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Victim and witness provisions of the ICC compared to other international tribunals

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MEMORANDUM FOR
THE INTERNATIONAL CRIMINAL COURT

ISSUE: VICTIM AND WITNESS PROVISIONS OF THE ICC COMPARED TO OTHER INTERNATIONAL TRIBUNALS

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues[1]

This memorandum addresses the victim and witness provisions implemented by the International Criminal Court ("ICC") by comparing them with the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Court for Rwanda ("ICTR"), and the Special Court for Sierra Leone ("SCSL"). This memorandum is broken into six major sections: Non-Disclosure of Identity; Protection from Media and Public Photography, Video and Sketch; Protection from Confrontation with the Accused; Anonymity; Protections for Victims of Sexual Assault; and Reparations to Victims. Each section identifies and describes the specific provisions relating to it. This analysis will focus on the general rights under the ICC, ICTY, ICTR and SCSL (collectively called the "Tribunals"). Additional examples from national court systems including the United States, Canada, Chile, Australia, South Africa, and the European Court of Human Rights are also included.

B. Summary of Conclusions

1. Non-disclosure of witness identity prior to trial has been and should continue to be a valuable protection measure for the ICC, as the potential problems of implementing the provision are relatively small and the other Tribunals have established numerous cases of jurisprudence on the issue.

Each tribunal specifically allows for the protection of non-disclosure prior to trial. The ICTY trial chamber in *Prosecutor v. Perisic* stated that the Prosecutor must disclose the identity

[1] Victims and Witnesses: Please discuss the victim-based provisions within the Rome Statute. What can the International Criminal Court learn from the experiences of the ICTY, ICTR and SCSL relating to victims and witnesses and their unique needs? Considering the ICTY, ICTR and SCSL, unlike the ICC, do not have specific provisions allowing for victim participation and reparations, please highlight (1) the benefits and (2) the potential problems or challenges of the victim-based provisions. In your discussion, please contrast these provisions with the ICTY, ICTR and SCSL experiences, highlighting the importance of these provisions for a permanent international court.

to the defense no later than 30 days before the trial.[2] The ICTR trial chamber in *Prosecutor v. Kajelijeli* ruled that the prosecutor must disclose the witness's identity no later than 21 days before trial.[3] The SCSL trial chamber in *Prosecutor v. Gbao* ruled that witness disclosure to the defense would be most appropriate on a rolling basis. The Court then ruled that witness identity must be disclosed 42 days prior to testimony.[4] However, this was shortened to a 21 day rolling basis in *Prosecutor v. Norman*.[5] Under the ICC Rules of Procedure and Evidence, Rule 76 states that disclosure of witnesses must take place sufficiently in advance to allow proper preparation time for the defense.[6] The specific requirement determining when the prosecution must disclose witness identity will be decided when it is brought up to the trial chamber.

2. Protection from media and public photography, video and sketch is a very important protection measure for the ICC, although it must be strictly monitored to ensure its compliance and ability to protect victims and witnesses.

Rule 87 of the ICC follows the ICTY and ICTR rules nearly word for word and provides specific measures that can be adopted to prevent disclosure to the public or media. Both the ICTR and ICTY have an identical Rule 75 that provides measures to protect victims and

[2] *Prosecutor v. Perisic*, Case No.: IT-04-81, Decision on Prosecution Motion for Protective Measures for Witnesses (ICTY Trial Chamber May 27, 2005). [Reproduced in the accompanying notebook at Tab 31]

[3] *Prosecutor v. Kajelijeli*, Case No.: ICTR-98-44-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (ICTR Trial Chamber July 6, 2000). [Reproduced in the accompanying notebook at Tab 24]

[4] *Prosecutor v. Gbao*, Case No.: SCSL-2003-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (SCSL Trial Chamber Oct. 10, 2003). [Reproduced in the accompanying notebook at Tab 23]

[5] *Prosecutor v. Norman*, Case No.: SCSL-2004-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (SCSL Trial Chamber June 8, 2004) [Reproduced in the accompanying notebook at Tab 30]

[6] Rules of Procedure and Evidence for the International Criminal Court, ICC-ASP/1/3, Rule 76. [hereinafter ICC Rules of Procedure and Evidence] [Reproduced in the accompanying notebook at Tab 3]

witnesses from the public and media. The SCSL Rule 75 is again similar to the ICTY and ICTR Rule 75. The one difference is that the SCSL rule expands "testimony through image- or voice-altering devices or closed circuit television" to include "video link or other technology."[7] Accordingly, this allows for witnesses to testify from another location other than the courtroom via video link, adding more security for the witness.

3. Protection from confrontation with the accused is a protection measure that is attractive to the Tribunals since it protects witnesses, especially those who have been severely traumatized, without restricting the accused's rights by much as granting complete anonymity.

In *Prosecutor v. Tadic*, the trial chamber called for the installation of temporary screens in the courtroom so the witness could not see the accused, but the accused could see the witness via a monitor.[8] Thus, even though Rule 75 allows for closed circuit television, it seems from the *Tadic* case that the ICTY will use screens instead. Under the ICTR, this notion is in direct conflict with the right of the accused to face the prosecution's witnesses as provided for in Article 20 of the ICTR Statute.[9] However, the courts must balance this with the rights of witnesses. This is especially true in cases of sexual violence. The SCSL in *Prosecutor v. Sesay* allowed certain witnesses to testify from behind screens.[10] The ICC does not allow for the use of screens in the courtroom in its Rules of Procedure and Evidence. However, screens probably

[7] Rules of Procedure and Evidence for the Special Court for Sierra Leone, Rule 69 (2003). [hereinafter SCSL Rules of Procedure and Evidence] [Reproduced in the accompanying notebook at Tab 6]

[8] *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (ICTY Trial Chamber Aug. 10, 1995). [Reproduced in the accompanying notebook at Tab 36]

[9] Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR Res. 955, art. 20 (1994). [hereinafter ICTR Statute] [Reproduced in the accompanying notebook at Tab 9]

[10] *Prosecutor v. Sesay*, Case No.: SCSL-2004-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (SCSL Trial Chamber July 5, 2004). [Reproduced in the accompanying notebook at Tab 34]

should be adopted so that judges can properly monitor witnesses, the accused can confront the witness, and the witness can feel protected from not having to confront the accused.

4. Allowing complete anonymity to witnesses will be a very contentious issue, as evidenced by the ICTY, the only tribunal to grant this measure, and the source of much criticism for allowing this protection measure.

The ICC does not allow for anonymity in its Rules of Procedure and Evidence. Moreover, Article 68 of the Rome Statute states that protection measures must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In accordance with the Rome Statute, the ICC should not allow for anonymity. However, even though Article 20(1) of the ICTY states that the protections must be in full respect for the rights of the accused, the trial chambers in the *Tadic* case allowed for witnesses to be completely anonymous.[11] The Courts in the ICTR and the SCSL have not yet had to rule on granting anonymity to witnesses.

5. The ICC has created novel provisions for victims of sexual assault, which will prove extremely useful in cases of sexual violence.

Rule 68(1) of the ICC is novel because it states a number of factors that the Court must take into consideration when granting the "appropriate measures" of protection, including age, gender, health, and the nature of the crime (like sexual violence).[12] Rule 68(2) states that special measures of protection *shall* be implemented in the case of a victim of sexual violence.[13] This indicates a presumption for protective measures in cases of sexual assault. Thus, the burden is on defense to prove that the measures shouldn't be afforded. This presumption however is not

[11] *Tadic*, *supra* note 8. [Reproduced in the accompanying notebook at Tab 36]

[12] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 68(1). [Reproduced in the accompanying notebook at Tab 3]

[13] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 68(2). [Reproduced in the accompanying notebook at Tab 3]

found in the other Tribunals. Rule 43(6) of the ICC is similar to the SCSL rule in stating the Victims and Witnesses Unit shall include staff with expertise in trauma, including that related to sexual violence crimes.[14] The ICTY and ICTR simply provide for hiring women to the staff. Rule 96 of the ICTY and ICTR states that no corroboration of the victim's testimony shall be required and that prior sexual conduct of the victim shall not be admitted in evidence.[15] This is in essence a rape shield rule. The SCSL only provides that no prior sexual conduct of the victim shall be admitted.

6. Granting reparations for victims has the potential to be an extremely successful aspect of the ICC, though several formidable issues exist due to its originality within the Tribunals.

The ICC includes novel provisions for victims and witnesses. Rule 75 allows for reparations to victims, including restitution, compensation and rehabilitation.[16] Also, to ensure that victims are adequately compensated, Rule 79 specifically calls for the establishment of a trust fund. Finally, Rule 68(3) allows victims to present their views and concerns to the court. The rule specifically allows this to be done by the representatives of the victims. None of the other Tribunals have provided reparations to victims.

[14] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 43(6). [Reproduced in the accompanying notebook at Tab 3]

[15] Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, IT/32/Rev. 36, Rule 96 (1994). [hereinafter ICTY Rules of Procedure and Evidence] Reproduced in the accompanying notebook at Tab 4]; Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda, Rule 96 (1995). [hereinafter ICTR Rules of Procedure and Evidence] [Reproduced in the accompanying notebook at Tab 5]

[16] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 75. [Reproduced in the accompanying notebook at Tab 3]

II. INTRODUCTION

The protections of victims and witnesses have evolved from the inception of the ICTY and continue through to the creation of the ICC. The ICTY set the benchmark on victim and witness protection through reliance on varying national court systems as well as on international standards. The ICTY's approach has been followed by the ICTR and the SCSL, though each tribunal made important advances in victim and witness protection.

The ICC has continued to follow the lead of the other tribunals. Since the ICC has yet to hear a case and issue a decision, it is still unknown how well the ICC will protect victims and witnesses. If the Rules of Procedure and Evidence are any indication, however, the ICC will provide proper protection measures for victims and witnesses in the international tribunal arena.

III. NON-DISCLOSURE OF IDENTITY

A. General Discussion of Non-Disclosure under the ICC

Rule 76 allows for non-disclosure of a witness's identity. It states that the prosecutor must disclose the identity of witnesses who are intending to testify and that this must occur "sufficiently in advance to enable the adequate preparation of the defence (sic)."[17] The specific requirement that determines when the prosecution must disclose witness identity will not be decided until it is brought up to the trial chamber. However, the ICC will be able to look to the other tribunals for insight.

