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PROVIDING WITNESSES WITH ADEQUATE SUPPORT AND PROTECTION:

The Difficult Challenge of the International Criminal Tribunals

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Abbreviations

ACHR	American Convention on Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
FIDH	International Federation for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
PTSD	Post-Traumatic Stress Disorder
RPE	Rules of Procedure and Evidence
VWS	Victims and Witnesses Section

Introduction

> *"If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission."*[1]

Over the past decades, issues relating to witnesses' protection have grown to be more and more important, especially within the scope of the fight against organised crime. Because of the famous so-called "rule of silence" which prevails among these circles, obtaining information about the activities of such groups is indeed very difficult. Appealing to informants and undercover agents is often the only way to do so. As any collaboration with the police automatically puts the safety of these insiders at stake, efficient protective measures had to be thought of to allow them to testify in court.

The experience of domestic courts in this field has been of great help for both International Criminal Tribunals, that is to say the one for the former Yugoslavia (ICTY) and the one for Rwanda (ICTR), where witnesses' protection is also of prime importance. First jurisdictions of this kind, those Tribunals were created by a resolution of the Security Council under Chapter VII of the United Nations Charter[2] to prosecute the numerous "serious violations of international humanitarian law"[3] committed during the conflict which broke out in the territory of the former Yugoslavia in 1991 and during the genocide which took place in Rwanda in 1994.

Due regard to the "particular nature of the crimes committed"[4] in both cases and to the high value of the defendants, protection is indeed often necessary to encourage witnesses to take the stand. Such a concern for witnesses' protection has been translated into the Statutes and the Rules of Procedure and Evidence

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[1] Prosecutor v. Brdjanin and Talić, ICTY Case n°IT-99-36, *Motion for Protective Measures*, 10 January 2000, paragraph 4.

[2] The ICTY was created by Security Council Resolution 827 on 25 May 1993 whereas the ICTR was created by Security Council Resolution 955 on 8 November 1994.

[3] See Articles 2 of the ICTY Statute (as amended on 17 May 2002 by Resolution 1411) and ICTR Statute (as amended).

[4] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), Presented on 3 May 1993 (S/25704), paragraph 108.

(RPE) of each Tribunal, where several articles and rules are dedicated to this question.[5] A special unit, the Victims and Witnesses Section (VWS), has even be created, within the Registrar of each Tribunal, to deal exclusively with witnesses' protection issues**.** Broad powers have been attributed to these two sections. Not only can they recommend protective measures and provide witnesses with counselling and support, but also request a Trial Chamber to take appropriate measures for the privacy and protection of witnesses.[6]

However, due also to the specific legal context both Tribunals have to deal with, providing witnesses with adequate protection is far more complicated for the International Criminal Tribunals than for domestic courts. As a matter of fact, being seated respectively in the Netherlands (the Hague) for the ICTY and Tanzania (Arusha) for the ICTR, they do not control any territory, nor have they at their disposal their own police forces to ensure witnesses' protection before, during, and after the proceedings, which make those measures entirely dependent on State co-operation. In addition, according to their Statutes, they have also the duty to ensure the accused a fair trial, which limits the range of protective measures they can resort to, a balance needing to be found between those two objectives.[7] Finally, like all United Nations bodies, they have, of course, both limited budgets and limited staff.

In addition to all these constraints both Tribunals have to cope with, the issue of witnesses' protection is also particularly delicate since they do not have only to deal with eyewitnesses and expert witnesses,[8] but also and above all with victim witnesses who are far more vulnerable than the first two categories, especially

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[5] See for example Article 22 of the ICTY Statute and Article 21 of the ICTR Statute, which read as follows : "The International Tribunal […] shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not limited to, the conduct of in camera proceedings and the protection of the victim's identity". See also Rules 69 and 75 of both RPEs.

[6] See rule 34 of the RPE of the ICTY and rule 34 of the ICTR. See also common Rule 75 of both RPE.

[7] See Article 20(1) of the ICTY Statute and Article 19(1) of the ICTR Statute, which both state that "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses".

[8] Expert witnesses have been defined by the ICTY as "persons called upon to support a court by providing it with information within their special knowledge and expertise". See Prosecutor v. Delalić and al., ICTY Case N° IT-96-21, *Decision on the Application for Adjournment of the Trial Date*, 3 February 1997, paragraph 25.

victims of sexual assault. The difficulties the ICTR encounters with the Rwandan associations of victims of the genocide is here quite relevant. In the beginning of 2002, the two major ones, *Ibuka* and *Avega*, publicly announced the temporary suspension of any collaboration with the ICTR, accusing this jurisdiction not to take enough into consideration the victims' interests. If such incident may seem anecdotic at the first sight, it regains all its importance when one knows that the assistance and support of these associations is crucial for the ICTR to obtain victims to testify.[9]

The aim of this paper will therefore be to present in detail the protection provided by both Tribunals to the witnesses who appear before them, while trying to call attention to the problems they encounter in doing so and to the limits of the protection they offer. Such approach seems especially interesting since the International Criminal Court (ICC), which has now become a reality,[10] will face the same issues relating to witnesses' protection and may learn a lot from the International Criminal Tribunals' experience.

Part I deals with the difficulties the ICTY and ICTR go through in order to obtain witnesses' attendance, both Tribunals having to convince and organise witnesses' travel to the Hague or Arusha before having them testify in court. Part II covers the set of protective measures for witnesses who are willing and able to be present at the seats of the Tribunals, while trying to assess these measures. Providing witnesses with adequate protection not only means preventing them from getting physically hurt, it also means assisting and supporting them psychologically throughout their participation in the proceedings. Thus, Part III finally describes the support and information available to them .

Before going further, a few preliminary remarks have to be made. First of all, it was very difficult to find updated data about these issues. A lot has indeed been written on the legal aspects of witnesses' protection before the International Criminal Tribunals, but only few documents dealing with the practical aspects of this question have been released by the said Tribunals. Press articles and NGO's reports are therefore often the only source available. An interview with Mr. Benoît

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[9] At the moment of writing this paper – 18 months after the beginning of the crisis – the said associations have just started to resume their contacts with the ICTR according to M. B. Kaboye, Head of the Justice Division of *Ibuka* (interviewed on August 28th, 2003).

[10] The Rome Statute has been adopted on 17 July 1998, and the sixty ratifications necessary for its implementation have been reached since Spring 2002.

Kaboye, Head of the Justice Division of *Ibuka*, was also arranged in Kigali to gather additional information. In addition, even though the idea was to study both the ICTY and ICTR, it was sometimes easier to find facts on a specific topic about one Tribunal rather than about the other, which explains references are not always made to both of them. However, since they were established under very similar rules of law (Statutes and RPE) and have the same Prosecutor and Appeals Chamber, the problems encountered by one Tribunal are actually often valid for the two of them.

Second of all, precisions have also to be made concerning the use of the term "witness", keyword of this paper. "Witness" is here understood as "any person […] who possesses information relevant to criminal proceedings".[11] As already mentioned, witnesses before both International Criminal Tribunals are often also victims. Rather than always making use of both "victims and witnesses" as it is often done by other authors, the term "witnesses" when employed by itself will automatically include the victims who testify. The expression "victims" will only be used when describing a situation or measures specific to the victim witnesses.

[11] Definition given by the Council of Europe in *Recommendation N°R(97)13 of the Committee of Ministers to Members States Concerning Intimidation of Witnesses and the Right of the Defence,* adopted by the Committee of Ministers on 10 September 1997, at http://cm.coe.int/ta/rec/1997/97r13.html.

1. Obtaining witnesses' attendance

Before both International Criminal Tribunals may be able to issue an arrest warrant against a certain defendant, evidence has to be collected to justify such decision. Investigation is thus the first stage of any proceedings. Not only have they to find pertinent possible evidence but also to secure it. This is particularly true with the potential witnesses who have been identified and may already need protection at this preliminary stage (1.1). Once those are safe, their travel to the Hague or Arusha has to be prepared, which requires tremendous organisation (1.2). Not all potential witnesses may however be willing to testify, both Tribunals having then to find means to convince or compel them to do so (1.3).

1.1. Protecting potential witnesses

Not only witnesses who have agreed to take the stand may need protection, but also those who are yet just *potentially* intending to do so. There is indeed a great risk that those witnesses may be intimidated by the Defendant or his supporters. Discouraging a witness from testifying appears to be the most effective way to prevent the truth from being revealed, especially as testimonial evidence is of crucial importance before both International Criminal Tribunals.

1.1.1 The predominant role of testimonial evidence before both Tribunals

If issues about witness protection have become a major concern before the International Criminal Tribunals, it is notably due to the fact that both Tribunals rely heavily on testimonial evidence to establish the truth. To give a few figures to illustrate this statement, more than one hundred witnesses testify per trial before

the ICTY.[12] As for the ICTR, more than 500 witnesses have been heard during the period of 1997 (date of the first trial) to mid 2002.[13]

To stress the importance of witness testimonies before both Tribunals, a comparison is often made with their predecessor, the International Military Tribunal for Nuremberg, which, on the contrary, made wide use of documentary evidence to establish the culpability of the defendants.[14] The difference in the types of evidence used can, however, be simply explained. First of all, at the time the Nuremberg Tribunal was set up, German forces had already surrendered, Germany was occupied and the Allies had full access to all records kept by the Nazis. The International Criminal Tribunals encountered more difficulty in accessing potential archives (or other documents) and in obtaining the co-operation of the authorities concerned. Indeed, when the ICTY was put in place in 1993, the Yugoslav conflict had not been put to an end yet since the Dayton Peace Accords were only signed in 1995. Moreover, some entities within the territory of the former Yugoslavia, like Serbia, the Republika Srpska in Bosnia-Herzegovina or Croatia, were, at first, extremely hostile with the ICTY.[15] The ICTR has also regularly complained about the lack of co-operation of Rwandan authorities; ironically, Rwanda was the country that expressly requested its creation back in 1994.[16] Second of all, even if both International Criminal Tribunals were able to count on the full collaboration of the concerned States to access documents, unfortunately, the existing records do not contain as many traces of plans or transmission of orders (connected to the atrocities committed) as the Nazi

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[12] For example 126 witnesses were called in the Tadić case; 157 in the Kupreškić case; 161 in the Blaškić case; 110 witnesses were heard over 98 days of trial in the Krstić case; 139 witnesses over 113 days of trial in the Kvocka and al. case (source: ICTY website).

[13] See *Note by the ICTR on the Reply* of *the Government of Rwanda to the Report of the Prosecutor of the ICTR to the Security Council*, 8 August 2002, Reproduced in International Federation for Human Rights (FIDH), *Entre illusions et disillusions: les victimes devant le Tribunal Pénal International pour le Rwanda* (TPIR), n°343, October 2002 at http://www.fidh.org/afriq.

[14] See for example P. M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal,* in "Yale Human Rights and Development Law Journal", Volume 5, 2002, p.217, at http://www.yale.edu/yhrdlj/index_enhanced.htm.

[15] Ibidem, p.218.

[16] See H. Ascensio, *Les Tribunaux Ad Hoc pour l'Ex-Yougoslavie et pour le Rwanda,* in H. Ascensio, E.Decaux et A.Pellet, *Droit International Pénal*, Paris, Editions A. Pedone, 2000, p.715.

archives did.[17] Thus, very often, survivors' testimonies are the only evidence the Tribunals have at their disposal to prove certain crimes have occurred at a given date and place.

Documentary evidence, even if not so abundant, should gain more importance before both *ad hoc* Tribunals as time goes by and as more of the "so-called 'big fish' defendants", like Slobodan Milosević (former President of Serbia) or Jean Kambanda[18] (Prime Minister of the Rwandan Government during the genocide), are brought before them.[19] Unlike the Nuremberg Tribunal, which was only competent to prosecute "major war criminals", the ICTY and ICTR have a broader competence, as they may try any person "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime".[20] As a matter of fact, even if both International Criminal Tribunals are competent to prosecute simple executants, they intend to limit themselves to prosecuting only those who were at the top of the hierarchical structure.[21] Indeed, it would be unrealistic to expect them to investigate all of the crimes perpetrated during the Yugoslav conflict or Rwandan genocide, whereas domestic courts can do so.

Establishing the responsibility of those who were at the highest place in the chain of command is complicated, as these persons did not directly and physically perpetrate the crimes, but ordered them or failed to stop subordinates from committing them. To be able to prove their culpability, the Prosecution has to accurately reconstitute the chain of command, which is at the origin of the alleged crimes. In order to do this, victims' testimony is not as relevant as it is to establish the execution of the said crimes.[22] In that case, in addition to potential written

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[17] See R. May and M. Wierda, *Evidence before the ICTY*, in R. May and al. (Eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, The Hague, Kluwer Law International, 2001, p.257.

[18] J. Kambanda was actually the first head of Government to be indicted and convicted for genocide (source: ICTR website).

[19] P. M. Wald, *Ten Observations From the Bench About ICTY Trials*, *Remarks on International Humanitarian Law Before the ICTY Conference,* 11-12 February 2002, at http://www.soros.org.ba/en/programi/pravni/icty_lectures.doc.

[20] See Article 7(1) of the ICTY Statute and Arcticle 6(1) of the ICTR Statute.

[21] See S. Wohlfart, *Les Poursuites*, in H. Ascensio, E.Decaux et A.Pellet, *Droit International Pénal*, op.cit. (note 16), p.752-754.

[22] P. M. Wald, *Ten Observations From the Bench About ICTY Trials*, op.cit. (note 19).

signs of the orders given, only testimonies of "insiders" (that is to say persons who are from the same ethnic group of the accused) or neutral "observers" may be pertinent, and those are far more difficult to obtain than the ones of the numerous survivors of the atrocities perpetrated.

