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# INTERNATIONAL PARAMETERS TO PROTECTION OF WITNESS

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## ABSTRACT

Every country has their own justice administrative system in which witnesses plays an important role. Their role in a criminal trial is crucial as their evidence before the Court of law can change the entire course of a case. According to Jeremy Bentham “witnesses are the eyes and ears of justice”. They are a vital assistance in the justice dispensation system in any civilized society. There each and every statement is very important as it has a power to change the course of the whole case. By giving evidence involving the commission of an offence they bring the criminal justice machinery into action. Witnesses, who are considered as the eyes and ears of justice, are turning hostile with volatile irregularity. Witnesses are turning hostile as when high profile characters are involved in any crime they try to threaten them which ultimately leads to ruining our criminal justice system. Presently, the vulnerability of the witnesses is very protruding. A primary idea of reference for international law relating to the protection of witnesses in criminal proceedings has stemmed from the International Criminal Tribunal of the Former Yugoslavia (ICTY)<sup>1</sup> which resorts under the UN. It is to be noted that the rules of international criminal law have only begun to develop in recent years and that guidelines of international criminal procedure are equally applicable to the International Criminal Tribunal for Rwanda (ICTR) and to a large level they also apply for the International Criminal Court (ICC). Therefore, here in this paper an attempt has been made to determine and analyse the protection and parameters available to witnesses at the international level.

**Keywords:** witnesses, protection, international law, European union.

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<sup>1</sup> International Criminal Tribunal for the Former Republic of Yugoslavia - Security Council Resolution 827 of 25 May 1993

## Introduction

International law does not provide any definition on what a ‘witness’ is? It can however be inferred from the treaties and case laws that parties give their testimony in criminal proceedings of the states. Further there is also no definition of the protective measures in international law that a witness should be given in criminal proceedings. A primary idea of reference for international law relating to the protection of witnesses in criminal proceedings has stemmed from the **International Criminal Tribunal of the Former Yugoslavia (ICTY)**<sup>2</sup> which resorts under the UN. It is to be noted that the rules of international criminal law have only begun to develop in recent years and that guidelines of international criminal procedure are equally applicable to the **International Criminal Tribunal for Rwanda (ICTR)**<sup>3</sup> and to a large level they also apply for the **International Criminal Court (ICC)**<sup>4</sup>.

Legally talking there is no legal act at UN level that solely deal with protection of witnesses or traitors with justice, nevertheless in recently adopted universal legal instruments – such as UNTOC<sup>5</sup> and UNCAC<sup>6</sup> account is taken of the part of witnesses, collaborators who can provide valuable material in relation to the issues covered by these Conventions. It is to be noted that there are number of international instruments which recognize the need to protect witnesses from intimidation, threats & harm. Some among them are provided below-

- **Declaration of basic principles of justice for victims of crime and abuse of power**<sup>7</sup>- which provides that the states should take measures to minimize inconvenience to victims, guard their privacy, when necessary, and safeguard their safety, as well as that of their families & witnesses on their behalf, from intimidation & retribution. This declaration was adopted by the UN General Assembly in 1985.
- **UN Convention Against Transnational Organized Crime of 2000**<sup>8</sup>- it requires state

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<sup>2</sup> International Criminal Tribunal for the Former Republic of Yugoslavia - Security Council Resolution 827 of 25 May 1993

<sup>3</sup> International Criminal Tribunal for Ruanda - Security Council Resolution 955 of 8 November 1994.

<sup>4</sup> 3 Rome Statute of the International Criminal Court, Rome, 17 July 1998. The Statute entered into force on 1 July 2002.

<sup>5</sup> United Nations Convention against Transnational Organised Crime (UNTOC), New York, 15 November 2000 - Article 24 contains provisions for witness protection.

<sup>6</sup> United Nations Convention against Corruption (UNCAC), New York, 31 October 2003 Article 32-33 contain provisions for witness protection

<sup>7</sup> Art.6(d) of Declaration of basic principles of justice for victims of crime and abuse of power

<sup>8</sup> Art. 24, UN Convention Against Transnational Organized Crime of 2000.

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 (money laundering, corruption, trafficking in persons, smuggling of migrants etc.) and for their relatives and other persons close to them.

- **UN Convention Against Corruption of 2003<sup>9</sup>**- States Parties shall take appropriate measures in accordance with their domestic legal system and within their means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences covered by the Convention (money laundering, bribery of public officials, embezzlement or misappropriation by a public official, abuse of functions, illicit enrichment etc.) and for their relatives and other persons close to them.

## **WITNESS PROTECTION UNDER EUROPEAN UNION -**

A number of issues have led to increased consideration for the role of witnesses in criminal proceedings in the past 10-15 years. Significant rise in terrorist and organised crime has been the main factor for the same. It is to be considered as a civic duty of every person to give testimony as a witness if so, required by the criminal proceeding, and at the same time states too have a duty to protect the safety of witnesses by providing them with specific protection measures. Witness protection is important in the fight against organised crime too. The traditional investigating tools been applicable are not adequate when it comes to more serious and organised crimes. Offenders will very often try to avert witnesses from providing the information they have. However, in European legislation there are no binding texts on witness protection. The Council of Europe has even set-up an expert committee(s) on the issue.<sup>10</sup> Regarding European Union instruments on the issue, they have a limited scope as far as they are relevant only in relation to the fight against organised crime and take the form of soft law, i.e. Council Resolutions. The Resolution of the Council of 23 November 1995 on the protection of witnesses in the contest against international organized crime<sup>11</sup> and as for the collaborators

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<sup>9</sup> Arts. 32, 37(4) UN Convention Against Corruption, 2003.