[17] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 76. [Reproduced in the accompanying notebook at Tab 3]

B. History of Non-Disclosure

1. ICTY

Article 22 of the Statute of the ICTY and Rule 69 of the ICTY Rules of Procedure specifically allows for the non-disclosure of identity.[18] Unlike the ICTR, Rule 69 of the ICTY only calls for the Prosecutor to request this protection.[19] In 1997, the trial chamber in *Prosecutor v. Delalic* ruled that the defense must disclose its witnesses to the prosecution.[20] The trial chamber reasoned that the defense's obligations are much different from the prosecution's obligations, and judges drafted all these rules with full respect to victims and witnesses.[21] In 1998, however, the Court in *Prosecutor v. Blaskic* modified this rule and allowed the defense to apply for non-disclosure protections for its witnesses as well.[22] In that decision, the defense argued that testimony from witnesses for the defense may be contrary to the interests of the government of the Republic of Bosnia and Herzegovina, thus creating a greater risk.[23] The trial chamber noted that the ICTY had an obligation to ensure effective protection for the witnesses of both the prosecution and the defense, and based on the reasonable arguments given by the defense non-disclosure, the trial chamber granted non-disclosure protection to the defense witnesses to any third parties.[24]

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[18] ICTY Rules of Procedure and Evidence, *supra* note 15. [Reproduced in the accompanying notebook at Tab 4]

[19] ICTY Rules of Procedure and Evidence, *supra* note 15, Rule 69(a). [Reproduced in the accompanying notebook at Tab 4]

[20] *Prosecutor v. Delalic*, Case No.: IT-96-21, Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses (ICTY Trial Chamber June 13, 1997). [Reproduced in the accompanying notebook at Tab 20]

[21] *Id.*

[22] *Prosecutor v. Blaskic*, Case No.: IT-95-14, Decision on the Defence Motion for Protective Measures for Defence Witnesses (ICTY Trial Chamber Sept. 30, 1998) [Reproduced in the accompanying notebook at Tab 14]

[23] *Id.*

[24] *Id.*

Similar to the ICC, Rule 69 of the ICTY does not state the specific time frame for disclosure to the defense. Instead, it simply states that a person's identity must be disclosed to the accused so that he or she has adequate time to prepare for cross-examination.[25] This issue, though, was resolved in *Prosecutor v. Perisic*.[26] There, the trial chamber reiterated that Rule 69 allows for delayed disclosure of witness identity only in exceptional circumstances and that the identity of the victim or witness must be disclosed in sufficient time to allow defense to prepare for trial. In fact, in *Prosecutor v. Blaskic*, the trial chamber denied a non-disclosure request by the Prosecution because they failed to show exceptional circumstances.[27]

The ICTY identified three issues that must be taken into consideration. First, the court must look at the likelihood that the prosecution witness will be interfered with or intimidated once their identity is made known to defense. As the trial chamber noted in *Prosecutor v. Brdanin*, the longer the time between the disclosure of the witness identity and the time when the witness is to give evidence, the more potential for interference with that witness.[28] Second, a distinction must be drawn between measures to protect individual victims and witnesses in the particular trial, which are permissible under the Rules of Procedure and Evidence, and measures that simply make it easier for the Prosecution to bring cases against other persons in the future, which are not. Again, the *Brdanin* Court emphasized that blanket protection measures are far too

[25] Virginia Moriss & Michael P. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia 245 (1995). [Reproduced in the accompanying notebook at Tab 46]

[26] *Perisic*, *supra* note 2. [Reproduced in the accompanying notebook at Tab 32]

[27] *Prosecutor v. Blaskic*, Case No.: IT-95-14, Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 30 August 1996 in Respect of the Protection of Witnesses (ICTY Trial Chamber Oct. 2, 1996). [Reproduced in the accompanying notebook at Tab 15]

[28] *Prosecutor v. Brdanin*, Case No.: IT-99-36, Decision on Motion by Prosecution for Protective Measures (ICTY trial chamber July 3, 2000). [Reproduced in the accompanying notebook at Tab 18]

lenient and the rights of the accused must remain the first consideration of the ICTY.[29] Finally, the court must decide the length of time prior to the trial that the identity of the victims and witnesses must be disclosed to the accused. Thus, even though the *Brdanin* Court realized that witness harassment is much more likely the longer their names have been disclosed, the ICTY must still create a reasonable time to allow the defense to properly prepare for cross-examination.[30] From this, the trial chamber in *Perisic* concluded that the Prosecutor must disclose the identity of witnesses under Rule 69's protection to the defense no later than 30 days before the trial.[31]

2. ICTR

Similar to the ICTY, non-disclosure is specifically provided for in Article 21 of the ICTR statute as well as Rule 69.[32] Under Rule 69, either party can apply to trial chamber for this protection.[33] Once again, the trial court had to decide the appropriate time frame for disclosing witness identity. The prosecutor in *Prosecutor v. Kajelijeli* recommended that the trial court allow disclosure to occur seven days before trial.[34] The trial chamber ruled that seven days was not adequate time to prepare a defense and instead ruled that the prosecutor must disclose the witness's identity no later than 21 days before trial.[35] The trial chamber in *Kajelijeli* even

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[29] *Id.*

[30] *Id.*

[31] *Perisic*, *supra* note 2. [Reproduced in the accompanying notebook at Tab 32]

[32] ICTR Statute, *supra* note 9, art. 20. [Reproduced in the accompanying notebook at Tab 9] ICTR Rules of Procedure and Evidence, *supra* note 15, Rule 96. [Reproduced in the accompanying notebook at Tab 5]

[33] ICTR Rules of Procedure and Evidence, *supra* note 15, Rule 69. [Reproduced in the accompanying notebook at Tab 5]

[34] *Kajelijeli*, *supra* note 3. [Reproduced in the accompanying notebook at Tab 25]

[35] *Id.*

modified the defense's request for 60 days down to 21 days, aiding the defense witnesses and showing the ICTR's commitment to this protection measure.[36] In fact, the trial chamber noted that it was a "normal measure" for defense witnesses.[37] Twenty-one days seems to be the basis at the ICTR, through an earlier decision by the trial chamber ruled that disclosure must occur within 15 days before trial.[38] Non-disclosure is not granted in every instance, though, as was reiterated in *Musema v. Prosecutor*.[39] There, the Appeals Chamber ruled that Rule 69 stipulates that there must be exceptional circumstances that warrant the non-disclosure of witness identity.[40] Moreover, the ICTR looks to the security situation when granting non-disclosure protection.[41]

3. SCSL

Rule 69 of the SCSL Rules of Procedure also specifically allows for the non-disclosure of identity.[42] Unlike the ICTY, but similar to the ICTR, the rule states that either party may apply for this protection for witnesses. In *Prosecutor v. Gbao*, the Court ruled that witness disclosure to the defense would be most appropriate on a rolling basis.[43] As stated earlier, the ICTY and the ICTR required disclosure to occur 30 and 21 days respectively prior to the beginning of trial.

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[36] *Id.*

[37] *Id.*

[38] *Prosecutor v. Ruzindana*, Case No.: ICTR-95-1-T, Decision on the Motion Filed by the Prosecutor on the Protection of Victims and Witnesses (ICTR Trial Chamber March 4, 1997). [Reproduced in the accompanying notebook at Tab 33]

[39] *Musema v. Prosecutor*, Case No.: ICTR-96-13-A, Decision (Extremely Urgent Motion for Protective Measures for Witnesses) (ICTR Trial Chamber May 22, 2001). [Reproduced in the accompanying notebook at Tab 13]

[40] *Id.*

[41] *Prosecutor v. Niyitegeka*, Case No.: ICTR-96-14-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (ICTR Trial Chamber July 12, 2000). [Reproduced in the accompanying notebook at Tab 29]

[42] SCSL Rules of Procedure and Evidence, supra note 7, Rule 69. [Reproduced in the accompanying notebook at Tab 6]

[43] *Gbao, supra* note 4. [Reproduced in the accompanying notebook at Tab 23]

The SCSL decided that witness identity should be disclosed 42 days prior to that witness's testimony.[44] In its decision, the trial court stated that it was attempting to balance the interests of the victims and witnesses with the pre-eminent interest of the accused's right to a fair and public trial.[45] Thus, even though the trial chamber in *Gbao* noted the unique security situation of having the court in the country where the atrocities were committed, it demanded that the prosecution disclose witness identity twice as early as the prosecution had requested. However, the SCSL later decided that the 42 days was too long. Therefore, in *Prosecutor v. Norman*, the trial chamber ruled that disclosure must be only 21 days before a witness is scheduled to testify.[46] This ruling greatly restricted the defense from obtaining witness identification. The trial chamber in *Prosecutor v. Fofana* followed the decision in *Norman* granting non-disclosure protection until 21 days prior to testimony.[47]

C. Benefits of Non-Disclosure

1. Protection from accused during the early part of the trial

The protection of non-disclosure of a witness is very beneficial. First, it protects witnesses and victims from the accused during the early part of the trial process, which can be lengthy. Witnesses and victims can feel secure during this time period knowing that their identities are safe from the accused as well as from the media. Probably the most significant benefit of this provision is that it does not interfere with the trial process itself. Instead, this protection is a

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[44] *Id.*

[45] *Id.*

[46] *Prosecutor v. Norman*, Case No.: SCSL-2004-14-T, Ruling on Motion for Modification of Protective Measures for Witnesses (SCSL Trial Chamber Nov. 18, 2005). [Reproduced in the accompanying notebook at Tab 31]

[47] *Prosecutor v. Fofana*, Case No.: SCSL-2003-11-PD, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (SCSL Trial Chamber Oct. 16, 2003). [Reproduced in the accompanying notebook at Tab 22]

preliminary step in securing the safety of victims and witnesses. If properly applied, this protection will not hinder the defense from being able to properly prepare for cross-examination.

2. Provides extra time for the Victims and Witnesses Unit to accommodate victims and witnesses

Furthermore, non-disclosure allows the Victims and Witnesses Unit extra time to set up any other protections and accommodations that may be needed. For example, if witnesses are able to travel to the ICC prior to their identities being released, this may be an important security measure for the Victims and Witnesses Unit, as virtually all victims and witnesses will be required to fly or otherwise travel to The Hague. The Witness and Victims Support Section of the ICTR had facilitated the travel of over 150 witnesses to Arusha from over 10 countries.[48] The Victims and Witness Unit of the ICC will surely have similar obligations. Many victims and witnesses may fear traveling to the ICC if the accused knows their identities. Therefore, non-disclosure may aid in bringing witnesses to the Court.

D. Possible Challenges of Non-Disclosure

1. The ICC should allow the Defense to apply for this provision

All three tribunals allow the defense to apply for this protection measure. The ICTY provision only states that the prosecutor can request the protection, similar to the ICC provision. However, as stated earlier, the ICTY ruled in *Prosecutor v. Blaskic* that the defense can also apply for non-disclosure protections. Therefore, it seems only appropriate that the Court also permit the defense to apply for this provision under Rule 76. However, this cannot be confirmed until a case arises where the defense seeks this protection for its witnesses. At that time, the trial court will have to make a determination. If the trial court rules against allowing the defense to

[48] International Crimes, Peace, and Human Rights: The Role of the International Criminal Court 13 (Dinah Shelton, ed., 2000). [Reproduced in the accompanying notebook at Tab 42]

utilize Rule 76, the ruling could create a controversy. It is also possible that Rule 76 be amended so that it comports with Rule 69 of the ICTR and SCSL. This would eliminate any controversy, but may be more difficult to implement.

