 and 45, available at: https://www.icc-cpi.int/CourtRecords/CR2016_18527.PDF.

With regard to the terminology, Mr Vaatainen was of the view that witnesses are usually more clearly defined than victims when it comes to protection. Some witnesses can have dual status and be victims at the same time.

Development of victim and witness protection

Looking at the history of victim and witness protection, Mr Vaatainen pointed to the origins which can be traced back to national efforts to fight organised crime and which saw the development of systematic protection programmes.

At the national level, there has been much focus on witness protection programmes which relocate witnesses and are able to change the identities of protected persons. These types of programmes and the relevant agencies have increased tremendously in the past 10 to 15 years. Now they exist in most European countries and are increasingly established in other continents as well. In some countries, the programmes are based on administrative regulations whilst in others, they are legislated, which may makes the programmes institutionally stronger.

On the regional level, there have been efforts to enhance regional cooperation within Europe and develop common standards with the aim to easily relocate witnesses from one European country to another. For example, EUROPOL has developed practice guidelines and manuals.

In 2005, the Council of Europe issued recommendations on the protection of witnesses which recognise the special role of witnesses in a criminal justice process.[4] The recommendations recognise that because witnesses have a civic duty to testify, states have the duty to protect them. The Council of Europe follows the holistic view by including "physical, psychological, social and financial protection and support".[5]

The European Union Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime establishes a set of rights that victims are entitled to, including the right to protection, right to information, right to individual needs assessment for proportional measures, and the obligation to train practitioners on these rights.[6] According to Mr Vaatainen, the Directive is a significant step forward in the field of victim rights.[7]

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[4] Council of Europe Committee of Ministers, Recommendation Rec(2005)9, of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, 20 April 2005, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805b0cf7.
[5] Ibid, para. 22.
[6] Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029.
[7] See also, African Commission, General Comment No.4 on the African Charter on Human and Peoples' Rights: The right to Redress for Victims of Torture and Other, Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), February 2017, Section V, at http://www.achpr.org/instruments/general-comment-right-to-redress/.

International instruments on protection

On the international level, much attention has been given to vulnerable victims and witnesses. Different measures are employed at different stages and relocation is often not necessary.

In the 1984 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the obligation to protect the privacy and safety of victims is specifically mentioned.[8] International courts which had protection clauses in their statutes have since contributed to developing the standards for protection. This culminated in the Rome Statute of 1998 which contains very specific rules.[9]

Commonwealth countries adopted a Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice Process (Commonwealth Best Practice Guide).[10] This guide takes a holistic approach, which is understood to look not only at the physical safety but also at the general well-being and comfort of witnesses, and requires that measures taken by different actors – for example judges, prosecutors, investigators - are complementary.[11] It recognises that the criminal justice system needs to adjust flexibly to the needs of the case.[12] These needs must be established by threat and risk assessments as there is no standard approach that fits all witnesses.[13]

In 2008, the United Nations Office on Drugs and Crime (UNODC) published a good practice manual for protection of witnesses involving organized crime.[14] UNODC's Legislative Guides

[8] UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of PowerA/RES/40/34, 29 November 1985, available at: http://www.un.org/documents/ga/res/40/a40r034.htm, para. 6(d); the 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 of 16 December 2005 similarly provide in para.12 (b) that States should "[T]ake measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their 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;" available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

[9] Rome Statute of the International Criminal Court, A/CONF.183/9, entered into force on 1 July 2002, available at: https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf, Art. 68 (hereinafter Rome Statute).

[10] Commonwealth Secretariat, LMM(11)14, Victims of Crime in the Criminal Justice Process, Annex A.

[11] Ibid, p. 5.

[12] Ibid, p. 3.

[13] Ibid.

[14] UNODC, Good practices for the protection of witnesses in criminal proceedings involving organized crime, 2008, available at: https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf.

for the Implementation of the UN Convention against Transnational Organized Crime and the Protocol thereto also contains chapters on protection.[15]

The Rome Statute takes a holistic view on protection and includes privacy, dignity, and psychological well-being in addition to physical safety.[16] It establishes shared common responsibility for all actors at the ICC.

Protection strategies

Mr Vaatainen emphasised that witness protection programmes alone are not sufficient. First and foremost, the overall justice system has to function independently and effectively. Where the actual process is not impartial or independent, witnesses will be exposed to influence by the justice actors themselves rendering protection programmes futile.