1.1.2 Evaluating the need for protection

If issues related to witness protection before both International Criminal Tribunals have generated so much literature, it is also due to the fact that real risks hang over victims and witnesses who may be susceptible or have already agreed to appear before them. Indeed, even if the Yugoslav conflict and the Rwandan genocide do not seem to have much in common at first sight, they share a very important characteristic: strong ethnic animosity which has been promoted and used by political and military leaders. This explains the similarities in the problems encountered by both Tribunals to ensure witnesses' security.

In fact, atrocities committed in both cases were the result of tensions, if not hatred, between opposing ethnic groups living in the same territory (in this case, Serbs, Croats and Bosnian Muslims for the Yugoslav conflict and Hutus and Tutsis for the Rwanda genocide). Therefore, as F. Mumba points out,[23] most of the time, prosecution witnesses are from a different group than the defendant (and by logic, Defence witnesses are generally be from the same ethnic group as the accused). Considering the level and amount of atrocities perpetrated on both the territory of the former Yugoslavia and in Rwanda, those different ethnic groups have not yet been reconciled, and even though several years have gone by, tensions between them remain.

Indeed, when looking at the reasons invoked for requesting protective measures before the ICTY, several common concerns can be identified, for example, the fear of "physical reprisals";[24] the fear for the safety of the witness' family members, who reside in an area dominated by members of the same ethnic group

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[23] F. Mumba, *Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests?*, in R. May and al. (Eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, op. cit. (note 17), p.360.

[24] See for example Prosecutor v. Krnojelac, ICTY Case n°IT-97-25, *Order on Protective Measures for witness at Trial*, 26 October 2000.

as the accused";[25] the witness' desire to return to his or her place of residence after having testified;[26] the fact that the witness has to undertake frequent travels in a region where the ethnic group of the defendant is in the majority;[27] the risk that such testimony "might cause serious harm to the reputation of the witness",[28] or "might seriously jeopardize" the assimilation of the witness "into his working environment and community".[29]

Concerning the situation in Rwanda, Trial Chambers of the ICTR have regularly acknowledged the "volatile nature of the security situation in the Great Lakes Region since 1994".[30] Indeed, during the past decades, this region has been destabilized by numerous civil wars or political crises - the Rwandan genocide being one the most atrocious. The main risk to ICTR Prosecution witnesses (who are, in a great majority, Tutsis) results principally from the "infiltration" in Rwanda of the so called "Hutu rebels" (*abacengezi*), especially in the western part of the country, from the Democratic Republic of Congo, where they had fled to following the genocide. Such rebels, being usually former members of the Rwandan Armed Forces or of the *Interahamwe* militias, whose responsibility in the Rwandan genocide has been clearly established, are consequently sympathizers of the defendants who are prosecuted before the ICTR. Moreover, it is important to keep in mind that the genocide was perpetrated with the massive assistance of the Hutu population, who was caught in a spiral of blind hatred and violence that went beyond them. Most of the perpetrators or suspected perpetrators were from the victim's close environment: neighbours, friends, sometimes even relatives. Thousands of them have been arrested, impressing evidence of which being the overcrowded Rwandan prisons. Still, as it is not

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[25] See for example Prosecutor v. Naletilić and Martinović, ICTY Case n°IT-98-34, *Order on prosecutor's Motion for Protective Measures for Deposition Witnesses*, 2 August 2001.

[26] See for example Prosecutor v. Vasiljević, ICTY Case n°IT-98-32, *Order on Protective Measures for Witnesses at Trial*, 24 July 2001.

[27] See for example Prosecutor v. Brdjanin, ICTY Case n°IT-99-36, *Decision on Prosecution's Sixteenth Motion for Protective Measures for Victims and Witnesses*, 20 May 2003.

[28] See for example Prosecutor v. Erdemović, ICTY Case n°IT-96-22, *Order for Measures of Protection for Witness "X"*, 18 October 1996.

[29] See for example Prosecutor v. Erdemović, ICTY Case n°IT-96-22, *Order for Measures of Protection for Witness "Y"*, 13 November 1996.

[30] See for example Prosecutor v. Zigiranyirazo, Case n°ICTR-2001673-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses*, 25 February 2003.

possible to imprison every single one that has participated somehow in the genocide, many of them are free. Perpetrators and survivors often keep living in the same village or hill, which explains the last ones feel threaten and may be reluctant to testify. Moreover, the families of the incarcerated perpetrators facing trial before domestic jurisdictions, often also show them their resentment, which obviously reinforces this general sentiment of insecurity.

In addition to all previous remarks, the higher the defendant was in the political or military hierarchy during either the Yugoslav conflict or the Rwandan genocide, the greater is the danger for the witnesses who are willing to testify against him. Indeed in that case, as F. Mumba emphasises, "the more individuals will care about the welfare of the accused"[31] and may constitute a threat for the said witnesses. Such defendants have the means to organise intimidation or retaliation against witnesses, making use of their former influence and their financial wealth.

1.1.3 Protective measures at the investigation stage

Having emphasised the true risks which hang over ICTY and ICTR witnesses' safety, it seems obvious that protective measures should be available to them as early as possible. The main objective of intimidators is indeed "to prevent the truth from being revealed, and usually thus prevent the defendant from being charged or sentenced".[32] Putting pressure on potential witnesses is certainly the best way to do so, which explains why the RPEs of both Tribunal provide for protective measures already at the investigation stage.

Such measures may be ordered by the Prosecutor whose investigators are the first ones to get in contact with potential witnesses. Indeed, at this early stage of the procedure, the Victims and Witnesses Sections (VWS) of both Tribunals do not intervene yet. the Prosecutor alone play a key role in the progress of investigations. The latter is actually the only one capable of initiating them, either "ex-officio or on the basis of information obtained from any source".[33] As for the

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[31] F. Mumba, *Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests?*, op. cit. (note 23), p.360.

[32] Council of Europe, *Explanatory Memorandum to Recommendation Rec(1997)13 on Intimidation of Witnesses and the Right of the Defence,* adopted on 10 September 1997 at the 600th meeting of the Ministers' Deputies, paragraph 42, at http://cm.coe.int/ta/rec/1997/ExpRec(97)5.htm.

[33] Article 18(1) of the Statute of the ICTY and Article 17(1) of the Statute of the ICTR.

protection of potential witnesses, Rule 39(ii) of each RPE states that he "may take any measures which seem necessary to complete the investigation and allow the conduct of the prosecution at trial, "including the taking of special measures to provide for the safety of potential witnesses and informants". To this end, concerning the ICTR, a witness protection sub-unit has been established by the Prosecutor in Kigali (Rwanda) to facilitate the investigators' work.[34] As for the ICTY, a field office has been opened by its VWS in January 2002 in Sarajevo (Bosnia Herzegovina).[35] If the official objective of such office is to "expand and enhance the services provided to witnesses"[36] by this unit, one can legitimately imagine that it might also be involved in the protection of potential witnesses at the request of the Prosecutor.

Rule 40(iii) of the RPE of the ICTY and Rule 40(A)(iii) of the RPE of the ICTR state also that "in case of urgency, the Prosecutor may request any State to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness,[37] or the destruction of evidence." Thus, the protection both Tribunals may offer to potential witnesses depends directly on the assistance the authorities of their State of residence are willing to provide.

1.2. Organising witnesses' travel

Once potential witnesses have been identified, arrangements have to be made to allow them to participate in the proceedings. Actually, most of the witnesses testifying before the International Criminal Tribunals are willing to do so,[38] often for very different reasons, such as "to speak for the dead", "to look for justice in the present", "to help the truth to be known by the world" or "in the hope that

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[34] See T. Ingadottir, F. Ngendahayo and P. Viseur Sellers, *The International Criminal Court, The Victims and Witnesses Unit (Article 43.6 of the Rome Statute), A discussion Paper*, Edited under the auspices of the Project on International Courts and Tribunals (PICT), March 2000, p.20, at http://www.iccnow.org/html/vwu.pdf.

[35] See ICTY, 9th annual report (2002), paragraph 269, at http://www.un.org/icty/pub.htm.

[36] Ibidem.

[37] Emphasis added by the author.

[38] S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p.234.

such crimes could be prevented in the future".[39] Bringing the witnesses to testify before both Tribunals requires tremendous logistical organisation and is far more complicated that it seems. Here the VWS of both Tribunals play a major role, making arrangements to allow witnesses to travel to the Hague or Arusha.

1.2.1 Solving immigration-related problems

As a general rule, witnesses must be physically present at the seat of the Tribunals when they give evidence. Live testimonies are supposed to be more reliable than any other form of testimonies (e.g. deposition). As the Trial Chamber I of the ICTY has underlined in the Tadić case, the physical presence of a witness at the seat of the Tribunal presents two advantages: on the one hand, it "enables the Judges to evaluate the credibility of a person giving evidence" and on the other hand, it "may help discourage the witness from giving false testimony".[40] Moreover, having witnesses testify in person gives full opportunity to the Trial Chamber and both parties to question them. With the seats of both Tribunals being outside the territories where the alleged crimes took place, generally, witnesses must travel to come to testify. In 1997, for example, 168 witnesses came to the Hague.[41] 430 travelled in 2000,[42] compared to 590 (including accompanying persons) in 2002.[43]

A certain number of administrative arrangements need to be made in order to allow a witness to leave his or her country of residence to go to the Netherlands or Tanzania, and to ensure that he or she will be able to return. The ICTY experience in this matter is significant. During the first years of trials (of this Tribunal), the majority of potential witnesses residing within the territories of the former Yugoslavia were "without identity documents, passports, legally valid residential

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[39] See *Statement by Wendy Lobwein, support officer at Victims and Witnesses Unit of the ICTY* in Report of Panel Discussions on Appropriate Measures for Victim Participation and Protection in the ICC hosted by the Women's Caucus for Gender at http://www.iccwomen.org/resources/vwicc/statement7.htm.

[40] See Prosecutor v. Tadić, ICTY Case n°IT-94-1, *Decision on the Defence Motions to Summon and Protect Defence Witnesses*, *and on the Giving of Evidence by Video-Link*, 25 June 1996, paragraph 11.

[41] See ICTY, 5th annual report (1998), paragraph 154, at http://www.un.org/icty/pub.htm.

[42] See ICTY, 7th annual report (2000), paragraph 224, at http://www.un.org/icty/pub.htm.

[43] See ICTY, 9th annual report (2002), op.cit. (note 35), paragraph 268.

permits, or means of obtaining such documents".[44] The VWS of the ICTY had to find ways to obtain the creation of such papers. This task was all the more complex since most of the administrative processes of the former Yugoslavian Republics had broken down with the conflict.[45] Concerning witnesses residing outside the territories of the former Yugoslavia, the mission of the VWS was not effortless either, since each country had different procedures regarding exit and re-entry. Consequently, most of the initial efforts of the VWS of the ICTY were devoted to these arduous but unavoidable administrative issues.[46] The VWS of the ICTR has also struggled to bring witnesses to Arusha, as many of them reside in isolated areas, do not possess identity papers, or live illegally in their State of residence.[47] As a matter of fact, some ICTY and ICTR potential witnesses have fled from their home countries and live illegally in an other one. They are therefore afraid of leaving their new State of residence and not being able to re-enter the said country after having testified in the Hague or Arusha. As both Tribunals do not have the power to grant refugee status to those witnesses, they have to come to an arrangement with the authorities of the countries where the concerned witnesses have sought refuge.

Generally speaking, the co-operation of their state of residence is indispensable to facilitate witnesses' appearance. The recent problems encountered by the ICTR with the Rwandan authorities provide a good example. In June 2002, eight witnesses for the Prosecution were unable to travel from Kigali to Arusha to give testimony, because of an unexpected change in the existing Rwandan procedures regarding travel documents.[48] Certificates of Attestation of "Good Conduct", "Proof of Identity" and "Non-Pursuit" were suddenly required to obtain the necessary "laissez-passers" for ICTR witnesses. Despite its great efforts, the

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[44] See *Statement by Wendy Lobwein*, op.cit. (note 39).

[45] Ibidem.

[46] Ibidem.

[47] See T. Ingadottir, F. Ngendahayo and P. Viseur Sellers, *The International Criminal Court, The Victims and Witnesses Unit (Article 43.6 of the Rome Statute), A discussion Paper*, op.cit. (note 34), p.29.

[48] See *Note by the ICTR on the Reply of the Government of Rwanda to the Report of the Prosecutor of the ICTR to the Security Council*, op.cit. (note 13), paragraphs 1-10.

Tribunal failed to obtain these documents; the said witnesses were unable to appear on time, and two trials had to be postponed.[49]

1.2.2 Avoiding risks to the witnesses' safety

Bringing witnesses before the International Criminal Tribunals is one thing, bringing them without jeopardizing their safety is another. The VWS of both Tribunals not only organizes witnesses' travel, but is also responsible for their safety. Thus, ideally, to avoid any risks, the preparation and transport of witnesses to the seats of the Tribunals should be as discreet as possible.

Here again, nothing can be done without the co-operation of their State of residence, who determines the requirements witnesses must satisfy prior to leaving. Obviously, the more people (within the local authorities) who know the whereabouts and reason for departure of the persons willing to testify, the greater risk of leaks becomes, and by consequence, so does the compromising of their security. For example, the ICTR has criticised the new measures introduced by Rwandan authorities[50] for not only preventing witnesses to appear, but also for endangering their safety. To try to obtain the new required documents, those had apparently been obliged to "reveal the reason for their travel at the lowest level of administration in the locality of their residence" and been "subject to rigorous interviews that exposed their identity and intent to testify".[51] Actually, similar dysfunctions in the Rwandan administrative process had previously been denounced. In a report dated April 1998, Amnesty International had already pointed out the potential dangers to which ICTR witnesses residing in Rwanda were exposed, as they were obliged "to register at different administrative levels" (*cellule*, *secteur*, *commune*, *préfecture* and national levels) and had to complete departure forms at the airport, where they were required to give their names, addresses, reasons for travelling and destination.[52] The procedure of obtaining the

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[49] Ibidem, paragraphs 11-15.

[50] See paragraph above.

