



Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court

Introduction

The round table on the protection of victims and witnesses was held on 29 and 30 January 2009 at the seat of the Court in The Hague. It was organised at the Registrar's initiative to explain how the protection system operates, what challenges are faced and what support the Court requires to fulfil its mandate. The round table was also intended as a discussion forum to allow different points of view to be exchanged.

Discussions took place on six major topics, which were set out in the amended agenda (appended as an annex). Several categories of participants came together on this occasion for a constructive exchange of views on the subject.

Non-governmental organisations and representative bodies from the criminal field attended – HRW, ASF, FIDH, BPI-ICB, IBA, IFWLC, CICC, Redress, and Women's Initiative¹ – as they are the focus of a Registry initiative to raise awareness in the field of protection; some will also play a part in terms of providing protection services in the wider sense. In addition, the Court's institutional partners also attended the discussions – Eurojust, Europol, UNICEF, UNHCR, UNODC, UNHCHR –² along with professionals from *Centrum 45*³ who can provide assistance in implementing a global witness protection strategy. Representatives from other international criminal tribunals such as the ICTY and SCSL,⁴ together with a representative from the Dutch Ministry of Justice, also attended the round table and explained the problems they themselves have encountered and the solutions they have implemented. The States Parties were represented by the Ambassador of the Kingdom of Belgium, the facilitator for The Hague Working Group on cooperation.

Representatives from the Presidency, the Office of the Prosecutor, the Office of Public Counsel for the Defence and the Office of Public Counsel for Victims and the relevant sections of the Registry also attended the discussions.

1. A global vision for protection

a) The Court's protection system

The primary aim of the round table was to explain the protection system as it exists at the Court, to highlight the challenges faced and to discuss alternative arrangements. The official responsible for protection and the official in charge of operations within the Victims and Witnesses Unit ("the VWU") explained the four major protective measures which exist at present:

¹ Human Rights Watch, *Avocats sans Frontières*, International Federation for Human Rights, International Criminal Bar, International Bar Association, International Federation of Women in Legal Careers, Coalition for the International Criminal Court.

² United Nations Children's Fund, United Nations High Commission for Refugees, United Nations Office on Drugs and Crime, United Nations High Commission for Human Rights.

³ "*Centrum 45*" is the Dutch national institute which is responsible for the diagnosis and treatment of psycho-traumatic disorders caused by persecution, war and violence.

⁴ International Criminal Tribunal for the former Yugoslavia, Special Court for Sierra Leone.

- Best practices: these are based on the premise that prevention is the best protection. The VWU dispenses training to participants who meet with victims and witnesses in order to ensure that they are not exposed at these meetings.
- Initial response system: this system enables the witness/victim to call a third party if he/she is threatened and to be evacuated from the location of the threat if appropriate.
- Internal or external resettlement: this measure of last resort involves permanently resettling the witness/victim and his or her family in another region or country.
- Measures adopted under the direct supervision of the judges: there are a number of standard procedural measures to protect witnesses/victims. They involve the redaction of information which could identify a witness/victim from public documents, closed sessions, measures to conceal the identity of a witness from the public (voice or image distortion). Most of these are set out in rule 87 of the Rules of Procedure and Evidence. The Chamber also asked the VWU to conduct analyses on the security conditions for witnesses or victims.

Furthermore, the approach adopted by the VWU regarding the assessment of risks was clarified. It was explained that the VWU's recommendation regarding participation in the protection programme is based on a global risk assessment. This involves considering both the threat assessment (intention of the persecutor and ability to harm) and the assessment of the risk (likelihood of the persecutor acting and the consequences of his actions). In addition to the issue of assessing risk, the VWU must obtain the informed consent of the individual, who must undergo a psycho-social examination in order to ensure that he or she will be able to cope with the consequences of resettlement

Participants at the round table requested clarification regarding the concept of crucial testimony (UNHCR), the definition of a persecutor, the ongoing nature of the threat (Office of the Prosecutor) and the link between the threat and the individual's collaboration with the Court.

The VWU pointed out that its mandate does not cover threats not involving collaboration of persons with the Court. In other words, the VWU would not take any action to protect a victim of domestic violence, unless such violence was connected to his or her status as a witness. The ICTY indicated that it takes the same approach. The SCSL, however, added that measures would be taken to try to resolve the issue (making contact with local agencies or NGOs for example).