Mr Vaatainen concluded his presentation by a brief overview of protection strategies. One of such strategies entails measures to hide the identity of the witness to avoid others to target this person, e.g. by ensuring anonymity and confidentiality. Another strategy is to make it difficult to reach/ get in contact with the witness, e.g. through protection of the home. In addition, criminalising and aggressively prosecuting witness interference can have a deterrent effect.

When the process reaches the stage where witnesses will be called to testify, the court needs to identify vulnerabilities of each witness and take steps to address them, e.g. through psychological support during their testimony.

DISCUSSION

During the plenary discussion, Mr Vaatainen expounded on the experience at international tribunals where for the most part physical threats have not been the most prominent problem but rather witnesses have struggled with the impact of testifying because the court system can be very alien to them. There is a need to create a suitable environment from the outset of the interviewing stage and continue helping witnesses to understand the role of the different justice actors.

With regard to **potential witnesses** who are identified at the investigation stage but may not be called to testify at trial, Mr Vaatainen noted that they should be protected from exposure to threats at the investigation stage. At a minimum their identities must be kept confidential. A threat and risk assessment is also important for potential witnesses.

[15] UNODC, Legislative Guides for the Implementation of the UN Convention against Transnational Organized Crime and the Protocol Thereto, 2004, available at: https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.
[16] Rome Statute, Art. 68(1).

III.2. The Witness Protection Bill in Uganda

Ms **Jeroline Akubu**, Assistant Commissioner for Law Reform at the Uganda Law Reform Commission (ULRC), presented on the development of the Witness Protection Bill in Uganda and its current status.

Baseline study

Ms Akubu introduced the ULRC as a constitutional body tasked with the review and reform of Ugandan laws. From 2010 to 2014, ULRC carried out a study on witness protection as there was no specific piece of legislation in place on this matter. Courts and other justice institutions have been using different protection measures but none of them were based on existing legislation. The study was initiated because many witnesses were withdrawing from criminal proceedings as a result of fear and some were harmed or even killed. For the purpose of the study, ULRC researched current laws and practices in the different justice institutions, e.g. the police, Director of Public Prosecution (DPP), judiciary, Uganda Human Rights Commission, and in other countries.

The study found that there are laws dealing with witnesses and evidence, such as the Evidence Act, Magistrate Courts Act, Trial on Indictments Act and Whistleblowers Protection Act, but they do not address witness protection specifically. It also found that different institutions used different measures to ensure protection. For example, courts would consider the needs of children or vulnerable victims by hearing them in chambers. The DPP would use police to provide physical protection or house witnesses in safe houses. Prisons sometimes would keep potential witnesses separately and test their food for poison.

Through the study, the ULRC identified the existing gaps, including the lack of formal facilities, such as two way mirrors for suspect identification; the lack of separate waiting areas in the court for witnesses; insufficient knowledge among duty-bearers witnesses and the public; and the lack of legislation. The study confirmed that witnesses regularly withdraw from cases because of threats as well as actual physical and mental harm. Despite the fact that the state has the responsibility to protect, duty-bearers who fail to meet this obligation have not faced consequences in cases where witnesses were threatened and/ or subjected to harm.

ULRC recommendations

Based on the findings of the study, the ULRC recommended the adoption of specific legislation on witness protection to establish a protection programme which would provide protection measures based on a threat-risk assessment before, during and after a trial. The legislation would not need to list all possible measures but would require the relevant institution to spell them out. The ULRC also recommended to establish a witness protection agency to operationalise the protection programme which should be independent from the police or DPP.

Content of Witness Protection Bill

Based on these recommendations, URLC drafted the Witness Protection Bill and submitted it to the Ministry of Justice in 2015. The Bill has not been adopted as law so far. ULRC's mandate to work on legislation ends with the submission of the Bill. However, URLC will consider lobbying with Parliament should funding become available.

The Witness Protection Bill establishes the Witness Protection Agency which has the mandate to manage the protection programme by assessing who needs protection, arranging protection measures, such as safe temporary accommodation, relocation, change of identity, and facilitation for attending trial. The Agency would be staffed with one Executive Director, two Deputy Directors, and a Secretariat.

According to the Witness Protection Bill, admission to the programme can only be granted upon consent of the persons affected. Where necessary, family members of witnesses could be admitted as well. Protection measures would be kept in place as long as the witness is exposed to threats. The identity of any person admitted to the programme would be protected. Ms Akubu pointed out that the Witness Protection Bill allows for the withdrawal of protection in certain cases, e.g. upon request by the protected person or breach of the terms of the protection order by the protected person.