[51] See *Note by the ICTR on the Reply of the Government of Rwanda to the Report of the Prosecutor of the ICTR to the Security Council*, op.cit. (note 13), paragraph 26.

[52] See Amnesty International, International Criminal Tribunal for Rwanda : Trials and Tribulations, 1 April 1998, IOR 40/003/98, at http://web.amnesty.org/pages/int_jus_ictr.

necessary travel documents should therefore be as simple as possible; thus limiting witnesses' requirements and exposure to different officials.

In case the intent to testify would not be kept secret, the level of risk will vary from a witness to another; some being evidently more exposed than others due notably to their place of residence or the identity of the accused they are going to testify against or in favour of. To simplify, the dangers here may be of two sorts. First of all, before leaving his or her country of residence, a witness may be intimidated, or even physically attacked, in order to prevent him or her from testifying. To give a concrete example of such practices, a few months ago, the abduction and detention of a Defence witness, while she was collecting her travel documents, by a group of Tutsis who wanted to stop her from testifying was reported to the ICTR.[53] Fortunately, the witness managed to escape, but this incident perfectly illustrates the dangers at this stage. Second of all, once the witness has testified and is back home, he or she may fall victim to reprisals.

In addition to the risks connected to the requirements for obtaining travel documents, the departure of a witness to the seat of one of the Tribunals, and consequently his or her absence for a few days or weeks, may sometimes pass unnoticed with difficulty. In small villages where everyone knows each other, it may be very complicated for a witness to justify his or her absence, especially if the said witness has never travelled outside his or her place of residence. Moreover, neighbours or others may make the connection between the international trial presently taking place at the Hague or Arusha and the absence of the person concerned. Still, there is little the Tribunals or their VWS can do to avoid such risks, apart from taking them into account while assessing the dangers to which the witness may be exposed, because of his or her participation in one of their proceedings.

1.2.3 Establishing policies to minimize inconvenience for witnesses

Last but not least, besides administrative formalities, the appearance of witnesses may also require many additional arrangements. The idea is not only to protect the physical safety of witnesses who have been asked to testify, but also to try to limit

[53] See Hirondelle News Agency, *Tribunal Orders Investigations Into Witnesses' Security*, in "AllAfrica.com", 18 March 2003, at http://allafrica.com/stories/printable/200303180549.html. The name of the country where this incident happened was however kept secret to prevent identification of the concerned witness.

any inconveniences generated by the need to travel to the Hague or Arusha to take the stand.

To begin with, the witness may need help for very practical arrangements, such as securing his or her property while he or she will be away, finding someone to replace him or her in case of farming, or organising care for his or her dependents (such as children, spouse or parents).[54] Such problems, which may prevent the witness from appearing if not resolved, have to be taken into account by the Tribunals. Both VWS of the ICTY and ICTR have, notably, adopted policies to provide arrangements for dependents while the witness is away.[55]

Second, the appearance of a witness before one of the Tribunals may financially penalize him or her. If the full cost of transportation (return trip included) is borne by both Tribunals, witnesses may still be faced with other financial losses as a result of testifying. The appearance of a witness may actually prevent him or her from practising his or her professional activity while staying abroad. The amount of lost earnings in this case will vary from one witness to another. Obviously, the longer one stays in the Netherlands or Tanzania, the more wages will be lost. And, for example, financial loss may be even worse for self-employed witnesses. In addition to the losses already mentioned, a witness may also have to organize, at his or her place of residence, care for persons who may depend on him or her. Such arrangements also generate expenses. Because it would be unfair to the witness to have to meet costs that are directly linked to his or her attendance, both Tribunals have established compensation policies. The criteria and conditions witnesses before the ICTY have to fulfil to be reimbursed have notably been detailed in the Directive on Allowances for Witnesses and Expert Witnesses of December 2001.[56]

Finally, in addition to material and financial support, witnesses may also need emotional support. Travel to the Hague or Arusha and the appearance before the Tribunals by itself may legitimately provoke witnesses' anxiety, especially with those who have never left their place of residence or are of particular

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[54] See T. Ingadottir, F. Ngendahayo and P. Viseur Sellers, *The International Criminal Court, The Victims and Witnesses Unit (Article 43.6 of the Rome Statute), A discussion Paper*, op.cit. (note 34), p.29.

[55] Ibidem.

[56] Directive on Allowances for Witnesses and Expert Witnesses of the ICTY, adopted on 5 December 2001 (IT/200) at http:/www.un.org/icty/legaldoc/index.htm.

vulnerability, like survivors or victims of sexual assaults. Also, for example, some witnesses may not be able to travel by themselves because of health problems or illiteracy. To try to limit, as much as possible, any stress of this kind, both tribunals have adopted several supportive measures. The ICTY has, for example, usually favourably considered the requests of witnesses who wished to be accompanied by a relative or a friend.[57] The VWS of both Tribunals have also organised accompaniment by staff members of these sections to help the witness during his or her journey and to make sure he or she will arrive safely at his or her destination. In this case, the ICTY makes sure women witnesses are escorted by women assistants, in order to avoid any potential uneasiness.[58]

1.3. Dealing with reluctant witnesses

If, as already mentioned, most potential witnesses are willing to testify, some however may be reluctant to appear, whether because of personal security reasons or professional concerns. As the ICTY and ICTR do not have their own police force to provide protection, convincing those witnesses to come to testify at the Hague or Arusha may be problematical. Moreover, Defence witnesses, fearing prosecution if they appear, may be especially hesitant to testify. Intending to encourage them to come, both tribunals have proposed specific protective measures, including alternative possibilities to live testimony.

1.3.1 Requiring their attendance

Neither the Statutes nor the RPEs of the International Criminal Tribunals provide with a definition of the term "witness". The ICTY Directive on Allowances for Witnesses and Expert Witnesses, however, defines as "witness" any person who "provides, or is due to provide testimony before the chambers, as a result of being called by the Parties" or "summoned by the Chambers".[59] As this definition

[57] See ICTY, 2nd annual report (1995), paragraph 115, at http://www.un.org/icty/pub.htm.

[58] See *Statement by Wendy Lobwein*, op.cit. (note 39).

[59] See article 2 of the Directive on Allowances for Witnesses and Expert Witnesses of the ICTY, op.cit. (note 51).

emphasizes, witnesses will appear before both Tribunals either because they have been "called" by the Prosecutor or the Defence, or "summoned" by a Trial Chamber, the second option being more formal, as the Tribunals will then issue an order requiring the witness to appear. Rule 54 of both RPEs stipulates that "at the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". Rule 98 of both RPEs, which deals with the power of the Trial Chambers to order the production of additional evidence, reaffirms that Trial Chambers may themselves summon witnesses and order their attendance. To summarize the previous rules, two situations are conceivable. First of all, the parties have tried to obtain the attendance of a witness but did not succeed and will then ask the Trial Chamber to summon the said witness. Indeed, it may be sometimes very difficult for the Defence to convince witnesses to appear, as they may fear being arrested by the Prosecutor, when coming to the Hague or Arusha to testify. To obtain such a summons from the Trial Chamber, the Defence (or the Prosecutor) will have to persuasively demonstrate to the Trial Chamber that all his attempts to contact or obtain the cooperation of the witness in question have been unsuccessful.[60] Second of all, the Trial Chamber itself will consider that, in order to get additional information and evidence, it is indispensable to hear a certain witness and will summon him or her.[61] In both cases, the summons will contain indications about the identity and whereabouts of the witness, the place and date of the testimony, the subject(s) on which the witness is invited to testify and sometimes also, the amount of the penalty he or she might incur in case of non-compliance with the said summons.[62]

Summoning a witness will not however automatically guarantee that he or she will appear. The ability of the Tribunals for persuading him or her will then essentially depend on the co-operation of his or her State of residence. According to article 29(1) of the Statute of the ICTY and article 28(1) of the Statute of the ICTR, "States shall cooperate" with the Tribunals "in the investigation and

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[60] See for example Prosecutor v. Kupreškić and others, ICTY Case n°IT-95-16, *Decision on Defence* Motion *to Summon Witness*, 8 February 1999.

[61] See for example Prosecutor v. Krstić, ICTY Case n°IT-98-33, *Order for a Witness to Appear*, 15 December 2000.

[62] S. Zappalà,, *Human Rights in International Criminal Proceedings*, op.cit. (note 38), p.234.

prosecution of persons accused of committing serious violations of international humanitarian law". The second paragraph of both articles goes further, specifying "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber". However, as many authors suggest, it may be very difficult for a State to compel an individual to appear before the Tribunals as a witness if there is no provision in its domestic law, which provides for such coercive power.[63] For example, the domestic legislation, introduced by the United Kingdom to govern its co-operation with the ICTY, imposes expressly to witnesses an obligation to comply with summons from this Tribunal, failing which they may be arrested and transferred.[64] Germany,[65] Spain[66] and Finland[67] have also introduced such obligation in their domestic law. Looking at the facts, it seems, however, that very few States have actually adopted such specific provisions in their domestic legal system.[68]

In addition to this legal problem, some individuals may be exempted from complying with summons issued by the International Criminal Tribunals. That is notably the case for the delegates of the International Committee of the Red Cross (ICRC) and war correspondents. If such privilege is not surprising for the first ones, it may be for the second ones. Indeed, neutrality and impartiality are fundamental principles of the ICRC, which may justify the decision taken on 27 July 1999 by the Trial chamber III of the ICTY to exempt ICRC officials and

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[63] Such provision may either be a general one that would apply to any international existing court or a specific one, providing for a personal obligation to comply with summons issued exclusively by one or both International Criminal Tribunals. See F. J. Hampson, *The International Criminal tribunal for the Former Yugoslavia and the Reluctant Witness*, in "International and Comparative Law Quarterly", Vol. 47, January 1998, p.57.

[64] See Articles 9 and 19 of The United Nations (International Tribunal) (Former Yugoslavia) Order 1996, entered into force on 15 March 1996.

[65] See Section 4, paragraph 2 of the Law Regulating the Co-operation with the ICTY of 10 April 1995, entered into force on 14 April 1995.

[66] See Article 7 of the Organisation Act 15/1994 of 1 June on Co-operation with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, entered into force on 2 June 1994.

[67] See Section 8 of the Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the former Yugoslavia and on Legal Assistance to the International Tribunal of 5 January 1994, entered into force on 15 January 1994.

[68] See A. Klip, *Witnesses Before the International Criminal Tribunal for the Former Yugoslavia*, in "International Review of Penal Law", Vol.67, pp.270-274.

employees from testifying.[69] Concerning reporters, the Appeals Chamber of both Tribunals has recently taken an innovative stand, recognising that they should not be obliged to give evidence, unless their testimony "is of important and direct value in determining a core issue in the case" and the evidence they could give "cannot reasonably be obtained elsewhere".[70] The Appeals Chamber took indeed the view that "if war correspondents were to be perceived as potential witnesses for the Prosecution, they may have difficulties in gathering significant information, because the interviewed persons may talk less freely with them, and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk".[71]

1.3.2 Encouraging Defence witnesses' participation

As already mentioned, Defence witnesses may be particularly hesitant to appear since they fear being prosecuted once having undertaken the travel to the seats of the Tribunals. Indeed, Defence witnesses usually come from the same ethnic group than the defendant and might have also committed offences for which the International Criminal Tribunals would be competent. For that reason, they can legitimately fear to be arrested and prosecuted when present in the premises of the Tribunals to give their testimony. Thus, to encourage those witnesses to take the stand, both Tribunals may issue "safe conducts" which grant them a certain immunity "from prosecution or restriction of liberty while coming to give evidence".[72]

Such order, which was not provided for neither by the Statutes nor the RPEs, was established for the first time by the ICTY in the Tadić case under the general

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[69] See S. Jeannet, *Recognition of the ICRC's long-standing rule of confidentiality – An important decision by the International Criminal Tribunal for the former Yugoslavia*, in "International Review of the Red Cross", June 2000, N°838, pp.403-425.

[70] See Prosecutor v. Brdjanin and Talić, ICTY Case n°IT-99-36, *Decision on Interlocutory Appeal*, 11 December 2002, paragraphs 48 and 49. Such decision is known as the "Randal case". Jonathan C. Randal, former correspondent of the Washington Post in Yugoslavia, was indeed summoned to testify in the trial of Radoslav Brdjanin because of an article he wrote in 1993, which contained an interview with Brdjanin. Randal refused however to comply with the said summons, arguing that journalists' independence and impartiality would be jeopardised if they would be forced to testify.

[71] Ibidem, paragraph 43.

[72] S. Zappalà, *Human Rights in International Criminal Proceedings*, op.cit. (note 38), p.235.

power of Rule 54.[73] However, as the Trial Chamber I has specified at that time, a safe conduct "grants only a very limited immunity from prosecution"[74] since immunity is only given "with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal".[75] In consequence, immunity will not be ensured for any crimes perpetrated after the departure of the concerned Defence witness from his or her State of residence to the Hague or Arusha, nor for any offences which do not fall under the competence of both Tribunals as defined by article 1 of each Statutes.[76] Moreover, a safe conduct grants just a limited immunity in time as it will apply "only for the time during which the witness is present at the seat of the International Tribunal for purpose of giving testimony".[77] In practice, such immunity is also valid during the travel to and from the seats of both Tribunals.[78]

Safe conducts do not grant neither immunity from prosecution by national jurisdictions.[79] Indeed, many ICTR Defence witnesses, who are essentially Rwandan Hutus, have fled abroad after the genocide and are afraid, when travelling to Arusha to testify, of being "accused of complicity in the crimes committed […] in 1994", taken into custody and transferred to Rwanda to be prosecuted by domestic jurisdictions. As M. Scharf comments, despite the fact that the ICTR has primacy over national courts (so does the ICTY), it cannot force national jurisdictions to give up prosecutions when itself does not prosecute the

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[73] See paragraph above for the dispositions of Rule 54 of both RPEs.