2. The ICC must determine the appropriate time for disclosure

The key challenge for non-disclosure provision is that the Court will have to determine what length of time is adequate for the defense to prepare for cross-examination. This challenge does not become any easier when looking to the other Tribunals, as each tribunal has determined a different timeframe. Moreover, it is difficult, if not impossible to compare the three as the SCSL has created a rolling timeframe; the ICTY demands disclosure 30 days prior to trial, while the ICTR requires disclosure 21 days before trial. The rolling time frame may be the most beneficial to the witness. For example, if witness X is slated to testify last in the Prosecution's case, having his identity released 21 or 30 days before trial will mean that his identity may be known by the defense for months before he testifies. Conversely, if witness Y is set to testify first at trial, he might rather have the 21 or 30 day notice before the trial begins, instead of a 21 day rolling-basis notice. Theoretically, though, the rolling basis is most beneficial because it imposes the same burden on each witness, as each witness's identity will be disclosed the same amount of time before their respective testimonies. In practice, though, this may prove problematic. For example, the Prosecution will not be able to precisely state which day each witness will testify. Thus, the Prosecution will be forced to err on the safe side and disclose a witness's identity at least 21 days before testimony, even though the testimony may not take place for another 60 days. This will also place a burden on the Court to keep track of the process. A simpler process may be to set a specific time before trial as the ICTY and ICTR have

done. The only problem with this approach is that a witness's identity may be known for months before he or she actually testifies. Ultimately, this will be a decision for the ICC to decide.

E. Conclusion

Non-disclosure of identity will undoubtedly continue to be one of the most frequently employed protection measures at the ICC. The other Tribunals have used this protection measure with success, though each has implemented the measure differently. The trial chamber of the ICC must look to the other Tribunals' jurisprudence, and eventually decide how to implement this protection measure.

IV. PROTECTION FROM PUBLIC AND MEDIA

A. General Discussion of Protection from Public and Media under the ICC

Rule 87 specifically allows for the protection from public or media of any victim, witness or "other person at risk on account of testimony given by a witness…"[49] Under this rule, a chamber may provide five different protection mechanisms. First, the Court may decide to expunge the name or any identifying information of a witness from the public records.[50] Second, the Court may prohibit the prosecution, the defense or any other participant in the proceedings from disclosing identifying information to a third party.[51] Third, testimony may be given via electronic or other special means. This includes the use of voice and/or picture alteration,

[49] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 87(3). [Reproduced in the accompanying notebook at Tab 3]

[50] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 87(3)(a). [Reproduced in the accompanying notebook at Tab 3]

[51] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 87(b)(3). [Reproduced in the accompanying notebook at Tab 3]

videoconferencing, closed-circuit television, and exclusive use of the sound media.[52] Fourth, the Court may provide a pseudonym to be used instead of the person's actual name.[53] Fifth, the Court may decide to hold part of its proceedings on camera.

B. History of Protection from Public and Media

1. National Jurisdictions

The Tribunals are not the first to adopt protective measures from the public and media. Many national courts allow for this protection as well. For example, Chile allows courts to change the identity of witnesses in serious cases.[54] Canada also allows the court to order the protection from the public.[55] In fact, Canada also provides in its statute that witnesses may testify behind a screen in the courtroom.[56] This procedure has been adopted by the other Tribunals, as will be discussed below. South Africa also provides for non-disclosure to the public if it appears that harm will likely result from the testimony.[57] Also, courts in the United States have declared that an accused's right to a public trial under the Sixth Amendment is not an absolute right, and can be restricted in the interests of justice.[58]

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[52] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 87(3)(c). [Reproduced in the accompanying notebook at Tab 3]

[53]ICC Rules of Procedure and Evidence, *supra* note 6, Rule 87(3)(d). [Reproduced in the accompanying notebook at Tab 3]

[54] International Encyclopaedia of Laws: Criminal Law (Cyrille Fijnaut, ed., 2004). [Reproduced in the accompanying notebook at Tab 43]

[55] R.S.C. 1985, c. C-46, s. 446 §2.1. [Reproduced in the accompanying notebook at Tab 1]

[56] R.S.C. 1985, c. C-46, s. 446 §2.101(b).

[57] 1977 SA Procedural Law 51, sec. 153(2)(b). [Reproduced in the accompanying notebook at Tab 7]

[58] *Waller v. Georgia*, 467 U.S. 39, 46 (1984). [Reproduced in the accompanying notebook at Tab 38]

2. International Conventions

Besides national courts, international conventions also discuss the protection of witnesses from the public and media. Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Covenant on Human Rights both state that the media and public may be excluded in the interest of protection of the parties.[59] The Tribunals in interpreting the rules pertaining to this protection have used much of this information.

3. ICTY

Under the ICTY, Rule 75 specifically states measures that can be adopted to prevent disclosure to the public or media. Such measures listed are: expunging names and identifying information from the public records; non-disclosure of records which identify the victim; testimony through image- or voice- altering devices or closed circuit television; and assigning a pseudonym.[60] These protection measures are nearly identical to the ICC provisions. One major technological advantage in the ICTY's protection measure is that the broadcast is released after a delay of 30 minutes. This allows the parties to seek redaction of any inadvertent reference to a protected witness or to potentially identifying information.[61] Another benefit is that this protective order may continue throughout the proceedings, or even after the proceedings are concluded.[62]

The chambers of the ICTY were quick to utilize these protection measures for the Prosecution witnesses. In the *Tadic* case alone, the trial chamber ordered closed sessions for 13

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[59] *Tadic*, *supra* note 8. [Reproduced in the accompanying notebook at Tab 36]

[60] ICTY Rules of Procedure and Evidence, *supra* note 15, Rule 75(B)(i). [Reproduced in the accompanying notebook at Tab 4]

[61] *The International Criminal Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection*, 10 Leiden J. Int'l L. 179, 181 (1997). [Reproduced in the accompanying notebook at Tab 65]

[62] An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, *supra* note 27, 244-45. [Reproduced in the accompanying notebook at Tab 46]

witnesses and facial distortion for eight witnesses.[63] Measures were also used in *Prosecutor v. Boskoski* to protect witnesses from the media.[64] However, it eventually became apparent that defense witnesses might also deserve this protection. In *Prosecutor v. Delalic*, the trial chamber stated, "The Trial Chamber has exercised this power for the protection of witnesses for the Prosecution and it is incumbent upon it to give equal consideration from the Defence."[65] It then ordered non-disclosure of the defense witness's name to the media, as well as adopting a pseudonym for him. In its decision, the trial chamber stated that objective fear of a witness is a sufficient basis to grant protective measures such as non-disclosure to the public and media.[66] The ICTY will not provide for this provision carte blanch, however. In *Prosecutor v. Boskoski*, the trial chamber granted protection from the public and media for only one of the Annexes requested, and stated that the other was so general in nature that the public and media should be free to have access to it.[67] Another important aspect of this protection is that the trial chamber decides how long the protections last.[68]

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[63] *The International Criminal Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection*, supra note 61, 190-91. [Reproduced in the accompanying notebook at Tab 65]

[64] *Prosecutor v. Boskoski*, Case No.: IT-04-82, Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses (ICTY Trial Chamber June 20, 2005). [Reproduced in the accompanying notebook at Tab 16]

[65] *Prosecutor v. Delalic*, Case No.: IT-96-21, Decision on Confidential Motion for Protective Measures for Defence Witnesses (ICTY Trial Chamber Sept. 25, 1997). [Reproduced in the accompanying notebook at Tab 19]

[66] *Id.*

[67] *Prosecutor v. Boskoski*, Case No.: IT-04-82, Decision on "Prosecution's Motion Seeking Further Protective Measures for Victims and Witnesses with Confidential Annexes A & B" (ICTY Trial Chamber Aug 17, 2005). [Reproduced in the accompanying notebook at Tab 17]

[68] *Prosecutor v. Stansic*, Case No.: IT-03-69, Decision on Prosecution's Application for Variation of Protective Measures (ICTY Trial Chamber Sept. 1, 2005). [Reproduced in the accompanying notebook at Tab 35]

4. ICTR

Rule 75 of the ICTR is identical to rule 75 of the ICTY.[69] In implementing these measures, the ICTR looks at the context of the entire security situation affecting the concerned witness, and demands that there be a real fear and objective basis for the fear.[70] Moreover, the trial chamber in *Prosecutor v. Kajelijeli* states that it is solely the decision of the chamber, not that of the witness, to "determine how long a pseudonym is to be used…"[71] The ICTR also allowed the defense to request protection from the public and media. In *Prosecutor v. Kayishema*, the trial chamber granted the defense's request because the witnesses for the defense feared reprisals for openly testifying about the 1994 Rwandan genocide.[72] The trial chamber in *Prosecutor v. Musema* further bolstered this decision when it stated that the security situation in and around Rwanda was a factor in granting protection from the public and media.[73]

5. SCSL

The SCSL Rule 75 is again similar to the ICTY and ICTR Rule 75. The one difference is that the SCSL rule expands "testimony through image- or voice- altering devices or closed circuit television" to include "video link or other technology."[74] Accordingly, this allows for

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[69] *See* ICTR Rules of Procedure and Evidence, *supra* note 15, Rule 75. [Reproduced in the accompanying notebook at Tab 5]

[70] *Prosecutor v. Kamuhanda*, Case No.: ICTR-99-54-T, Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defense Witnesses (ICTR Trial Chamber March 22, 2001). [Reproduced in the accompanying notebook at Tab 26]

[71] *Prosecutor v. Kajelijeli*, Case No.: ICTR-98-44-I, Decision on Juvenal Kajelijeli's Motion for Protective Measures for Defense Witnesses (ICTR Trial Chamber Apr. 3, 2001). [Reproduced in the accompanying notebook at Tab 24]

[72] *Prosecutor v. Kayishema*, Case No.: ICTR-95-1-T, Decision on the Defence Preliminary Motion for Protective Measures for Witnesses (ICTR Trial Chamber Feb. 23, 1998). [Reproduced in the accompanying notebook at Tab 27]

[73] *Prosecutor v. Musema*, Case No.: ICTR-96-13-T, Decision on the Prosecutor's Motion for Witness Protection (ICTR Trial Chamber Nov. 20, 1998). [Reproduced in the accompanying notebook at Tab 28]

witnesses to testify from a location other than the courtroom via video link, adding more security to the witness. The trial chamber granted protective measures of this type in *Prosecutor v. Sesay*.[75] There, non-disclosure of names or identifying information as well as applying pseudonyms was granted. The trial chamber noted that Sierra Leone is different from the other Tribunals because it sits in the country where the crimes were allegedly committed.[76] Therefore, it seems that the SCSL may be more sensitive to the needs of victims and witnesses by specifically stating the possibility of using other technologies to protect victims and witnesses from the public and media.