The Witness Protection Bill lists in-court protection measures, e.g. video-link testimony. It does not comment on how to assess evidence given by protected persons in such fashion. Instead, ULRC has made proposals to amend the Evidence Act to require corroboration of testimony given by witnesses whose identities are concealed.

While the Witness Protection Bill has not been passed yet, the ULRC has compiled lists of protection measures that can be used by different institutions even in the absence of a specific law on protection. According to Ms Akubu, the DPP is currently in the final stages of developing protection guidelines and setting up a protection department. Such a department is already in existence within the Uganda Police Force.

DISCUSSION

During the plenary discussion, participants raised the question of **how the justice institutions, namely judges and registrars, would interact with the Witness Protection Agency**. Ms Akubu clarified that ULRC made separate recommendations to these institutions on the measures they should provide. Some institutions have set up protection departments. They would only need to engage the Witness Protection Agency where the institutions cannot provide the necessary measures.

The participants also discussed the need for **corroboration of evidence** given by witnesses whose identities are concealed during trial. Whereas some argued that such corroboration is not necessary because all parties agree to the concealment, others were of the view that corroboration would safeguard the rights of the accused. Mr Vaatainen clarified that at the international level, there is no need for corroboration where the identity is protected from the public but known to the defendant. In cases of total anonymity, i.e. the identity is not even known to the defendant, the European Court of Human Rights has ruled that convictions cannot be based solely on such testimony.[17]

Some participants raised concerns about the **delay in passing the Witness Protection Bill**. Ms Akubu noted that the ULRC is in discussion with the Ministry of Justice and Constitutional Affairs with a view to getting the Bill on the Cabinet and Parliament agenda. Some participants suggested changes to the Criminal Procedure Code as stopgap measures in the absence of witness protection legislation. This was countered by the concern that amending laws are time-consuming and might be stalled in the same way as the Witness Protection Bill. Other participants suggested to develop interim guidelines until the Bill is adopted.

The discussion also addressed the question whether **consent of the protected person** is necessary to provide protection measures. Similarly, some participants questioned the value of withdrawal of protection measures where witnesses undermined their own protection. Some participants were of the view that there would be a risk of losing vital witnesses if protection was dependent on their consent or if withdrawals are possible. Therefore, crucial witnesses should be compelled to accept protection. Others raised the point that witnesses must be willing to cooperate and not compromise the protection measures. If they do not cooperate, this could put those at risk who protect them. In addition, many protection measures depend on the actions taken by the protected person. If they are not willing to follow the instructions, there would be no value in the protection. The costs of protection for someone who is not interested would also need to be considered.

[17] See for example ECtHR, *Marcu Ellis et al. v. UK*, Application nos. 46099/06 and 46699/06, 10 April 2012, paras. 76-78.

Ms Akubu clarified that **victims can also be witnesses** as understood by the Witness Protection Bill. However, the Bill does not deal specifically with victims, and so does not make provisions for victims who are not acting as witnesses.

The participants went on to discuss the **funding of the Witness Protection Agency** and protection measures. Suggestions were made to incorporate witness protection departments within the institutions without establishing a new entity. The financial burden would then be distributed to various actors. Mr Vaatainen pointed out that often protection programmes will cost less money than the protection agency gains through assets confiscated from convicted persons. Ms Akubu added that the government will consider donor funding to bear the initial costs.

Ms Akubu explained that the reason for not including a **list of specific protection measures** in the Witness Protection Bill was that there is no one-size-fits-all approach. The concrete measures should be determined by regulations. Others were of the view that including specific measures in the Bill would make it easier for practitioners as they would only need to resort to one legal instrument. The participants agreed that it would be helpful to share measures used by different institutions among each other.

III.3. Protection Strategies at the International Criminal Court (ICC)

Mr **Gerhard van Rooyen**, Senior Manager at the Victims and Witnesses Section of the ICC, explored the protection system at the ICC, including its legal framework and operational principles.

Mr Van Rooyen began with an introduction on early witness protection measures whereby witnesses were placed in detention for their own protection. This, however, proved to be counter-productive as they would be exposed to undue influence in prison.