[74]Prosecutor v. Tadić, *Decision on the Defence Motions*, op.cit. (note 40), paragraph 12.

[75] Ibidem.

[76] According to article 1 of each Statutes, the ICTY is competent for prosecuting "persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991" whereas the ICTR is competent for prosecuting "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994".

[77] Prosecutor v. Tadić, *Decision on the Defence Motions*, op.cit. (note 40), paragraph 12.

[78] See for example Prosecutor v. Tadić, *Decision on the Defence Motions*, op.cit. (note 40), where the safe-conduct was granted for a period of fifteen days prior to and fifteen days after the testimony of the concerned witness; Prosecutor v. Dokmanović, ICTY Case n°IT-95-13A, *Order on Defence Motion for Safe-Conduct*, 12 June 1998, where the safe-conduct was granted for a period of seven days prior and seven days after the witness' testimony.

[79] Prosecutor v. Ntagerura, Case no. ICTR-96-10A-I, Decision for the Defence Motion for the Protection of Witnesses, 24 August 1998.

case.[80] Thus, Defence witnesses who beneficit from a safe conduct are assured being immune from prosecution by the International Criminal Tribunals when present at their seats to give testimony but have no guarantee vis-à-vis domestic jurisdictions.

1.3.3 Providing for alternatives to life testimony

Issuing safe conducts is not the only way to obtain reluctant Defence witnesses' collaboration. Both Tribunals may also resort to alternatives to life testimony, which do not require witnesses to be present at the seats ofthe Tribunals in order to testify. In practice, it has indeed happened that a witness, whose testimony appeared important to the case, was unable to travel to the Hague or Arusha to testify (because of his or her current state of health, for example),[81] not to mention the number of witnesses who were simply not willing to do so. In order to obtain their testimony, other methods have been authorized for giving evidence. Their probative value is, however, not as weighty as evidence given in the courtroom.
Defence witnesses, or other witnesses unwilling to travel to the seats of the Tribunals, may notably give their testimony by way of deposition. Such a possibility is provided by Rule 71 of the RPE of each Tribunals, which reads as follows: "Where it is in the interests of justice to do so, a Trial Chamber may order, proprio motu or at the request of a party, that a deposition be taken for use at trial, whether or not the person whose deposition is sought is physically able to appear before the Tribunal to give evidence". It is interesting to note that originally, the writing of this Rule was more restrictive, only allowing those depositions to be taken "in exceptional circumstances". However, due to the high number of witnesses heard in each case and to the necessity for the Tribunals to carry out their work as expeditiously as possible, such a provision was not realistic.

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[80] M. Scharf, *Commentary*, in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals, Volume III: The International Criminal Tribunal for Rwanda 1994-1999*, Antwerp, Intersentia, 2001, p.250.

[81] See for example Prosecutor v. Krnojelac, ICTY Case N° IT-97-25-T, *Order for Testimony via Video-Conference Link*, 15 January 2001; Prosecutor v. Milosević, ICTY Case N°IT-02-54, *Order on Prosecution Motion for the Testimony of Nojko Marinović via Video-Conference Link*, 19 February 2003.

In addition, the RPE of the ICTY provides for the possibility to receive testimony via video-link conference.[82] This technique appears to be the closest to live testimony, as the witnesses in question gives evidence through a live testimony link with the courtroom where all persons present are able to see, hear and communicate with them. Therefore, even if witnesses are not *physically* present, judges are still able to assess their credibility while they testify. However, in order to present evidence by video-link testimony, two criteria must be met: firstly, the testimony must be "sufficiently important to make it unfair to proceed without it" and secondly, the witness must be "unable or unwilling to come to the International Tribunal".[83] Moreover, such arrangement being quite expensive, the parties are encouraged to organise the giving of evidence by video-conference link of as many witnesses as possible at the same time.[84]

To conclude this first part relating to obtaining witnesses' attendance, we are forced into observing how complicated it is for both Tribunals to organise witnesses' travel to their seats and how crucial is the co-operation of the State of residence of the said witnesses for doing so. The Tribunals are indeed completely helpless without the assistance and collaboration of the concerned States, not only for providing effective protection to potential witnesses, but also for obtaining the necessary travel documents and compelling individuals who would be reluctant to appear before them. Although States have the obligation to co-operate with both Tribunals, they are still sovereign entities which, unfortunately, do not always display good will. It is therefore positive that the ICTY, as well as the ICTR, have liberalised the conditions to accept non-live testimony, which do not require witnesses' appearance and enlarger their independence.

[82] See Rule 71 *bis* of the RPE of the ICTY.

[83] See Prosecutor v. Tadić, *Decision on the Defence Motions*, op.cit. (note 40), paragraph 19.

[84] See Prosecutor v. Kordić and Čerkez, ICTY Case n°IT-95-14/2 , *Order on Defence Application for Video-Conference Link*, 4 May 2000.

2. Efficiently protecting witnesses while respecting the defendant's right to a fair trial

Once having obtained witnesses' attendance, both Tribunals must be able to offer them adequate and efficient protection. Two systems of protective measures may be conceivable: procedural and extra-procedural measures. Whereas the first type is aimed at protecting witnesses during the proceedings (e.g. closed hearings), the second favours protection at the post-trial stage (e.g. relocation). All protective measures contained in both Statutes and RPEs of the ICTY and ICTR are procedural. Those procedural measures may be divided in three broad categories: those seeking confidentiality (2.1), those seeking anonymity (2.2) and those seeking specific protection for victims of sexual assault (2.3).[85] Both Tribunals may however also provide for a witness' relocation when obtaining the necessary State co-operation.

2.1. Protective measures to prevent identification from the public and the media

Such measures, also called "confidentiality measures",[86] intend not only to protect the safety of the concerned witness, but also his or her privacy.[87] The witness' identifying data (name, address and other whereabouts) will then be kept secret from the public and the media, but not from the accused and his counsel. Such protective measures however, may raise legal problems and present limits, which are discussed below.

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[85] Such division is inspired from the one the Trial Chamber I of the ICTY did in the Tadić case, when identifying five different categories of protective measures: "those seeking confidentiality whereby the victims and witnesses would not be identified to the public and the media", "those seeking protection from retraumatization by avoiding confrontation with the accused and his counsel", those seeking anonymity whereby the victims and witnesses would not be identified to the accused and his counsel", "miscellaneous measures for certain victims and witnesses" and "finally, […] general measures for all victims and witnesses who may testify before the International Criminal Tribunal". See Prosecutor v. Tadić, ICTY Case n°IT-94-1-T, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995, paragraph 4.

[86] S. Zappalà, *Human Rights in International Criminal Proceedings*, op.cit. (note 38), p.237.

[87] F. Mumba, *Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests?*, op.cit. (note 23), p.361.

2.1.1 Impact of the confidentiality measures

Rule 75(A) of the RPE of both Tribunals allows Trial Chambers to order protective measures "for the privacy and protection of victims and witnesses". Judges may do so *proprio motu* or at the request of a party, or of the concerned victim and witness, or of the VWS. Such protective measures have to be "appropriate" and "consistent with the rights of the accused". In addition to this general power granted to trial Chambers by Rule 75(A), Rules 75(B) and (C) give some guidance to them, by providing further details of what kind of protective measures may be adopted to that effect.

First of all, according to Rules 75(B)(i) and (ii) of the RPE of both Tribunals, a Trial Chamber may intend to protect the safety and privacy of a witness by ordering "measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness". Such measures may include:

(A) "Expunging names and identifying information from the Chamber's public records;

(B) non-disclosure to the public of any records identifying the victim;

(C) giving the testimony through image- or voice- altering devices or closed circuit television; and

(D) assignment of a pseudonym".[88]

To be able to assess the impact of this first set of provisions, one has to know which definition is given to the broad terms of "public" and "media". More precisions concerning these two notions may be found in the ICTY jurisprudence. The expression "public" actually includes "all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the Tribunal and the staff of the Registry […], and the Prosecutor and the Defence",[89] but also "without limitation, family, friends and associates of the Accused; the Accused in other cases or proceedings before the Tribunal; Defence

[88] See Rule 75(B)(i) of both RPE.

[89] See for example Prosecutor v. Mrdja, ICTY Case n°IT-02-59, *Order on Prosecution's Motion for Protective Measures*, 8 July 2002.

Counsel in other cases or proceedings before the Tribunal".[90] The "media" signifies "all video, audio and print media personnel, including journalist, authors, television and radio personnel, their agents and representatives".[91] Evidently, the "media" are also part of the "public".[92] Thus, a Trial Chamber's order requiring non-disclosure of the identity of a witness to the public, which then, logically includes the media.

Second of all, Rule 75(B)(ii) of both RPEs also provides for the possibility for witnesses to be heard in closed sessions, as do also the Statutes of both Tribunals.[93] According to Rule 79 of both RPEs, in this case, the public and the media may be excluded, either from the totality of the proceedings, or from a part of them.

Looking through the order for protective measures issued by both Tribunals, it appears clearly that "confidentiality measures" are complementary to each other. Indeed, it would be useless to protect the identity of a witness by using a pseudonym while referring to him or her in court, if his or her real name would be mentioned in publicly disclosed records.

2.1.2 Legal problems connected with the adoption of such measures

In accordance with well-established international standards,[94] the Statutes of both Tribunals provide for the defendant's right to a fair and public trial.[95] The adoption of "confidentiality measures" (especially *in camera* sessions) for Prosecution witnesses, whose objective is to limit the publicity of the proceedings to protect the safety and privacy of the said witnesses, directly entails however the right of the accused to have public proceedings.

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[90] Ibidem.

[91] Ibidem.

[92] See for example Prosecutor v. Stakić, ICTY Case n°IT-97-24, *Order on Prosecution's Motion Concerning 10 December 2001 Decision on Protective Measures*, 10 January 2002.

[93] See Article 22 of the ICTY Statute and Article 21 of the ICTR Statute.

[94] See notably Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[95] See Article 21(2) of the ICTY Statute and 20(2) of the ICTR Statute.

Privileging public hearings rather than closed ones presents several advantages. As the Trial Chamber II of the ICTY has underlined in the Tadić case, "the principal advantage of press and public access is that it helps to ensure that a trial is fair".[96] As a matter of fact, public hearings favour more transparency than *in camera* sessions; everyone being able to check how justice is dispensed. Thus, publicity may deter any irregularities in the conduct of the proceedings and offer greater protection to the defendant. Public trials have also educative virtues and notably may facilitate "public knowledge and understanding"[97] of the work of the judiciary. Such an effect may be particularly interesting for the International Criminal Tribunals whose creation has given rise to much criticism and suspicion. Finally, public hearings may also deter future crimes.[98]

Those benefits are well established. However, when looking at the major international human rights instruments, the defendant's right to public hearings is not absolute. The International Covenant on Civil and Political Rights (ICCPR) states notably that the press and the public may legitimately be excluded "for reasons of morals, public order or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extend strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".[99] The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) contains identical dispositions, adding only to the previous list the possibility to restrict the defendant's right to a public trial when "the interests of juveniles" require it.[100]

The provisions of Rule 75(B)(ii) of both RPEs, which allows closed sessions, are thus consistent with international human rights law. The conditions required by Rule 79 of both RPEs to limit the accused's right to public hearings are similar to

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[96] Prosecutor v. Tadić, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, op.cit. (note 85), paragraph 32.

[97] Prosecutor v. Kunarac and al., ICTY Case n°IT-96-23, *Order on Defence Motion Pursuant to Rule 79*, 22 March 2000, Reproduced in J. Ackerman and E. O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, The Hague, Kluwer Law International, 2000, p.398.

[98] Ibidem.

[99] Article 14(1) of the ICCPR, adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976.

[100] See Article 6(I) of the ECHR, adopted on 4 November 1994, entered into force on 3 December 1953.

the ones provided by the previous instruments, the exclusion of the press and the public being exclusively authorised, before both Tribunals, when necessary to ensure "public order or morality"[101] and "the protection of the interests of justice".[102] The only novelty brought by this Rule is to have added a new justification to these traditional requirements, that is to say the need to protect witnesses. Such a concern does not appear, however, unreasonable. As the Trial Chamber II of the ICTY has emphasised, there is indeed "a growing acceptance in domestic jurisprudence of the need to protect the identity of victims and witnesses from the public when a special interest is involved".[103]

Admitting closed hearings does not seem, thus, to arise particular legal problems, as long as *in camera* sessions keep being the exception. Both Tribunals having regularly reaffirmed the importance to favour public trials[104] and being obliged to make public the reasons on what grounds they have decided to exclude the press and the public,[105] the risk of abuses appear limited.

2.1.3 Limits of the protection offered by confidentiality measures

If confidentiality measures have the merit not to entail dangerously the Defendant's rights, they have, on the other hand, limited efficiency since precisely, the identity of the witness is not withheld from the accused and his counsel. Logically, the more people know the witness' name and whereabouts, the greater is the risk of leaks and uselessness of the said measures. One can easily figure out the inconvenience and dangers protected witnesses may encountered when, for example, their names are purposely publicly disclosed in national and local newspapers as it has been the case for several ICTY protected witnesses.[106]

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[101] Rule 79(i) of both RPEs.

[102] Rule 79(iii) of both RPEs.

[103] Prosecutor v. Tadić, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, op.cit. (note 85), paragraph 39.

[104] See for example Prosecutor v. Kunarac, op.cit. (note 97).

[105] See Rule 79(B) of both RPEs.

[106] See for example Prosecutor v. Blaškić, ICTY Case n°IT-95-14, *Order for the Immediate Cessation of Violations of Protective Measures for Witnesses*, 1 December 2000 (regarding the publication of statements or transcripts of a testimony given by a protected witness by two Croatian newspapers, *Globus* and *Slobodna Dalmacija*). See also Prosecutor v. Milosević, ICTY Case n°IT-02-54-T, *Order for the Immediate Cessation of Violations of Protective Measures for*

Aware of these problems, both Tribunals have tried to prevent and deter violations of confidentiality measures through different means.