C. Benefits of Protection from Public and Media

The general benefit of this protection is very apparent; it keeps victims and witnesses safe from the public and media. However, another major benefit to this protection is that it still allows the accused to know the identity of the witnesses testifying against him. This measure is much less intrusive from the accused's point of view as the accused will still be able to fully prepare to cross-examine these witnesses. Therefore, this measure may be used much more liberally than a measure that grants complete anonymity of a witness where the accused will not know the identity of the accusers.

D. Possible Challenges of Protection from Public and Media

A major challenge to this protective measure is ensuring its compliance throughout all stages of the trial, and even afterwards. All of the other Tribunals have used the protection with success. However, there is always a chance that someone may "leak" a name to the media. If names are disclosed, then witnesses may be in real danger. In fact, two witnesses who testified

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[74] SCSL Rules of Procedure and Evidence, *supra* note 7. [Reproduced in the accompanying notebook at Tab 6]

[75] *Sesay*, *supra* note 10. [Reproduced in the accompanying notebook at Tab 34]

[76] *Id*.

in the *Akayesu* and the *Ruzindana* cases from the ICTR were killed.[77] This prompted the ICTR to reinforce security measures as well as strengthen the cooperation with the government of Rwanda.[78] The ICTR also pushed for establishing a special unit for transporting witnesses with unmarked vehicles.[79] Also, in November 2000, two Croat newspapers published excerpts from testimony given by a witness in the *Blaskic* case who had been granted protective measures.[80] After this, the ICTY charged five journalists with "'knowingly and willfully' publishing the name of a protected witness, and…publishing excerpts from private testimony by that witness."[81] Contempt under the ICTY is punishable by up to seven years in prison or fines up to $120,000.[82] Because of these incidents, there must be ample insurance that names will not be disclosed. Moreover, the Court must determine the proper sanctions or punishments if it finds out that someone has disclosed a protected witness's identity.

E. Conclusion

Protection from the public and media has been another common protection measure at the other Tribunals. The other Tribunals have used this measure successfully, though there have been notable exceptions, as discussed above. If the ICC can properly ensure that protections from media and public are adhered to, this can be a very valuable measure.

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[77] Virginia Moriss & Michael P. Scharf, The International Criminal Tribunal for Rwanda, Volume 1, 535-36 (1998). [Reproduced in the accompanying notebook at Tab 47]

[78] Virginia Moriss & Michael P. Scharf, The International Criminal Tribunal for Rwanda, Volume 2, 560 (1998). [Reproduced in the accompanying notebook at Tab 48]

[79] *Id.*

[80] Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 Yale J. Int'l L. 111, 129 (2002). [Reproduced in the accompanying notebook at Tab 67]

[81] Marlise Simons, *U.N. Court Seeks Arrest of Croatian Journalist*, The New York Times, 4, Oct. 2, 2005. [Reproduced in the accompanying notebook at Tab 75]

[82] *Id.*

V. Protection from Confrontation with the Accused

A. General Discussion of Witness Protection from Confrontation with the Accused under the ICC

Rule 87(3)(c) allows for a witness to testify through electronic means.[83] This means that a witness may testify outside of the courtroom. Rule 87(3), though, states that this protection measure is in response to public or media protection. Therefore, the ICC does not explicitly allow for the victim or witness to be protected from a confrontation with the accused. However, Rule 88(5) does provide that a Chamber must be "vigilant in controlling the manner of questioning."[84] Again, however, this section relates to victims of special crimes such as sexual violence. The question thus becomes: How should the ICC rule when confronted with a request to allow a witness to testify without specifically confronting the accused? As will be discussed below, the other Tribunals have allowed for such measures as installing screens in the courtroom to shield the victim from viewing the accused. The ICC does not allow for the use of screens in the courtroom in its Rules of Procedure and Evidence. However, this approach should be adopted so that judges can properly monitor witnesses, the accused can confront the witness, and the witness can feel protected from not having to confront the accused.

B. History of Witness Protection from Confrontation with the Accused

1. ICTY and ICTR

Both the ICTY and ICTR specifically allow for measures to protect victims and witnesses from the accused. Rule 75 (B)(iii) of both the ICTY and ICTR states that a chamber may order appropriate measures such as one-way closed circuit television. This would allow the witness to

[83] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 87(3)(c). [Reproduced in the accompanying notebook at Tab 3]

[84] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 88(5). [Reproduced in the accompanying notebook at Tab 3]

testify outside of the courtroom without seeing the accused while still allowing the accused and the chamber to monitor the witness. However, this approach was never really used by the ICTY. Instead, the trial chamber in the *Tadic* case decided that the installation of temporary screens in the courtroom would be more appropriate. These screens, designed so the witness cannot see the accused, but the accused can see the witness via a monitor, were determined to be a better solution than using closed circuit television.[85] The Chamber reasoned that having the witness actually in the courtroom was very important to insuring a proper trial, as the judges would be able to better monitor the witness in person. However, the *Tadic* Court did establish two criteria for allowing video-conferencing: the testimony must be so important that it would be unfair to proceed without it; and the witness must be unable or unwilling to testify in the courtroom.[86]

In *Prosecutor v. Delalic*, the trial chamber reiterated the validity of using screens in the courtroom as a protective measure against confronting the accused.[87] There, witness "B" was a detainee at the Celebici Camp. The chamber reasoned that the Prosecutor's motion to allow witness "B" to testify from a remote witness room constituted a request for partial anonymity.[88] Witness "B" was extremely worried about additional security risks to his family, and he had been extremely traumatized from his experience at Celebici.[89] The chamber noted that, if granted, the accused's right to confront witnesses testifying against him would be partially compromised. So, the chamber forced witness "B" to testify in the courtroom in an open session, but with the use of

[85] *Tadic*, *supra* note 8. [Reproduced in the accompanying notebook at Tab 36]

[86] Rydberg, Asa, *The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC*, 12 Leiden J. Int'l L. 455, 471 (1999). [Reproduced in the accompanying notebook at Tab 73]

[87] *Prosecutor v. Delalic*, Case No.: IT-96-21, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M" (ICTY Trial Chamber Apr. 29, 1997) [Reproduced in the accompanying notebook at Tab 21]

[88] *Id.*

[89] *Id.*

a protective screen. This, the chamber concluded, was a proper balance between the rights of the accused and the safety of the witness.[90] Thus, the *Delalic* case added a third requirement to the *Tadic* criteria: the accused must not be prejudiced in the exercise to confront the witness.[91] Therefore, the three criteria the ICTY set forth through the *Tadic and Delalic* cases are as follows: The testimony must be so important that it would be unfair to proceed without it; The witness must be unable or unwilling to testify in the courtroom; and The accused must not be prejudiced in the exercise to confront the witness.

2. SCSL

In *Prosecutor v. Norman,* the trial chamber of the SCSL stated that screens do, to a small degree, negatively affect the public nature of the trial, and thus hinder the accused's right to a public trial.[92] The chamber, in noting the preference for public hearings, stated that this preference must be balanced with the interest of protecting victims and witnesses. In the end, the chamber ruled that the use of screens "is a reasonable…and sensible way" to balance the right of the accused to a public hearing with the importance of protecting victims and witnesses.[93] The trial chamber in *Prosecutor v. Norman* was challenged by the defense on its decision. Regardless, the chamber stuck with its original decision.[94] The chamber was confident that it made a balanced evaluation between the rights of the accused and the importance of protecting the witnesses and victims.[95] The trial chamber in *Prosecutor v. Sesay* followed the *Norman*

[90] *Id.*

[91] Rydberg, *supra* note 86, 471. [Reproduced in the accompanying notebook at Tab 73]

[92] *Norman*, *supra* note 5. [Reproduced in the accompanying notebook at Tab 30]

[93] *Id.*

[94] *Norman*, *supra* note 46. [Reproduced in the accompanying notebook at Tab 31]

[95] *Id.*

court's reasoning and allowed certain witnesses to testify from behind screens.[96] Both the *Norman* and *Sesay* decisions also emphasized the fact that the SCSL was located in the same country in which the atrocities took place, thus making protective measures even more important.[97]

Besides testifying behind screens, Rule 75 of the SCSL allows for witnesses to testify from outside of the courtroom via video link.[98] This can help protect a witness from the trauma of being confronted by the accused, or even being in his or her presence. This provision proves especially beneficial for children, as was evidenced when the chamber in *Prosecutor v. Sesay* granted this protection measure for child witnesses.[99]

Again, the use of screens was not novel to the Tribunals. Other countries, such as Canada, allow for this protective measure. In Canada, though, only children (under 18 years of age) are allowed to testify behind screens.[100]

C. Benefits of Witness Protection from Confrontation with the Accused

Obviously, this protection measure allows witnesses the opportunity to be free from confronting the accused. As has been documented in the cases above, this measure is a major attraction to many victims and witnesses, but especially to child victims and victims of sexual violence. At the same time, the use of screens can also benefit the accused. As with video-link, it allows for a similar courtroom atmosphere. It also allows the judges to better observe the

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[96] *Sesay*, *supra* note 10. [Reproduced in the accompanying notebook at Tab 34]

[97] *Norman*, *supra* note 5. [Reproduced in the accompanying notebook at Tab 30] and *Sesay*, *supra* note 15. [Reproduced in the accompanying notebook at Tab 34]

[98] SCSL Rules of Procedure and Evidence, *supra* note 7, Rule 75. [Reproduced in the accompanying notebook at Tab 6]

[99] *Sesay*, *supra* note 10. [Reproduced in the accompanying notebook at Tab 34]

[100] International Encyclopaedia of Laws, *supra* note 54, 393. [Reproduced in the accompanying notebook at Tab 43]

demeanor of the witness, insuring a fair trial. However, the benefit of testifying via video-link is more beneficial to extremely traumatized victims and witnesses. It allows these people to testify in a safe location and to be completely separated from the accused. Deciding which approach is correct depends largely on the factors present.

