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The Problem of Witness Interference before International Criminal Tribunals

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Abstract

Victims of international crimes, such as genocide, crimes against humanity and war crimes, are considered crucial in establishing the evidence in cases before international criminal tribunals. Yet, due to the geographic, political, ethnic or religious circumstances in the country of origin, the nature of the crimes concerned and the nature of the victims' or accuseds' involvement in the crimes, international cases also bring with them significant risks for victims/witnesses and challenges for tribunals in protecting them. At times, individuals have disclosed identifying information of victims/witnesses in violation of protection orders of the tribunal, which has led to threats, intimidations and even murders, and ultimately, in a number of cases, the unwillingness of victims/witnesses to testify. Although the tribunals have measures at their disposal to sanction individuals breaching protection orders, the question remains how big the problem of witness interference really is and how to address this issue adequately.

Keywords

protection – victims/witnesses – witness interference – international criminal law – contempt of court – international criminal tribunals – media – disclosure of identifying information

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Introduction

On a number of occasions it has been held that the testimony of victims/witnesses of international crimes, such as genocide, crimes against humanity and war crimes, is crucial for establishing the evidence at international criminal tribunals. Silvia Arbia, the former Registrar of the International Criminal Court (ICC), for instance, said:

Bluntly put, cases rely on evidence, and it is witnesses that provide the bulk of such evidence. If witnesses appearing before it were to come in harm's way before their testimony, or were not able to give their testimony with dignity and in a safe environment, our cases may not be able to efficiently move forward. The court relies on witnesses, and in turn they rely on us to ensure that they are not harmed as a result of their interaction with us. We therefore have to ensure that their interaction with the Court is a successful one.¹

For many victims/witnesses of international crimes, testifying before an international criminal tribunal – often located outside their country of origin – may be a positive experience, but may also require an act of great courage, in particular when the perpetrators still walk the streets of their villages or towns.² For those who do testify, a number of them experience adverse consequences such as intimidation and death threats, while some have even been killed. Such consequences are often the result of the disclosure of identifying information about victims/witnesses (“witness interference”) by a number of possible actors (e.g., the accused, members of the Defence team, journalists). Such disclosures are often intentional, although they may also be accidental (e.g., ICT tribunal staff members). The net result of such disclosures often leads to an unwillingness of victims/witnesses to testify in court or to recantations of their testimonies.

1 Silvia Arbia, *The icc Registrar's Speech at the Opening of the Seminar on the Protection of Victims and Witnesses*, 24 November 2010. See also, e.g., Marlise Simons, ‘Witness in War Crimes Court Tallies Cost of a Decade in Hiding’, *The New York Times*, 15 August 2014 (according to the Registrar of the ICC, Herman von Hebel: “Without witnesses, without key insiders, there are basically no trials”); Patricia M. Wald, ‘Note from the Field: Dealing with Witnesses from War Crimes Trials: Lessons from the Yugoslav Tribunal’, 5 *Yale Human Rights & Development Law Journal* (2002) 217, 219; Human Rights Center, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses*, June 2014, p. 11 (“Victims and witnesses are the lifeblood of trials involving serious international crimes (...”).

2 Human Rights Center, *ibid.*, pp. 5–6, 11.

The international criminal tribunals have protective and special measures at their disposal in order to protect those who are of utmost importance to their proceedings: victims/witnesses. Moreover, it cannot be expected that victims/witnesses will risk their lives, face rejection by their own society or accept exposure to secondary traumatisation as a consequence of their giving testimony without assurance of protection. However, in light of the above noted adverse impacts, the question remains whether the rights of victims/witnesses (to safety, privacy and dignity, and physical and psychological well-being) are adequately safeguarded by the protective and special measures available at the international criminal tribunals? Limited academic attention has been paid to the topic of witness interference before international criminal tribunals.³ Even less attention has focussed on the publicly available cases of witness intimidation and the reasons why protection of victims/witnesses is such a difficult matter in international cases.

An exploration of the relevance and urgency of efficient protective measures is reviewed in this contribution. In addition, the publicly known cases of witness intimidation, the underlying reasons of why protecting victims/witnesses in international cases can be problematic, and the international criminal justice response to cases of witness interference are explored. In particular, the rules and practices before the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and

3 For further discussion in relevant academic literature, see *e.g.*, Carla Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level', 4 *Journal of International Criminal Justice* (2006) 546; Mark B. Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings', 2(2) *Journal of International Criminal Justice* (2004) 407–408; Göran Sluiter, 'The ICTY and Offences against the Administration of Justice', 2(2) *Journal of International Criminal Justice* (2004) 631–641; Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR* (Intersentia, Oxford – Antwerp, 2005), pp. 231–282; Andrew Trotter, 'Witness Intimidation in International Trials: Balancing the Need for Protection against the Rights of the Accused', 44 *The Geo. Wash. Int'l L. Rev.* (2012) 521–537; Robert Cryer, 'Witness Tampering and International Criminal Tribunals', 27(1) *Leiden Journal of International Law* (2014) 191–203; Daniel Kravetz, 'The Protection of Victims in War Crimes Trials', in: Thorsten Bonacker and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, The Hague: T.M.C. Asser Press, 2013, pp. 149–163; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, London, 2014), pp. 74–81; Mayeul Hiéramente, Philipp Müller and Emma Ferguson, 'Barasa, Bribery and Beyond: Offences against the Administration of Justice at the International Criminal Court', 14 *International Criminal Law Review* (2014) 1123–1149.

the ICC are examined.⁴ At the outset, a brief overview of the legal framework related to the available protective measures that international criminal tribunals can use to protect victims/witnesses and to address breaches of such protective measures is provided (section 1). Following this, attention is focussed on the impacts and risks of disclosing identifying information not only on victims/witnesses themselves, but on the public at large and the administration of justice as well (section 2). The underlying difficulties facing international criminal tribunals when protecting victims/witnesses of international crimes is then examined. Here, critical considerations including the geographic, political, ethnic or religious circumstances in the country of origin, the nature of the crimes concerned and the nature of the victims' or accuseds' involvement in the crimes are considered (section 3). Next, one specific group of actors that has in the past been accused of disclosing identifying information of victims/witnesses, i.e., people working for the media, will be highlighted. This section will examine the effects of the media's disclosing identifying information of victims/witnesses on victims/witnesses, the public and the administration of justice and how the international criminal tribunals have dealt with such instances (section 4). In the final section (section 5), some concluding remarks on the way forward will be provided.

1 Legal Framework

Not all victims/witnesses of international crimes want or in fact need protection when testifying in court. The numbers of victims/witnesses who have benefited from protective measures at the international criminal tribunals vary. For example, between 1996–2013 more than 4,500 witnesses testified before the ICTY, of which over a quarter of those testifying received some type

4 For purposes of consistency and readability, the following terminology is used in this contribution: (a) Victims/witnesses: victims and/or witnesses of international crimes, who can be victims/witnesses of the prosecution or the defence as well as actual, potential or alleged victims/witnesses ('alleged' in the sense that others assume they may be victims/witnesses); (b) International criminal tribunals: international tribunals/courts (ad hoc, hybrid, permanent) before which accused of international crimes are, or have been prosecuted, such as the ICTY, ICTR, ICC, Extraordinary Chambers in the Courts of Cambodia (ECCC), Special Court for Sierra Leone (SCSL) and Special Tribunal for Lebanon (STL), with a focus on the first three tribunals; (c) International crimes: the crimes that can be prosecuted before any of the international criminal tribunals, including genocide, crimes against humanity, war crimes, the crime of aggression, and acts of terrorism; (d) International cases: cases in which accused persons are prosecuted for international crimes, either before international criminal tribunals or national and local courts, with a focus on the international criminal tribunals.

of protective measure.⁵ At the ICTR, on the other hand, of the approximately 3,400 witnesses who testified before this tribunal to date, some eighty-three per cent did so using one or more protective measures.⁶ At the ICC, over 650 witnesses, victims and family members have been provided with protective measures.⁷ In this section the protective measures available to victims/witnesses of international crimes before international criminal tribunals is set out as well as the tribunals' possible responses in case of breach of such protective measures.

1.1 *Protective Measures*

Protective measures for victims/witnesses who appear before international criminal tribunals are provided for a number of reasons, including: (1) to minimise serious risks to their security; (2) to avoid serious incursions of their privacy and dignity; and (3) to reduce trauma associated with their participation or giving testimony in court.⁸ Based on these reasons, three main categories of protective and special measures for victims/witnesses emerge including those aimed at: (1) protection from the accused and his counsel (also referred to as anonymity measures); (2) protection from the press and the public, such as the use of pseudonyms for victims and witnesses, the use of image or voice distortion and the use of closed sessions (also referred to as confidentiality measures); and (3) protection from retraumatisation, or so-called secondary victimisation, such as measures that avoid face-to-face confrontation with the

5 See 'Witness statistics', <www.icty.org/sid/10175>, 2 December 2014.

6 See 'Witnesses', <www.unmict.org/en/about/witnesses>, 2 December 2014.

7 ICC Press Release, 'ICC Deeply Concerned with Reported Death of Mr Meshack Yebesi; Stands Ready to Assist Kenyan Investigations', 6 January 2015.