The VWU also explained that the ongoing nature of the threat was taken into account. An assessment conducted at a given time can always be reviewed if fresh information comes to light. In addition, certain ad hoc measures (IRS – immediate response system) could be turned into long-term measures (resettlement). It is crucial to emphasise that the work of the VWU begins well before the appearance of the person in court, that is, from the date of the first contact between the Court and individuals.

As far as the concept of crucial testimony is concerned, participants were informed that only the parties applying for protective measures are in a position to decide whether testimony is crucial or not. Crucial testimony cannot be replaced by any other because it is unique. The persecutor therefore knows that by “eliminating” that person, the participant in the proceedings will no longer be able to give evidence about an event. This does not mean that witnesses who supply less crucial statements will be unable to benefit from protective measures other than the ICC protection programme (ICCPP).

The VWU also noted the comments made by UNHCR, which indicated that it was vital to have a broader definition of the concept of persecutor.

b) Alternative protection methods

Alternative protection methods were suggested by the participants. The Registry mentioned the possibility for a Chamber to make a specific request for protection to a State, for example to protect a zone, a camp or a passage-way. The ICTY mentioned that this type of request had not been submitted to the states of the former Yugoslavia.

Since it is difficult for the Court to sign resettlement agreements with the parties, the VWU also mentioned the possibility of asking certain States to fund resettlement programmes in a third-party State. The States Parties' representative encouraged the Court to find alternatives to the signing of resettlement agreements. With regard to the resettlement of witnesses with refugee status, the UNHCR representative also reported that it was possible to settle persons in a relay country whilst waiting for the person to be allowed into a host country.

The VWU also emphasised the need to allow protection programmes to be established at a local level. It has thus taken part in training programmes with this in mind.

HRW suggested certain areas for discussion, such as stepping up the surveillance of witnesses' homes, setting up a local network to collect information on security, establishing a telephone helpline system for witnesses to use on a regular basis and not only in emergencies, allowing temporary resettlement or working with the country's police forces.

Participants also emphasised the importance of developing protective measures other than resettlement, which has a major impact on the lives of witnesses. The Office of the Prosecutor said that it was interested in this type of measure.

Finally, the issue of persons receiving protective measures was raised. Although there is no question that the VWU's mandate covers witnesses and victims, some participants have requested that the Court intercede for persons who plead the Court's case or for intermediaries. The fact that the family of the witness (dependants) are resettled with the witness was made clear.

c) What future for protection? A joint vision

The various participants in the round table discussions felt that it was possible for a joint strategy to emerge from the various interests present.

UNHCHR thus suggested examining the possibility of establishing an independent international body to work on protection issues.

In addition, UNODC and Europol mentioned that they were working on witness protection legislation. In this respect, UNHCHR mentioned that States which adapt the Rome Statute implementing legislation would need to pay particular attention to the protection of victims and witnesses.

The role of networks was also highlighted. UNHCR explained that it was working with two types of partners: a) intermediaries responsible for implementing projects in the field ("implementing partners") on the basis of a formal partnership with contracts and obligations, especially involving protection, and b) a broader range of partners responsible for operations ("operational partners"). Participants also decided to seek partnerships with institutions such as the European Union or the African Union. UNODC also mentioned assistance which might be provided by other bodies, such as the Commission for Human Rights.

It was also pointed out that a collective approach should be adopted for the negotiation of resettlement agreements. UNODC offered to encourage States to host witnesses by offering to provide them with tools to develop their domestic capability in return.

2. Legal and psychological assistance

a) Legal assistance

Legal assistance can be envisaged as a form of witness protection. One important aspect which was discussed during the round table was the need for the witness/victim to take informed decisions regarding the protective measures to be applied to him or her. Furthermore, where children are involved, it is vital that the child's parents or guardians agree to the proposed protective measures.

Eurojust, which is working on better legal cooperation, can provide valuable expertise, in particular when children are involved in the legal process. ASF also emphasised the need to provide legal assistance to witnesses. Although witnesses who have the dual status of victims benefit from the advice of a legal representative, this is not necessarily the case for a witness. Yet a witness runs the risk of self-incrimination. In addition, a witness can be resettled in a country in which he or she could be prosecuted.

In this regard, rule 17(2)(b) of the Rules of Procedure and Evidence provides that the VWU must advise witnesses on where to obtain legal advice for the purpose of protecting their rights, in particular with regard to their testimony.

b) Socio-psychological support

The VWU elected to make a presentation on the difficulties faced by persons joining a protection programme and the support they require. The director of *Centrum 45* emphasised the challenges faced by persons who have fled their home country and arrive in a different culture. The presentations set out the significant needs of these people and the mechanisms to be set up to enable them to be integrated successfully and for the programme to be a success. One of the difficulties highlighted by the assistant responsible for providing support to victims and witnesses is the lack of control by the VWU over the conditions for support in the country of resettlement. She also explained that mechanisms had been set up in order to improve the working relationship between social workers in the host country and the Court's departments.