D. Possible Challenges of Witness Protection from Confrontation with the Accused

The primary challenge with this protection measure comes in balancing the rights of the accused with the need to protect victims and witnesses. The two primary rights of the accused that are of concern are the right to confront the witness and the right to a public trial. Both of these rights are enumerated in Article 67 of the Rome Statute.[101] Thus, the ICC will have to confront this issue and determine which witnesses deserve the protection of non-confrontation with the accused. It will be helpful for the ICC to look at the precedents set by the other Tribunals, such as the three criteria created by the ICTY.

E. Conclusion

Even though the ICC does not explicitly allow for the victim or witness to be protected from a confrontation with the accused, this protection measure should be afforded. The other Tribunals have created a strong jurisprudence for this protection measure. Additionally, the other Tribunals expanded this protection to allow for testimony from behind screens in an effort to help ensure a fair trial. The ICC should look to the other Tribunals' decisions and follow their lead.

[101] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 67. [Reproduced in the accompanying notebook at Tab 3]

VI. ANONYMITY

A. General Discussion of Anonymity under the ICC

Anonymity is not specifically discussed in the ICC's Rules of Procedure and Evidence. Instead, Article 64(6)(e) simply states that the trial chamber may provide protection for victims and witnesses.[102] Likewise, Article 68(1) states that the Court shall "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."[103] However, the article goes on to state "these measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair trial and impartial trial."[104] As will be discussed below, this "balancing test" provision is nearly identical to that of the ICTY's provision. Moreover, the ICC provides instances where the balancing test is not necessary. Article 68(2) affirms that special measures of protection *shall* be implemented in cases involving victims of sexual violence.[105] The wording of this article ensures that protections will automatically be put in place. This shifts the burden to the defense to prove that the measures decided by the Court should not be afforded. Therefore, Article 68 allows the possibility of anonymous witnesses testifying at the ICC.

[102] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 64(6)(e). [Reproduced in the accompanying notebook at Tab 3]

[103] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 68(1). [Reproduced in the accompanying notebook at Tab 3]

[104] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 68(1). [Reproduced in the accompanying notebook at Tab 3]

[105] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 68(2). [Reproduced in the accompanying notebook at Tab 3]

B. History of Anonymity

1. ICTY

Dusko Tadic was the first person tried at the ICTY. He was charged with thirty-four counts of Breaches of the Geneva Conventions, Violations of the Laws and Customs of War, and Crimes Against Humanity, including murder, rape and torture of Muslim men and women.[106] During the pre-trial motions, the trial chamber ruled that two witnesses who had been victims of sexual assault could testify anonymously; it was reported that these witnesses were forced to participate in sexual mutilation.[107] Two other witnesses' identities were determined not to be essential to the trial as they were chance observers.[108] The trial chamber noted Article 20(1) of the ICTY statute that states the court must give "full respect for the rights of the accused and due regard for the protection of victims and witnesses."[109] The trial chamber noted that in general, all evidence must be produced in the presence of the accused at a public hearing. However, the trial chamber emphasized that a "fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses."[110] From this, the trial chamber ruled that the anonymity of these witnesses was necessary because the ICTY could not guarantee the safety of the witnesses "due to a lack of a fully-funded and operational witness protection programme."[111]

The court in Tadic created five requirements in order for anonymity to be allowed. First, there must be a real fear for safety. Second, the witness's testimony must be important to the

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[106] Michael P. Scharf, Balkan Justice 100 (1997). [Reproduced in the accompanying notebook at Tab 45]

[107] *The International Criminal Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection*, supra note 61, 185. [Reproduced in the accompanying notebook at Tab 65]

[108] *Id*. at 186.

[109] *Tadic*, *supra* note 8. [Reproduced in the accompanying notebook at Tab 36]

[110] *Id*.

[111] Balkan Justice, *supra* note 106, 108. [Reproduced in the accompanying notebook at Tab 45]

prosecutor's case. Third, there must be no prima facie evidence that the witness is untrustworthy. Fourth, the Court must determine the ineffectiveness of a witness protection program. Fifth, the Court must decide that the measures taken are strictly necessary.[112] The Court also added four guidelines to be followed when evidence is taken from anonymous witnesses. First, the judges must be able to observe the demeanor of the witness. Second, the judges must be aware of the witness's identity in order to test his or her reliability. Third, the accused must be allowed ample opportunity to question the witness on issues unrelated to his or her identity. Finally, the witness's identity must be released when the reasons for requiring the anonymity are over. With these factors, the court ruled that anonymity does not violate Article 21(4) as long as the defense is given ample opportunity to question the anonymous witness.[113]

Regardless of the national court systems that allow for anonymity and the groundbreaking *Tadic* decision, there has been limited use of this protection in the Tribunals. In *Prosecutor v. Delalic*, the court ruled that the right of the accused to face his accusers cannot be compromised except in the public interest and to uphold public policy.[114] Moreover, the court in *Prosecutor v. Blaskic* stated that the court shall apply only those protections that are absolutely necessary.[115] The ICTY and the SCSL have yet to rule on granting anonymity to witnesses.

2. European Court and National Courts

These guidelines are reflected in the *Kotovski v. The Netherlands* decision. There, the European Court concluded that the disadvantages that an accused faces when addressing the evidence of an anonymous witness can be overcome by appropriate safeguards provided by the

[112] *Tadic*, *supra* note 8. [Reproduced in the accompanying notebook at Tab 36]

[113] *Id.*

[114] *Delalic*, *supra* note 87. [Reproduced in the accompanying notebook at Tab 21]

[115] *Blaskic*, *supra* note 22. [Reproduced in the accompanying notebook at Tab 14]

trial court.[116] The decision underscored the increasing violent, organized crime that has led witnesses to fear reprisals. It also stated that the Commission on Threatened Witnesses, created in 1984 by the Minister of Justice, concluded that while the law should forbid the use of anonymous witnesses in principle, there may be exceptions where "the witness would run an unacceptable risk if his or her identity were known."[117] That ruling is essentially the basis of the *Tadic* decision.

Certain national courts also allow for anonymity. Chile allows witnesses who appear voluntarily to request anonymity.[118] The court then decides if the situation warrants the request. English law also provides for this protection in exceptional circumstances.[119] Denmark did allow for anonymity after an historical Supreme Court ruling in 1983.[120] However, this protection was short lived; it was outlawed in 1986.[121] The United States does not permit the use of anonymous witnesses, even when the witness's safety has been threatened.[122] Instead, the United States court system relies on protective measures.

C. Benefits of Anonymity

Granting anonymity is the ultimate protection to fearful witnesses. Many victims would be fearful of confronting their assailants. This protection is even more essential when considering the fears held by victims of sexual violence. The UN Special Rapporteur on

[116] *Kotovski v. The Netherlands*, (1990) 12 E.H.R.R. 434. [Reproduced in the accompanying notebook at Tab 11]

[117] *Id*.

[118] International Encyclopaedia of Laws, *supra* note 54, 233. [Reproduced in the accompanying notebook at Tab 43]

[119] Hakan Friman, *Inspiration From the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court*, 3 LPICT 373, 394 (2003). [Reproduced in the accompanying notebook at Tab 62]

[120] International Encyclopaedia of Laws, *supra* note 54, 370. [Reproduced in the accompanying notebook at Tab 43]

[121] *Id*.

[122] *Nora v. Demleitner, Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 Am. J. Comp. L. 641, 641 (1998). [Reproduced in the accompanying notebook at Tab 59]

violence against women stated that "[s]evere traumatization, feelings of guilt and shame are accompanied by the fear of rejection by husband or family and by the fear of reprisals against themselves and their families."[123] In fact, this reality is evidenced in the *Tadic* case where one of the witnesses was granted anonymity but still refused to testify.[124]

Offering anonymity aids the ICC in meeting its objectives. It was stated that the ICTY had three functions: "to do justice, to deter further crimes and to contribute to the restoration and maintenance of international peace."[125] Professor Chinkin argues that the unwillingness of witnesses to testify prevents the ICTY from successfully prosecuting those who have been indicted, thus undermining the objectives of the tribunal.[126] This analysis parallels the work of the ICC as it works to administer justice, deter heinous crimes and promote international peace. The failure of witnesses to testify will undermine these objectives.

D. Possible Challenges of Anonymity

1. Anonymity is not specifically authorized in the Rome Statute or the Rules of Procedure and Evidence

Similar to the other Tribunals, the ICC does not specifically authorize the use of anonymous witness testimony in either the Rome Statute or the Rules of Procedure and Evidence. Critics may argue, as they have for the ICTY, that the ICC should not create this option. In formulating the Rome Statute, nations had ample opportunity to insert an anonymous witness provision. Other specific provisions are listed in the Rome Statute. Therefore, had the

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[123] Radhika Coomaraswamy, *Preliminary Report on Violence against Women, its causes and consequences*, UN Doc. E/CN.4/1995/42, para 281 (1994). [Reproduced in the accompanying notebook at Tab 77]

[124] Chinkin, Christine M., *Due Process and Witness Anonymity*, 91 Am. J. Int'l L. 75, 78 (1997). [Reproduced in the accompanying notebook at Tab 55]

[125] *Id* at 76.

[126] *Id*.

drafters of the Rome Statute wished to provide for anonymous testimony, they would have included it just as they included other provisions.

2. Allowing anonymous testimony will conflict with the notion of providing the accused with a fair trial

Article 67 of the ICC specifically provides that the accused shall have the right "to examine, or have examined, the witnesses against him."[127] Critics may argue that the right to cross-examine witnesses cannot be effectively conducted without the knowledge of the identity of the witness.[128] Others argue that allowing anonymous testimony may give the appearance of guilt instead of affording presumption of innocence.[129] Moreover, Article 68 of the Rome Statute states that protection measures must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[130] By allowing witnesses to testify anonymously, it is argued, the accused will be prejudiced by not knowing the identity of the witnesses. Knowledge of witness identity is important for many reasons. First, it allows the accused to mount a complete defense to the testimony given by conducting background searches of the witness. Second, the accused will be better able to specifically refute testimony made by the witness if the accused has personal knowledge of the situation and the person involved. This can be done on cross-examination of the witness as well as through the testimony of the accused. Also, knowledge of a witness's identity gives more legitimacy to the specific trial. Besides these

[127] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 67. [Reproduced in the accompanying notebook at Tab 3]

[128] Leigh, Monroe, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am. J. Int'l L. 235, 236 (1996). [Reproduced in the accompanying notebook at Tab 68]

[129] Momeni, Mercedeh, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 How. L.J. 155, 163 (1997). [Reproduced in the accompanying notebook at Tab 69]

[130] The Rome Statute of the ICC, Article 68. [hereinafter Rome Statute] [Reproduced in the accompanying notebook at Tab 2]

considerations, the ability of the Court to ensure the legitimacy of the witness's statement is vital to a proper trial. The best way to ensure the truthfulness of the witness's testimony is by allowing the accused, his or her counsel, as well as the judges, to monitor the witness.