8 Or, in the language of Article 68 of the ICC's Rome Statute, "the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". These goals are also recognised in, *inter alia*, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Resolution 40/34, 29 November 1985, Article 6(d); and Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, Council of Europe, 28 June 1985, C.8, F.15, G.16. Note that all international criminal tribunals provide for more or less similar frameworks concerning the available protective measures and criminal justice responses when breaches of protective measures occur. See *e.g.*, Guido Acquaviva and Mikaela Heikkilä, 'Trial Process – Witnesses: Protection and Testimony', and Anne-Marie de Brouwer and Mikaela Heikkilä, 'Victim Issues: Participation, Protection, Reparation and Assistance', in Göran Sluiter, Hakan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalà (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press, Oxford, 2013), pp. 818–878 and pp. 1333–1354, respectively (note that, unlike the ICTY and ICTR where victims only appear as witnesses, the ICC also allows victims to participate in the proceedings).

accused.⁹ Since the Statutes of the international criminal tribunals state that protective measures shall not be prejudicial to, or inconsistent with, the rights of the accused to a fair and impartial trial,¹⁰ full anonymity (withholding the identifying information of victims/witnesses from the accused and his/her team members) has generally not been granted as a protective measure for victims appearing as witnesses.¹¹ Protective measures that are applied during the investigation and prosecution of the crimes¹² serve to minimise the risks a witness runs following testimony. However, even in the post-trial phase, the international criminal tribunals have adopted certain measures to ensure the victims' and witnesses' safety, including relocation either inside or outside the home country, where the need arises.¹³ However, in light of the enormous human sacrifices (contact with family and friends is forbidden) and high costs involved with relocation, this particular measure has been infrequently applied.¹⁴ In addition, States have generally shown reluctance to concluding agreements on the relocation and protection of witnesses.¹⁵ It has been held that the current number of agreements that the ICC has, for instance, concluded with States – likely fewer than two dozen – may not be sufficient to

- 9 In the legal framework of the ICC, ICTY and ICTR, the significance of victim and witness protection is recognised on several occasions. See, *inter alia*, Articles 68 ("Protection of the victims and witnesses and their participation in the proceedings") and 69(2) ("Evidence") Rome Statute and Rules 87 ("Protective measures") and 88 ("Special measures") of the ICC's Rules of Procedure and Evidence (RPE); and common Rules 69 ("Protection of Victims and Witnesses"), 75 ("Measures for the Protection of Victims and Witnesses") and 79 ("Closed Sessions") of the ICTY and ICTR RPE.
- 10 See *e.g.*, Articles 68(1) and 67 Rome Statute ("Rights of the accused"); Articles 20–22 ICTY Statute; and Articles 19–21 ICTR Statute.
- 11 See further on this topic, *e.g.*, Anne-Marie de Brouwer, 'Anonymity as a Protective Measure for Victims and Witnesses before the International Criminal Court', in Toine Spapens, Tijs Kooijmans and Marc Groenhuijsen (eds.), *Liber Amicorum Prof. Cyrille Fijnaut* (Intersentia, Antwerp, 2011), pp. 17–29.
- 12 For the ICC, for example, see Article 68(1) Rome Statute.
- 13 See *e.g.*, Rule 16(4) ICC RPE (dealing with the possibility of relocation and support services) and ICC Rule 17 RPE (referring to long-term plans for protection).
- 14 For example, before the ICTY, "less than a fraction of one per cent of witnesses have been granted long-term protection such as relocation to third countries". See 'Witness statistics', <www.icty.org/sid/10175>, 2 December 2014.
- 15 See *e.g.*, Blake Evans-Pritchard and Simnon Jennings, 'Action Urged on ICC Witness Protection', *IWPR*, 28 March 2014; ICC Assembly of States Parties, *Summary of the Arusha Seminar on Witness Protection (29–30 October 2013)*, ICC-ASP/12/36/Add.1, 7 November 2013; Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa*, (Institute for Security Studies, 2010), pp. 54–56.

adequately justify the need to relocate and protect witnesses.¹⁶ To conclude, within the Registries of the international criminal tribunals, a special “Witness Support and Protection Unit” exists that provides support and protection services to victims/witnesses from both the Prosecution and Defence.¹⁷

1.2 *Breach of Protective Measures: Contempt of Court Proceedings*

The Prosecutor, the Defence or any other participant in the proceedings are prohibited from disclosing information to a third party revealing the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification. The rule has a broad reach as it prohibits the disclosure of identifying information by participants in the proceedings to anyone who was not directly involved in the case. It is imperative that the chain of people aware of the identity and whereabouts of the victims/witnesses is kept as small as possible in order not to jeopardise the victims/witnesses’ safety, privacy and dignity. Before the ICC, for example, anyone who breaches the rule on non-disclosure of identification details of a victim to a third party can be sanctioned for misconduct before the Court.¹⁸ The sanction may include a fine or the removal of the person who committed the misconduct from the proceedings for a temporary or permanent period.¹⁹ In addition, the Rome Statute provides for another form of contempt of court that is aimed to protect witnesses, which relates to “corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence”.²⁰ The sanction the ICC may impose in these instances is imprisonment to a maximum of five years or a fine, or both. Before the ICTY and the ICTR, breach of

16 *Ibid.*

17 See *e.g.*, Article 43(6) Rome Statute and Rules 16–18 ICC RPE; and common Article 34 ICTY and ICTR Statutes.

18 Article 71 Rome Statute.

19 See Rules 170–172 (“Misconduct Before the Court Under Article 71”) ICC RPE. Rule 171(4) states that the fine may not exceed EUR 2,000, except in cases of continuing misconduct where a new fine may be (cumulatively) imposed for each day the misconduct continues.

20 Article 70 Rome Statute (“Offences against the Administration of Justice”) and Rules 162–169 ICC RPE. Rule 172, however, provides that if the conduct covered by Article 71 also constitutes one of the offences defined in Article 70, the Court will proceed in accordance with Article 70 and Rules 162–169. According to Acquaviva and Heikkilä, contrary to the ICTY and ICTR regimes, breaches of confidential measures are not as such *explicitly* included in the Rome Statute. See Acquaviva and Heikkilä, *supra* note 8, pp. 830–831.

confidentiality measures ordered by the Tribunals may also lead, and has led, to contempt of court proceedings.²¹ It is interesting to note that the penalties before the ICTY and ICTR are higher than those under the ICC regime. Such penalties include: imprisonment with a maximum of five years (ICC) to a maximum of seven years (ICTY/ICTR). Furthermore, fines with a total amount not exceeding 50 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants (ICC) in comparison to fines with a maximum of € 100,000 (ICTY/ICTR).

Another way to prevent breaches of confidentiality orders has been found in the keeping of a log which includes the names of the persons in possession of the witnesses' statements.²² These individuals are under instruction not to reproduce those statements and to return them when no longer required, on pain of contempt of court.²³ Such orders have been imposed for the benefit of protected witnesses regularly.²⁴ In December 2009, the Judges at the ICTY introduced a new rule in its RPE, i.e., Rule 92 *quinquies*. This rule allows a party, in lieu of oral testimony, to tender in writing the evidence of a person subjected to improper interference, which includes threats, intimidation, injury, bribery or coercion. This provision specifically allows for the admission of evidence that goes to the acts and conduct of the accused without cross-examination in the interest of justice.²⁵ To date, this rule has not yet been applied²⁶ and it

21 Common Rule 77 ICTY and ICTR RPE.

22 *Prosecutor v. Tihomir Blaškić*, Decision of Trial Chamber I on the Requests of the Prosecutor of 12 and 14 May 1997 in Respect of the Protection of Witnesses, Case No. IT-95-14, 6 June 1997, para. 10.

23 *Ibid.*

24 See e.g., *Prosecutor v. Dragan Gagović, Gojko Janković, Janko Janjić, Radomir Kovač, Zoran Vuković, Dragan Zelenović, Dragoljub Kunarac and Radovan Stanković*, Decision on Prosecution Motion to Protect Victims and Witnesses, Case No. IT-96-23 and 23/1, 29 April 1998.

25 This rule has been criticised by some as violating the right of the accused to a fair trial. See e.g., Colleen Rohan, 'Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?', in William A. Schabas *et al.* (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Ltd., Aldershot, 2013), pp. 289–306; Michele Caianiello, 'First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?', 9 *Journal of International Criminal Justice* (2011) 385. See otherwise Trotter, *supra* note 3, p. 537.

26 Yvonne McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis', 27(4) *Leiden Journal of International Law* (2013) 973.

remains to be seen whether this option will be implemented and whether it will work in practice.

Despite the prohibition of disclosing identifying information of victims/witnesses, several contempt of court proceedings have nevertheless been held before international criminal tribunals due to the disclosure of such identifying information.²⁷ Given this, the next sections will address the extent to which victims/witnesses can really be protected and whether penalties for breaching protective orders really work.

2 The Impacts and Risks Involved when Disclosing Identifying Information of Victims/Witnesses

As previously noted, despite explicit rules on protective measures for victims/witnesses and penalties in case of breaches thereof, identifying information of actual, potential or alleged protected victims/witnesses before international criminal tribunals has at times been divulged by a variety of actors both in and outside the international criminal tribunals. From studying the publically known effects on victims/witnesses, it can be held that the effects of disclosing identifying information can be very severe for the victims/witnesses concerned.

2.1 *Effects Resulting from the Disclosure of Identifying Information of Victims/Witnesses*

Disclosure of identifying information of victims/witnesses before international criminal tribunals has, at times, resulted in:²⁸

- Intimidations, death threats, attacks (sometimes causing temporary or permanent injury) and killings (“physical harm”).^{29,30,31}

27 For example, for the contempt of court cases before the ICTY, see the list of 24 such cases at the ICTY website, <www.icty.org/action/contemptcases/27#casetabs>, 2 December 2014. See further section 4 below on contempt of court cases involving media officials.

28 The prevalence of witness interference is difficult to quantify for many reasons, including for reasons of underreporting. The list of examples of cases given in this report are therefore only a sample of cases that could be found in the public domain.