ICC's legal framework on protection

At the ICC, a number of legal instruments have been adopted to deal with protection, including the Rome Statute, Rules of Procedure and Evidence, and Regulations of the Registry. Importantly, Art. 68 of the Rome Statute puts an obligation on the Court to protect victims and witnesses. It also uses a holistic approach by taking into consideration the "safety, physical and psychological well-being, dignity and privacy".[18] The Victims and Witnesses Section (VWS) was set up as a one-stop shop for everything related to protection.[19]

Protection provided by the VWS is focused on persons who are called to testify. This can also include victims who are called to testify either on facts or to give a victim impact statement. Rules 87 and 88 of the ICC's Rules of Procedure and Evidence[20] list specific protection measures which are not exhaustive and the VWS can take other measures where necessary. The measures listed in Rules 87-88 include measures to conceal a victim's or witness's identity including for instance through the use of pseudonyms, as well as 'special measures' designed to protect a victim's and witness's privacy and to prevent re-traumatisation.

The ICC's Regulations of the Registry[21] provide for the following measures:

- Regulation 92: Security arrangements
- Regulation 93: Local protection measures

[18] Rome Statute, Art. 68(1).
[19] Rome Statue, Art. 43(6).
[20] Rules of Procedure and Evidence, ICC-ASP/1/3, 3-10 September 2002, available at: https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf (hereinafter RPE).
[21] Regulations of the Registry, ICC-BD/03-01-06-Rev. 6, as amended on 4 December 2013, available at: https://www.icc-cpi.int/resource-library/Documents/RegulationsRegistryEng.pdf.

- Regulation 94: Protection measures in Court
- Regulation 94*bis*: Special measures for vulnerable victims and witnesses appearing before the Court
- Regulation 95: Assisted Move
- Regulation 96: Protection programme
- Regulation 96*bis*: Termination of participation in protection programme

The ICC relies on the cooperation of states for example for the relocation of witnesses. For this purpose, the ICC signs agreements with governments or with local partners.

Operational principles of VWS

The VWS operates on the principle of neutrality and provides services to all parties to the proceedings, including the prosecution and defense. The Court seeks to obtain consent from victims and witnesses for their protection.[22] However, where consent is not given, the Court can order protection and subpoena witnesses to testify. Protection extends to members of the family of the witness/victim or "another person at risk on account of testimony given by the witness", e.g. police officers.[23]

When a person is called to testify in court, the VWS will arrange all steps necessary for the court appearance, including the procedure for passports, travel, video-link, familiarisation visits, etc. VWS also provides psycho-social support throughout the process. Ideal protection encompasses support for physical as well as psychological needs and against unfair treatment in the courtroom. However, protection only works where there is effective investigation and prosecution as well as protection can only be sustained for a certain time and where trials are delayed protection measures become futile.

Protection measures at the ICC

At the investigation stage, identities of victims and witnesses who are interviewed must be protected by interviewing in safe and secure places and keeping the record confidential. Additional basic security measures can include police control of the area where a witness lives, hardening targets by putting measures in place to make it more difficult for potential aggressors to reach the person, for example by providing patrols or securing premises, and providing a hotline. These are non-procedural measures outside of the courtroom.[24]

In addition, local protection measures can be put in place where a response mechanism located near the witness's residence can react within a few minutes. This usually is offered to high-profile witnesses only.

[22] RPE, Rule 87(1).
[23] REP, Rule 87(1).
[24] See Chapter III.5. below on procedural measures.

If a combination of all the above measures is not sufficient, the last resort is to include the witness in a protection programme which requires relocation and change of identity. This is far reaching and will change the life of that person immensely. Therefore, it is the last in a range of measures and it is crucial to obtain consent from the protected person.

Threat and risk assessments

Which measure or combination of measures is necessary is decided based on threat and risk assessments to show the existence of an objective threat. To avoid the perception that victims and witnesses were influenced by benefits they potentially received through protection measures, it is important to justify the need for protection. Protection cannot eliminate all risks but can help manage risks and mitigate them. At times, subjective factors can influence the witness's willingness to testify, e.g. when witnesses feel intimidated by the courtroom. These should also be taken into consideration.

Threat and risk assessments follow a specific model and require information to be gathered from all sources, e.g. intelligence services and local police. The model looks at the intent of "threat actors" (people who might want to harm the witness) and their capacity to realise their intent (what their resources are and what their knowledge is). This will indicate the level of threat, i.e. whether or not the life of the witness is in serious danger. As a second step, the likelihood that the threat materialises and the possibilities of mitigation are assessed which form the basis for the risk.