E. Conclusion

Allowing completely anonymous testimony is a very controversial issue. Only the ICTY granted this unique protection measure in its proceedings. This measure will be an important issue for the ICC to consider. Ultimately it will be the ICC chambers that will decide if anonymity will be granted to witnesses.

VI. PROVISIONS FOR VICTIMS OF SEXUAL VIOLENCE

Crimes of sexual violence have become a major issue in the Tribunals. The ICTY Statute specifically states that rape is a crime against humanity.[131] The ICTR Statute also lists rape as a crime against humanity, but then includes the sexual offenses of "rape, enforced prostitution, and any form of indecent assault" as war crimes.[132] The ICC does not differ from the ICTR, and expressly states that crimes of sexual violence constitute Crimes Against Humanity and War Crimes.[133]

A. General Discussion of Provisions for Victims of Sexual Violence under the ICC

The ICC has several provisions relating to victims of sexual violence. First, Article 68(1) of the ICC states a number of factors that the Court must take into consideration when granting "appropriate measures" of protection, including age, gender, health, and the nature of the crime,

[131] Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 5(g). [hereinafter ICTY Statute] [Reproduced in the accompanying notebook at Tab 8]

[132] ICTR Statute, *supra* note 9, Article 3(g) and 4(e). [Reproduced in the accompanying notebook at Tab 9]

[133] Rome Statute, *supra* note 130, Article 7(g) and (8)(2)(b)(xxii). [Reproduced in the accompanying notebook at Tab 2]

like sexual violence.[134] This, as will be shown below, is a novel rule to the Tribunals. Next, Rule 68(2) states that special measures of protection *shall* be implemented in the case of a victim of sexual violence.[135] This rule is also novel and very important because it indicates that there is a presumption for protective measures in cases of sexual violence. Thus, the burden is on the defense to prove that the measures shouldn't be afforded. Third, Rule 43(6) of the ICC states that the Victims and Witnesses Unit *shall* include staff with expertise in trauma, including that related to sexual violence crimes.[136] In fact, this is so important to the ICC that its website actually discusses the Victims and Witnesses Unit's obligation to include staff with expertise in trauma related to crimes of sexual violence.[137] Fourth, Rule 71 states that a Chamber shall not allow any evidence of a victim's prior or subsequent sexual conduct.[138] In short, these four provisions show the ICC's dedication to protecting victims of sexual violence.

B. History of Provisions for Victims of Sexual Violence

1. ICTY and ICTR

A report by the Secretary-General of the U.N. stated that there was a need to provide protection to victims of rape and sexual assault in the former Yugoslavia.[139] The ICTY has heeded this report and has created certain provisions protecting victims of sexual violence,

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[134] *Id* at Article 68(1).

[135] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 68(2). [Reproduced in the accompanying notebook at Tab 3]

[136] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 43(6). [Reproduced in the accompanying notebook at Tab 3]

[137] *Victims and Witnesses Protection*, International Criminal Court, http://www.icc-cpi.int/victimsissues/witnessprotection.html (last visited Sept. 24, 2005). [Reproduced in the accompanying notebook at Tab 79]

[138] ICC Rules of Procedure and Evidence, *supra* note 6, Rule 71. [Reproduced in the accompanying notebook at Tab 3]

[139] Moriss & Scharf, *supra* note 25, 242. [Reproduced in the accompanying notebook at Tab 47]

though some argue that it was due more to the efforts of non-governmental organizations which focus on women's war crime issues.[140] Under Rule 96 of both the ICTY and ICTR Rules of Procedure and Evidence, no corroboration of a rape victim's testimony is required.[141] It has been noted that this Rule has been extremely important as it helps to prevent irrelevant, embarrassing, or prejudicial evidence about rape victims from being heard in court. It also helps to prevent harassment during cross-examination. This is basically a rape shield statute, which is common in the United States. The ICTY was faced with victims of sexual violence in its first case.[142] There, in the *Tadic* case, the trial chamber worked especially hard to protect the victims of sexual violence, and even went as far as to allow them to testify completely anonymously, as discussed earlier in this memorandum.

The ICTY and ICTR also have implemented a protection measure in which a rape victim's previous sexual history or conduct is kept from being admitted into evidence.[143] This provision has the same effect as the previous provision that protects the victim from testifying about embarrassing or prejudicial evidence. Moreover, it protects victims during cross-examination.

2. SCSL

The SCSL, on-the-other-hand, does not have the same provisions for victims of sexual violence. Under Rule 96, the SCSL simply states that credibility, character, or predisposition to

[140] Wald, Patricia M., *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 Yale H.R. & Dev. L.J. 217 (2002). [Reproduced in the accompanying notebook at Tab 76]

[141] ICTY Rules of Procedure and Evidence, *supra* note 15, Rule 96. [Reproduced in the accompanying notebook at Tab 4] ICTR Rules of Procedure and Evidence, *supra* note 15, Rule 96. [Reproduced in the accompanying notebook at Tab 5]

[142] *Tadic*, *supra* note 8. [Reproduced in the accompanying notebook at Tab 35]

[143] ICTY Rules of Procedure and Evidence, *supra* note 15, Rule 96(iv). [Reproduced in the accompanying notebook at Tab 4] ICTR Rules of Procedure and Evidence, *supra* note 15, Rule 96(iv). [Reproduced in the accompanying notebook at Tab 5]

sexual availability cannot be inferred by a victim's prior sexual conduct.[144] Therefore, under the Rules of Procedure and Evidence of the SCSL, the defense may admit a victim's prior sexual history into evidence, but it cannot use that prior history to question the credibility of the witness. This rule could create situations that are embarrassing or even harassing to the victim. The ICC also contains a very similar provision. However, unlike the SCSL, the ICC bolsters the provision with Rule 71, as discussed above. Regardless, the SCSL has worked to protect victims of sexual violence.[145]

Concerning Victims and Witnesses Units, the ICTY and ICTR both provide counseling and support for victims of rape and sexual assault.[146] The SCSL also provides that its Witnesses and Victims Section also be staffed by experts in trauma related to crimes of sexual violence.[147] Therefore, the ICC follows very closely with the other Tribunals in regards to staffing its Victims and Witnesses Unit with personnel that are specifically trained to work with victims of sexual violence crimes.

3. National Courts

Provisions for victims of sexual violence are not unique to the Tribunals. In Denmark, for example, victims of rape or incest may request trials to be conducted on camera.[148]

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[144] SCSL Rules of Procedure and Evidence, supra note 7, rule 96(iv). [Reproduced in the accompanying notebook at Tab 6]

[145] *Norman*, *supra* note 5. [Reproduced in the accompanying notebook at Tab 30]

[146] Bachrach, Michael, *The Protection and Rights of Victims Under International Criminal Law*, 34 Int'l L. 7, 12-13 (2000). [Reproduced in the accompanying notebook at Tab 51]

[147] SCSL Rules of Procedure and Evidence, supra note 7, Rule 34(B). [Reproduced in the accompanying notebook at Tab 6]

[148] *Delalic*, *supra* note 87. [Reproduced in the accompanying notebook at Tab 21]

Moreover, both the Swiss and German judicial systems may prohibit the publication of the identity of such victims.[149]

C. Benefits of Provisions for Victims of Sexual Violence

The fear for a witness's safety can be especially acute for rape victims.[150] As discussed above, testifying in trial may embarrass many victims of sexual violence. Moreover, sexual crimes are so psychologically disturbing that many victims are unwilling or even unable to confront their assailants. However, in order to administer justice, the testimony of these victims is vital to the trial process. Therefore, proper provisions must be in place to protect these victims. The actual protection measures fall into the categories that have already been discussed in this memorandum. The benefits of the extra provisions help ensure the protections needed for victims of sexual violence are properly administered.

D. Possible Challenges of Provisions for Victims of Sexual Violence

The major challenge of providing proper protections for victims of sexual violence is having a well-trained staff that is able to minister to these victims. A victim of sexual violence has endured a most traumatic experience, and therefore needs special attention. Rule 43 addresses this situation by staffing the Victims and Witnesses Unit with trained professionals in the area of sexual violence. In fact, Rule 43(6) has received much praise as it has been noted that it is "absolutely crucial to have the Victims and Witnesses Sections staffed by trained, competent, dedicated, and caring professionals, including professionals with expertise in gender

[149] *Id*.

[150] Creta, Vincent M., *Comment: The Search for Justice in the Former Yugoslavia and Beond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 Hous. J. Int'l L. 381 (1998). [Reproduced in the accompanying notebook at Tab 56]

crimes."[151] Therefore, the ICC's challenge in creating special provisions for victims of sexual violence is in assuring that properly trained professionals are employed who can deal with the intense emotional trauma that sexual violence victims have endured.

E. Conclusion

Creating special provisions for victims of sexual violence will surely impact on the ICC's credibility. Sexual crimes will continue to be committed, and the ICC must not only be prepared to prosecute those who commit these acts, but also be able to protect the victims of these heinous crimes. The ICC, through its novel approaches as well as through established Tribunal provisions, has created a positive change in international law. As one author stated, "This is no doubt an important step forward in enhancing awareness, and sensitivity to the victims, of sexual crimes."[152]

VII. REPARATIONS

The Rome Statute has made it possible for the ICC to order reparations to victims. As will be discussed below, this is a significant departure from previous Tribunals, and one that will have a major impact on the functioning of the ICC as well as on the shaping of international criminal law. However, for the ICC to be successful in allowing for reparations to victims and their families, there are still some very important issues that must be discussed and resolved.

A. General Discussion of Reparations under the ICC

The basic provisions regarding reparations under the ICC are found in Article 75 of the Rome Statute and in Rules 94 – 98 of the Rules of Procedure and Evidence. Article 75 of the

[151] International War Crimes Trials: Making a Difference? 52 (Steven R. Ratner and James L. Bischoff, eds., 2004). [Reproduced in the accompanying notebook at Tab 44]

[152] The Rome Statute of the International Criminal Court: A Commentary 1359 (Antonio Cassese et al. eds., 2002). [Reproduced in the accompanying notebook at Tab 49]

Rome Statute gives the Court the power to order reparations to victims by convicted persons.[153] The Court, either by request or in "exceptional circumstances" on its own motion, can determine the amount and magnitude of damages, losses and injuries to victims.[154] After this determination, the Court, under Rule 98, can make an order for reparation against the convicted person. Article 75 defines reparation as compensation, restitution and rehabilitation. As part of the reparation process, the Court, under Article 75(3), may allow the offender, victims, and other interested persons or states to represent their interests. Article 75(5) mandates that state parties give effect to the reparation order. As part of this process of reparations, Article 79 provides for the creation of a Trust Fund for the benefit of victims and their families. The Trust Fund may obtain assets from voluntary contributions from the following: Governments, NGOs, corporations, or private individuals; Fines and forfeitures assessed against the accused to the Trust Fund; Resources collected through awards ordered by the Court; and Any other funds that are transferred by State Parties.[155]

The idea of victim reparation is novel to international tribunals. The tribunals before the ICC were created specifically for the punishment of international criminals. In essence, they were "symbolic exercises of the victor over the vanquished."[156]

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[153] Rome Statute, *supra* note 130. [Reproduced in the accompanying notebook at Tab 2]

[154] M. Cherif Bassiouni, The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text, Volume 1, 177 (2005). [Reproduced in the accompanying notebook at Tab 39]

[155] Fischer, Peter G, *The Victims' Trust Fund of the International Criminal Court – Formation of a Functional Reparations Scheme*, 17 Emory Int'l L. Rev. 187, 209 (2003). [Reproduced in the accompanying notebook at Tab 61]

[156] *Id* at 192.