<sup>10</sup> Committee of experts on the protection of witnesses and pentiti in relation to acts of terrorism and Committee of experts on the protection of witnesses and collaborators with justice

<sup>11</sup> 2Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organized crime, OJ C 327, 07/12/1995, p.5.

with justice, the Council of the European Union adopted a **Resolution in 1996**<sup>12</sup> should also be taken into consideration. No other specific EU legislation deals with protection issues, nonetheless, the possibility to grant benefits in exchange for information is also foreseen in certain binding legislation like the **Framework Decisions on terrorism**<sup>13</sup> and the Proposal for a **Framework Decision on organized crime**<sup>14</sup>, also the **Council Framework Decision on the standing of victims in criminal proceedings**<sup>15</sup>.

The Council of Europe, has acknowledged the variety of different situations in which witnesses may need protection in its wide-ranging Recommendation (97) 13 on the intimidation of witnesses and the rights of the defence<sup>16</sup> as well as in the recently adopted Recommendation (2005) 9 on the protection of witnesses and collaborators of justice<sup>17</sup>. In relation to procedural protection the Council of Europe has made a large contribution through the rulings of the European Court for Human Rights (ECHR) that has widely owed with relevant procedural issues, specifically Article 6 regarding the guarantee of a fair trial<sup>18</sup>. Besides, mention has to be made of further Council of Europe legal instruments<sup>19</sup> that have provisions on protection issues and they have to be taken into account when discussing witness protection. Relatively under International law protection is given of higher status than European law. The main complications in implementing of the witness protection measures in ICC are of various natures. Since these complications are not easily dealt with under the provisions of the Rome Statute, Rules and Regulations, the main problem is to clearly define their part and the protective measures. Their role in the proceedings is intended at the institution of truth.

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<sup>12</sup> Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime, OJ C 010, 11/01/1997, p.1-2.

<sup>13</sup> Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22/06/2002, p. 3-7.

<sup>14</sup> Commission Proposal for a Council Framework Decision on the fight against organised crime, COM (2005) 6 final, 19 January 2005

<sup>15</sup> 2001/220/JHA Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 082, 22/03/2001, p. 1-4

<sup>16</sup> Council of Europe, Committee of Ministers, Recommendation R (97) 13 concerning the intimidation of witnesses and the rights of defence, Strasbourg 10 September 1997, <http://cm.coe.int/rec/1997/1997r13.htm>

<sup>17</sup> Council of Europe, Committee of Ministers, Recommendation R (2005) 9 on the protection of witnesses and collaborators of justice, Strasbourg 20 April 2005, <http://cm.coe.int/rec/2005/2005r9.htm>

<sup>18</sup> Among others ECHR cases with relevance: *Kostovski v. the Netherlands*, Judgement of 20 November 1989, Application No. 1145185, Series A No. 166; *Doorsen v. the Netherlands*, Judgement of 26 March 1996, Application No. 20524/92, Reports 1996-II.; *Kok v. the Netherlands*, Judgement of 4 July 2000, Application No. 43149/98, Reports 2000-VI.; *Windisch v. Austria*, Judgement of 27 September 1990, Application No. 12489/86, Series A No. 186.; *Lüdi v. Switzerland*, Judgement of 15 June 1992, Application No. 1233/86, Series A No. 238

<sup>19</sup> Recommendation (2001) 11 concerning guiding principles on the fight against organised crime and Recommendations relating to the protection of victims, Criminal Law Convention on Corruption (No. 173, Strasbourg, 27.01.1999.) contains article on the collaborators

However, as a consequence, numerous witnesses and their families have experienced terrorization and some of them have been killed too.

### **WITNESS PROTECTION & INTERNATIONAL HUMAN RIGHTS-**

In order to make a fair balance to the rights of the accused and the prosecutor, it is important to adhere to the highest standards of international criminal justice, particularly to the fair trial rights provided in the human rights treaties such as ICCPR and ECHR<sup>20</sup>.

In maximum democratic structured constitutions and the countries believing in the rule of law, the condition currently is that in the direct presence of the defendant, the right of open trial is imperious. The balance of rights has to be interpreted carefully as long as there is no general privilege to protect fundamental human rights of the witness.<sup>21</sup> The general right to a 'fair trial' is enshrined in the **Universal Declaration of Human Rights**,<sup>22</sup> and the **regional human rights conventions**,<sup>23</sup> as well as in **humanitarian law instruments**.<sup>24</sup>

#### **Universal-Declaration of Human-Rights (UDHR)**

The UDHRs treasures the just principle of fair trial. It provides, each person must have complete equality in determining his rights & responsibilities in prosecution proceeding in opposition to him, for an open, fair hearing by an impartial and independent judiciary.<sup>25</sup>

#### **International Covenant on Civil and Political Rights (ICCPR)**

The standard for organizing rights of a fair proceeding is provided under Article 14, of ICCPR. The ICCPRs relates to blamed person's right of just, open, transparent hearing. The rights demonstrate the need for a balance between multiple conflicting rights. Such regulations on

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<sup>20</sup> Chile Eboe-Osuji, Protecting humanity: essays in international law and policy in honour of Navanethem Pillay, article of Segun Jegede" The right to a fair trial in International Criminal Law" Martinus Nijhoff, 2010, p. 547.