Nowadays, open sources, in particular social media, can be used to expose identities of witnesses under protection and their location. This allows people from outside of the country where the witness is residing to intimidate witnesses. At the same time, witnesses under protection can expose themselves unknowingly by revealing their location through the use of social media.

Assessments need to be done on the general situation (situational threat and risk assessment) and on the individual's situation (individual risk assessment). They need to be conducted before and after the trial. The initial assessment is conducted by the prosecution and shared with VWS which reviews it and makes recommendations.

Following the threat and risk assessment, VWS recommends protection measures on a confidential basis. If the witness agrees to the proposed measure(s), s/he will be asked to sign an agreement. In most cases, a combination of measures offers the best protection with some of them implemented in the country of residence and some in the court-room.

At trial stage, the ICC requires a number of protocols to be filed to the Trial Chambers for each person who is called to testify. The VWS makes a representation to the judges on threat and risk assessment and protection, e.g. recommending assistance in the court, face distortion, etc. After the in-court testimony, the VWS re-evaluates the situation of the witness to assess any new risks flowing from the testimony and continues monitoring her/his situation after they are sent back home. This goes to show how threat and risk assessments are a continuous process.

DISCUSSION

During the plenary discussion, participants pointed out that the ICC Act in Uganda omitted the rules on protection and that this should be reviewed.

Mr Van Rooyen explained the origins of witness protection in South Africa where the police was at one point given the directive to take any steps necessary to protect witnesses **before legislation was passed**. In South Africa, witnesses had to be certified by the prosecution before they were given protection measures to ensure that actual witnesses were receiving benefits, such as housing, rather than relatives of police officers. A custodial police officer was appointed to be in charge of protection issues. The biggest threat came from former members of the police, prosecution and military eventually requiring the establishment of an independent agency. In 2006, this agency was created in the Department of Justice as it was seen as more objective than the police. This experience shows that putting in place legislation takes time but that institutions that are providing protection should cooperate.

Mr Van Rooyen emphasised that it is not the **role of victims' counsel** to provide protection. They should be able to resort to someone to seek advice on protection. The participants discussed how victims' counsel and prosecution should interact on the issue of protection. Mr Van Rooyen pointed out that dual status witnesses who are also victims should be under the responsibility of the prosecution. At the ICC, basic security measures are taken by the prosecution in such cases. Participants noted that victims' counsel can refer protection issues to the prosecution or the Registrar when they become aware of a problem. Some also were of the view that victims' counsel should have the right to request protection measures before trial despite the fact that the current ICD Rules of Procedure do not provide for this possibility.[25]

Mr Van Rooyen pointed out that it is crucial for the **Registrar to appoint a focal point** to take on the coordinating role on protection similar to the VWS at the ICC. If there is no entity yet mandated to protect witnesses, the senior police officer could be appointed as focal person and liaise with different institutions. Participants raised the concern that the public has lost confidence in police officers so they might not trust them to protect witnesses.

Some participants suggested that any protection measure, be it in-court or outside of the court, **requires a court order** which can be requested by the prosecution or the defense. The court can also act *propio motu* and order protection measures on their own initiative. Others were of the view that basic security measures would not need a court order except when the police refuse to take action. Some participants stated that police often only act when there is a court order. In particular, in the absence of an official structure for

[25] See also recommendation in REDRESS, Ugandan International Crimes Division (ICD) Rules 2016 – Analysis on Victim Participation Framework, August 2016, available at: http://www.redress.org/downloads/publications/1608REDRESS_ICD%20Rules%20Analysis.pdf.

protection, court orders might be helpful to promote protection. However, others were of the view that the development of a witness protection system that can be implemented by a competent authority without the need for a court order and without the dependency on other government departments to provide services, would be crucial to ensure effective protection and absolute confidentiality.

The participants agreed that a **careful scheduling of witnesses' and victims' appearances** in the court for testimony avoids disruption of their lives and can possibly prevent exposing them to their communities as witnesses. The scheduling needs to be planned closely between the Registrar and Chambers. To avoid long travels, video-link testimonies from a location closer to the witness's residence can be helpful. However, some participants raised the concern that in Uganda communities are very inquisitive and it would be difficult to hide the fact that a person is going to court to testify. Participants also pointed out that the decision should take into account what the witness or victim wants.