First of all, the risk of leaks may obviously come from the defendant whose interest to have Prosecution witnesses intimidated or stopped from testifying is manifest. The accused may indeed easily reveal the identity of a protected witness who is going to take the stand against him to ill-intentioned people. While incarcerated in the ICTY or ICTR Detention Units, detainees are effectively not to be cut off from the outside. The set of rules, adopted by each Tribunal to govern their detention, provide notably that they shall be allowed to "communicate with their families and other persons with whom it is in their legitimate interests to correspond by letter and by telephone".[107] However, such right is not absolute and may be limited in certain circumstances. It is indeed possible to "prohibit, regulate or set conditions for contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact" could "be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber pursuant to Rule 53 or Rule 75[108] of the Rules of Procedure and Evidence".[109]

Second of all, the Defence counsel may also disclose the witness' identity, either intentionally or by mistake during the proceedings. As a matter of fact, not all the attorneys acting before the International Criminal Tribunals show high standards of integrity and professionalism. To deter any misconduct from their part, several instruments have been put in place. To begin with, a "Code of professional conduct for Defence counsel" has been adopted by both Tribunals, which reaffirms that Defence counsels should act with competence, integrity and independence.[110] Furthermore, when ordering confidentiality measures, Trial

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Witnesses, 18 June 2002 (regarding the disclosure of a protected witness' identity by the Serbian newspaper *Nacional*).

[107] See Rule 60 of the ICTY *Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention")*, adopted on 5 May 1994, as amended on 29 November 1999 (IT/38/Rev. 8). See also Rule 58 of the ICTR *Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal*, adopted on 5 June 1998.

[108] Emphasis added by the author.

[109] See Rule 66 of the ICTY Rules of Detention and Rule 64 of the ICTR Rules of detention, op.cit. (note 107).

[110] See Article 10 of the ICTY "Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal" (IT/125 REV.1, as amended on 12 July 2002) and Article 5 of

Chambers usually mention the bans and obligations which fall to the Defence in this field. It is notably required from the Defence team not to disclose any information enabling a witness to be identified to the public; not to divulgate non-public documents to the media; to inform any third party (to which it is necessary to disclose non-public information for the preparation of the case) not to copy, reproduce, publicise or disclose them; to keep a log of the name, address and function of any person receiving confidential information and to return any confidential materials in case of withdrawal from the case.[111] In addition to these general precautions, the Trial Chamber I of the ICTR went further, stating that the Defence was "to personally[112] ensure that the accused does not disclose to anyone else, other than the immediate Defence team, any material comprising identifying information in respect of protected witnesses, or any such information".[113]

Third of all, besides the accused and his counsel, other third parties may also consciously disclose the witness' protected identity, such as interpreters, translators, or investigators of the Defence for example. In doing so, they risk however to be prosecuted for contempt of the Tribunals as Rule 77 of each RPE stipulates that "any person who discloses information relating to those proceedings in knowing violation of an order of a Chamber" may be liable to a fine or a imprisonment.

If this set of safeguards is worth existing, its deterrent power is unfortunately restricted, the Tribunals obviously not being able to control everything. Witnesses who benefit from confidentiality measures should, therefore, be fully aware of

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the ICTR "Code of Professional Conduct for Defence Counsel"(adopted on 8 June 1998), which read as follows:

"In providing representation to a client, Counsel must:

(a) act with competence, skill, care, honesty and loyalty;
(b) exercise independent professional judgement and render open and honest advice;
(c) never be influenced by improper or patently dishonest behaviour on the part of a Client;
(d) preserve their own integrity and that of the legal profession as a whole;
(e) never permit their independence, integrity and standards to be compromised by external pressures."

[111] See for example Prosecutor v. Galić, ICTY Case n°IT-98-29, *Order on the Prosecution Motions for Protective Measures and for Extension of Time*, 5 June 2000; Prosecutor v. Stakić, ICTY Case n°IT-97-24, *Order on Prosecution's Motion for Particular Protective Measures*, 29 January 2002.

[112] Emphasis added by the author.

[113] See Prosecutor v. Mpambara, Case n°ICTR-2001-65-I, *Decision on the Prosecutor's Motion for Witness Protection Measures*, 30 May 2002, paragraph 24, reproduced in Prosecutor v. Zigiranyirazo, Case n°ICTR-2001-73-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses*, 25 February 2003, paragraph 16.

their limits in order to be able to rightly assess the repercussions their testimony may have on their safety and privacy.

2.2. Protective measures seeking anonymity

Contrary to confidentiality measures, the ones seeking anonymity allow not only the non-disclosure of the witness' identity to the public and the media, but also from the accused and his counsel. If such measures may provide vulnerable witness with a greater protection, they also interfere more seriously with the right of the accused to a fair trial. This disadvantage could be avoided by the use of extra-procedural protective measures.

2.2.1 Impact of the anonymity granted by both Tribunals

According to Rule 69 of the RPEs of both Tribunals, the Trial Chambers may, "in exceptional circumstances", order the non-disclosure of the identity[114] of a witness "who may be in danger or at risk until such person is brought under the protection" of the Tribunals. Such measure is only temporary as the name and whereabouts of the said witness "shall be disclosed in sufficient time prior to the trial[115] to allow adequate time for preparation of the Defence". Indeed, Articles 21(4)(b) of the ICTY Statute and 20(4)(b) of the ICTR Statute clearly state that the defendant should have "adequate time and facilities for the preparation of his defence", which is more than legitimate.

To fully understand this protective measure, a few explanations are necessary. First of all, what meaning should be given to the broad term "identity"? The Trial Chamber II of the ICTY has precised in the Delalić case that the "identity" of a witness intends to express his or her "name, sex, date of birth, place of origin, names of parents and place of residence at the time relevant to the charges to which the witness will testify" but does not include his or her current adress.[116]

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[114] Emphasis added by the author.

[115] Emphasis added by the author.

[116] See Prosecutor v. Delalić, ICTY Case n°IT-96-21, *Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses*, 18 March 1997, reproduced in J. Jones, *The Practice of the International Criminal tribunals for the Former Yugoslavia and Rwanda*, 2nd Edition, New York, Transnational Publishers, 2000, p.347.

Second of all, what actually can be considered as "sufficient time prior to the trial"? As F. Mumba rightly comments, this will obviously "differ from case to case, depending among other things on the role of the witness" in question.[117] Therefore, the more important the witness to establish the guilt of the defendant, the earlier should his or her identity be communicated to the Defence team.

As already mentionned, the non-disclosure provided by this rule is only temporary and should not be confused with what is called "full anonymity". In the latter case, the identity of the witness is, on the contrary, permanently made secret to the accused and his counsel. Neither the Stautes nor the RPEs of both Tribunals clearly provide for such a radical measure, Article 22 of the Statute of the ICTY and Article 21 of the Statute of the ICTR only mentionning the possibility to protect "the victim's identity" to ensure victims and witnesses' security. Actually, full anonimity has been granted once since both Tribunals have been set up. Indeed, the Trial Chamber II of the ICTY, in its first case, the Tadić case, authorised three Prosecution witnesses to testify anonymously.[118] The said Trial Chamber considered that full anonimity could only be granted "in exceptional circumstances" and if the following conditions were met: "first and foremost, there must be a real fear for the safety of the witness or her or his family";[119] secondly, "the testimony of the particular witness must be important to the Prosecutor's case";[120] thirdly, "the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy";[121] fourthly, it must be taken into account "the ineffectiveness or non-existence of a witness protection programme";[122] and finally "any measures taken should be strictly necessary".[123]

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[117] F. Mumba, *Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests?*, op.cit. (note 23), p.367.

[118] See Prosecutor v. Tadić, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, op.cit. (note 85).

[119] Ibidem, paragraph 62.

[120] Ibidem, paragraph 63.

[121] Ibidem, paragraph 64.

[122] Ibidem, paragraph 65.

[123] Ibidem, paragraph 66.

Full anonymity was also requested by the Prosecutor in the Blaškić case but not granted by the Trial Chamber I, which did not consider that "exceptionnal circumstances" existed to justify such a measure in this particular case.[124]

2.2.2 Legal problems linked to the acceptance of anonymous testimony

If the temporary anonymity granted by Rule 69 does not give rise to criticisms as long as the identity of the witness is disclosed to the accused in sufficient time to allow him to prepare adequately his defence, full anonymity is far much debated as the numerous reactions following the Tadić decision[125] have demonstrated.

Actually, allowing anonymous testimony entails one of the fundamental features for a trial to be fair, that is to say being able to confront his or her accusers. Already acknowledged by the Roman law,[126] such right is well established in international law since it is recognised by all major international and regional human rights' treaties. The ICCPR, the ECHR and the American Convention on Human Rights (ACHR) indeed all specify that the accused should be entitled to examine the witnesses against him.[127] So do the Statutes of each International Criminal Tribunals where the ability to confront prosecution witnesses is defined as one of "the minimum guarantees" the defendant should have to be able to determine the charges against him.[128]

It seems in effect very difficult for the accused to defend himself and prove that the witness testifying against him is not reliable or hostile when he or she does not even know the name of the said witness. As the Defence has argued in the Tadić case, there are "only very limited circumstances in which the identity of the

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[124] See Prosecutor v. Blaškić, ICTY Case n°IT-95-14, *Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses*, 5 November 1996, paragraph 45.

[125] Prosecutor v. Tadić, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, op.cit. (note 85).

[126] D. Lusty, *Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials*, in "Sydney Law Review", Vol.24, pp.361-426.

[127] See Article 14(3)(e) of the ICCPR, Article 6(3)(d) of the EHCR and Article 8(2)(f) of the ACHR.

[128] See Article 21(4)(e) of the ICTY Statute and Article 20(4)(e) of the ICTR Statute, which entitle the accused "to examine, or have examined, the witnesses against him".

witness can be witheld from the accused and still permit the accused a fair trial". That is, firstly, when the witness is only a "fortuitous bystander" and not a victim of the alleged crime and secondly, when "there is no other relationship" between the said witness and the defendant.[129] Apart from that particular case, allowing witnesses to testify anonymously appears very risky.

Inspired by the jurisprudence of the European Court of Human Rights (notably the Kostovski case[130]), the Trial Chamber II, in its Tadić decision, has tried to minimize the dangers of full anonymity by establishing a set of safeguards to guarantee a fair trial to the accused even so. First of all, Judges "must be able to observe the demeanour of the witness" (when this one is testifying) in order to be able to assess his or her reliability.[131] Second of all, Judges "must be aware of the identity of the witness".[132] Third of all, "the Defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts".[133] Finally, the identity of the witness must be released to the Defence as soon as "there are no longer reasons to fear for the security of the witness".[134] An additional protection had been proposed, in the Blaškić case, by the Defence who suggested appointing a neutral third party to investigate and question the witness in order to assess his or her credibility before letting him or her testify anonymously.[135]

If such safeguards are praiseworthy and may undeniably offer more guarantees to the defendant, they cannot completely ensure that the anonymous witness is really reliable and that is a risk the International Criminal Tribunals should not allow themselves. Being the first international jurisdictions of this kind, their credibility

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[129] Prosecutor v. Tadić, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, op.cit. (note 85), paragraph 9.

[130] The European Court of Human Rights, *Kostovski v. Netherlands*, 20 November 1989, Series A N°166. The court stated that anonymous testimony may only be accepted if: 1) the said testimony is not the only evidence to establish the guilt of the accused and 2) the prejudice to the Defence's rights is compensated for (in every case, the Defence must be able to confront the witness, submitting him written questions or allowing the Defence counsel alone to attend the interrogation of the witness for example). [See F. Sudre, J-P. Marguénaud, J. Andriantsimbazovina, A. Gouttenoire, M. Levinet, Les grands arrêts de la cour européenne des Droits de l'Homme, Paris, Presses Universitaires de France, 2003, p.294].

[131] Ibidem, paragrpah 71.

[132] Ibidem, paragrpah 71.

[133] Ibidem, paragrpah 71.

[134] Ibidem, paragrpah 71.

[135] See S. Zappalà, *Human Rights in International Criminal Proceedings*, op.cit. (note 38), p.132.

is shaky and could be seriously affected if the rights of the accused did not seem to be fully respected.

2.2.3 Privileging extra-procedural protective measures as an alternative

If full anonymity is prejudicial to the defendant's rights, such a measure, on the other hand, confer witnesses with an effective protection. Ensuring the defendant a fair trial and adequately protecting witnesses are not, however, incompatible with each other. Both objectives may actually be reached through the setting up of extra-procedural protective measures.

Contrary to the procedural measures described above, which grant protection to witnesses during the proceedings, extra-procedural measures intervene after the trial, witnesses being relocated and giving a new identity, once they have testified, to protect them from retaliation. Such a protection scheme, commonly called "witness protection program", has been established in several countries, notably within the scope of the fight against organised crime; the most famous programs being those of the United States, Canada and Italy.

Both the ICTY and ICTY have provided witnesses with relocation. Discretion being the prerequisite to the success of this type of measures, very little data has been disclosed on the subject. The ICTR is said, for example, to have "permanently relocated 35 witnesses deemed particularly vulnerable to risk to their safety",[136] which is nothing considering the high number of witnesses who are heard by this Tribunal in each case. If both Tribunals should make more use of extra-procedural measures, organizing witnesses' relocation is, actually, very difficult for both of them and this, for several reasons.

To begin with, relocation programmes are extremely complex to set up.[137] Protected witnesses have indeed to be moved from their current place of residence to a safer other one, if possible with their close relatives. Sometimes, relocation is not sufficient to ensure their security and a change of identity is also necessary to

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[136] Figure given in February 2002. See *The International Criminal Court: Lessons from the International Criminal Tribunal for Rwanda – Potential Problems for the Registrar*, Paper presented by Mr. Adama Dieng, United Nations Assistant Secretary-General and Registrar, ICTR, at the Conference on "Towards Global Justice: Accountability and the International Criminal Court", held at Wilton Park, Sussex, United Kingdom, 4-8 February 2002, p.6.