<sup>21</sup> See Claus Kress, p.333

<sup>22</sup> G A Res. 217 A (III), UN Doc. A/810 (1948) See Annex.

<sup>23</sup> American Convention of Human Rights, (1978) 1144 UNTS 123, Art. 8; ECHR (1955) 213 UNTS 221, Art. 6; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev.5, Art. 7; Convention on the Rights of the Child, GA Res. 44/25, Art. 40, para. 2.

<sup>24</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Art. 84-87 and 99-108; Geneva Convention (IV) Relative to the Protection of Civilians, (1950) 75 UNTS 287, Art. 5, 64-76; Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts; (1979) 1125 UNTS 3, Art. 75; Protocol Additional II to the 1949 Geneva Conventions and Relations to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 3, Art. 6.

<sup>25</sup> Article 10 of UDHR

balance are contained or detailed in various Criminal codes rules of some nations. It provides that everyone before the tribunals and courts should be equal. Each of them will be allowed to have just and transparent trial by a competent & unbiased court when determining any criminal prosecution against him or his right and duties in a lawsuit.

The specifications of the ICCPRs, therefore, stipulate that defendant's trial must be "open, public, fair proceeding" and provide that in presence of victim the defendant must be tired and that the witness who has been brought against him must be investigated or scrutinized. Citizens, the audience and the media have a right to be informed and broadcast, subject to limits to respect other persons' rights or image or to protect national safety, public order, morality, or health of the public. In the view of the Court, the journalists and the audience may be prohibited to safeguard the aforesaid rights or, if private life interests so necessitate, in rare situations like the case of publicity, it can be allowed.

**ECHR (European Convention for Protection of Human Rights)** -The idea of just public hearing in Article 6 of ECPHR & Fundamental Freedoms states that for the sake of public order, morality, or national safety the press and the public may be barred from the whole/certain portion of the proceeding. Further, requirement of young people's interests or the preservation of the party's privacy, or where exposure would harm the interest of the court are needs to be considered by law courts<sup>26</sup>. For the sake of justice to safeguard witness against those suspected of having committed the most horrible offenses and attract international displeasure, such as genocide, human rights crimes, as well as war offenses; the equality of procedures, adversarial procedure, and the revelation of evidence, therefore, need a balance to be maintained between opposite parties. The adversarial trial gives chances to parties to observe, analyse and react against the evidences produces in law courts.

The witnesses, nevertheless, have the following rights, in an essence of the ECHR:

- the right, while providing testimony shouldn't be exposed to degrading or inhuman treatment<sup>27</sup>;

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<sup>26</sup> Lavoro Mamledar v. Maharashtrawadi Gomantak Party and Ors. (19.07.2021 - BOMHC):

<sup>27</sup> Article-3, ECPHR.

- the right not to be retained without sufficient protection;<sup>28</sup>
- The implicit right of children's witnesses and complainants is the condition of the right of a defendant to a court meeting<sup>29</sup>;
- and the right to preserve family & private life<sup>30</sup>.

ECHR's Article 6(3)(d), evidently gives witnesses a lot of rights, for instance: to acquire their presence on the same basis as witnesses against the defendant and review their testimony. However, right to a reasonable trial to accused is recognised right but this right is not unlimited. Paragraph 3, therefore, does not offer an unlimited right for the defendant to ensure that witnesses shall remain present in court for his testimony. In fact, Article 6 does not require specific consideration of witness interests. It is possible that their lives, freedom, and security, which are typically protected by Article 8 of the Convention, will be jeopardized in the future. Remaining basic articles of convention stipulate that their criminal procedures should not be organized in such a manner that their interests are not unduly jeopardized, may potentially safeguard such rights of witnesses and victims. In this context, fair trial rules also demand that defence interests be balanced, in relevant cases, with those of witnesses or victims who are required to provide evidence. Only special steps are need to be taken to support frightened witnesses, but no extraordinary measures are required to be executed. The pre-requisite is protection of FRs of victim, accused & the witness for fair proceeding and that will definitely be in great benefit to criminal proceeding. A commitment from all parties to the procedures is nonetheless necessary for effective execution.

## **WITNESS PROTECTION IN ICC AND INTERNATIONAL TRIBUNALS-**

### **Witness Protection under ICC's Rome Statute-**

Rome Statute includes crucial protection and assistance mechanisms for witnesses as well as victims. The Prosecutor, the Court, and the Registry are responsible for measures and assistance. For effective proceedings, the participation of witnesses in the hearing is essential. Therefore, protecting the witness is the priority of the court.<sup>31</sup> There are several unique

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<sup>28</sup> Article-5, ECPHR.