III.4. Witness Protection Programmes

Mr Van Rooyen explored witness protection programmes (WPP) in more detail.

Definition of WPP

WPP are specific programmes to secure witnesses where all other measures fail and the person is at risk of death or other serious harm. WPP remove witnesses and their families to other places through relocation. It should be noted that WPP are the last resort of protection because it requires highly skilled and specialised staff, e.g. psychologists, finance experts, etc., who can operate in a highly confidential environment to avoid leaking the new location. It also is the most time- and resource-consuming protection measure and has a life-changing effect on the protected person. After relocation, WPP have to help the protected person manage the new situation and build a new life, by e.g. finding schools for the children, managing expectations of the family, developing skills to seek new employment.

Ideally, WPP should be governed by a legislative framework because WPP officers might need specific powers to circumvent existing rules for government officers, e.g. procurement rules, rules on receiving and spending cash, rules on making purchases incognito, rules on public tenders. For example, it would be counterproductive to require public tenders to rent a safe house.

UNODC defines WPP as "a formally established covert programme subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities".[26] The only purpose of WPP is to secure evidence of threatened persons. Consequently, victims who are not witnesses cannot benefit from WPP.

If a witness does not cooperate with the law enforcement agency, then they can be removed from WPP and sued for the costs. The reason is to avoid establishing a welfare project and the misuse of WPP by public officials who want to include their family members in the programme. There is no reason to protect someone who no longer cooperates with law enforcement because the sole purpose of WPP is to ensure evidence.

[26] UNODC Good Practices, p. 5.

Admission criteria

Given this narrow objective of WPP, there are usually strict admission criteria which take into consideration at a minimum:

- Seriousness of the offence
- Nature and relevance of evidence
- Nature of the apparent danger
- Willingness of the applicant to submit to WPP
- Alternative protection measures

To be admitted to WPP, it is required that the danger is linked to the fact that the person will testify. The law can allow exceptions to be decided by the WPP agency. The criteria for admission should be embedded in the law to be transparent and avoid excluding witnesses not favoured by the government.

For vulnerable and traumatised witnesses, threats can be very subjective and addressed through other measures, including for instance familiarisation of courtroom and screens in courtroom to avoid eye contact, rather than through admission to WPP. In some cases, however, only the increased assistance witnesses receive because they are placed in WPP helps them to testify.

WPP process

It is important to constantly assess the situation of the witness while in WPP, e.g. by conducting background checks on people who rent in the same complex where a witness is placed.

The admission process usually includes the stages of application, assessment and decision. An application can usually be filed by witnesses, the investigative agency or prosecution. For the assessment, the witness is interviewed by a protection officer who will conduct a threat and risk assessment.

After a decision is made admitting the witness to WPP, the agency will relocate the person, continuously monitor the security situation, provide psychosocial support, help manage the new situation, develop and implement a reintegration plan. The agency needs the powers to operate all these activities without having to rely on other entities such as the local police.

Any WPP needs continued funding which can be sourced from asset forfeitures of convicted persons.

DISCUSSION

In the plenary discussion, Mr Van Rooyen clarified that the location of the WPP agency should be kept confidential, especially the operational parts of it. They should be treated similar to intelligence services in this regard.

Mr Van Rooyen expanded on what can constitute a threat by adding that threats to the livelihood of a witness can also be considered. He provided an example where a subsistence farmer was admitted to the WPP because the defendant threatened to destroy his farm on which he depended for his livelihood.

III.5. In-Court Protection Measures

In his second presentation, Mr Vaatainen focused on in-court protection measures and discussed different options that have been used in other contexts and the principles to be considered when ordering such measures.

Overall, Mr Vaatainen emphasised that victims and witnesses should not only be considered as objects but should be empowered through the process of testifying in court. Some judges are very apt in putting them at ease and giving them back the feeling of control and power over their own affairs that they may have lost as a result of traumatic experiences.

Procedural measures

Procedural measures are aimed at shielding the identity of victims or witnesses who are testifying from the public or limiting disclosure to the other party in proceedings. Such measures are usually ordered by the court upon an application by the parties or the victim/witness unit. They can also be ordered *proprio motu*. The latter option gives judges the power to look after the interest of victims and witnesses and remain alert if protection issues should arise in the courtroom.