[137] See Council of Europe, *Rapport sur la Protection des Témoins*, PC-CO (1999) 8 REV, 24 March 1999, at http://www.coe.int.

prevent them from being find again. Providing them with a new identity is, however, very complicated, witnesses receiving not only new identity papers but also a new past with all the necessary documents to make it credible. In addition to the numerous legal and adminstrative problems such a measure may obviously generate, a change of identity may also have strong psychological effects on the concerned witnesses and their relatives, those having to totally renounce their past lives.[138] Psychological support should therefore be available to them if necessary. Relocation is also synonymous with rehabilitation, which notably implies helping protected witnesses to find a new job, a new school for their children, etc...

Secondly, ICTY and ICTR witnesses' relocation cannot be arranged without State co-operation. Indeed, for each witness to relocate, both Tribunals have to find a State willing to welcome him or her on its territory. The ICTY is said, for example, to have concluded an agreement with the British authorities on the relocation of its witnesses.[139] The ICTR seems to encounter more difficulties in obtaining State co-operation, relocations having been made possible "mostly through the assistance of the Office of the United Nations High Commissioner for Refugees".[140]

Thirdly, relocating a witness is very expensive.[141] Relocated witnesses must indeed be provided with a new housing. They must also receive a monthly allowance until they are able to find a job and earn their living. The medical and psychological support at their disposal generates expenses as well. Due to the limited budgets of the Tribunals, the optimum is that all these expenses be taken care of by the State which has accepted to welcome the protected witness, which notably may partly explain the reluctance shown by States to co-operate with the Tribunals to relocate witnesses.

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[138] Ibidem, pp.21-22.

[139] See T. Ingadottir, F. Ngendahayo and P. Viseur Sellers, *The International Criminal Court, The Victims and Witnesses Unit (Article 43.6 of the Rome Statute), A discussion Paper*, op.cit. (note 34), p.26.

[140] *The International Criminal Court: Lessons from the International Criminal Tribunal for Rwanda – Potential Problems for the Registrar*, op.cit. (note 136), p.6.

[141] See Council of Europe, *Rapport sur la Protection des Témoins*, op.cit. (note 137), p.24.

2.3. Specific protective measures for victims of sexual violence

Like in many armed conflicts, numerous gender-related crimes have been reported during the Yugoslav war and the Rwandan genocide. Historically, the majority of victims of such abuses have been women; however, in some cases, men have also been sexually assaulted.[142] Speaking about their traumatic experiences, and notably coming to the Hague or Arusha to testify, requires great courage from those victims. Both Tribunals, aware of the extreme vulnerability of this category of witnesses, have adopted specific rules in order to facilitate their testimony and prevent, as best as possible, any additional trauma.

2.3.1 Acknowledging their extreme vulnerability

During both the Yugoslav conflict and the Rwandan genocide, rape had been widely used as an instrument of "ethnic cleansing", the main objective of such policy being the eradication of a certain ethnic group from a given area by force or intimidation.[143] Indeed, as the UN Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia has commented, rape, in this case is "not only an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group" to which the victim belongs.[144] In Bosnia Herzegovina, most of the reported rapes were committed by Serb forces against Muslim women. Rapes were also mainly perpetrated in Kosovo against Albanian women by Serb soldiers and paramilitaries,[145] whereas in Rwanda, sexual violence was principally directed against Tutsi women by Hutu militia

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[142] Rapes, sexual abuses and castration of males prisoners have indeed been reported in the Yugoslav conflict. See K. Dawn Askin, *War Crimes Against Women, Prosecution in International War Crimes Tribunals*, The Hague, Kluwer Law International, 1997, p.271.

[143] Ibidem, pp.262-263.

[144] *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur on the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992*, UN Doc. E/CN.4/1993/50, 10 February 2003, paragraph 85.

[145] See Human Rights Watch, *Kosovo: Rape as a Weapon of "Ethnic Cleansing"*, 1 March 2000, at http://www.hrw.org/reports/2000/fry/index.htm#TopOfPage.

groups (*Interahamwe*) or soldiers of the Rwandan Armed Forces.[146] The consequences of rape on those women are numerous. In addition to possible serious health problems,[147] they may also suffer from a high level of trauma which frequently comes with a sentiment of shame, guilt and fear of retaliation if they dare to talk about their painful experience.

Survivors may indeed be highly exposed to stigmatisation, as rape is generally seen as shameful in Muslim, Kosovar Albanian or Rwandan societies. As a matter of fact, in traditional patriarchal Muslim society, the loss of her chastity and purity not only sullies the rape survivor's honour but also the one of her whole family. It also makes her not worthy of a man, which explains why many married Muslim women do not dare to talk about their rape fearing to be rejected (or even killed) by their husbands whereas others are afraid of never being able to marry.[148] The same is true for Kosovar Albanian women who are "terrified that they would be blamed for their rape, shunned by friends and family, and unable to marry".[149] In Rwandan society as well, women who have the courage to admit publicly they have been raped take a big risk of being "ostracised from their families and community".[150] As Rwandan women "are valued primarily for their role as wives and mothers", here again, the fear of not being able to marry or remarry (since many rape survivors are widows, their husbands having been killed during the genocide) keeps them from talking. Moreover, Rwandan women who have been sexually assaulted are automatically suspected to have caught a sexually transmitted disease, such as AIDS.[151] Taking into consideration this high and broad risk of stigmatisation, one can easily understand why victims of sexual

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[146] See Human Rights Watch, *Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath*, September 1996, at http://www.hrw.org/reports/1996/Rwandan.htm.

[147] The most common health problem is evidently sexually transmitted diseases. Sexual mutilations, which often followed the rapes, can provoke serious injuries as well. In addition, when the victim got pregnant after being raped, she may also suffer from complications if she had resorted to self-induced or clandestine abortion.

[148] K. Dawn Askin, *War Crimes Against Women,* op.cit. (note 142), pp.267-273.

[149] See Human Rights Watch, *Kosovo: Rape as a Weapon of "Ethnic Cleansing"*, op.cit. (note 145).

[150] See Human Rights Watch, *Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath*, op.cit. (note 146).

[151] Ibidem.

violence may be afraid of the publicity brought on by their appearance before one of the Tribunals.

Besides being scared of social isolation, many women feel guilty for having been sexually abused. For instance, during the Rwandan genocide, Tutsi women were usually raped after having to view "the torture and killings of their relatives and the destruction and looting of their homes".[152] Many of them were murdered after being sexually assaulted but some managed to survive or were spared by their attacker(s). Those rape survivors often feel extremely guilty of being alive and would have rather preferred to die. Such feeling of guilt is notably intensified by the fact that often other Tutsis, who were able to flee the country before the genocide and who have returned in Rwanda since (the so-called "returnees"), "view the genocide survivors with distrust and suspicion", accusing them of having "collaborated" with the perpetrators to stay alive.[153]

Such victims may also fear reprisals. Indeed, both in the Yugoslav conflict and the Rwandan genocide, attackers were often neighbours, acquaintances, even friends of the victims.[154] Therefore, women often knew their rapist(s). He or they may even still live in the same village than the victim, which explains that some of them are really afraid of retaliation if they agree to testify.

2.3.2 Avoiding "retraumatization"

Like all other witnesses, victims of sexual violence are entitled to all the protective measures described in the previous paragraphs. Because of their extreme vulnerability, they benefit, however, from additional specific measures.

Rule 96 of both RPEs provides notably for particular exclusionary rules of evidence in case of rape. Firstly, when producing evidence in case of sexual assault, "no corroboration of the victim's testimony shall be required".[155] As a matter of fact, if many Yugoslav or Rwandan women have been publicly raped, many others have been attacked without witnesses. Moreover, many of them may not have dared to seek medical help due to the risk of stigmatisation, nor had

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[152] Ibidem.

[153] Ibidem.

[154] K. Dawn Askin, *War Crimes Against Women,* op.cit. (note 142), p.282

[155] See Rule 96(i) of both RPEs.

medical assitance at their disposal, a situation of armed conflict generating often the breaking down of many State institutions and notably medical facilities. In these conditions, taking into account only testimonies that may be corroborated would be extremely frustrating for all the victims who cannot obtain the required corroboration.

Secondly, consent cannot be raised as a defence by the accused if the victim "has been subjected to or threatened or has had reasons to fear violence, duress, detention or psychological oppression".[156] Indeed, any attempt of resistance from the victim being very often violently punished by the rapist(s), one cannot legitimately deduce consent from the passivity of the said victim who may simply be terrified. Consent cannot be used neither if the victim "reasonably believed that if [she] did not submit, another might be subjected, threatened or put in fear".[157] Apart from those two definite situations provided by Rule 96(ii), evidence of the victim's consent may be raised. However, to be able to use it, the Defence have to demonstrate, "in camera", to the Trial Chamber that such evidence is actually "relevant and credible",[158] which is not an easy thing to do as consent is often meaningless in time of war. The Trial Chamber II of the ICTY has notably recognised, in the Furundžija case, that "any form of captivity vitiates consent".[159] Many other reasons may as well fairly explain the "non-resistance" of the victim at the time of the event. As Kelly Dawn Askin observes,[160] "a woman may try to please or even seduce her captor so that he will protect her from the others [soldiers]" for example; she may also "agree to have sex with a soldier in hopes that he will allow her to keep the food she has managed to secure for her children, or simply allow her to remain in her home".

Thirdly, the "prior sexual conduct of the victim shall not be admitted in evidence".[161] In the Delalić case, the Trial Chamber II of the ICTY had the

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[156] See Rule 96(ii)(a) of both RPEs.

[157] See Rule 96(ii)(b) of both RPEs.

[158] See Rule 96(iii) of both RPEs.

[159] Prosecutor v. Furundžija, ICTY Case n°IT-95-17/1, *Judgement*, 10 December 1998, Paragraph 271.

[160] K. Dawn Askin, *War Crimes Against Women,* op.cit. (note 93), p.305.

[161] See Rule 96(iv) of both RPEs.

opportunity to detail the validity of this last sub-rule.[162] First of all, such provision intends to protect victims of sexual violence "from harassment, embarrassment and humiliation by the presentation of evidence which relates to past sexual conduct".[163] Second of all, the introduction of evidence concerning prior sexual conduct "may lead to a confusion of the issues", [164] the victim witness not being the one on trial. Third of all, such evidence is usually only brought by the Defence to denigrate the victim's reputation.[165] Finally, even if the prior sexual conduct of the witness was relevant, its value would be "nullified by the potential danger of further causing distress and motional damage" to them.[166] Moreover, in both the Yugoslav conflict and the Rwandan genocide, women have often been raped indiscrimately. Human Rights Watch has notably reported that during the Rwandan genocide, "young girls or those considered beautiful were particularly at the mercy of the militia groups, who [...] often raped indiscriminately".[167] Such a rule is exclusionary, and not susceptible to any waiver.

In addition to these exclusionary rules of evidence, victims of sexual assault may be allowed to testify through one-way closed circuit television as provided by 75(B)(i)(c) of both RPEs. Such a technique has the great advantage to protect those witnesses from having to be directly confronted to the defendant in court. Indeed, describing the atrocities they have undergone make inevitably rape victims relive their aggression. Coming face to face with the accused may needlessly increase such a trauma and strongly disturb them. Moreover, such a protective measure has the merit not to entail any right of the Defence as the accused and his counsel are able to see the victim when she gives evidence and to cross-examine her.

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[162] See Prosecutor v. Delalić and Others, ICTY Case n° IT-96-21, *Decision on the Prosecutor's motion for the Redaction of the Public Record*, 5 June 1996.

[163] Ibidem, paragraph 48.

[164] Ibidem.

[165] Ibidem.

[166] Ibidem.

[167] Human Rights Watch, *Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath*, op.cit. (note 146).

In conclusion of this second part, it appears clearly that it is very difficult for both Tribunals to find a balance between their duty to protect victims and witnesses and their obligation to ensure that the accused will benefit from a fair trial. Indeed, those two concepts are often antagonistic, one being favoured to the detriment of the other one. Such observation is particularly true for procedural protective measures, which lose much of their efficiency if totally respectful to the Defence rights. Only extra-procedural measures, that is to say witness protection programs, may ensure both witnesses' protection and due process as such protective measures intervene only at the post-trial stage. However, measures of this kind are very difficult to implement for both Tribunals since they are very expensive and require finding a state to welcome the concerned witnesses.

3. Organising sufficient and suitable support and information for all witnesses

If protecting the physical safety and privacy of the witnesses who take the stand is indispensable, providing them with adequate support, counselling and information is also just as important. Indeed, the act of testifying may cause anguish and stress for the witnesses, not to mention disappointment and frustration, if their expectations are not met. As already pointed out, the majority of witnesses who accept to give evidence will have to travel to a foreign country. This means they will have to take the plane, will find themselves in an unfamiliar environment in the Hague or Arusha and will have to appear in court, which can prove to be a rather daunting experience. Fully aware of these problems, both Tribunals, through their VWS, have put in place different measures to assist, support and inform witnesses (3.1). Particular attention should be paid to victim witnesses, whose ambiguous status may provoke much frustration (3.2) and to the preparation of cross-examination, which can be hard on all witnesses (3.3)

3.1. Establishing support and information programs

Rule 34 of both RPE provides that the VWS of each Tribunal should not only "recommend the adoption of protective measures for victims and witnesses",[168] but should also provide counselling and support for them.[169] Both VWS have adopted a wide range of similar policies. Such services should not be "reserved" solely for protected witnesses, but, on the contrary, should be made available to all witnesses.

3.1.1 Providing adequate support and counselling

Support and counselling are provided to witnesses in very different fields. First of all, very basic forms of support may be required. Thus, all witnesses who come to the Hague or Arusha will be provided with accommodations. For example,

[168] Rule 34(A)(i) of both RPE.