<sup>29</sup> Article-6, ECPHR.

<sup>30</sup> Article-8, ECPHR.

<sup>31</sup> Rome Statute, Arts. 57 (3)(c), 64(2), 64(6)(e) & 68; Rules of Procedure and Evidence, Rules 87-88.

considerations about security of victims & witness from threats of reprisals by assuring that the prosecution and inquiry itself do not further victimize people who have already endured the crimes they have perpetrated. The Prosecutor is needed to defend, and account for the nature of the offense, in terms, when it includes gender-based violence, sexual violence, or child abuse, the interests and personal conditions of the witnesses and victims such as gender, age, as specified under Article 7(3) and health<sup>32</sup> at the investigation stage. If it indicates serious risk to any witness as well as their family, the prosecutor is authorized to refuse the revelation of testimony.<sup>33</sup> Further, the Prosecutor should execute required actions, or demand that appropriate actions be considered, for ensuring the safety.<sup>34</sup>

Trial Chamber impose similar tasks.<sup>35</sup> It should take mandatory actions to safeguard the safety of the witnesses as well as victims, their psychological and physical, their dignity and their confidentiality. The Court takes account, specifically, but not restricted to where the offense includes gender and sexual violence or child abuse, of all elements relevant to it which include health, gender, age, and the criminal nature.<sup>36</sup>

Trial Chamber can use extraordinary provision for public hearings.<sup>37</sup> The use of on-camera sessions may be allowed and the electronic proof can be submitted. This procedure is extensively employed at countries legal mechanism which involve children when witnesses testify by video and cannot see the culprit. For reaching at decision, court can consider the opinions of witnesses.<sup>38</sup>

In addition, the Registrar assigns a legislative responsibility for protection and support and to provide suitable aid to victims/witnesses to VWU,<sup>39</sup> Article 43(6) involves the Registrar

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<sup>32</sup> Article 54(1)(b) of Rome Statute.

<sup>33</sup> Article 68(5) of Rome Statute.

<sup>34</sup> Article 54(3)(f) of Rome Statute.

<sup>35</sup> The prosecution and defence of the accused are handled by the trial chamber. After hearing all of the evidence provided by all sides, the judges decide whether or not an accused individual is guilty or innocent. According to the regulations, the trial chamber must defend the rights of the accused while simultaneously considering the interests of victims and the protection of witnesses. One of the judges' main duties is to decide whether the prosecution's hypothesis is supported beyond a reasonable doubt by the evidence produced during the trial. When this threshold is not fulfilled in other international courts, some accused are acquitted, which is unusual. The trials are conducted in public and are live aired on television. In rare circumstances, it may be essential to hold parts of a trial in a closed session. There are three judges on the trial bench, one of them is a Lebanese national. Available at <http://www.stl.tsl.or.g/en/about-the-stl/structure-of-the-stl/chambers/trial-chamber-40> (Visited on 20 November 2020).

<sup>36</sup> Article 68(1) of Rome Statute.

<sup>37</sup> Ibid

<sup>38</sup> Art. 68(2) of Rome Statute.

<sup>39</sup> Art. 43(6) of Rome Statute, Regulations of the Registry.



establishing a VWU<sup>40</sup> check on victims and witnesses who testify in the Registry of Court and other at risk because of witnesses in their testimony, in discussion with OTP, and offering safeguarding measures, safety facilities, consultancy, and additional support. These regulations are detailed in the Rules of Court. The Registrar's and VWU's obligations are covered under Rules 16–19. The protection and additional measures conferred by the Chamber are provided for under Rules 87 and 88.

When the defence and prosecution are the obligatory parties to the Court proceedings, witnesses are potential parties since they are not strict sense necessary to their participation. It does not imply that the witness has no claim to be safeguarded and to take an active part in the ICC hearings (not only an interest).<sup>41</sup> In the Statute on Procedural Matters, the most important purpose of the ICC trial is the search for truth and not the punishment or retribution of persons. The ICC Registry is accountable for administrative activities of Court and the service of the Court. The Registry of the ICC has special responsibility in three cases:

- (1) safety and assistance for witnesses as well as victims;
- (2) Legal assistance to victims as well as accused; and (3) Family visits to detainees' organizations.<sup>42</sup> The slogan servicing of the Court refers to one of the roles of the Registry as a channel of communication of the Court,<sup>43</sup> namely to inform cooperative requests made by the Chambers, as well as to help States with implementation, for example about the protection of witnesses.

The ICC Registry has unique responsibilities for the security as well as support of the witnesses and victims. Sufficient security of witnesses and victims has a critical role in ensuring that witnesses are freely and honestly involved, without fear of retaliation or future injury for the effective implementation by court. The legislative system makes explicit that the Court must

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<sup>40</sup> 9 As a result, the Victims and Witness Unit (VWU) is charged by law with providing protection, support, and other essential assistance to witnesses and victims who appear before the Court. According to the Rules of Procedure and Evidence, the Victims and Witnesses Unit is also responsible for providing appropriate protection and security measures to witnesses, victims who appear before the Court, and those who are at danger as a consequence of their testimony, as well as creating long- and short-term plans for their safety, and proposing the adoption of protective measures to the Court's organs.