For procedural measures, it is important to safeguard the defendant's rights, which requires a reasoned application, the opportunity for defendants to respond, and an assessment of the application. Where total anonymity, i.e. non-disclosure of identity to defendant, is requested, stringent criteria in assessing the justification of such a measure must be applied to ensure that the defendant's rights are not violated. The European Court of Human Rights has ruled that convictions cannot be solely based on such totally anonymous testimonies.

The Commonwealth Best Practice Guide lists a number of procedural measures, including:[27]

- Redacted disclosure
- Disclosing in summary form
- Delayed disclosure
- Not disclosing witness identities to defendant (but only to counsels)
- Instructions for handling information
- Monitoring non-privileged communication of accused
- Excluding public from live testimony
- Use of pseudonyms
- Face distortion

[27] Commonwealth Best Practice Guide, p. 8-13.

- Voice distortion
- Screens
- Video-link testimony

With regard to limitations on disclosure, one option is to allow only rolling disclosure whereby the prosecution only has to disclose the identity and witness statement an agreed number of days prior to the testimony in court. Before that, only redacted versions need to be disclosed. The option of summary disclosure is necessary when the statements contain so much exposing information that redaction of all these details would make the statement unusable. Limited disclosure orders are used when there is a concern that defendants might compromise the witness.

Specific instructions on handling information can require that certain documents are only accessible to certain people among the teams.

Monitoring non-privileged communication of the accused can be necessary where there is suspicion that the accused is leaking information about witnesses. Defendants in detention usually are allowed to communicate with the outside world.

Video-link testimony allows victims and witnesses to testify from a remote location.

Special measures

Special measures intend to create conditions for vulnerable victims that help them testify in court by creating an emotionally safe environment. This can help them tell their entire story without feeling intimidated by the court. For example, in some francophone African countries, witnesses must stand next to the accused in the courtroom which can have an intimidating effect. Another example can be found in the Lubanga case at the ICC where a former child soldier froze because he was under the impression that the accused could still control him.

Special measures can include:

- In-court assistance
- Reading assistance
- Length of sessions
- Breaks
- Delayed publication of court materials

To make victims and witnesses feel more at ease, it is important to explain what to expect and how to behave in the courtroom. Once in the courtroom, vulnerable victims can be easily intimidated and confused by the way questions are asked. It is important for judges to control the questioning which is not intended to shield them from difficult questions but to create conditions under which they are able to provide a full account.

Another special measure can be allowing support persons to be present in the courtroom during the testimony. Such persons cannot interfere with what the witness says but can bring a matter to the attention of the court, e.g. by raising their hands to recommend a break.

Principles for ordering in-court protection measures

Explaining a recent ICC decision of the single judge in the case against Dominic Ongwen on in-court protection measures requested by the prosecution,[28] Mr Vaatainen discussed the principles underlying this order.

The first principle the single judge raised was the need to consider the rights of the accused:

> […] *the publicity of proceedings is a fundamental right of the accused and a necessary component of a fair and transparent trial. At the same time, this general principle is not absolute and is subject to certain exceptions, one of which is indeed the protection of victims and witnesses*.[29]

The single judge acknowledged that the duty to provide protection applies to the entire court, including the Chambers. Any protection measures need to be justified by an objectively justifiable risk. The judge conceded that risk assessments are not an exact science with a level of speculation and depend on how much information is available. Threats from individuals are more difficult to assess than from organised entities because their capacity of realising the threat is easier to gauge. Nevertheless, according to the single judge the applicant has to show that without protective measures there would be a negative impact on the interest of the victim/witness. Such applications need to be reasoned and accompanied by a risk assessment.

The assessment of risks cannot be exclusively based on the witness's own subjective perception. While her/his views are important, the decision on protection cannot be guided solely by them. It is not necessary to show a direct threat but factual circumstances are required to show that legitimate interests of the victim/witness are at risk. For example, the prosecution did not provide actual information on the possibility of retaliation by Ongwen's family or supporters on witnesses and therefore protection measures could not be based on such allegations.

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[28] ICC Trial Chamber X, *The Prosecutor v. Dominic Ongwen*, Decision on the 'Prosecutor's application for in-court and special measures', ICC-02/04-01/15-612-Red, 29 November 2016, available at: https://www.icc-cpi.int/CourtRecords/CR2016_25452.PDF (hereinafter ICC Protection Decision). The Prosecutor requested the use of pseudonyms, face and voice distortion to withhold the identities from the public during court hearings for victims of sexual violence, victims who were victimised as children, a witness who is a staff member of the Office of the Prosecutor and witnesses who are vulnerable to re-traumatisation.