[169] Rule 34(A)(ii) of the RPE.

protected witnesses of the ICTR stay in a so-called "safe house", whereas non-protected witnesses stay in hotels (at the Tribunal's expense), and benefit from a daily allowance to cover food and other unavoidable expenses.[170] If it is necessary to provide protected witnesses with safe accommodations, care should also be taken to make the place as comfortable and welcoming as possible, especially since witnesses will have to stay there permanently, and will not, for obvious security reasons, be able to go out, save for escorted trips to the seat of the Tribunal. Criticism has been made against the ICTR "safe house", which has been described by some witnesses as a sort of depressing "prison", were ICTR protected witnesses were kept.[171] Last but not least, for obvious reasons, Prosecution and Defence witnesses should not be accommodated in the same place, so as to avoid any risk of meeting or confrontation.

ICTR protected witnesses will also be escorted from the airport to their temporary place of residence and will be "provided with a person who speaks their language".[172] The VWS of the ICTY has put in place similar measures, but has gone further by establishing (for its witnesses) the so-called "Witness Assistant Program", which provides "twenty-four hour live-in support, information and assistance".[173] Such program has been "financially and professionally" supported by both the EU and the Danish "Rehabilitation and Research Centre for Torture Victims" (RCT).[174] Particular attention is paid to the training of the assistants participating in this program (which, most of the time, have been hired only because of their linguistic competence). Thus, for example, they are provided with "monthly debriefing and consultation from a Consultant Psychologist to assist them in their work" and with specific training-programs, notably concerning the specific needs of victims of sexual assault.[175]

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[170] See *Witnesses and Victims Support Section*, Fact Sheet N°9, February 2001 at http://www.ictr.org/wwwroot/ENGLISH/factsheets/9.htm.

[171] See Fondation Hirondelle, *Rwanda Tribunal Witnesses Unhappy with their Treatment*, 29 May 2001, at http://www.hirondelle.org.

[172] Ibidem.

[173] ICTY, 5th annual report, op.cit. (note 41), paragraph 153.

[174] Ibidem.

[175] See *Statement by Wendy Lobwein*, op.cit. (note 39).

Second of all, witnesses may also need medical and psychological support, especially victims of sexual assault. The ICTY, for example, offers its witnesses the "opportunity to consult with medical practitioners while in the Hague" and is also able to offer them professional psychological and psychiatric support.[176] The ICTR also provides victims of sexual assault with "counselling and psychological rehabilitation".[177]

If the need to provide witnesses with support and counselling during the trial stage is not called into question, the extension of these measures, once witnesses have gone back home, is much debated. The absence of medical support in the post-trial stage is actually one of the grievances the Rwandan associations of victims of the genocide have against the ICTR. As confirmed by Mr. Benoît Kaboye, Head of the Justice Division of *Ibuka*, those associations notably reproach the ICTR for not providing medical care for the victims of sexual assault who are HIV positive whereas the defendants, who are HIV positive, are treated.[178] Here arises the question of the limits of the mandate of the Tribunals. If there is no doubt that witnesses may also need support in the post-trial stage, is it really the Tribunals' rôle to provide them with it? Their mandate, as well as their means, are limited. In 2002, the VWS of the ICTY had a total of 35 staff members,[179] which is far from sufficient considering the amount of work they have to do. As for their budgets, those are also restricted. In these conditions, it seems very difficult for them to be in a position to provide witnesses with adequate and efficient support in the post-trial stage.

3.1.2 Providing sufficient information

If supporting witnesses is necessary, informing them is also essential. Indeed, providing witnesses with sufficient information about, among other things, how their involvement in court is going to take place and what will be expected from them, plays an indispensable part in reassuring them. Obviously, the more the

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[176] Ibidem.

[177] See *Witnesses and Victims Support Section,* op.cit. (note 170).

[178] Interviewed on August 28th, 2003.

[179] ICTY, 9th annual report, op.cit. (note 43), paragraph 270.

witness will feel comfortable, the better will be his or her participation in court, and the more helpful his or her testimony will be to establish the truth.

Such information should be disclosed to witnesses as soon as possible. The ICTY has, for example, published an informative "brochure", translated in Bosnian, Croat, Serbian and Albanian, which will be sent to witnesses prior their departure to the Hague.[180] An information video was also in preparation in 1999.[181] In particular cases, an officer or assistant from the VWS may travel to the place of residence of the witness to meet with him or her and answer any questions that he or she might have concerning the act of testifying.[182] When they arrive at the Hague, witnesses are also shown the courtroom.[183] The translation equipment is explained to them and they are able to try it. In case the witness will give his or her testimony through image- and voice-altering devices, a demonstration of the efficacy of such means can be shown to reinsure him or her that neither his or her image, nor voice, could be recognized this way. Similar preparation is provided by the ICTR, each witness is given "a full briefing about their rights and duties", and is able to visit the courtroom, where it is explained to them how the proceedings are conducted.[184]

3.1.3 Offering the same services to non-protected witnesses

Concerning the provision of support and information, all witnesses, protected or not, should be treated equally and benefit from the same services. Indeed, the fact that a witness has not asked or has refused protective measures does not prevent him or her for needing support and information while staying in the Hague or Arusha. If such assertion seems obvious, the reality may be different, like the misadventure of two ICTR unprotected witnesses, reported by a journalist of "Fondation Hirondelle" in May 2001,[185] seems to indicate.

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[180] See *Statement by Wendy Lobwein*, op.cit. (note 39) and ICTY 3rd annual report (1996), paragraph 122, at http://www.un.org/icty/pub.htm.

[181] Ibidem.

[182] Ibidem.

[183] ICTY, 3rd annual report (1996), op.cit. (note 180), paragraph 122.

[184] See Fondation Hirondelle, *Rwanda Tribunal Witnesses Unhappy with their Treatment*, op.cit (note 171).

[185] Ibidem.

The ICTR unprotected witnesses in question encountered several misfortunes during their stay in Arusha. Both reported that the only assistance they received from the Tribunal was transportation from the airport to their hotels. They actually had to go to the Tribunal by their own means and ask for a security pass at the entrance to be able to get into the Tribunal. They also complained about having to wear a badge where it "was marked 'witness' in large letters",[186] which made them feel very uncomfortable about the idea that everybody could easily identify them as "witnesses". They pointed out, as well, the fact that they had no means for communicating with the VWS (like mobile phones, for example) in case of emergency or smaller problems such as getting lost on the way to the Tribunal.
Evidently, the bad experience of only two witnesses is certainly not sufficient to draw general conclusions but may be useful to understand the potential, serious risk and feeling of abandonment unprotected witnesses might feel if insufficient care is provided to them.

3.2. Taking into consideration the ambiguous status of victim witnesses

Contrary to eyewitnesses who, as fortuitous bystanders, have observed the incriminated acts, the victim witnesses have directly suffered because of them and, consequently, may have very high expectations of their appearance before the International Criminal Tribunals. The very limited participation in the proceedings to which they are entitled may therefore cause much disappointment and frustration that adequate counselling and support, if provided, could help avoid.

3.2.1 Victims' position in ICTY and ICTR proceedings

As already mentioned in the introduction of this paper, the adequate recognition of victims' interests has been in the heart of the disagreement between the Rwandan associations of victims of the genocide and the ICTR. Looking at the Statutes and RPEs of both Tribunals, it seems indeed that victims have been, in a way, left out**.**

[186] Ibidem.

S. Zappalà distinguishes "two main methods" to respond to their needs.[187] First of all, victims can be attributed "rights to service", that is to say physical and psychological support. Second of all, they can be entitled to procedural rights, that is to say being able to participate in the proceedings and obtain reparation. Obviously, the optimum would be to grant them both. If both International Criminal Tribunals provide them with support through the services offered by their respective VWS,[188] victims have, on the other hand, a very limited role in the proceedings. One may recognise here the direct influence of the common law system's tradition[189] where, contrary to civil law system's tradition, victims do not have the right to participate in criminal proceedings as *partie civile*.

Indeed, as already mentioned, neither before the ICTY nor the ICTR, victims are entitled to lodge a complaint. Only The Prosecutor can initiate investigations on alleged crimes, either proprio motu or on the basis of information transmitted by third parties.[190] As S. Zappalà notices, victims' participation in the opening of an investigation is thus confined to contacting[191] the office of the Prosecutor to pass him information related to crimes for which the Tribunals would be competent.[192] Nevertheless, in doing so, victims have no guarantee that the Prosecutor will investigate the matter. The latter does not even have to inform them of his decision to initiate or not an investigation.[193]

During the trial stage, the role allocated to victims is also very restricted. Victims cannot be legally represented through a counsel, nor can they intervene in court, except as witnesses for the Prosecution. The ICTR has however allowed, on several occasions, certain represententatives of associations of victims to intervene as *amicus curiae*,[194] as did the Belgian authorities in the Bagosora case

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[187] S. Zappalà, *Human Rights in International Criminal Proceedings*, op.cit. (note 38), p.221.

[188] See chapter 3.1.1 above.

[189] The procedural system of the International Criminal Tribunals is often defined as a mixed one, containing elements of both common law and civil law.

[190] See chapter 1.1.3 above.

[191] Usually through an association of victims.

[192] S. Zappalà, *Human Rights in International Criminal Proceedings*, op.cit. (note 38), pp.33-34.

[193] Ibidem.

[194] L. Walleyn, *Victimes et Témoins de Crimes Internationaux : Du Droit à une Protection au Droit à la Parole*, in "International Review of the Red Cross", March 2002, Vol.84, N°845, p.59

on behalf of their nationals who had been killed during the genocide.[195] Finally, victims are not entitled to appeal against a judgement pronounced by one of the Trial Chambers.

If such a limited participation in the proceedings may frustrate victims, so may do the definition given to the term "victim" itself, which is very restricted. Indeed, according to Rule 2(A) of both RPEs, only "a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed" may be qualified as "victim" before the International Criminal Tribunals. Such a definition appears particularly narrow when compared to the one provided by The United Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[196] of 1985:

> *"1. 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws […].*
>
> *2. […] The term 'victim' also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."*

The definition given by this Declaration is effectively much broader as it also includes, in addition of the direct victim of the crime, his or her family members and dependents, as well as any person who would have sustained harm for having tried to help or protect the said victim. Obviously, the more extensive the definition, the better for the victims' recognition. Being identified as victims may not only have a symbolic value in the eyes of those who have suffered from the Yugoslav conflict or the Rwandan genocide, but it is above all essential to be awarded reparation for the harm or the loss suffered.

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[195] See R. Maison, *La Place de la Victime*, in H. Ascensio, E.Decaux et A.Pellet, *Droit International Pénal*, Paris, Editions A. Pedone, 2000, p.782. See also Prosecutor v. Bagosora, Case n°ICTR-96-7-T, *Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium*, 6 June 1998.

[196] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly resolution 40/34 of 29 November 1985.

3.2.2 Towards a true right to reparation?

Victims have, however, almost no right to reparation before the ICTY and ICTR. The Statutes and RPEs of both Tribunals effectively contain provisions for the restitution of property and for compensation, but those are extremely limited and, consequently, far from satisfactory for the victims.

Article 24.3 of the Statute of the ICTY and Article 23.3 of the Statute of the ICTR, provide for the possibility that Trial Chambers order, in addition of a prison sentence, the return of "any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners". Looking at Rule 105 of both RPE, Rule 98ter(B) of the RPE of the ICTY and Rule 88(B) of the RPE of the ICTR, three conditions have to be met for a victim to be able to obtain the restitution of his or her property.[197] First of all, the accused must be convicted by the Trial Chamber which has tried him. Second of all, a direct connection between the crime and the property taken must be established. Finally, such a restitution is only possible if the Prosecutor or the Trial Chamber require it, the victims by themselves not being entitled to make such a claim.

As for compensation, both Tribunals do not have the authority to directly award it to victims. Rule 106 of both RPEs recommend victims, who would claim compensation, to "bring an action in a national court or other competent body" to obtain satisfaction. In case a judgement found "the accused guilty of a crime which has caused injury to a victim", the Registrars of the International Criminal Tribunals shall transmit it "to the competent authorities of the State concerned",[198] expecting those to deal with civil litigation according to their domestic legislation on the subject.

During the past few years, victims' indemnisation has been widely discussed before both Tribunals. The creation of a trust fund financed by voluntary contributions was notably proposed by the clerk of the ICTR in December 1998.[199] Victims' compensation was also on the agenda of the plenary meetings of

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[197] See S. Malmström, *Restitution of Property and Compensation to Victims*, in R. May and al. (Eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, op. cit. (note 17), p.375.

[198] See Rule 106(A) of both RPEs.

[199] See L. Walleyn, *Victimes et Témoins de Crimes Internationaux : Du Droit à une Protection au Droit à la Parole*, op.cit. (note 194), p.62.

each Tribunal in 2000.[200] Both the ICTY and ICTR have, however, come to the conclusion that it would not be desirable they be entitled to such a power. Several reasons were invoked to justify such a finding, notably that "it would seriously hamper the everyday work" of the Tribunals, that there are "other, quicker and simpler methods" for victims to receive compensation.[201] Furthermore, it has been said that, in order to be able to deal with claims for compensation, the Tribunals "will have to develop a new jurisprudence", "to expand [their] staffing considerably" and to "establish new rules and procedures for assessing claims".[202] Alternative solutions were, however, proposed, such as setting up a specialized agency to administer a trust fund or allowing the Tribunals "to exercise a limited power to order payments from this trust fund",[203] but none of them has been put in place yet.

3.2.3 Limiting the risks of "revictimization"

Since victims are not entitled to any procedural rights, taking the stand is the only possibility for them to participate in the proceedings and to be "recognized" as victims. To recount in court what they had to experience may also help them to recover from their trauma. In these conditions, victims may attach a great significance to their appearance as witnesses and may feel extremely frustrated and disappointed if not all their expectations are met by their intervention in court. To avoid any risk for them to feel "revictimized", they should be clearly explained, before they give evidence, what the ambiguous status of victim witness implies.