<sup>41</sup> Romina Beqiri, *Witness Protection in International Criminal Court* (2011) (Unpublished Ph.D. thesis, Faculty of Law, Lund University. Available at: <http://lup.lub.lu.se/luur/download?func=download>

<sup>42</sup> Silvana Arabia, "The International Criminal Court: witness and victim protection and support, legal aid and family visits", 36:3 *Commonwealth Law Bulletin* 520 (2010).

<sup>43</sup> *Ibid*

take adequate steps to safeguard victim's and witnesses' safety, psychological and physical wellbeing, privacy, and dignity. In proceeding of Thomas Lubanga Dyilo it was held that initial problems of efficient witness protection have become evident from the ICC.<sup>44</sup>

### **Witness Protection Measures under the Rome Statute**

In the context of the offenses claimed in the Rome Statute: The contribution of witnesses, as well as their testimony they offer in criminal trials, is frequently vital to the conviction of defendants: humanity crimes, war offenses, and genocide. In the VWU, protecting & assisting victims & witnesses during trials is main obligation. In terms of witness protection, fundamental concepts are:

1. Physical protection: The VWU has a responsibility to offer consultancy and other suitable support to victims & witnesses who testify Infront of court and of anyone whose life risk enhance as a result of witness testimony.<sup>45</sup> This is especially crucial when witnesses are already aware of the offender. Types of physical security that may always be addressed concerning particular circumstances include police guides to and from the court, the safety of the hotels in which the victim resides, informing the victim of hearings, and safeguarding the family of the witness.
2. Psychological protection: It involves stabilizing the psychological status of the victim and preventing further strain (for example, re-victimization or re-trauma as a result of the court proceedings). Psychological protection types that always have to be taken into account are: to keep the witness properly aware, so that expert advisors may assist the witness before the court.<sup>46</sup>
3. Protection from unfair treatment: Victims must be handled in a way that complies with their dignity as well as rights. Before effectively prosecuting the perpetrators of major crimes in the ICC, the significance of witnesses is fundamental, but they are often seen as tools. It may result in unfair witness treatment, such as repetitive questions, intrusive

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<sup>44</sup> Available at [www.lubangatrial.org](http://www.lubangatrial.org)

<sup>45</sup> Article 43(6) of Rome Statute, Regulation of the Registry.

<sup>46</sup> In the Lubanga case, Trial Chamber I delegated responsibility for arranging in-court assistant psychologists and other professionals-who might be made available to accompany vulnerable witnesses in the courtroom to the VWU. The in-court aids have the responsibility of ensuring the witness's feeling of emotional security and assisting the Chamber of the International Criminal Court in taking all necessary steps to reduce the trauma of delivering evidence

medical examinations, as well as imprisonment. Fair treatment includes firstly treating witnesses as people with the right to dignity and the preservation of their rights. Providing competent legal counsel and services might help safeguard witnesses from unfair treatment even before they choose to be witnesses at initial stages.

The **Rome Statute** requires that proceedings before the Court be carried out fairly and impartially, with full respect for the rights of the parties in the proceedings. With regard to fair trial rights, the trial shall be held in public<sup>47</sup>. There are instances where there will be restrictions to obtaining witness testimony in open court such as where the witness fears the threat of violence to himself or his family, or where the testimony will bring public shame, the witness will feel conflicted by his personal interest in refusing to testify and the duty he is likely to feel toward society and in the interest of justice. Therefore, under the Rome Statute, there is no obligation of the witnesses to appear and testify in the Court because of the principle of voluntary appearance.

Nevertheless, there are reasons that limit a witness not to testify on the bases of special circumstances. A first important reason not to testify concerns the fear of victims of crimes with the status of “a witness”, of being traumatized by the testimony and the confrontation with the accused. The terror of traumatising applies specifically to the victims of and witnesses to rape and sexual assault. In accumulation, the proceedings before the ad hoc Tribunals offer several examples of such situations.<sup>48</sup> The practices of the ad hoc Tribunals validate witness’s fear for his or her own safety, as well as for his or her family’s safety, is often a real one. As far as the ICTR is concerned, Morris and Scharf mention reports detailing killings and other attacks against genocide survivors during 1996.<sup>49</sup> Actually, two witnesses testifying before the ICTR in Akayesu and Ruzindana were killed.<sup>50</sup> However, the other face of the coin is that the

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<sup>47</sup> Article 67(7) of Rome Statute

<sup>48</sup> For example, in Tadic, the ICTY Trial Chamber paid considerable attention to and acknowledged the traumatization of victims and witnesses in cases of sexual assault: Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Tadic (IT-94-1-T), Trial Chamber II, 10 August 1995, pp. 45-52

<sup>49</sup> UN High Commissioner for Human Rights Field Operation in Rwanda, Killings and Other Attacks Against Genocide Survivors and Persons Associated with Them from January Through December 1996, Status Report as at 24 January 1997, UN doc. HRFOR/STRPT/33/24 Jan. 1997/E, as cited in V. Morris and M.P. Scharf, *The International Criminal Tribunal for Rwanda* (Irvington-on-Hudson, New York: Transnational Publications, 1998) p. 535.