29 With regard to the ICTY, see e.g., Marlise Simons, ‘Court Rejects Any Liberty for Milosevic, Citing Threats’, *The New York Times*, 7 March 2002 (victims/witnesses scheduled to testify in the Milošević case were threatened, including through death threats); Simons, *supra* note 1 (a victim/witness in the Milošević case was attacked); UNHCR, *UNHCR’s Concerns with the Designation of Bosnia and Herzegovina as a Safe Country of Origin*, July 2003, p. 5 (two victims/witnesses were, upon their return from the ICTY to Bosnia-Herzegovina,

- attacked); Amnesty International, *Croatia: Protect War Crimes Witnesses*, 10 February 2011 ("many of them [victims/witnesses from Croatia] have been exposed to threats and intimidation or even killed. (...) In many cases witnesses [including ICTY witnesses] have refused to testify citing fears for their safety as the main reason"); Mirko Klarin, 'Comment: Protected Witnesses Endangered', *IWPR (Institute for War & Peace Reporting)*, 22 February 2005 (victims/witnesses in the *Milošević* case suffered from threats and attacks); *IWPR*, 'Serbian Anger at Haradinaj Acquittal', 14 April 2008 (citing threats, killings and attacks and victims'/witnesses' reluctance or refusal to testify in court in the trial of *Haradinaj et al.*); Eric Stover, *The Witnesses: War Crimes and The Promise of Justice in The Hague* (University of Pennsylvania Press, Philadelphia, PA, 2005).
- 30 With regard to the ICTR, see *e.g.*, Canada: Immigration and Refugee Board of Canada, *Rwanda: Whether People Who Give Testimony at the Trials and Hearings of Those Accused of Genocide and Crimes Against Humanity Are Being Harassed, Intimidated and Threatened*, RWA30932.E, 1 January 1999 (at least 21 individuals who had agreed to testify before the ICTR had been killed before they had the opportunity or were seriously injured); *Associated Press*, 'Tutsi Witness Is Killed After Her Testimony', 17 January 1997 (a woman who had testified about killings in the *Akayesu* case was killed upon her return along with her husband and seven children (four being her own)); *Hirondelle News Agency*, 'Survivors Accused 14 Defence Investigators of Genocide Crimes', 25 March 2002 (a man who had testified in the *Kayishema/Ruzindana* case received threats upon his return and was attacked, which caused him serious injuries and a permanent disability; three victims/witnesses who had testified about sexual violence in the *Kajelijeli* case faced, upon their return home, death threats and had to go into hiding in a city where they had no shelter, close relatives or means of survival; a family that had requested anonymity in the case of Rutaganda had received threats (by means of a letter) while still in Arusha); International Federation for Human Rights, *Report: Victims in the Balance, Challenges Ahead for the International Criminal Tribunal for Rwanda*, No. 329/2, November 2002, p. 9 (two witnesses who had returned home from the ICTR received a number of messages containing death threats and had to seek asylum in Kigali); *Hirondelle News Agency*, 'Prosecution Witness Assassinated in Rwanda', 20 October 2004 (a Prosecution witness, a confessed *genocidaire*, was killed at his home one month after he had returned from the ICTR, where he had given evidence against Colonel Simba); *The Ottawa Citizen*, 'Witnesses to Rwanda Genocide Live in Fear', 21 March 2008 (two victims/witnesses in the *Nsengimana* case received threats and feared for their lives); Mahony, *supra* note 15, p. 59 (citing 99 killings before the establishment of the ICTR's Witnesses and Victims Support Section in 1996).
- 31 For the ICC, see *e.g.*, *Procureur c. Thomas Lubanga Dyilo, Situation en République Démocratique du Congo*, icc-01/04-01/06-964, 28 septembre 2007, para. 3, Conclusions Conjointes des Représentants Légaux des Victimes a/0001/06 à a/0003/06 et a/0106/06 Relatives aux Modalités de Participation des Victimes dans le Cadre des Procédures Précédant le Procès et Lors du Procès, (in which the legal representatives of the four recognised victims, a/0001/06 to a/0003/06 and a/0105/06, pointed out that since the victims all live in the DRC they are at risk of intimidation and threats from their own community – the same community the accused comes from and where he is still influential); Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*,

- Stigmatisation and isolation by relatives, community members and others, in particular in cases where the victims/witnesses suffered from sexual violence (“psychological harm”).³²
- Economic and social hardship, such as loss of jobs, houses and friends (“socio-economic harm”).³³
- Offering of bribes.³⁴
- A similar fate as the victims/witnesses (e.g., threatened, attacked, killed) for relatives, loved ones and others.³⁵

Frequently, the ultimate effect or net result of such disclosures is the refusal of victims/witnesses to testify in court, even when subpoenaed by an international criminal tribunal. In this way, witness interference was done with the aim of making sure that there was no evidence with regard to a particular

July 2008, p. 153 (“Human Rights Watch’s research in situation countries indicates that real threats have been made against victim participants and against the intermediaries who help to facilitate their interaction with the Court”); *AllAfrica.com*, ‘Kenya: Ocampo Witnesses Escape Death’, 5 January 2010 (discussing attempts to kill potential witnesses in the Kenya situation); *Prosecutor v. Bemba Gombo*, Public Redacted Version of the 26 September 2011 Decision on the Accused’s Application for Provisional Release in Light of the Appeals Chamber’s Judgment of 19 August 2011, ICC-01/05-01/08, 27 September 2011, para. 29 (“several incidents have been reported since July 2011 in which threats have allegedly been made against prosecution witnesses and their families in connection with their testimony at the Court”); Human Rights Center, *supra* note 1, pp. 50, 62. (some victims/witnesses or their families had experienced threats after the victims’/witnesses’ testimony or feared for reprisals).

- 32 *E.g.*, Binaifer Nowrojee, “*Your Justice Is Too Slow: Will the ICTR Fail Rwanda’s Rape Victims?*”, UNRISD Occasional Paper Series, No. 10, Geneva, 2005 (citing examples of victims/witnesses who were abandoned by partners and isolated, ridiculed and stigmatised by family and community members after they found out that the victims/witnesses had testified before the ICTR).
- 33 Stover, *supra* note 29, p. 98.
- 34 *E.g.*, *Prosecutor v. Muthaura and Kenyatta*, Prosecution Notification of the Withdrawal of Charges against Francis Kirimi Muthaura, ICC-01/09-02/11, 11 March 2013, para. 11 (“a critical witness against Mr Muthaura, who recanted a significant part of his incriminating evidence after the confirmation decision was issued, and who admitted accepting bribes from persons allegedly holding themselves out as representatives of both accused”); *Prosecutor v. Walter Osapisi Barasa*, Warrant of Arrest for Walter Osapisi Barasa, ICC-01/09-01/13, 2 August 2013 (arrest warrant for offering bribes to prosecution witnesses to get them to withdraw from proceedings).
- 35 *E.g.*, *Associated Press*, ‘Tutsi Witness Is Killed After Her Testimony’, 17 January 1997 (other children, who happened to be in the same place as the victim/witness and her family, were killed as well).

accused or charge. In other cases, the aim of witness interference was to have victims/witnesses recant or change their testimonies (e.g., testify to events that did not occur or that a particular accused was not involved).³⁶ For example, before the ICTY, in the *Haradinaj et al.* case, many witnesses cited fear as a prominent reason for not wishing to appear before the court to give evidence.³⁷ One of the subpoenaed witnesses began to testify in court but held that he was “under a great deal of stress and feared for his safety and that he was therefore unable to complete his testimony”.³⁸ The Chamber in this case held that: “the difficulty in obtaining evidence was a prominent feature of this trial and a few witnesses who were expected to give evidence on central aspects of the case were never heard”.³⁹ Two of the three defendants were, seemingly due to this, acquitted⁴⁰ and the third was acquitted on re-trial. In the *Limaj et al.* case, serious witness interference also permeated the trials and resulted in the acquittal of two of the three accused due to a lack of evidence.⁴¹ In the *Tadić* case, threats to the victim and to the victim’s family resulted in the withdrawal of the victim from the case and, in the absence of sufficient evidence, the dropping of the rape charges for which the victim was going to provide evidence.⁴² In the *Milošević* case, several victims/witnesses decided not to testify in the trial because of threats directed at them and their families.⁴³ Before the ICC, witness interference also impacted on the willingness of victims/witnesses to testify before the Court. For example, in the *Ruto* case (Kenya situation) the Prosecutor held that “some witnesses were being intimidated in Kenya, some of whom have withdrawn from the case”.⁴⁴ A possible witness in the *Ruto* case,

36 *E.g.*, *Prosecutor v. Tadić*, Judgement, IT-94-1-T, 7 May 1997, paras. 553–554; *ICTY Press Release*, Judgement in the Case of The Prosecutor v. Beqa Beqaj, 5 May 2005; *Independent Counsel v. Bangura, Kargbo, Kanu and Kamera*, Judgment in Contempt Proceedings, SCSL-2011-2-T, 25 September 2012; *Prosecutor v. Muthaura and Kenyatta*, Prosecution Notification of the Withdrawal of Charges against Francis Kirimi Muthaura, ICC-01/09-02/11, 11 March 2013, para. 11.

37 *Prosecutor v. Haradinaj et al.*, Judgement, IT-04-84-T, 3 April 2008, paras. 6, 22.

38 *Ibid.*, para. 22. See also *Sense Agency*, ‘Witness Refuses to Testify Because Witnesses Get Killed in Kosovo’, 5 June 2007. See also *Prosecutor v. Shefqet Kabashi*, Sentencing Judgement, IT-04-84-R77.1, 16 September 2011.

39 *Prosecutor v. Haradinaj et al.*, Judgement, IT-04-84-T, 3 April 2008, para. 28.

40 *Prosecutor v. Haradinaj et al.*, Judgement, IT-04-84-A, 19 July 2010, para. 38.

41 *Prosecutor v. Limaj et al.*, Judgement, IT-03-66-T, 30 November 2005, para. 15. See also Kravetz, *supra* note 3, p. 160.

42 William Walker, ‘The Yugoslav War Crimes Tribunal: Recent Developments’, 19 *Whittier Law Review* (1997) 308.

43 Klarin, *supra* note 29.

44 *BBC*, ‘Kenya’s William Ruto Trial: ICC Judge Warns Bloggers’, 18 September 2013.