Indeed, victims who have agreed to testify must be fully aware that not all the witnesses coming to the seats of the Tribunals will inevitably give testimony since their appearance may sometimes be cancelled at the last minute.[204] They should

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[200] Ibidem.

[201] See *Letter dated 9 November 2000 from the President of the ICTR addressed to the Secretary-General*, annexed to *Letter dated of 14 December 2000 from the Secretary-General adressed to the President of the Security Council*, UN doc. S/2000/1198, 15 December 2000.

[202] Ibidem.

[203] Ibidem.

[204] In 1999, for example, 7% of ICTY witnesses travelling to the The Hague did not testify. See See T. Ingadottir, F. Ngendahayo and P. Viseur Sellers, *The International Criminal Court, The*

also realise that, like all other witnesses, they are only "an instrument in the hand of the Prosecutor"[205] to establish the guilt of the defendant, "without any word to say about the case, nor about the their personnal recollection of the story".[206] Apart from warning victims about these facts, not much can be done to change this situation.

3.3. Providing for adequate preparation to cross-examination

Before both Tribunals, each witness appearing in court has to undergo through several examinations.[207] First, the witness is questioned by the party which has called him (examination-in-chief). Then, the other party is entitled to cross-examine him. And finally, he is re-examined by the party which has asked him to testify. Such a procedure is evidently hard on all witnesses, especially the cross-examination stage which is aimed at assessing the credibility of the said witnesses. If the benefit of such procedure is not to be called into question, its negative impact on witnesses could, however, be softened with adequate preparation.

3.3.1 Debate over the reliability of witness testimony

Typical of common law systems, cross-examination is a very efficient instrument to judge the credibility of a witness. Indeed, witness testimony is not infallible as it always "carries the possibility of distortion as to what really occurred".[208] Not only is there a risk that a witness may consciously commit perjury but also that he unconsciously misrepresents the events he witnessed. Such distortion may result from several factors.

Victims and Witnesses Unit (Article 43.6 of the Rome Statute), A discussion Paper, op.cit. (note 34), p.17.

[205] S. Zappalà, *Human Rights in International Criminal Proceedings*, op.cit. (note 38), p.222.

[206] Ibidem.

[207] See Rule 85(B) of each RPE.

[208] P. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, op.cit. (note 14), p.226.

First of all, witness' memories may evidently be altered by time. The longer the time having passed between the incriminated events and the giving of evidence, the more likely the witness' testimony will contain inaccuracies and omissions. Witnesses who appear at present before the ICTR, for example, are reporting incidents that took place almost ten years ago (the genocide having been perpetrated in 1994). One cannot legitimately expect them to recall accurately all details about the events they had witnessed or even undergone themselves.

Second of all, experiments have shown that the reliability of a witness depends directly on "the specific sensory organs involved in the act of perception".[209] To be more explicit, an eyewitness is supposed to be more reliable than a witness who would have heard about something but not seen it by himself. Both the ICTY and ICTR accept hearsay evidence but they take into consideration, when assessing the probative value of such evidence, "the absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is 'first-hand' or more removed".[210] Indeed, it has been proven that chain transmission always distort the meaning of a message, each receptor "rebuilding" it unconsciously.[211] In addition to these previous observations, cultural factors have also to be taken into consideration. For example, as the Trial Chambers of the ICTR regularly mention in the judgements they pronounce, "most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else".[212] A particular attention has therefore to be paid to make sure witnesses make a clear distinction "between what they had heard and what they had seen".[213]

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[209] Ibidem, p.226.

[210] Prosecutor v. Aleksovski, ICTY Case n°IT-95-14/1, *Decision on Prosecutor's Appeal on Admissibility of Evidence*, 16 February 1999, paragraph 15.

[211] See A. Rodrigues and C. Tournaye, *Hearsay Evidence*, in R. May and al. (Eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, op. cit. (note 17), p.303.

[212] See Prosecutor v. Akayesu, Case n°ICTR-96-4-T, *Judgement*, 2 September 1998, paragraph 155. This judgement has addressed a certain number of evidentiary matters (the assessment of evidence, the impact of trauma on witnesses, questions of interpretation from Kinyarwanda into French and English, and cultural factors which might affect an understanding of the evidence presented), to which it is often refered to in ICTR judgements.

[213] Ibidem, paragraph 155.

Third of all, the trauma the witness may suffer from can have an impact on his testimony. Indeed, many of the witnesses who testify before both Tribunals have experienced or have been subject to atrocities one could hardly imagine. Therefore, as the Trial Chamber I of the ICTR has pointed out in the *Akayesu* Judgement, "the recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context".[214] In addition, such witnesses may suffer from post-traumatic stress disorder (PTSD), which could distort their recollection of the events. The PTSD is a psychiatric illness which can "occur following the experience or witnessing of life-threatening events such as military combat, natural disasters, terrorist incidents, serious accidents, or violent personal assaults like rape".[215] People who suffer from it usually keep re-experiencing their trauma, both mentally (flashbacks, nightmares, anxiety, etc.) and physically (difficulty to sleep, agitation, etc.). They also tend to avoid any reminders of their traumatic experience, which may notably imply troubles "remembering important part of what happened during the trauma".[216]

3.3.2 Impact of cross-examination on witnesses

If cross-examination may allow detecting potential inconsistencies and fallibilities in a witness testimony, such procedure may also seriously affect the witness being questioned. As the International Federation for Human Rights (FIDH) has reported, cross-examination is often seen as an ordeal by the witnesses who testified before the ICTR. The content of the questioning, the way questions were asked and the length of the interrogation can, indeed, be very hard on them.[217]

To begin with, the content of the questioning may be very stressful for witnesses, since the main objective of the cross-examiner is to discredit the testimony of his opponent's witnesses. To do so, he conducts a close questioning of the said

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[214] Ibidem, paragraph 142.

[215] See the website of the National Center for Post-traumatic Stress Disorder at http://www.ncptsd.org.

[216] Ibidem.

[217] See International Federation for Human Rights (FIDH), *Entre illusions et disillusions: les victimes devant le Tribunal Pénal International pour le Rwanda* (TPIR), op.cit. (note 13), p.7.

witnesses in connection with the answers and information they have given previously. As former ICTY Judge P. Wald has pointed out, "the most useful cross-examinations focus on weak points in the witness' identification of the accused, or perhaps variations in the witness' story as opposed to other witnesses who were also present".[218] In practice however, cross-examiners often concentrate on details, underlining the possible differences between the testimony given in court and the pre-trial statement collected by field investigators. As Judge Wald has also commented: "Somehow the oft-used technique of pointing out inconsistencies between a witness' in-court testimony and prior statements made to field investigators years before doesn't come across as compelling unless it really goes to the heart of whether the accused was the perpetrator. If the witness' testimony is crucial as to the accused's participation in the crime and his uncorroborated, then any inconsistencies in the details surrounding the incident may become more important […]".[219] Focusing on such inconsistencies can indeed be sometimes of crucial importance for the case. Nevertheless, more often it is not relevant, solely disturbing for the witnesses who do not understand what their cross-examiner is driving at.[220] In addition to this general reproach, victims of sexual assault usually feel extremely uncomfortable having to answer very intimate questions about the attack they have been victim of. Talking about sex may even be taboo in the society they come from, as it is the case in Rwanda for example.[221]

The way the questions are asked by the cross-examiner is also of prime importance. Most of the times, during cross-examination, witnesses feel as if that they are the ones who are put at trial. Moreover, when there are several co-defendants in a case, witnesses may be cross-examined by several Defence counsels, one after the other, who will ask them the same questions. Thus, they may be under the impression that their answers are not taken into consideration by the cross-examiners.[222]

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[218] P. Wald, *Ten Observations from the Bench About ICTY Trials*, op.cit. (note 19).

[219] Ibidem.

[220] See International Federation for Human Rights (FIDH), *Entre illusions et disillusions: les victimes devant le Tribunal Pénal International pour le Rwanda* (TPIR), op.cit. (note 13), p.7.

[221] Ibidem, p.7.

[222] Ibidem, p.8.

Finally, the interrogation may last several days, or even more than a week, which is undeniably a very long period of time. Several factors can explain such a length. As already mentioned, the questioning of a witness takes place in three successive phases: examination-in-chief, cross-examination and re-examination. In addition, every question and answer has to be traduced in French, English (the two working languages of both Tribunals) and the witness' mother tongue, which evidently wastes a lot of time. Obviously, the longer the interrogation, the more tiresome it is for the witness.

3.3.3 Trying to "soften" the cross-examination impact

As cross-examination can be very hard on witnesses, it should be softened as much as possible. Both the Judges and the VWS may intervene to do so, the first ones by effectively implementing the safeguards contained in the RPE of each Tribunal, and the second ones by providing witnesses with adequate preparation.
Indeed, witnesses' questioning is not boundless, several rules of the RPEs being aimed at protecting witnesses while those are interrogated by the parties. First of all, according to Rule 75(c) of both RPEs, Judges "shall control the manner of questioning to avoid any harassment or intimidation".[223] Rule 90(g) of the RPE of the ICTY and Rule 90(f) of the RPE of the ICTR also stipulate that they "shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time". Finally, Rule 90(h) of the RPE of the ICTY and Rule 90(g) of the RPE of the ICTR intend to delimit the scope of cross examination, stating that it should be restricted to the issues raised during the examination-in-chief and "matters affecting the credibility of the witness".[224] Judges have therefore the duty and the power to ensure that witnesses are treated with dignity and respect by their cross-examiners. They should also be watchful that the questions witnesses have to answer are actually pertinent and that the interrogation does not last more than necessary. In practice, however, it seems that ICTY and ICTR Judges do not fully use these prerogatives and could intervene more frequently during cross-

[223] Emphasis added by the autor.

[224] The Trial Chamber may however permit the witness to be interrogated on additional matters if necessary (see Rule 90(h)(iii) of the RPE of the ICTY and Rule 90(g) of the RPE of the ICTR).

examination. ICTR witnesses interviewed by the FIDH have notably reported having really felt to be on their own while being cross-examined,[225] which, probably, would not have happened if the safeguards both RPEs provide for had been correctly implemented.

In addition to urging Judges to play a more active role during cross-examination, witnesses should be better prepared for this confrontation. One should not forget that most of the witnesses who take the stand before both Tribunals are far from familiar with proceedings and can be easily impressed. Trying to prepare them as much as possible for the cross-examination stage will undeniably help them to hold it up. Obviously, the VWS of each Tribunal are the more designed to do so, given the fact they are already providing witnesses with basic information concerning their intervention in court.[226] Witnesses should notably be clearly explained the objective of the cross-examiners, that is to say discredit their testimony, to avoid them being too much surprised by the questions and the attitude of the said cross-examiners.

In conclusion of this third part, it is obvious that both VWS have tried to provide witnesses with adequate support and information, even though they have suffered from financial shortage and a lack of qualified staff. However, some improvements are still to be made. The very limited role given to victims during the proceedings is indeed far from sufficient to satisfy the said victims. Furthermore, a great effort has to be done on the preparation of cross-examination, which is always very hard on witnesses.

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[225] See International Federation for Human Rights (FIDH), *Entre illusions et disillusions: les victimes devant le Tribunal Pénal International pour le Rwanda* (TPIR), op.cit. (note 13), p.9.

[226] See chapter 3.1.2 above.

Conclusion

Taking into consideration all the constraints both International Criminal Tribunals have to deal with in the field of witnesses' protection, that is to say great dependence from State co-operation, necessity to respect the Defendant's rights, as well as limited budgets and staff, one cannot deny that they have done quite a good job. Being the first jurisdictions of this kind, they were not able to benefit from the experience of any predecessor at the international level, the Nuremberg Tribunal not yet being confronted to this issue since few witnesses were heard at that time. Thus, the only guidance at their disposal was the protective measures set up by domestic courts, which had, however, to be adapted to an international legal framework. In these conditions, one could not have legitimately expected them to immediately provide witnesses with perfect protective measures, if such a thing may exist.

In fact, throughout the trials, both Tribunals have kept adapting the protection and support they were in a position to offer to witnesses, trying to assess and satisfy their needs as best as possible. The numerous amendments of their RPEs can testify to that. Their respective VWS have also carried out a tremendous work, especially by organising witnesses' travel and supporting them during their stay in the Hague or Arusha.

Of course, the protection and support they provide could still be improved. The fragility of the confidentiality measures, the difficulties encountered to relocate vulnerable witnesses, the insufficient preparation to cross-examination have often been pointed out at various occasions by non-governmental organisations. The very limited role attributed to victims has also been frequently denounced. All those critics are well-founded. Some changes can indeed be made, notably regarding witnesses' preparation to cross-examination. The Tribunals cannot do much, however, to solve certain other problems (notably concerning the attribution of procedural rights to victims), their mandate and powers being legally limited .

Nevertheless, their experience, especially their setbacks, has been of crucial importance for the establishment of the ICC witnesses' protection system where major innovations and improvements have been achieved. Revolutionary was notably the new role given to victims which now can participate in the

proceedings and claim compensation, [227] since a trust fund has been established. A specialized unit has even been created to deal exclusively with these victims' issues (e.g. the Victims Participation and Compensation Unit). As for witnesses' protection, if the set of protective measures the ICC will have at its disposal is almost identical to the ones of the ICTY and ICTR, the necessity to hire staff with expertise and to negotiate agreements with member States to permit witnesses' relocation when necessary has been strongly reaffirmed.

The development and refining of the procedures relating to witnesses' protection is, of course, far from completed. One should notably keep in mind that the ICC, not being limited on a particular conflict, will face unnumbered new situations yet unknown to both the ICTY and the ICTR, and will constantly have to adapt its arsenal of protective measures to provide witnesses with the most adequate protection and support in each case.

[227] See Articles 68and 75 of the Rome Statute.

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