[29] ICC Protection Decision, para. 5.

For the application, the prosecution had grouped victims and witnesses into three groups which reflected their vulnerability, namely victims of sexual violence, child victims, witnesses with special professional circumstances, e.g. government agents working in confidential settings, and requested measures for each group. The single judge found that each victim/witness must be assessed on a case-by-case basis. However, it is possible that individual victims/witnesses are part of a group due to their similar circumstances.

The single judge ordered the use of pseudonyms and that the identity of victims of sexual violence should be withheld from the public during trial. However, this was made subject to each individual's desire to testify in open court or not. Mr Vaatainen pointed out that some victims might wish to testify publicly. For example at the International Criminal Tribunal for the Former Yugoslavia, victims generally gave four reasons for wanting to testify: they wanted to get justice, speak for the dead or let the world know what really happened, and to prevent such crimes from happening again in the future. Most of them testified in open court with protective measures but some wanted to testify without any procedural protective measures.

For victims who were children at the time the crime was committed, the single judge ruled that the mere fact that they were children at the time of victimisation is not sufficient to justify protective measures. Similarly, the risk of re-traumatisation as a result of a public testimony is not enough to justify protection measures. The same applies to cases where the witness is known to the accused. However, it ordered the use of pseudonyms and the protection of their identities from the public due to the concrete risk of stigmatisation as former rebels.

The single judge highlighted the importance of empowering victims and witnesses by providing clear information to them on the proceedings.

In its ruling, the single judge took note of the fact that two protocols, one of which requires the VWS to familiarise victims and witnesses with the court before their testimony. The second protocol mandates the VWS to conduct a vulnerability assessment of each witness/victim.

DISCUSSION

The participants discussed whether limiting the disclosure of the identity of witnesses to the defendant violates her/his **rights to know the accuser**. Mr Vaatainen clarified that this balance between the right to protection and rights of the accused has been extensively discussed before international tribunals and the European Court of Human Rights. The rights of the accused are not absolute and there are criteria on when protection measures can be granted. However, to avoid this issue it would be easier to

order various measures which allow the accused to know the witness's identity but which can provide some form of protection at the same time.

Some participants raised **examples of protection measures** that were employed in the past even though there is no clear legal basis. One example was the use of limitations on disclosure where the identities of witnesses would only be disclosed to counsel but not to the accused. Another example was the use of disclosure on a rolling basis. In addition, fully covering up witnesses to shield their identity from the public was raised. Some described another example of placing the witnesses in a manner that avoids eye contact with the accused but allows the judges to see her/him. Others mentioned that pseudonyms have been used in some cases.

The participants went on to discuss the **role of the prosecution and defence** in protection. It was suggested that prosecutors should provide reasoned applications for such measures. The defence on the other hand has the right to contest such applications but can also agree to them.

Currently, the ICC is conducting a case in Uganda in parallel to the ICD's case against Thomas Kwoyelo. The participants agreed that there is a need to **coordinate closely with the ICC** because there is a joint interest, in particular where both are using the same witnesses.

Mr Vaatainen clarified that **individual assessments** of victims who are grouped together due to their similar circumstances can still be assessed case-by-case but whoever belongs to a certain group will receive the same type of protection measures.

For the **post-trial stage**, Mr Vaatainen explained that an assessment has to be conducted after a few days to determine if additional measures are necessary. Even after the end of the testimony, the court still has the obligation to provide protection. At the ICC, witnesses are also given a contact number for emergencies.

The participants discussed the difference between **actual and perceived threats**. Mr Vaatainen explained that the threat and risk assessment follows a certain method. First, the source of the threat has to be identified. The next step would be to collect information about this threat, e.g. how much does this person know about the witness, how much resources does this person have, does the person have access to arms, what is their interest in harming the witness, etc. This will help to evaluate if the risk is low or high. Subsequently, mitigating measures need to be identified, e.g. sending police officers to the family of the accused to warn them against any attempts of interference. Such threat and risk assessments depend on the quality of the information that can be obtained. The conclusion of the threat and risk assessment is presented to the court. Mr Vaatainen noted that there are templates for such assessments but that the users must be trained on how to apply them. Eventually, the decision lies with the Chamber but using a thorough method can help justifying the protection application.