<sup>50</sup> See Second Annual Report of the ICTR, UN doc. A/52/582 and UN doc. S/1997/868, 2 December 1997, p. 51.

refusal to give testimony means the expulsion from the protection programme.

## **Difficulties in the Implementation of the WPP**

### **A- Overlapping of the Roles of the Court's segments**

During all those years of operation, one of the challenges posed in the 2010 report of the Court was the implementation of measures to safeguard witnesses as a result of the overlapping of roles. This vision covers all the operations of the Registry and clarifies the separation between the legal and administrative tasks of the Court. In relation to such principles, the operations of the Registry are connected with the judicial tasks of the Court, the Chairperson has a vital function to play in ensuring supervision of the Registry's management as a whole and chambers can handle particular problems. A decision to relocate an individual witness, for illustration, would come under the competence of court, while the presidency is competent to maintain a witness relocation system as a whole.

### **B- International and National Cooperation-**

As a universal principle, the Rome Statute rest on collaboration of States for the purposes of the investigation. An appendix in the draft provision provided at the Rome Conferences states - Some delegations expressed the view that the prosecutor be unable to act upon the authority conferred by the Pre-Trial Chamber in the absence of any enforcement powers. While other delegations do not agree with them. Unambiguously, **Article 86** offers a general duty to all state parties to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

The Court as a right may request for cooperation to a member state for assistance and take actions, including actions related to the protection of material information, which is necessary for ensuring the safety of any victims, potential witnesses and their families. The Court may request that any information that is provided under Part 9 of Rome Statute shall be protected from any harm either physical or mental of any victims, potential witnesses aa well as their families.<sup>51</sup>

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<sup>51</sup> Rome Statute, Article 87(4)

In the ICTR State Cooperation,<sup>52</sup> which provides the Tribunals vigorously to pursue state cooperation, e.g. in the relocation of witnesses, but generally refrains from imposing compulsions on any states. Nevertheless, if a witness's appearance is of substantive implication for the trial, it obliges states to ensure witnesses' appearance in accordance with Article 18 & 28 of the Statute.

### **The difficulties of the present situation**

After analysing the brief situation of the witness protection legislations at EU, international and Member States level approves that in spite of certain accomplishments in many areas related to the protection of witnesses over the preceding years, their situation is not satisfactorily stabilised. Various specific problems can be identified,

- such as the scattering of activities stirring upon issues related to witness protection (EU, including Europol and Member States, Council of Europe, international criminal court and tribunals, G8-level);
- the various degrees of enactment of the mostly non-binding European and international instruments; the insufficient co-ordination among the relevant authorities of the Member States and EU bodies when elaborating policies,
- strategies and programmes related to the protection of witnesses; meagre use of prevailing networks of the relevant national bodies;
- the absence of a complete idea on what has been achieved so far in absence of data and analyses, mainly due to the personal nature of information;
- the absence of good practice to ensure effective protection for protected persons.

Further it is to be taken into consideration that the countries where applied difficulties arise from their own geographical or demographic appearances and countries that are highly affected by criminal organisations need to relocate protected persons to some other countries, and have all the other protective measures implemented in those countries. Criminal courts and tribunals at the international level should rely on international agreements with other countries for the

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<sup>52</sup> Sluiter G. "The ICTR and the Protection of Witnesses" *Journal of International Criminal Justice* 3 (2005)

protection of witnesses. But actually, when doing so practically the member states face practical difficulties which arise from relocation requests by both the requesting and the requested state. Though, all states already provide for the protection possibilities, substantial differences concerning national legislations obviously still exist. Further it should be noted that international requisites concerning these matters, i.e. cooperation with international criminal courts, are lacking. Even though the primary responsibility for addressing many of the issues related to witness protection respite at national level, in the light of the above evaluation it is without uncertainty that they also have a European dimension, nevertheless the existing EU legislation tackle only partially the wide range of challenges. The requirement for a specific EU policy on protection related issues are becoming more and more urgent. First of all, the existing legal and operational instruments should form the core of this framework and be complemented by a predominant coordination. The main determination would be to improve the compatibility of national criminal justice systems in relation to certain aspects of the protection of witnesses and collaborators with justice and improve the efficiency of co-operation. Approximation and harmonization of legislation and mutual trust in each other legal system is therefore absolutely compulsory.

### **Witness Protection in Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)**

UNSC in 1993, created ICT for the Former Yugoslavia in reaction to major criminal offence such as ethnic violence in earlier Yugoslavia. The UN's Legal Affairs Office developed enabling legislation- "Statute of the International Tribunal for Yugoslavia", accepted in May 1993 by Security Council. First 11 ICTY Judges were chosen in September 1993 by the General Assembly. Judges developed ICTY regulations following Article 15 of Statute between November 1993 and February 1994.<sup>53</sup> On the Measures of Witness Protection, ICTY has a range of protective methods at its disposal, ranging from exposure of names and information identification from Tribunal records to pseudonym witnesses, electronic facial, or voice distortion, and closed sessions.<sup>54</sup> Additional procedures are provided under Art. 75 of Rules of Procedure & Evidence, alike video-conference evidence and remote testimony from a witness room. A Judge may, therefore, announce adequate privacy actions for safety of witnesses & victims, on the demand of either party or the witness/or victim, or by the VWU,

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<sup>53</sup> Law Commission of India, 198th Report on Witness Protection and Witness Protection Program, (August 2006).