Mr. Meshack Yebei, was found dead in Kenya in January 2015.⁴⁵ According to the Prosecution, Mr. Yebei was ultimately not included on the Prosecution's list of trial witnesses due to the fact that he was alleged to have corrupted Prosecution witnesses in the *Ruto* case.⁴⁶ According to the Prosecution: "a network of individuals [has been identified] who have been working together to sabotage the Prosecution's case against Messrs. Ruto and Sang, by using bribes and/or threats to either dissuade witnesses from testifying in this case or influence Prosecution witnesses to recant their testimony".⁴⁷ In the *Muthaura* case (Kenya situation), the Prosecutor decided to drop the charges against him, which was in part, if not mostly, because of the interference with witnesses.⁴⁸ Similarly, in the *Kenyatta* case (Kenya situation), the Prosecutor withdrew the charges against the President of Kenya in light of the state of the evidence in the case.⁴⁹ The Prosecutor had to take this decision due to the unwillingness of the Kenyan government to cooperate with the Court and witness interference which led to witnesses withdrawing from the proceedings or changing their testimony.⁵⁰ Also, the *Lubanga* case (DRC situation), was plagued with witness interference which impacted on the victims'/witnesses' willingness to appear before the Court.⁵¹

2.2 *Risks Resulting from Witness Interference*

It is not the case that every witness interference will always and automatically lead to an unwillingness of every victim/witness to testify before an international criminal tribunal.⁵² However, it is clear that witness interference with its

45 ICC Press Release, 'ICC Deeply Concerned with Reported Death of Mr Meshack Yebei; Stands Ready to Assist Kenyan Investigations', 6 January 2015.

46 ICC Press Release, 'Statement of the Office of the Prosecutor Regarding the Reported Abduction and Murder of Mr. Meshak (sic) Yebei', 9 January 2015.

47 *Ibid.*

48 *Prosecutor v. Muthaura and Kenyatta*, Prosecution Notification of the Withdrawal of Charges against Francis Kirimi Muthaura, ICC-01/09-02/11, 11 March 2013, para. 11. See also Bernard Momanyi and Simon Jennings, 'Kenya Witnesses Face Harassment', *IWPR*, 5 June 2013.

49 ICC Press Release, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges against Mr. Uhuru Muigai Kenyatta', 5 December 2014.

50 *Ibid.* In addition, according to the Prosecutor: "The withdrawal of the charges does not mean that the case has been permanently terminated. Mr. Kenyatta has not been acquitted, and the case can be re-opened, or brought in a different form, if new evidence establishing the crimes and his responsibility for them is discovered".

51 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras. 151–168.

52 To establish this, interviews with all victims/witnesses who have been subjected to such witness interference would be required, if at all possible. Furthermore, it should be noted

frequent physical, psychological and/or socio-economic effects, creates a significant risk that victims/witnesses will be unwilling to testify before international criminal tribunals.⁵³ This has been recognised by the ICC in the *Lubanga* case, where it was noted that whether or not the threats were credible (and many were), they had an effect on victims/witnesses and their willingness to co-operate with the Court.⁵⁴ In addition, as explained by the former Registrar of the ICC, Silvia Arbia: “If the Court wants to retain the confidence of victims and affected communities, as well as maintaining its reputational capital, it is important that it pays particular attention to this delicate issue [witness protection and interference]”.⁵⁵ In general it has been held that “witness intimidation lowers public confidence in the criminal justice system and creates the perception that the criminal justice system cannot protect the citizenry”.⁵⁶

It is important to note that these consequences can occur for actual, potential and alleged victims/witnesses. It is the conduct of witness interference that creates a hostile environment or sends a signal that similar things can happen to anyone and not only to individuals who are actual victims/witnesses.

that victims/witnesses are not a homogenous group who respond in the same way to similar actions.

- 53 This has been recognised in cases of common criminality and it can be held that this is therefore (see remarks on this in paragraph 2.4) even more so in cases concerning international crimes. See Kelly Dedel, *Witness Intimidation*, US Department of Justice, July 2006, p. 6; and Robert Davis, Barbara Smith and Madeline Henley, *Victim/Witness Intimidation in the Bronx Courts: How Common Is It, And What Are Its Consequences?*, 1990 (this study measured the prevalence of witness intimidation among 260 victims and witnesses in the Bronx Criminal Court, Bronx, New York, to assess its consequences for victims and its impact on case outcomes. The study found that intimidation was widespread, and that it can have serious consequences, including that victims who were threatened were nearly three times as likely as victims who had not been threatened to decide to drop charges); Stuart Mass, ‘The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, the Contempt Powers of the Court, and the Witness Protection Program’, 50 *Fordham Law Review* (1981–1982) 583 (“Public awareness of the potential danger to prospective witnesses, as well as specific threats against potential witnesses and their families, frequently account for the refusal of individuals to testify at criminal proceedings”).
- 54 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 156. See also: Cryer, *supra* note 3.
- 55 Arbia, *supra* note 1. See also *e.g.*, Associated Press, ‘Tutsi Witness Is Killed after Her Testimony’, 17 January 1997 (after the killing of a victim/witness together with her husband and seven children, according to the then Deputy Prosecutor of the ICTR “many people have refused to speak to the tribunal, fearing reprisals”).
- 56 Dedel, *supra* note 53, p. 6.

Further, the disclosed identifying information does not even have to be accurate. It is the perception that confidential or protected information of purported victims/witnesses has been disclosed that has the damaging effect.

2.3 *The Importance of Witness Protection and Countering Witness Intimidation*

In the ICTY *Aleksovski* case, the Trial Chamber explained why the protection of witnesses is of primary importance; not only for the protection of the lives of the witnesses, but also for the functioning of the Tribunal.⁵⁷ In the *Haradinaj et al.* case, the Appeals Chamber held, while recognising the serious witness intimidation that had plagued the trial proceedings, that “countering witness intimidation is a primary and necessary function of a Trial Chamber”. It further noted that, “for the Tribunal to function effectively, Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them”.⁵⁸ The protection of victims/witnesses from witness interference is thus crucial because 1) it cannot reasonably be expected that victims/witnesses will risk their lives, limbs and reputation by going to testify before an international criminal tribunal; and because 2) of the integrity and outcome of the legal proceedings.⁵⁹ It has been stated many times, not in the least by officials who work or who have worked at international criminal tribunals themselves, that international criminal tribunals – oftentimes in the absence of documentary evidence of the criminal plans of the accused – are heavily dependent on victims’/witnesses’ testimony to establish the crimes committed and the accused’s guilt thereof.⁶⁰ In this light, the absence of victims/witnesses coming forward to testify essentially means that there can basically be no trials.⁶¹ Without victims/witnesses coming forward to testify, the ability to bring justice and end a culture of impunity is thus seriously reduced.⁶² Witness intimidation deprives

57 *Prosecutor v. Zlatko Aleksovski*, Décision Portant Condamnation Pour Outrage Au Tribunal, IT-95-14/1-T, 11 December 1998; cited in: *ICTY Press Release*, ‘Mr. Nobile Found to be in Contempt of the Tribunal’, 15 December 1998.

58 *Prosecutor v. Haradinaj et al.*, Judgement, IT-04-84-A, 19 July 2010, para. 35.

59 Mahony, *supra* note 15, p. 1.

60 *E.g.*, Åsa Rydberg, ‘Case Analysis: The Protection of the Interests of Witnesses: The ICTY in Comparison to the Future ICC’, 12 *Leiden Journal of International Law* (1999) 455; Richard May, ‘The Collection and Admissibility of Evidence and the Rights of the Accused’, in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes against Humanity* (Hart Publishing, Oxford, 2013), pp. 161, 165.

61 See *supra* note 1.

62 Human Rights Watch, Julianne Kippenberg, *Protecting Child Victims in Sexual Violence Trials in the DR Congo: Suggestions for the Way Forward*, 24 November 2009.

the international criminal tribunals of critical evidence, which can result in a loss of the case or the dropping of one or more charges against the accused. Witness interference can thus be seen as a form of conduct which obstructs the administration of justice, something which has in fact been recognised in several cases before the international criminal tribunals.⁶³

2.4 *Witness Interference for International and Common Criminality Cases Prosecuted Nationally*

The effects of witness interference outlined above are also not uncommon for international cases that are being dealt with by national and local courts in the countries where the atrocities took place or other countries willing to prosecute suspects of international crimes. For example, victims/witnesses in the countries of the former Yugoslavia and Rwanda faced severe intimidation, threats, attacks, and in some cases, even death in efforts to prevent them and others from giving testimony before the courts in those countries.⁶⁴ In the case of Joseph Mpambara, who stood trial before a Dutch court for his alleged involvement in the Rwandan genocide, the Court held that several of the witnesses in Rwanda were missing, pressured into lying or had received threats which could all be linked to family members of the accused.⁶⁵ It is recognised that the negative effects on victims/witnesses by disclosing their identifying information can also be found in cases of common criminality in peace time situations.⁶⁶

63 See generally, Göran Sluiter, *supra* note 3. For the cases, see section 4 below and the literature cited in *supra* note 3.

64 For the former Yugoslavia, see *e.g.*, Amnesty International, *Bosnia-Herzegovina: Shelving Justice – War Crimes Prosecutions in Paralysis*, 12 November 2003; Amnesty International, *Justice Shelved – Impunity for Rape in Bosnia Herzegovina*, 12 October 2004; Amnesty International, *Amnesty International's Concerns on the Implementation of the "Completion Strategy" of the International Criminal Tribunal for the former Yugoslavia*, 6 June 2005; Rachel Irwin and Velma Saric, 'Poor Protection for Balkan Trial Witnesses', *IWPR*, 22 November 2012 ("despite their importance to the process, witnesses who come forward to give testimony in local trials [in Serbia, Bosnia, Croatia, and Kosovo] still face threats, intimidation, violent reprisals, and the public outing of their identities (...)"). For Rwanda, see *e.g.*, *BBC News*, 'Genocide Witnesses Being Killed: The Rwandan Government Has Been Urged to Halt the Murder and Intimidation of Potential Witnesses to the Genocide in 1994 During Which 800,000 People Died', 16 December 2003; *The New Times*, 'Survivors' Houses Burnt', 28–29 June 2004; *The New Times*, 'Gacaca Witnesses Murdered', 25 April 2005; *Hirondelle News Agency*, 'Rwanda Ibuka Report – 167 Genocide Survivors Murdered since 1995', 15 July 2008.