The nature of the assistance to be provided was also examined. The issue of to the extent to which the Court has a mandate to fund a surgical operation for a witness or victim who has suffered a facial injury was raised. Is the Court considered to have authority only when such an incident prevents the person from expressing himself or herself intelligibly at the hearing? Discussions must take place on the boundaries for the Court's intervention in this field.

UNICEF emphasised the fact that in view of the Court's work on child soldiers, it was important to set up protective measures to allow proceedings to be adapted to the needs of children. The Registry indicated that it would be beneficial for the Court to work more closely with UNICEF. UNICEF mentioned that it would be prepared, if required, to offer/provide training for relevant ICC staff. UNODC also mentioned that the Court could work with networks of NGOs which specialise in victim support, such as an existing witness protection programme in Brazil.

The VWU explained that it was working with certain African countries in order to develop local protection programmes, which will have the benefit of reducing the sense of being uprooted for witnesses who are resettled. One problem remains, however, for which a solution needs to be found – the impact of resettlement on those who stay behind. The balance of a village can be upset if persons with key administrative roles leave. Another obstacle to be avoided, according to UNHCR, is temporary resettlement, which fails to meet international protection standards.

Finally, certain measures which would enable the most vulnerable witnesses to be dealt with sympathetically at the hearing were discussed. The following were also mentioned: the possibility of

the judges sitting on the Registry bench rather than on the judges' raised dais; the parties being asked to attend the hearing without gowns; limiting the number of persons present in the courtroom or holding the hearing in less formal surroundings.

In this regard, the Office of the Prosecutor emphasised the importance of the familiarisation process. It pointed out that this was a key moment for assessing whether the witness required additional protection during the proceedings and that it was important for the prosecution to be able to keep in close contact with witnesses to safeguard their psychological welfare between the time of the initial interview and their arrival in The Hague.

3. Victim protection

In response to questions from participants regarding the structures in place for victim protection by the ICC, the moderator conceded that, since the decision of 18 January 2008, which specifically clarified the VWU's mandate, this issue had to be a priority. There were more in-depth discussions by the Registry during talks on the ICC's strategy for victims.

It was reasserted that victims, like witnesses, were entitled to protection by the Court. The fundamental issue was to establish what types of measures could allow the Court to protect a significant number of victims. For example, it must be remembered that 93 victims are participating in the Lubanga trial. The facilitator indicated that the victims were less exposed than witnesses insofar as a persecutor would be less interested in threatening somebody participating in the proceedings than somebody providing incriminating evidence. However, this did not mean that these persons are not at risk, especially if it is assumed that all persons who are known to have contacts with the ICC face a certain degree of risk.

It was recalled that it is up to the legal representatives to decide, with the agreement of their client, what degree of exposure the client would be willing to be subjected to at the hearing or in the case file. One idea was raised, which would involve focusing the most disruptive protective measures such as resettlement on a spokesperson appointed by a group of victims. However, HRW criticised this idea because this proposal would fail to take the realities on the ground into account to a sufficient extent. A victim might be highly exposed without ever appearing before the Court.

Another issue examined was that of the dual status of witness and victim which one person may hold concurrently. The Office of Public Counsel for Victims indicated that because of the protective measures which certain witnesses are afforded, it faces difficulties in locating its clients.

4. Challenges encountered by the Registry

a) The Defence

The VWU explained that, from its position within the Registry, it serves the Prosecution, the Defence and the Legal Representatives of the Victims. It pointed out that during the negotiation of resettlement agreements, for example, the measures negotiated apply both to Prosecution and Defence witnesses. In addition, exactly the same best practice training is provided to the Defence and Office of the Prosecutor teams. At this point, the Office of Public Counsel for the Defence asked the VWU to explain its practices so that the Office could conduct a follow-up with the Defence teams it assists.

The specific role of the Defence was examined from two different angles. Firstly, the VWU mentioned that under national protection systems, Protection Units work closely with the Office of the Prosecutor. Measures are taken to reduce potential threats from the Defence. Within the ICC, the VWU is part of a neutral organ and does not assume that the accused (or detained person) poses a threat to Office of the Prosecution witnesses, except where there is evidence to the contrary. In addition, the VWU does not

necessarily have the capabilities for analysis to enable it to collect and analyse this type of information. For example, the Registry can initiate the active surveillance of detained persons' telephone conversations only if it has information in its possession which demonstrates that such a measure is necessary.