<sup>54</sup> Rule 75(B)(ii): Measures for the Protection of Victims and Witnesses ICTY.

stating that these actions should be compatible with defendant's rights. The Chamber must check the questioning methods when required to prevent intimidation or harassment. After protection against a victim or witness has been imposed at any court hearing (First hearings), those protective regulations:<sup>55</sup> must continue in any (second hearings) before the Tribunal to effect *mutatis mutandis* except until, in line with the method set out in that Rule, they are terminated, varied or extended; but the Prosecutor must not avoid the discharge of any obligation of disclosure under the Rules in the next hearings, as far as the Prosecutor informs that the nature of the preventive measures as imposed during the first hearings relates to the defence to whom disclosure is being made.

Under Article 22,<sup>56</sup> Statute of Tribunal and Rule 34<sup>57</sup> of Rule of Procedure & Evidence of Tribunal as an autonomous and impartial unit within the Registry, the VWS of ICTY was formed. It ensures that all witnesses may be confident that they are secure and safe and that the witness' experience does not lead to additional suffering, trauma, or harm. It protects and supports all witnesses, whether brought by the defence, the prosecution, or the chambers, who testify before the Judiciary. The section: offers consultation and support to witnesses and victims; ensuring that witnesses are appropriately satisfied with safety and security requirements; Proposes and takes measures to protect testimonials which the Tribunal has heard or will hear; notifies them of their rights to the proceedings; makes travel and accommodation arrangements for witnesses and the individuals accompanying, financial and other logistic and administrative arrangements; and keeps a regular touch with the trial teams concerning every fact of the testimony before the Court. One of the key advantages of ICTY protection is that after 30 minutes, broadcasts are released. This permits parties to inadvertently request the drafting or possible identification of any references to a protected witness.

### **Protection of Witnesses in the Statute of the International Tribunal for Rwanda**

U.N. Security Council founded ICT for Rwanda (1994) for the Prosecuting the persons who are liable for committing severe infringement of the IHL committed and Genocide in the

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<sup>55</sup> Rule 75 (F) of ICTY.

<sup>56</sup> According to Article 22 of the ICTY Statute, the International Tribunal must provide for the protection of victims and witnesses in its rules of procedure and evidence. These safeguards must include, but are not limited to, the conduct of in-camera procedures and the preservation of the victim's identity

<sup>57</sup> The Victims and Witnesses Section, according to Rule 34 of the Rules of Procedure and Evidence, consists of proposing protective measures for victims and witnesses in line with Article 22 of the Statute, as well as providing counselling and assistance to them, particularly in instances of rape and sexual assault

Territory of Rwanda under UN Charter's Chapter VII, and the citizens of Rwanda accountable on the territory of the bordering States for genocide and other similar breaches perpetrated from 1 January 1994 to 31 December 1994.<sup>58</sup> There are 32 Articles (as modified), the Rules of Evidence and Procedure in place there. There are three Trial Chambers in the building. For the purposes of investigation and prosecution, the office is divided into several sections. An Appeal Chamber associated with the ICTY.<sup>59</sup> A Witness and Victim Support Section has been constituted for defence and prosecution witnesses to (a) offer all of the victims and witnesses who are ordered to confess before the Court with unbiased assistance and security services; (b) Recommending the implementation of victim and witness protection measures; (c) ensuring that appropriate help is provided, notable consultation in rape and sexual attack, includes physical and psychological recovery; (d) design short- as well as long term protection strategies for individuals who have confessed before the Court and are afraid of a life, property or family danger; (e) In the determination of protection actions for witnesses and victims, reply to the Trial Chambers after discussions; and (f) Appeal a Judge or Chamber, subject to the actions being compatible with the defendant's rights, to decide suitable safety and privacy precautions for witnesses and victims.<sup>60</sup> In its rules of procedure and evidence for protection of witnesses and victims, the International Tribunal for Rwanda should provide such protective actions which include but are not restrained to behaviour of, in-camera hearing & safeguarding of identification of victim.<sup>61</sup>

### **Witness protection in USA & UK-**

The notion of witness protection as generally understood today arose from the notorious *Valacchi* case of 1962 in the United States. *Joe Valacchi*, a man with a serious criminal record, had agreed to give evidence about the inner workings of the Mafia. *Valacchi* was likely to be murdered by his former associates before he could appear in court. He was therefore, taken into protection by the US government, and so survived to give evidence. After this incident the Organized Crime Control Act, 1970 was established which later developed into Comprehensive Crime Control Act, 1984, which authorizes the witness security programs in the country.

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<sup>58</sup> Available at <http://www.icty.org/english/basccdocs/statute.html>

<sup>59</sup> Available at <http://www.icty.org/english/basccdocs/statute.html>

<sup>60</sup> Martin Dixon, *International Law* (Universal Law Publishing Company, New Delhi, 2001).