B. History of Reparations

1. ICTY and ICTR

Rule 105 of the ICTY and ICTR states that the trial chamber may determine the matter of restitution of property taken unlawfully by the convicted.[157] The Rule also states that the Tribunals may submit a judgment to the appropriate national authorities to aid in the restitution. This rule allows the national authorities to help the victim recover the restitution of property under national legal systems.[158] However, this rule has yet to be applied in either court system. In fact, it has been stated that the provisions "were included in the Rules as a symbolic afterthought rather than being expected to produce concrete results."[159] This was not the case with the ICC, as Article 75 was negotiated for many years, and it was ultimately decided to insert "shall" instead of "may" before "establish principles relating to reparations…"[160]

Moreover, Rule 106 of both Tribunals states that convicted persons are equally responsible for compensation of victims under actions brought in national courts. Unfortunately, this Rule has also been of little use.[161] In Rwanda, many national court cases have awarded large reparations to victims, but a lack of funds has curtailed enforcement. Carla del Ponte, the ICTR's Chief Prosecutor, was highly critical of the inadequate funds and stated a need for change.[162] Similarly, Judge Pillay and Judge Jorda, former Presidents of the ICTR and ICTY

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[157] ICTY Rules of Procedure and Evidence, *supra* note 15. [Reproduced in the accompanying notebook at Tab 4] ICTR Rules of Procedure and Evidence, *supra* note 15. [Reproduced in the accompanying notebook at Tab 5]

[158] Garkawe, Sam, *Victims and the International Criminal Court: Three Major Issues*, 3 Int'l Crim. L. R. 345, 362-363 (2003). [Reproduced in the accompanying notebook at Tab 64]

[159] *Id* at 363.

[160] Bassiouni, The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text, Volume 2, 544-545 (2005). [Reproduced in the accompanying notebook at Tab 63]

[161] M. Cherif Bassiouni & P. Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia 704 (1996). [Reproduced in the accompanying notebook at Tab 41]

respectively, now at the ICC, echoed del Ponte's frustrations and stated the need for development of appropriate mechanisms for reparations.[163] Both Presidents, though, decided against pursuing mechanisms for reparations because they believed that it may hinder the respective Tribunal's main objective which is to prosecute those responsible for the heinous crimes committed in their respective regions. This is strikingly dissimilar to the main objective of the ICC; the Preamble to the Rome Statute states that State Parties must be "mindful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[164] This change in perspective from simply prosecuting criminals to protecting victims was not an abrupt occurrence.

2. International Conventions and Courts

The idea of reparations to victims in international law became a major source of discussion in the last twenty years. The Netherlands Institute of Human Rights implored the U.N. to create a mechanism that would provide for reparations to victims of human rights violations. Theo van Boven, a member of the Netherlands Symposium, submitted a report on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms to the UNCHR. His reports declared "the violation of any human right gives rise to a right of reparation for the victim."[165] The American Convention on Human Rights insists that State Parties ensure appropriate compensation for victims.[166] The

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[162] Ferstman, Carla, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LJIL 667, 672 (2002). [Reproduced in the accompanying notebook at Tab 60]

[163] *Id* at 672-73.

[164] Rome Statute, *supra* note 130. [Reproduced in the accompanying notebook at Tab 2]

[165] Fischer, *supra* note 155, 196. [Reproduced in the accompanying notebook at Tab 61]

[166] The Velasquez Rodriguez Case, 1988 Inter-Am.Ct. H.R. at 155, reprinted in 28 I.L.M. 291 (1988). [Reproduced in the accompanying notebook at Tab 36]

U.N.'s Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power guarantees redress to individuals who have suffered physical and mental harm to person or property.[167] Likewise, the European Court of Human Rights ruled that effective remedies to victims include both "payment of compensation where appropriate," as well as, "punishment of those responsible."[168] This background helped to lead the Victim's Working Group to state in 1998, "There will be no justice without justice for victims. And in order to do justice to victims, the ICC must be empowered to address their rights and needs."[169] The Permanent Court for International Justice, in a famous opinion, stated:

> The essential principle contained in the actual notion of an illegal act…is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[170]

[167] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 34, U.N. Doc. A/RES/40/34 (1985). [Reproduced in the accompanying notebook at Tab 78]

[168] *Mentes v. Turkey*, 37 I.L.M. 858, 882 (Nov. 28, 1997). [Reproduced in the accompanying notebook at Tab 12]

[169] Fischer, *supra* note 155, 201. [Reproduced in the accompanying notebook at Tab 61]

[170] Factory at Chorzow (Ger. v. Pol.), Claim for Indemnity, 1928 PCIJ (ser. A) No. 17 at 41 (Sept. 13). [Reproduced in the accompanying notebook at Tab 10]

3. Truth Commissions

Reparations can take many forms, and not simply be restricted to monetary awards. In fact, since it may be easily argued that no two victim's needs are exactly alike,[171] having only a single form of reparation seems inadequate. This is very evident when one looks to the many truth commissions created throughout the world. To date, over 14 countries have created either truth commissions or other analogous bodies.[172] Chile and Argentina each provided compensation, rehabilitation and services to some, though not all, of the victims in their military dictatorships.[173] Chile also provided scholarships and free medical and psychological care for children whose parents were killed or have disappeared.[174]

One may also look to South Africa's Truth and Reconciliation Commission (TRC), created in the wake of the South African apartheid. One of the main bodies of the TRC was the Committee on Reparation and Rehabilitation (CRR). The CRR's main function was to recommend a policy to the government of South Africa regarding measures it should take to provide reparations to the victims of the apartheid.[175] The TRC ultimately recommended many different forms of reparations. First, it recommended legal and administrative reparations: death warrants, exhumations, reburials and ceremonies, provision of headstones and tombstones, declarations of death, expungement of criminal records, and the expediting of outstanding legal

[171] Roche, Declan, *Truth Commission Amnesties and the International Criminal Court*, 45 Brit. J. Criminol. 565, 571 (2005). [Reproduced in the accompanying notebook at Tab 71]

[172] Chapman, Audrey R. & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 Hum. Rts. Q. 1 (2001). [Reproduced in the accompanying notebook at Tab 54]

[173] Roht-Arriaza, Naomi, *Reparations Decisions and Dilemmas*, 27 Hastings Int'l & Comp. L. Rev. 157, 158 (winter 2004). [Reproduced in the accompanying notebook at Tab 72]

[174] *Id* at 171.

[175] Burton, Mary, *Custodians of Memory: South Africa's Truth and Reconciliation Commission*, 32 Int'l J. Legal Info. 417 (2004). [Reproduced in the accompanying notebook at Tab 53]

matters.[176] Second, the TRC recommended community reparations: renaming streets and facilities, erecting memorials and monuments, and conducting culturally appropriate ceremonies.[177] Third, the TRC recommended national reparations, such as the erection of memorials and monuments, and a day of remembrance.[178] Fourth, it was recommended that there be community rehabilitation, such as improving health services, social services, education, and housing, and creating skills training courses and specialized trauma counseling.[179] The TRC final report also sought an official apology.[180]

There have been some complaints of the TRC. For example, many victims were ultimately left out of the process and the South African government was slow to initiate any of the TRC's recommendations. However, as one author stated, "Perhaps the most important lesson of the South African experience is that reparations come in many forms and that reparative measures, whatever their form, should be valued."[181]

El Salvador also created a Truth Commission after the eleven year war that tore the country apart. The Truth Commission ultimately recommended that a monument be created, a day of remembrance, and a follow-up body to monitor compliance with the recommendations.[182] Plus, the commission recommended the establishment of a fund to compensate all victims, where

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[176] Garkawe, Sam *The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?*, 27 Melb. U. L. Rev. 334, 375 (2003). [Reproduced in the accompanying notebook at Tab 63]

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] Andrews, Penelope E., *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DePaul L. Rev. 1155, 1173 (2003-2004). [Reproduced in the accompanying notebook at Tab 50]

[181] Daly, Erin, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367 (2002-2003). [Reproduced in the accompanying notebook at Tab 57]

[182] Roht-Arriaza, supra note 173, 174-75. [Reproduced in the accompanying notebook at Tab 72]

at least 1% of all international assistance received from abroad be earmarked for such compensation.[183] Sadly, few of these recommendations were heeded. Instead, the Salvadoran Legislature took formal action to reject the Truth Commission's report.[184]

C. Benefits of Reparations

The benefits of reparations are obvious. First, the victims and their families can be compensated for the terrible acts committed against them. This not only aids the victims, but it is an extra punishment against the convicted criminals. Another benefit is that it allows victims to feel whole again. In past tribunals, victims were only given the comfort of knowing that their assailants were now incarcerated. However, this does little for victims who must return to their war torn communities. Moreover, it certainly does nothing for families of victims who have lost loved ones who provided for the family. Another benefit to offering reparations occurs when victims are more willing to step forward to testify against their assailants. For example, victims who must work to provide for their families may not chose to travel to the ICC to testify in a potentially lengthy trial only to receive personal gratification in knowing they helped to incarcerate the criminal. On-the-other-hand, if those victims are aware that reparations can be received, they may be more willing to leave their families in the hopes that they will be compensated for the crimes committed against them. Additionally, a victim fearful of testifying against an accused may again be more willing if reparations are available.

Besides the direct benefits to the victims, offering reparations has additional benefits as well. First, these reparations to victims will help the countries in which atrocities are committed. The infusion of money into these countries can free up funds needed by the government to repair

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[183] Buergenthal, Thomas, *The United Nations Truth Commission for El Salvador*, 27 Vand. J. Transnat'l L. 497, 537 (1994). [Reproduced in the accompanying notebook at Tab 52]

[184] Jowdy, Gregory, *Truth Commission in El Salvador and Guatemala: A Proposal for Truth in Guatemala*, 17 B. C. Third World L. J. 285, 300 (1997). [Reproduced in the accompanying notebook at Tab 66]

the country or region. Second, reparations may give more legitimacy to the Court as it seeks not only to put criminals in jail, but also to care for the victims of terrible crimes. This legitimacy may sway critics of the ICC, and could potentially turn a non-member country into a member-country. Finally, allowing for reparations by the ICC will undoubtedly aid in molding international law's view on reparations for victims.