65 *Prosecutor v. Joseph Mpambara*, Judgement, Court of Appeal of The Hague, 22-002613-09, 7 July 2011, para. 9.3.

66 *E.g.*, Nicholas R. Fyfe, *Protecting Intimidated Witnesses* (Ashgate, Surrey, 2001).

However, certain specifics inherent to international tribunal cases (as outlined in the next section), make protection issues in international cases even more delicate, challenging and complicated than in ordinary criminal cases.⁶⁷

3 Factors Influencing Victims'/Witnesses' Willingness to Testify

As outlined in the previous section, publicizing identifying information of alleged, potential and actual protected victims/witnesses can ultimately result in their unwillingness to testify or their recanting of their testimony before an international criminal tribunal. The following factors which are typically associated with international cases and are closely connected to each other, may further negatively contribute to victims/witnesses' willingness to testify before an international criminal tribunal.

3.1 *Geographic Circumstances in the Country of Origin*

Some societies are known as "close-knit", such as Kosovo and Rwanda. In such societies, often small and densely populated, perpetrators and survivors frequently live side by side and everyone, in one way or another, seems to know each other. For example, with regard to Kosovo, the ICTY's Trial Chamber in the *Haradinaj et al.* case observed that "Kosovo/Kosova's small communities and tight family and community networks (...) made guaranteeing anonymity difficult"⁶⁸ and, as a consequence, many witnesses cited fear as a key reason not to testify before the tribunal.⁶⁹ Especially for people living in the countryside, where people live a less anonymous life than in the cities, it can be hard to conceal their absence from home for any other purpose than testifying before an international criminal tribunal. This is even more true when the person has never before left the village for any significant length of time. For example, in

67 Wald, *supra* note 1, pp. 238–239 ("There is no doubt that more of them [witnesses in war crimes tribunal proceedings] require special protective measures than in ordinary criminal cases because of the hostile surroundings in which they live and the widespread network of people who have a continuing personal or political interest in silencing them").

68 *Prosecutor v. Haradinaj et al.*, Judgement, IT-04-84-T, 3 April 2008, para. 6.

69 See further *IWPR*, 'Witness Safety a Challenge to Regional Courts', 24 April 2008 ("The territory is so small and its communities so close-knit that relocating witnesses is pointless, and there are insufficient resources to move people abroad. Kabasi [Kosovo's Public Prosecutor] noted that this was one of the main problems facing witness protection efforts. 'Kosovo is a small country where people have close family ties and where everyone knows everybody, so they know who potential witnesses [might] be,' he said".); *Chronicle*, 'Inadequate Witness Protection Program in Kosovo', 30 July 2013.

the case of Rwanda, it has been noted that: “in most cases the identity was deduced by neighbours who noticed that the person was away at the same time as the radio reported on an ICTR trial concerning events from their region or district”.⁷⁰ Upon their return home, this often resulted in major security issues for the victims/witnesses concerned. Similarly, in the case of the DRC, it has been held that “if a local person had an unexplained absence from their village for more than a short period of time they were assumed to be co-operating with, or giving evidence at, the ICC, and opened themselves up to reprisals” from militia groups or members of their community, village or family.⁷¹ In these conflict or post-conflict close-knit societies – and even more so for victims/witnesses living in remote areas where road access and communication is more difficult – protection of victims/witnesses is usually not readily at hand.⁷²

3.2 *Political Circumstances in the Country of Origin*

International criminal tribunals have no (police) enforcement capacity on the ground and therefore have to rely on the national and local state mechanisms to provide protection to victims/witnesses.⁷³ However, as tribunals operate in conflict and post-conflict situations, there are numerous opportunities to intimidate witnesses, due to “absent, weak or involved official entities”.⁷⁴ For example, the frequent intimidation of victims/witnesses in Kosovo occurred in part due to an ineffective national witness protection programme, reluctance of court officials (prosecutors, judges) to take up war crimes cases, and the fact that several former war criminals are still in powerful positions.⁷⁵ In the Kenya

70 International Federation for Human Rights, *supra* note 30, p. 9.

71 Cryer, *supra* note 3, p. 200. See also *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 159.

72 *E.g.*, Human Rights Watch, *supra* note 31, p. 150; Binaifer Nowrojee, *supra* note 32, p. 24.

73 *E.g.*, Arbia, *supra* note 1; Antonio Cassese, ‘On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’, 9(1) *European Journal of International Law* (1998) 13.

74 Cryer, *supra* note 3, p. 200. See also Human Rights Watch, *supra* note 31, pp. 149–150; Harmon and Gaynor, *supra* note 3, p. 407 (“Further complicating the willingness of witnesses to come forward is the unstable political environment that remains in the former Yugoslavia. (...)”); Del Ponte, *supra* note 3, p. 546 (“(...) the lack of enforcement agents, the reliance on national law enforcement agencies in the former Yugoslavia to protect those who may be testifying against what is perceived to be the national interest of the entity or ethnic group, the lack of consistent and reliable intelligence information and the leaking of confidential information are continuing challenges”).

75 *E.g.*, Michael Farquhar, ‘Witness Intimidation a Serious Problem in Kosovo Cases’, *IWPR*, 18 November 2005; Harmon and Gaynor, *ibid.*; *Chronicle*, ‘Inadequate Witness Protection

cases before the ICC, where current government officials have been alleged to be the perpetrators of international crimes, it is unsurprising that they have basically no incentive to co-operate with the Court on implementing court orders on witness protection. Consequently, witness interference is said to have occurred.⁷⁶ As mentioned, in the *Kenyatta* case, the Prosecutor ultimately withdrew the charges against the President of Kenya due to both the unwillingness of the Kenyan government to cooperate with the Court and witness interference which led to witnesses withdrawing from the proceedings or changing their testimony.⁷⁷ The delicate and sensitive security and political situations in most (post-)conflict countries makes it thus challenging for court officials to find victims/witnesses willing to be interviewed and/or testify and disclosure of identifying information of protected victims/witnesses tricky.⁷⁸

3.3 *Ethnic, Religious and Other Circumstances in the Country of Origin*

Victims/witnesses appearing before international criminal tribunals usually live in volatile areas, even when the conflict is officially over as tensions between the warring groups usually do not disappear overnight. Hatred against opposing groups based on ethnicity, religion or any other reason, is often deeply rooted in society and goes back for years, if not decades. When victims/witnesses are willing to testify before an international criminal tribunal against an accused from another (ethnic or religious) group, this may well cause the victims, their family or even a whole community, to become the prime target

Program in Kosovo', 30 July 2013; CRDP, *Struggle On All Fronts*, 2013, pp. 61, 70 ("According to Besim Kelmendi of the Special Prosecutor's Office, prosecutors and judges are reluctant to take on cases dealing with war crimes out of fear of their reputation (*i.e.*, being labelled traitors), loss of their livelihood, their personal safety, and the safety of their families"); *IWPR*, 'Witness Safety a Challenge to Regional Courts', 24 April 2008.

76 See *e.g.*, Human Rights Watch, *Kenya: ICC – Judges Approve Kenyan Investigation – Witness Protection Key Challenge in Investigation*, 31 March 2010.

77 *ICC Press Release*, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta', 5 December 2014.

78 See *e.g.*, *Transcripts*, Katanga and Ngudjolo Chui Case, ICC-01/04-01/07-T-81-ENG, 25 November 2009, p. 11, lines 10–11 (the security situation makes it "enormously challenging" for the Prosecutor to find victims/witnesses willing to be interviewed); *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-119, 18 January 2008, para. 130 (while discussing the possibility of anonymity for victim participants, the Chamber mentioned that it is "conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety"); *The Prosecutor v. Salim Jamil Ayyash et. al.*, Decision to Hold Trial in Absentia, STL-11-01-/1/TC, 1 February 2012, paras. 114, 116, 117.

of reprisals by the accused and his or her sympathisers who do not wish to see the accused on trial and convicted.⁷⁹

Testifying against an accused who belongs to the same (ethnic or religious) group as the victim/witness has also been seen to affect the willingness of these victims/witnesses to testify. In close-knit communities with traditional values, allegiance to the ethnic group or clan to which an individual belongs is often taken for granted, and those who speak against members of their own community are viewed as traitors.⁸⁰ In the ICTY's *Limaj et al.* case, the Trial Chamber acknowledged that the values of honour and loyalty were particularly relevant to victims/witnesses with Albanian roots in Kosovo.⁸¹ It recognised that these values may affect the willingness of victims/witnesses to testify against the defendants of their same ethnicity and should be considered when evaluating their evidence.⁸² The Special Tribunal for Lebanon (STL) has specifically recognised these realities in the *Ayyash et al.* case. In trying to secure the appearance of the four accused before the tribunal who have been held to be involved in the 14 February 2005 attack that killed the former Lebanese Prime Minister Rafiq Hariri and others, reference was made to the totality of the political, territorial and security circumstances prevailing in Lebanon.⁸³ Of particular relevance here is the citation of the Lebanese Prosecutor-General as noted by the Tribunal:

I would like to draw your attention to the delicate and sensitive security situation in Lebanon, and to the difficulties faced by the Lebanese authorities in executing thousands of arrest warrants *in absentia* decades ago against persons who have committed different crimes and who have been secretly moving from one region to another. It is most likely that they are receiving help from their relatives and others who share common political views or religious or regional affiliations.⁸⁴

79 Florence Mumba, 'Ensuring a Fair Trial Whilst Protecting Victims and Witnesses – Balancing of Interests?', in Richard May *et al.* (eds.), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Kluwer Law International, The Hague, 2001), p. 360.

80 See the reference to the expert report of Stephanie Schwandner-Sievers in the ICTY's *Limaj et al.* case in *Prosecutor v. Limaj et al.*, Judgement, IT-03-66-T, 30 November 2005, para. 13.