<sup>61</sup> Article 21 provides Protection of Victims and Witnesses.



Initially the program went through many difficulties and criticism but later as per the situation modifications were done from time to time. Slowly and gradually this program started becoming as a model for witness protection in other countries as the Act provides for <sup>62</sup>-

- a) it provides protection and relocation to those witnesses or potential witnesses who were engaged in any organized criminal activity or some other serious offence, in any judicial proceedings,
- b) the protection extends to immediate family member of the witnesses or potential witnesses who were closely related to him and whose life is also in danger on account of participation in the judicial proceeding,
- c) it also has provision of giving new identities to the witnesses so as to protect them from any kind of apprehension in number of cases.
- d) It also aimed to provide housing facility, medical care, job training and also support in providing any kind of employment and funding till the witness desires.

A similar programme is in operation in Canada under the Witness Protection Act, 1996. The purpose of the Act is to encourage law enforcement by simplifying the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters. Likewise, the Australian Witness Protection Act, 1994 establishes the National Witness Protection Programme in which, *inter alia*, the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses.

In **United Kingdom**, the Serious Organized Crime and Police Act, 2005 is giving protection to witnesses. Under this Act, Police services and law enforcement agencies provide protection to witnesses. Provisions are also made for getting physical police protection, identity change, relocation and other support services if they are endangered because of giving testimony in Court. The Code gives certain protections to the witnesses like rejection of bail of the accused if there is apprehension that he may threaten the witnesses or their relatives, Witness may also be allowed to answer questions through video link. The questions which may disclose the

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<sup>62</sup> <https://www.law.cornell.edu/uscode/text/18/3521>

identity of witness may be avoided by the court. An attendant may also be allowed to remain present with the witness.

### **Witness Protection Under Indian Law-**

Hon'ble Supreme Court of India emphasized the need and urge for the same and highlighted in the case of *Mahender Chawla and Others v. Union of India and Others*.<sup>63</sup> The ministry of home affairs in consultation with the national legal service authority, bureau of police research & development and the state governments prepared witness protection scheme, 2018. The 2018 scheme acquired a wide-ranging approach to establish a complete legal and institutional framework for the protection of witnesses. In 2019, Ministry of Home Affairs had issued instructions regarding Witness Protection Scheme to all States / UTs<sup>64</sup>. Ministry of Home Affairs had requested all States / UTs to take suitable steps to enforce the Witness Protection Scheme, 2018 in letter and essence and that it shall be the 'law' under Article 141/142 of the Constitution. In view of the earlier request and the current provisions in **BHARTIYA NAGRIK SSURAKSHA SANHITA 2023**, such a scheme may be brought in all states/UTs.

**BNSS, 2023** Discloses the Safeguard of Witness Protection: The new law clearly emphasizes that Witness Protection is not just a legal provision but it's a commitment to justice. Hence, with an aim to guard the witnesses against criminal conduct, deter the lawbreakers and sanction those who violate or attempt to violate the laws of the land and to protect the witnesses from harm and ensure their safety a new section has been added in BNSS. Section 398 of BNSS: A Game-Changer in Witness Safety this revolutionary accumulation ensures witness safety becomes an integral part of the criminal procedural framework and every State Government is mandated to prepare and notify a Witness Protection Scheme (WPS)<sup>65</sup>.

### **CONCLUSION-**

In most of the countries governed by democratic constitutions and rule of law, the position today is the right to an open 'public trial' in the immediate presence of the accused which is fundamental but is not treated as absolute and may be restricted to a reasonable extent in the interests of fair administration of justice and for ensuring that victims and witnesses depose

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<sup>63</sup> 2018 SCC On Line SC 2679.

<sup>64</sup> vide No. 24013 / 35 / 2016 - CSR.III Dated January 14, 2019

<sup>65</sup> Section 398 of BNSS, 2023

without any fear. The right to public trial is specifically mentioned in Article 14(1) of the International Covenant on Civil Political Rights (ICCPR) to which India is a party. The ICCPR refers to the right of 'public, open, fair trial' to an accused and it also states in what manner it could be restricted.

The UNODC passed out an assessment of formal protection programmes for witnesses in criminal proceedings in 43 Member States. Of these, 14 (33%) jurisdictions had full-fledged witness protection programmes that were able to relocate and change the identity of threatened witnesses, four jurisdictions (9%) had enacted new legislation providing for the establishment of witness protection programmes, but the programmes were not so far effective. Eighteen jurisdictions (42%) had no established programmes but had some form of security measures, such as police or procedural in-court protection, and 7 jurisdictions (16%) had no witness protection measures at all.<sup>66</sup>

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ensures for taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and confirm their safety, as well as that of their families and witnesses on their behalf, from intimidation and retribution. Similarly, Rome Statute of the International Criminal Court, International Criminal Tribunal for Former Yugoslavia and Rwanda and International Human Rights Instruments also ensure protection to the witness.

Hence based on the conclusion of this chapter, it can be concluded that the modern witness protection program of all international entities is in a premature stage. It can also be said that there is a huge difference between the developed and developing countries' laws.

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<sup>66</sup> (UNODC, 2008).