Secondly, it is important to envisage the role of the Defence in relation to the impact of certain protective measures. Protective measures such as redactions, for example, which also apply to the Defence, albeit temporarily, undoubtedly impact significantly on its work.

Another specific feature of the work of the Defence was highlighted by the representative from the International Criminal Bar. The Defence has the right not to disclose the names of these crucial witnesses in advance and often is not in a position to do so because its strategy can evolve as the debates proceed. This will need to be taken into account by the VWU because one of the entry criteria for the ICCPP is the crucial nature of the testimony of the person to be protected.

Finally, the Office of Public Counsel for the Defence asked whether accused persons who testify in another case can benefit from protection afforded to witnesses. The issue of protection for accused persons who make statements in their own case (either as witnesses or via their Defence) which could expose them to risks was also raised. A similar issue will need to be taken into account for acquitted persons who are unable to return to their home country.

b) Witnesses with a particular profile

- Infiltrated witnesses or those with "dirty hands"

The SCSL and ICTY explained the problems encountered in protecting infiltrated witnesses or those with "dirty hands". They mentioned that there were several types of witnesses who fall into this category (co-perpetrator witnesses, witnesses with close links to the accused, witnesses who played a key role in the criminal organisation, detainee witnesses and so on).

The main difficulty involves resettling these witnesses who themselves were involved in crimes in third-party countries. In addition, UNHCR explained that the international law on refugees does not afford protection to criminals. The ICTY mentioned that agreements negotiated by the Office of the Prosecutor to prevent a witness being prosecuted in his or her country of residence are not valid when the witness is resettled in another country.

The issue of the right to residence for the families of detained persons who have testified was also mentioned.

- Polygamous families

Because of the situations examined by the Court, the Registry finds itself having to deal with the issue of the resettlement of polygamous witnesses. Many States turn down these witnesses, on the grounds that they breach their public order.

- Difficult witnesses

A number of difficulties were highlighted by the representative from the Dutch Ministry of Justice, who explained that it was difficult to balance the demands of witnesses without appearing to "bribe" them. At a national level, this balance is achieved by the Prosecutor responsible for relations with witnesses under the supervision of the Chamber. In addition, it is also necessary to deal with the sometimes unlawful requests from witnesses within the protection programme, especially when these involve blackmail (contacting the press, for example) whilst doing the utmost to ensure that the person can testify under optimum circumstances. The psychological assessment of the witness prior to his or

her admission to the protection programme should enable this type of behaviour to be detected in advance.

c) End of the protection programme

Two different aspects to this question were raised by the VWU. As far as the social aspect is concerned, the point was made that from the moment a person joins the protection programme, the issue of self-sufficiency has to be dealt with. The VWU must provide this person with the necessary support to enable him or her to achieve this goal.

From the protection point of view, the protection official mentioned that the protection programme can be terminated if the reasons justifying the admission of the person to this programme no longer exist or if the person has breached the protocol for admission to the programme. A person can also leave the programme of his or her own free will. Participants were told that a witness could apply to the Registrar for a review of the decision to end the programme or also ask the Chamber to do so.

d) Monitoring by the Chamber

The work of the Registry is monitored by the Presidency, but it is also governed by the various orders and decisions of the Chambers.

Thus a participant might request that a resettlement decision by the Registrar be reviewed by the Chamber. Judges have been called upon to rule on issues as crucial as the possibility for the Office of the Prosecutor to implement preventive resettlement measures or the definition of the VWU's mandate, specifically regarding protection for victims applying to participate in the proceedings. Furthermore, although the VWU can advise the Chamber on protective measures, it is up to the Chamber to take the decision in this regard.

Finally, the judge is responsible for ensuring that witness protection is organised in such a way that the rights of the Defence are respected. However, some participants commented that such arbitration by the Chamber had the disadvantage of slowing down the proceedings.

Conclusion

The objectives set by the round table were achieved as useful exchanges took place between the various participants, which helped to improve the protection of victims and witnesses before the Court.

Proposals were made *inter alia* regarding the development of alternative protective measures to the protection programme, the establishment of a joint international authority on protection issues and the adoption of a joint approach by the various tribunals to negotiate relocation agreements.

The participants emphasised the importance of following up the issues from this first seminar and requested that other similar seminars be organised.