81 *Ibid.*, paras. 13, 15. See also on this point Michael Farquhar, 'Witness Intimidation a Serious Problem in Kosovo Cases', *IWPR*, 18 November 2005.

82 *Prosecutor v. Limaj et al.*, Judgement, IT-03-66-T, 30 November 2005, paras. 13, 15.

83 *The Prosecutor v. Salim Jamil Ayyash et al.*, Decision to Hold Trial in Absentia, STL-11-01-/1/TC, 1 February 2012, paras. 114, 116, 117.

84 *Ibid.*, para. 116.

Again, the risks involved when identifying information (whether accurate or not) is disclosed or the fears that these results or consequences can occur, even when the conduct is directed at alleged victims/witnesses, can produce similar results for actual, potential and alleged victims/witnesses: they are all exposed, their lives may be compromised, and their willingness to testify may be diminished. As previously noted, the risks and perceptions of risks for victims/witnesses are even greater in conflict, post-conflict or other highly charged situations than in other regular peace time situations.

3.4 *The Nature of the Crimes Concerned and the Victims'/Witness' and Accused's Involvement*

International criminal tribunals all deal with the prosecution of individuals accused of the most heinous and serious crimes known to humanity, including genocide, crimes against humanity, war crimes, the crime of aggression and terrorism. The very nature of these crimes usually implies that many victims have suffered and that sentences for the perpetrators ought not to be inconsequential. In many cases, the individuals prosecuted before the international criminal tribunals occupied senior military or governmental positions and thus the danger for victims/witnesses who testify against these accused persons cannot be underestimated. Such accused persons will typically still have many influential friends and allies who care about their welfare.⁸⁵ Even when accused persons are imprisoned, far away from their home country, this does not diminish the possibility that the accused will interfere with witnesses, as evidenced in several international cases.⁸⁶ Where senior officials, still in office, are charged with international crimes, such as in the ICC's Kenya and Darfur cases, the high position of the accused makes it difficult to testify against him without risking retaliation.⁸⁷

Victims/witnesses who possess unique or rare information about the accused standing trial face particular security risks.⁸⁸ For international cases, it is not unusual that the evidence against an accused is based on only one or very few victims/witnesses, as oftentimes many victims/witnesses did not survive the international crimes committed against them. Prosecutors of international criminal tribunals are heavily dependent on victims'/witnesses' testimony to build

85 *E.g.*, Patricia M. Wald, 'Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal', 5 *Yale Human Rights & Development Law Journal* (2002) 239.

86 *See e.g.*, the *Milošević* and *Mpambara* cases, cited in section 2.

87 *E.g.*, BBC, 'Kenya's William Ruto Trial: ICC Judge Warns Bloggers', 18 September 2013.

88 Acquaviva and Heikkilä, *supra* note 8, p. 819.

their cases against an accused. Consequently, victims/witnesses, particularly those with key factual or insider information, are of significant importance to the tribunals.⁸⁹

4 Breaches by the Media of Protective Measures Ordered by the Court

As noted earlier, a variety of actors can be responsible for disclosing identifying information about protected victims/witnesses. This section focuses on members of the media in this regard. In several cases before international criminal tribunals, journalists have been charged with contempt of court for disclosing identifying information of one or more protected victims/witnesses. Most prominently this occurred before the ICTY where charges for contempt of court were brought against, and convictions entered for: one journalist from Montenegro (Dusko Jovanović), three journalists from Croatia (Ivica Marijačić, Domagoj Margetić and Josip Jović) and one journalist from Kosovo (Baton Haxhiu).⁹⁰ Although those accused in the abovementioned cases put forward several arguments in their defence (e.g., that the freedom of press was at stake or that the published information was no longer secret information or already in the public domain), such arguments were largely contested and rejected.⁹¹

89 *E.g.*, Wald, *supra* note 85, 219–220 (Wald explains that in some ICTY cases there were no witnesses who survived the atrocities to corroborate the charges and therefore no prosecutions followed).

90 In addition, in 2008, journalist and *Bota Sot* editor Bajrush Morina was held in contempt of the ICTY for pressuring and threatening a witness not to testify against Haradinaj and was sentenced to three months in prison (see *e.g.*, *Prosecutor v. Astrit Haraqia and Bajrush Morina*, Judgement on Allegations of Contempt, T-04-84-R77.4, 17 December 2008). Another case in which a journalist was found guilty of contempt of court concerns the case of Hartmann (see *e.g.*, *In the Case Against Florence Hartmann*, Judgement on Allegations of Contempt, IT-02-54-R77.5, 14 September 2009). Hartmann was found guilty of contempt of court for disclosing information of two confidential Appeals Chamber decisions in the *Milošević* case. As these two cases do not seem to concern the disclosure of identifying information of protected victims/witnesses as such, these cases are not discussed here. Before the ICTR, no cases involving members of the media seem to have reached the trial stage.

91 See *e.g.*, for these discussions *Prosecutor v. Baton Haxhiu*, Judgement on Allegations of Contempt, IT-04-84-R77.5, 24 July 2008, paras. 19, 28; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Judgement, IT-95-14-R77.2, 10 March 2006, para. 39; *Prosecutor v. Josip Jović*, Judgement, IT-95-14 & IT-95-14/2-R77, 30 August 2006, para. 23.

More recently, a special reminder to members of the media was given by an ICC judge in the *Ruto and Sang* case (Kenya situation), and at the STL, cases 14-05 and 15-06 involving members of the media (TV and newspaper agencies), are pending.

4.1 ICTY Cases

In the case against Dusko Jovanović, the director of a media company publishing the Montenegrin newspaper DAN, the accused was charged with contempt of court under Rule 77(A)(ii) of the ICTY Rules of Procedure and Evidence for revealing to the general public in one of his articles the name of a protected witness in the *Milošević* trial.⁹² According to the material supporting the indictment, “witness K32 [the protected witness] has received death threats since his identity was made public”.⁹³ Apparently, the case against Jovanović was dropped in April 2004 after he apologised in an editorial, “expressing ‘true remorse’ for any harm done to the court or the witness”.⁹⁴ Jovanović was murdered in the capital of Montenegro in May 2004.⁹⁵

The second case relates to Ivica Marijačić, who was a journalist and the then-editor-in-chief of *Hrvatski List*, a Croatian newspaper. In the *Marijačić and Rebić* case, the Trial Chamber found Marijačić guilty of contempt of court under Rule 77(A)(ii) of the ICTY RPE for deliberately disclosing identifying information about a Dutch army officer who testified as a protected witness in the case of former Croatian army general Tihomir Blaškić.⁹⁶ Marijačić had disclosed the information of the protected witness (including his identity and extracts of the witness’ statement) in an article, authored by himself, in the *Hrvatski List*. In the article and headlines it was stated that the information came from a “secret” testimony of an ICTY witness. Marijačić was ordered by the Trial Chamber to pay a fine of €15,000. The two most significant factors determining sentences of contempt of court cases were held to be the gravity of the conduct and the need to

92 *ICTY Press Release*, ‘Dusko Jovanovic Indicted for Contempt of the Tribunal’, 8 April 2003.

93 *Ibid.*

94 *Reporters without Borders*, ‘Dusko Jovanovic Murder: A Karate Champion Charged’, 4 October 2004. On the ICTY website the latest information on this case revealed that the case was postponed until further notice. See *ICTY Press Release*, ‘Dusko Jovanovic: Contempt Hearing Postponed’, 4 December 2003.

95 *Reporters without Borders*, *ibid.*

96 *Prosecutor v. Ivica Marijačić and Markica Rebić*, Judgement, IT-95-14-R77.2, 10 March 2006, para. 53. Marijačić was jointly prosecuted with Rebić, at the time of the offences the former head of the Croatian Security Information Service, who had an interview with him published in the newspaper *Hrvatski List*.

deter repetition and similar action by others.⁹⁷ The decision was upheld in appeal.⁹⁸

Although, in this case, no harm was apparently suffered by the protected witness as a result of the revelations of the identity and content of the testimony of the victim/witness,⁹⁹ the Trial Chamber did provide a comment. On the issue of the relevancy whether any harm is done to a protected witness as a result of disclosure of the victim's/witness' identity, the Trial Chamber stated:

Once protective measures are granted to any witness their effect cannot depend upon the assessment by third parties of the degree of vulnerability of a particular witness. Similarly, whether or not a witness came to harm after confidential information about his identity and testimony was revealed is not relevant to the question of whether the party revealing that information should be found responsible for contempt, although it may have some relevance to the matter of penalty.¹⁰⁰

The Trial Chamber continued by ruling that:

any deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice. Public confidence in the effectiveness of such orders is absolutely vital to the success of the work of the Tribunal. The Trial Chamber accepts that, in the particular circumstances of this case, the flouting of the closed session Order created such a risk (hereafter the "*Marijačić and Rebić* administration of justice ruling").¹⁰¹

A further media case involved Domagoj Margetić, who was, at the time, a freelance journalist and former editor-in-chief of two Croatian publications, *Novo*

97 *Prosecutor v. Ivica Marijačić and Markica Rebić*, Judgement, IT-95-14-R77.2, 10 March 2006, para. 46. This has been repeated by other Chambers in other contempt of court cases, including *Prosecutor v. Josip Jović*, Judgement, IT-95-14 & IT-95-14/2-R77, 30 August 2006, para. 26; and *Prosecutor v. Domagoj Margetić*, Judgement on Allegations of Contempt, IT-95-14-R77.6, 7 February 2007, para. 84.

98 *Prosecutor v. Ivica Marijačić and Markica Rebić*, Judgement, IT-95-14-R77.2-A, 27 September 2006.

99 *Prosecutor v. Ivica Marijačić and Markica Rebić*, Judgement, IT-95-14-R77.2, 10 March 2006, para. 44; and *IWPR*, Contempt of Court Appeals Dismissed, 29 September 2006.

100 *Prosecutor v. Ivica Marijačić and Markica Rebić*, Judgement, IT-95-14-R77.2, 10 March 2006, para. 44.

101 *Ibid.*, para. 50. See also paras. 48–49.

Hrvatsko Slovo and *Hrvatsko Slovo*. Margetić was convicted for contempt of court for publishing the complete list of names of 48 protected witnesses from the *Blaškić* case. The conviction further concerned three articles authored by Margetić about protected witnesses contained in the witness list on the internet over a long period of time.¹⁰² He was sentenced to 3 months in prison and fined €10,000. The Trial Chamber, describing the case as “particularly egregious”, stated that:

The Accused published protected witness information in relation to not just one or a few witnesses, but instead in relation to a high number of protected individuals, with no effort to distinguish between the vulnerability of these individuals. The Trial Chamber also takes into account the potential personal and psychological consequences for all of the protected witnesses and the proven personal and psychological consequences the disclosure had on the lives of three of the witnesses – MC1, MC2 and MC3.¹⁰³

According to the Trial Chamber, Margetić “not only acted intentionally but showed reckless disregard for the safety of witnesses” when he published the identifying information of the victims/witnesses on the internet.¹⁰⁴ As for witnesses MC1, MC2 and MC3 specifically, the Judgement noted that:

Two of them (MC1 and MC2) held that they would only be willing to testify in future Tribunal proceedings under the strictest of protective measures. One (MC3) said that “I can tell you first and foremost that I’m no longer secure. Secondly, I have constant pains. I’m on medication at all times”. As to the MC3’s willingness to testify before the Tribunal the witness said “Before my case is resolved I am not willing to come because I want what has been inflicted on me to be made good. I want to be paid compensation.” And for the witness willingness to testify before a national tribunal the witness said “I’m not willing, because – because I have been

¹⁰² *Prosecutor v. Domagoj Margetić*, Judgement on Allegations of Contempt, IT-95-14-R77.6, 7 February 2007, para. 94 (he was convicted under Rule 77(A), Rule 77(A)(ii), Rule 77(A)(iv) and Rule 77(G) of the ICTY RPE).

¹⁰³ *Prosecutor v. Domagoj Margetić*, Judgement on Allegations of Contempt, IT-95-14-R77.6, 7 February 2007, para. 86. See also: *IWPR*, ‘Margetic Conviction Sparks Media Ethics Debate’, 13 February 2007.

¹⁰⁴ *Prosecutor v. Domagoj Margetić*, Judgement on Allegations of Contempt, IT-95-14-R77.6, 7 February 2007, para. 88.

humiliated and then nobody is guaranteeing my security. My security is endangered where I live".¹⁰⁵

In addition, the Trial Chamber found that the actions of Margetić undermined the Tribunal's ability to safeguard the evidence of protected witnesses and referred to the *Marijačić and Rebić* administration of justice ruling.¹⁰⁶ Margetić's behaviour undermined confidence in the effectiveness of protection orders and was likely to dissuade witnesses from the *Blaškić* case from cooperating with the ICTY.¹⁰⁷

Of particular interest are paragraphs 64–76 of the Judgement. According to paras. 64–65:

Rule 77(A)(iv) of the Rules gives a non-exhaustive sub-list of possible forms of *actus reus* of the offence of contempt of the Tribunal, including "threat, intimidation, causing of injury, offering of a bribe and otherwise interfering with a witness or a potential witness". The phrase "otherwise interfering with a witness or potential witness" adds to these specifically provided acts any conduct that is likely to dissuade a witness or a potential witness from giving evidence, or to influence the nature of the witness' or potential witness' evidence. The Trial Chamber considers that any conduct which is likely to expose witnesses to threats, intimidation or injury by a third party also constitutes "otherwise interfering with a witness" as provided by Rule 77(A)(iv). Proof is not required that this conduct *actually* produced such a result. The Trial Chamber considers that such conduct can be fulfilled through personal or direct contact, as well as through intermediaries or through the media by way of publications.

In this particular case, the Trial Chamber held that the accused had reversed the effect of the protective measures given to the victims/witnesses by publishing the Witness List, thereby undermining the confidence of the victims/witnesses in the ICTY's ability to protect them. The Trial Chamber therefore found that "the Accused's conduct is likely to dissuade these protected witnesses from testifying in the future before the Tribunal, and that if they do, their evidence may be affected and given in fear".¹⁰⁸ While proof is not required that such effects actually occurred, the Trial Chamber referred to the testimonies of witnesses MC1, MC2

¹⁰⁵ *Ibid.*, paras. 30–32.

¹⁰⁶ *Ibid.*, para. 87.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, para. 69.

and MC3 and their reluctance to testify before the ICTY and their safety concerns. The Trial Chamber held that “the conduct of the Accused is likely to dissuade the protected witnesses on the Witness List from giving evidence, to influence the nature of their evidence should they testify in the future, or to expose them to threats, intimidation or injury by a third party”.¹⁰⁹ The Trial Chamber was not only convinced that the *actus reus* of Rule 77(A)(iv) was proven, but also the *mens rea*. The Trial Chamber had satisfied itself that Margetić knew that the Witness List was confidential and that many of the victims/witnesses on the list were protected. In addition, Margetić knew that the publication of these witnesses’ identities was likely to dissuade them from giving evidence in the future, influence the nature of their testimony, or expose them to threats, intimidation, or injury from a third party. In the first article that Margetić had published on the internet, he stated that he would “sooner or later, publish that confidential document, because I have done so before. I have said that I would always and regardless of the people in question, do the same: publish the information I obtained”.¹¹⁰ Despite Margetić’s denial at trial that he had wanted to single out these witnesses, the Trial Chamber was satisfied beyond reasonable doubt that Margetić wilfully published the Witness List without consideration of the consequences.¹¹¹

The ICTY case against Josip Jović (at the time the editor-in-chief of *Slobodna Dalmacija*, a Croatian daily newspaper), also involved a conviction of contempt of court under Rule 77(A)(ii) of the ICTY’s RPE for publishing identifying information and material in his newspaper concerning a protected Prosecution witness in the *Blaškić* case.¹¹² Jović refused to comply with an order to cease the publication and was sentenced with a fine of €20,000. The decision and sentence were upheld on appeal.¹¹³ Although the protected witness whose identity was revealed (the President of the Republic of Croatia) was apparently not harmed as a result of disclosing the identifying information of the victim/witness,¹¹⁴ this case highlighted, once again, that witness interference creates a real risk which undermines confidence of the work of the tribunal, resulting in serious interference with the administration of justice (again referencing to the *Marijačić and Rebić* administration of justice ruling).¹¹⁵

109 *Ibid.*, para. 72.

110 *Ibid.*, para. 74.

111 *Ibid.*

112 *Prosecutor v. Josip Jović*, Judgement, IT-95-14 & IT-95-14/2-R77, 30 August 2006.

113 *Prosecutor v. Josip Jović*, Judgement, IT-95-14 & 14/2-R77-A, 15 March 2007.

114 *Prosecutor v. Josip Jović*, Judgement, IT-95-14 & IT-95-14/2-R77, 30 August 2006, para. 18; and *IWPR*, Contempt of Court Appeals Dismissed, 29 September 2006.

115 *Prosecutor v. Josip Jović*, Judgement, IT-95-14 & IT-95-14/2-R77, 30 August 2006, para. 26.

The last ICTY case to be discussed here concerns Baton Haxhiu, an editor of a newspaper in Kosovo, who wrote and published a newspaper article that referred, by name, to a protected witness who was meant to be testifying anonymously at the trial of *Haradinaj et al.*¹¹⁶ Haxhiu was convicted of contempt of court and sentenced with a fine of €7,000.¹¹⁷ The Trial Chamber referenced the *Marijačić and Rebić* administration of justice ruling and held that:

The Accused's conduct could have jeopardized the security of the Witness and his family and was of a kind to undermine confidence in the effectiveness of the Tribunal's protective measures orders, and to have the effect of dissuading witnesses from cooperating with the Tribunal (...) It is fundamental to the fulfillment of the Tribunal's mission that courageous individuals who come to tell their story before the Tribunal, often about traumatic or difficult experiences and away from their families and familiar surroundings, may apply to do so with the security provided by protective measures.¹¹⁸

4.2 ICC and STL Cases

There are currently no contempt of court cases against journalists or other people working in the media sector before the ICC.¹¹⁹ Nevertheless, in

¹¹⁶ *Prosecutor v. Baton Haxhiu*, Judgement on Allegations of Contempt, IT-04-84-R77.5, 24 July 2008; Simon Jennings, 'Kosovo Journalist Faces Contempt Trial', *IWPR*, 30 June 2008 (in which it is, contrary to the Judgement, mentioned that Haxhiu is an editor of a newspaper in Kosovo).

¹¹⁷ *Prosecutor v. Baton Haxhiu*, Judgement on Allegations of Contempt, IT-04-84-R77.5, 24 July 2008, para. 40 (he was convicted on the basis of Rule 77(A)(ii) and Rule 77(G) of the ICTY's RPE. The Defence tried to appeal the case, but did this too late. The Appeals Chamber therefore declared the Notice of Appeal inadmissible and closed the case. See *Prosecutor v. Baton Haxhiu*, Decision on Admissibility of Notice of Appeal Against Trial Judgement, IT-04-84-R77.5A, 4 September 2008.

¹¹⁸ *Prosecutor v. Baton Haxhiu*, Judgement on Allegations of Contempt, IT-04-84-R77.5, 24 July 2008, para. 34.

¹¹⁹ The only contempt of court case before the ICC is momentarily against Walter Osapiri Barasa, a former intermediary for the Prosecution in the context of the investigation in the Kenya situation. Barasa has been charged with three offences against the administration of justice consisting of corruptly or attempting to corruptly influencing three ICC Prosecution witnesses, by offering bribes with the aim to have them withdrawn as witnesses. See *Prosecutor v. Walter Osapiri Barasa*, Under Seal Ex Parte, Only Available to the Prosecutor and the Registrar Warrant of Arrest for Walter Osapiri Barasa, ICC-01/09-01/13, 2 August 2013. Some news reports also allege that he worked as a journalist for a newspaper before the issuing of the arrest warrant. See e.g., *BBC*, 'ICC Seeks Walter Barasa Arrest

September 2013, an ICC Judge warned members of the press, bloggers, social media members or participants and their websites or other online presence and others not to reveal the identity of protected witnesses in the *Ruto and Sang* trial.¹²⁰ The Judge reminded them of the importance of witness protection and of the possible sanctions for an act or attempted act considered an offence against the administration of justice under Article 70 of the Rome Statute. Furthermore, the Judge mentioned that such conduct “may also amount to contempt of Court” and “any revelation of the identity of a witness whose identity has been protected by this Court amounts to an offence in [the ICC]. So too will any attempt to engage in any such revelation”.¹²¹ The first Prosecution witness in this case was a protected witness, but after the witness testified in court, a local news site published a photograph of the witness. As a result, numerous bloggers and social media sites published the witness’ supposed name.¹²² The witness, a member of the Kikuyu ethnic group, who was allegedly targeted by Ruto’s Kalenjin community, testified that she survived an attack on a church in which about 36 people were burnt to death.¹²³ It has been suggested that this disclosure incident may have the detrimental effect of deterring further witnesses from testifying:

Now that a witness has been identified it will be difficult to assure others that they and their family members will be safe. And in Kenya, it’s not just the nuclear family: There are aunts, uncles, cousins, (...) Witnesses are bound to feel that their family and their extended family may be in danger and might want to withdraw.¹²⁴

Before the STL there are two cases in which members of the media, an editor-in-chief of a newspaper and a head of a television broadcasting company, have been charged with contempt and obstruction of justice for revealing a list with identifying information of purported confidential witnesses in the *Ayyash et al.*

for Kenya ‘Witness Tampering’, 2 October 2013. In any case, the case is not further discussed here since it does not concern a case of disclosure of identifying information of protected victims/witnesses as such.

120 *ICC Press Release*, ‘Ruto and Sang Case: ICC Trial Chamber V(a) States that Interfering with Witnesses Is an Offence against the Administration of Justice and May Be Prosecuted (video included)’, ICC-CPI-20130918-PR941, 18 September 2013.

121 *Ibid.*

122 *BBC*, ‘Kenya’s William Ruto Trial: ICC Judge Warns Bloggers’, 18 September 2013.

123 *Ibid.*

124 *Ibid.*

case via TV, newspapers and online fora.¹²⁵ Several national and international news articles concerning the disclosure of identifying information of alleged witnesses in this on-going case before the STL underline that due to such disclosures the lives of the victims/witnesses exposed may now be compromised, and their willingness to testify may be withdrawn. For example, in the online news source *NOW*, a Lebanese lawyer is quoted as saying (regarding the question as to why the names of the purported witnesses were published by the newspaper *Al-Akhbar*):

‘Of course’ [it was] an attempt to intimidate them. (...) if these men are indeed witnesses, they may now decide to either change their testimonies or recant them completely. Such an eventuality would ‘pose a problem for the prosecution and sabotage the work of the Tribunal.’¹²⁶

Regarding the same case, it was reported in *The New York Times* that “the leaks raise the likelihood that witnesses may be silenced by fear or coercion, which could seriously weaken the prosecution’s case”.¹²⁷

4.3 Concluding Observations

To conclude, Harmon and Gaynor have explained why the disclosure of identities and testimonies of protected witnesses by the media is such a serious issue that must not be taken lightly:

While all breaches of protective orders of this nature are serious matters of concern, the problem is particularly acute when news media in the former Yugoslavia intentionally disclose the identities and testimonies of witnesses, in contravention of protective orders of a Trial Chamber. When individuals and media organs (attracting wide audiences) wilfully breach protective orders forbidding the disclosure of the identity of witnesses who are about to testify or have testified before the ICTY, the

¹²⁵ See *In the Case against new tv S.A.L. & Karma Mohamed Tahsin Al Khayat*, Indictment, STL-14-05, 31 January 2014; *In the Case against Akhbar Beirut S.A.L. & Ibrahim Mohamed Al Amin*, Indictment, STL-14-05, 31 January 2014; *In the Case against Akhbar Beirut S.A.L. & Ibrahim Mohamed Al Amin*, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, STL-14-06, 31 January 2014. The charges are based on Rule 60bis(A) of the STL’s RPE.

¹²⁶ *NOW*, ‘Attempted Intimidation?’, 17 January 2013.

¹²⁷ Marlise Simons, ‘Newspaper Adds New Obstacle to Tribunal Investigating Lebanese Official’s Death’, *The New York Times*, 9 March 2013.

potentially damaging consequences to the institution cannot be overstated: protected witnesses who have been publicly exposed may be at serious risk of physical harm; they may refuse to testify, thus potentially damaging the prosecution case; and other witnesses and potential witnesses who become aware that the protected witness's identity has been exposed or his confidential testimony revealed will have less confidence in the institution's ability to protect their identities and may refuse to cooperate further with the Tribunal.¹²⁸

Not only is the wide reach of the media, as such, problematic, but, in addition, the fact that the disclosure of identifying information is done by journalists or other members of the media in the victims'/witnesses' home country. Such disclosures can be, and often are, much more serious and result in greater risks for actual, potential and alleged victims/witnesses, than disclosures by the (international) media in another country.

5 Conclusions

It is clear from the findings reviewed in this article that, while perhaps not the norm, witness interference is a serious and continuous problem. This is particularly so in international cases where victims/witnesses testify before international criminal tribunals, oftentimes outside their own country, and where victim/witness testimony is crucial to establish the evidence in the cases. A number of factors make protecting victims/witnesses of international crimes and countering witness interference difficult in international cases. Such considerations include the geographic, political, ethnic or religious circumstances in the country of origin, the nature of the crimes concerned and the nature of the victims' or accuseds' involvement in the crimes. Contributing to this difficulty is the fact that despite protective measures available to victims/witnesses, certain individuals (e.g., members of the media) have at times breached these protective measures and revealed the identity of protected victims/witnesses. The disclosure of identifying information of alleged, potential and actual victims/witnesses can have enormous negative effects on them (e.g., threats, intimidation, murder), the public (i.e., its understanding and perceptions of the international criminal tribunals), as well as on the tribunals' administration of justice. It cannot be said that every witness interference will always lead to the unwillingness of every victim/witness to testify before an international

¹²⁸ Harmon and Gaynor, *supra* note 3, p. 422.

criminal tribunal. However, the reality of these cases of witness interference makes clear that such interference, frequently resulting in physical, psychological and/or socio-economic effects, creates a significant risk that victims/witnesses will be unwilling to testify or will recant their testimony before international criminal tribunals.

While the significant problem of witness interference before international criminal tribunals is not easily resolved, it has not gone unnoticed and has been on the agendas of the international criminal tribunals.¹²⁹ Several ways of addressing this issue have, over time, been proposed, including keeping a log with the names of the people in possession of the victims'/witnesses' statements and tendering in writing, the evidence of persons subjected to improper interference. In addition, the legal frameworks of the international criminal tribunals allow for the imposition of fines, imprisonment, and temporary or permanent removal from the courtroom for cases of contempt of court. Nevertheless, these options have not always prevented individuals from disclosing identifying information of victims/witnesses of international crimes. While maintaining a log is an essential element in keeping track of those persons possibly capable of leaking relevant information about the protected victim/witness, it may not always be easy to determine who is responsible for such disclosures. Furthermore, it would seem that consequences including the imposition of a fine, a temporary or permanent removal from the courtroom, or imprisonment to a maximum of five-seven years may not always offer sufficient safeguards against disclosure of a victim's/witness' identity. This may be true for accused persons, who possibly await convictions or those who have already been convicted. It may also be true in cases involving members of the media who have disclosed identifying information about victims/witnesses. Such individuals have received relatively low sentences before the ICTY: fines between €7,000-€20,000 and/or imprisonment in between 0-3 months. Although the rights of the accused to a fair trial cannot of course be compromised in international cases, a balance needs to be struck between the rights of the accused and the interests of victims. As observed by Trotter:

129 See e.g., ICC, *Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court*, 29 and 30 January 2009; ICC, *Summary Report on the Seminar on Protection of Victims and Witnesses Appearing Before the International Criminal Court*, 24 November 2010 (available at <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx>, 2 December 2014); ICC Assembly of States Parties, *Summary of the Arusha Seminar on Witness Protection* (29-30 October 2013), ICC-ASP/12/36/Add.1, 7 November 2013.

The competing consideration of the rights of the accused is just that – a competing, though not overriding consideration – and must not be elevated in excess to endanger the safety of witnesses. The role of witness testimony is central to the trial process, and cannot be threatened without undermining the quality of the legal findings of the tribunals. It is essential for the legitimacy of the tribunals that they deliver justice according to the highest standards of due process – but also, that they deliver justice.¹³⁰

In those situations where confidentiality measures do not provide sufficient safeguards for victims/witnesses, other more controversial protective measures may at times be needed. At the very least, certain alternative measures may require further exploration. Such possibilities might include allowing written evidence of victims/witnesses who have experienced interference, providing full anonymity for such victims/witnesses, relocating victims/witnesses, strengthening risk assessments/security mechanisms or making more use of social science evidence in order to replace some of the victim/witness testimony.¹³¹

¹³⁰ Trotter, *supra* note 3, p. 537.

¹³¹ See further *e.g.*, Evans-Pritchard and Jennings, *supra* note 15; De Brouwer, *supra* note 11, 17–29; Lynn Lawry, Anne-Marie de Brouwer, Alette Smeulers, Juan Carlos Rosa, Michael Kisielewski, Kirsten Johnson, Jennifer Scott and Jerzy Wieczorek, 'The ICC, the DRC and the Results from a Population Based Survey on Crimes, Perpetrators and Victims', 24(1) *International Criminal Justice Review* (2014) 5–21.