D. Possible Challenges of Reparations

1. Locating and Freezing Assets

There are multiple challenges to the idea of allowing for reparations by the ICC since there is no precedent for this in international tribunals. First, locating and freezing assets is a lengthy and intensive process. Unfortunately, hiding and shifting funds and money is not.[185] Therefore, the Court will be forced to act as swiftly as possible to find, freeze and seize assets of the convicted criminals. Fortunately, the Pre-Trial Chamber can take steps to freeze and/or seize a suspect's assets once a warrant or arrest or a summons is issued against that person.[186] In order for reparations to be effective, there must be national procedures in place to aid in the process. Some State Parties have already initiated internal legislation dealing with cooperation with the Court, including the freezing of assets. This comports with the Rome Statute that obligates State Parties to cooperate in the "identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture."[187] Moreover, State Parties must "take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited," and have it transferred to the Court.[188] Many parties have done this

[185] Ferstman, *supra* note 162, 678. [Reproduced in the accompanying notebook at Tab 60]

[186] Rome Statute, *supra* note 130, Article 57(3)(e). [Reproduced in the accompanying notebook at Tab 2]

[187] *Id* at Article 93(1)(k).

[188] Rome Statute, *supra* note 130, Article 109. [Reproduced in the accompanying notebook at Tab 2]

by involving an Attorney General or Public Prosecutor in the request. The French legislation allows for measures to be conducted by the Paris State Prosecutor.[189] Canada, on the other hand, requires judge's approval after application by the Attorney General.[190] New Zealand allows for the Attorney General to proceed if he or she is satisfied that the request relates to an international crime that is being investigated by the ICC and there is tainted property located in New Zealand.[191]

This problem is intensified when money is located in non-member States. Intelligent criminals will know which States are not a part of the ICC and transfer funds to those States. This makes it incumbent on the ICC to convince non-member States to cooperate with the Court "on the basis of an ad hoc arrangement, an agreement with such States or any other appropriate basis," as stated in Article 87(5)(a).[192] If the Court can work with non-member states to agree to freeze the assets of criminals being prosecuted by the ICC, a major step in ensuring the payment of reparations to victims will be taken.

2. Limited Amounts of Funds

Another challenge to the Court occurs when only a limited amount of funds for reparations exists. As one author stated, "It is clear that at this stage one cannot say that the Trust Fund has a definitive and clear source of sufficient funding."[193] When one considers the fact that there may be millions of victims of a specific instance of genocide, it would be extremely difficult to make each victim or victim's family whole again. In reality, it will be

[189] Ferstman, *supra* note 162, 680. [Reproduced in the accompanying notebook at Tab 60]

[190] *Id*.

[191] *Id* at 681.

[192] Rome Statute, *supra* note 130. [Reproduced in the accompanying notebook at Tab 2]

[193] Garkawe, *supra* note 150, 366. [Reproduced in the accompanying notebook at Tab 64]

impossible for the Court to accurately predict "the number of victims who will be affected in each case and what their corresponding level of financial need might be."[194] Therefore, the Court will inevitably be faced with offering collective awards. Moreover, it may be difficult to obtain assets from convicted criminals since it is very probable that these people will "not have any assets to pay over, or they have successfully hid or 'given away' their assets.[195] These collective awards must utilize both the money seized from the accused, but also Trust Fund assets, as discussed in Rule 98.

3. Consistently Allocating Reparations

Consistency in allotting reparations is a major challenge to the Court. As has been stated, "The most important quality of the Trust Fund's assessment methodology is consistency for each of the victims in every case. Arbitrary, unfounded awards discredit the legitimacy of the Trust Fund and the ICC as a legal institution."[196] The United States had several problems with victim reparations after the September 11th attacks.[197] The U.S. Government developed a very simple system for compensating victims. The system applied a flat amount for pain and suffering and added any expected earning capacity of the decedent had they not been killed.[198] However, it was found that this standardized assessment failed to adequately compensate many victims.

In order to be consistent, then, the Court must set guidelines for allotment of reparations. One suggestion may be to create a scale with upper and lower limits set by the ICC and also a list

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[194] Fischer, *supra* note 155, 215. [Reproduced in the accompanying notebook at Tab 61]

[195] Garkawe, *supra* note 150, 364. [Reproduced in the accompanying notebook at Tab 64]

[196] Fischer, *supra* note 155, 224. [Reproduced in the accompanying notebook at Tab 61]

[197] Ripley, Amanda, *What is a Life Worth?*, Time Magazine, 23, 25-27 (Feb. 11, 2002). [Reproduced in the accompanying notebook at Tab 70]

[198] *Id*. Each victim was given $250,000 for pain and suffering plus $50,000 for each child and spouse lost. The expected earnings of an individual were calculated by multiplying the annual earnings of the individual by the number of years he or she was expected to live, which was based on the national average.

of factors to evaluate where a victim should be placed on that scale. Such factors may include the following: Actual physical harm to the person; Harm to property; Emotional distress; Pain and suffering; Ability to live a productive life; Moral or Religious invasion; and Viewing crimes against one's family. Once the factors for reparations are in place, the Court can apply them to the upper and lower limits created. The following is a simplified example:

> The Court decides that the range of reparations will be from $100,000 to $200,000 based on the following factors: Harm to person, Ability to live a productive life, Harm to property, Pain and suffering, and Harm against one's family. Person A was raped repeatedly and then forced to watch her daughter be raped. The accused then poured acid on Person A's eyes, blinding her for life. Afterwards, her family's home was burned down. Person B had exactly the same done to her, except she was not blinded. Under the criteria, Person A would be awarded more than Person B.

By establishing appropriate criteria, the Court will gain legitimacy in this very sensitive area. It was said that the ICC "must create flexible, consistent standards of assessing loss and harm to victims that will take into account both tangible and intangible loss so that the awards may be appropriately distributed."[199] This may be very difficult to accomplish. However, by creating the appropriate criteria to base the reparations on, the Court will be consistent as well as flexible while taking into account both tangible and intangible loss.

4. Evaluating True Victims

Unfortunately the notion of reparations will most likely attract imposters hoping to attain money. The Court will have to evaluate all persons claiming to be victims. This is necessary for two reasons. First, the Court will not want to award money to those not worthy of the reparations, as doing so would quickly deplete the Trust Fund. Secondly, and arguably more

[199] Fischer, *supra* note 155, 226. [Reproduced in the accompanying notebook at Tab 61]

importantly, imposter victims will give false testimony to convict the accused in order to acquire reparations. Obviously, this will taint the trial and the Court. Therefore, the Registrar must take appropriate measures to make sure those individuals making claims are truly victims.

5. Determining the Types of Reparations to be Administered

The many Truth Commissions created throughout the world have all recommended multiple types of reparations for victims. The ICC must also decide what reparations are appropriate for the victims that come before the court. Many times monetary relief will be either inadequate or unreasonable depending on the crimes and the number of victims. Proper reparations may prove problematic due to the ICC's limited resources. Regardless, the ICC will surely encounter countless victims, thus strengthening the need for more than simple monetary awards. Instead, the ICC should look into community and national reparations that can benefit more victims, especially those appearing at the ICC.

6. Getting Reparations to the Victims

Once money is allocated to victims, assurances must be made that the victims receive the reparations. This will be a major problem in parts of the world where governments are too weak to handle this burden, are corrupt, or fail to exist at all. This has, in fact, already occurred in Kosovo.[200] Unfortunately, these very circumstances exist in some of the governments where the Court will operate. Moreover, if government officials committed the crimes, the Court will have a difficult time trusting that the money will end up with the victims. Similarly, it may be difficult for victims to even accept the money for fear of reprisal. As of yet, there seems to be no clear answer to this problem. One possible solution is to have the Trust Fund and/or the

[200] Scharf, Irene, *Kosovo's War Victims: Civil Compensation or Criminal Justice for Identity Elimination?*, 14 Emory Int'l L. Rev. 1415, 1424-1425 (2000). [Reproduced in the accompanying notebook at Tab 74]

Registrar determine if the country is too unstable to receive the reparations, and to determine an alternate method to award the money to the victims.

7. Illegitimacy of the Court

The ICC seems to have two vital functions: Bring heinous criminals to justice; and protect the victims of those crimes. In order for the Court to be successful, both objectives must be met with success. The Court must understand this and treat reparations seriously. Meeting these challenges with respect to reparations will bear on the legitimacy of the Court. If these challenges are not met, critics of the Court will undoubtedly maintain that the Court is not a legitimate body. Moreover, the very victims that the Court seeks to aid may feel that the court is not legitimate if these challenges are not met.

E. Conclusion

The ICC's provisions for victim reparations represent a major step forward in the progression of international law. Reparations allow the Court to administer a form of justice beyond prosecution of the criminal. However, there are some concerns that must be addressed in order to ensure that offering reparations to victims becomes a positive aspect of the ICC. If the ICC does not properly address these issues, it may lose credibility, not only with the victims, but also with the international community.

VIII. CONCLUSION

This memorandum sought to discuss and analyze the different victim and witness provisions implemented by the ICC by comparing them to similar provisions of the ICTY, ICTR, and SCSL. The memorandum was broken into 6 major sections: Non-Disclosure of Identity; Protection from Media and Public Photography, Video and Sketch; Protection from

Confrontation with the Accused; Anonymity; Protections for Victims of Sexual Assault; and Reparations to Victims. Each section identified and described the specific provisions relating to the topic. The analysis focused on the general rights under the Tribunals as well as specific court decisions from those Tribunals. Additional examples from national court systems including the United States, Canada, Chile, Australia, South Africa, and the European Court of Human Rights were also included.

It is also clear from this analysis that victim and witness provisions have evolved from the inception of the ICTY and continue to evolve through the creation of the ICC. The ICC has developed extensive victim and witness provisions that mirror those established by the other tribunals.

The other Tribunals have been utilizing victim and witness provisions since their inception. In fact, the ICTY trial chambers have granted protective measures to between 85 and 90 percent of witnesses.[201] To date, the ICC has yet to hear a case and issue a decision, and it is therefore still unknown how well the ICC will protect victims and witnesses.

This memorandum has provided an analysis of how victim and witness provision have been implemented in the other Tribunals. It has also analyzed the benefits of each provision. More importantly, this memorandum analyzed potential problems in implementing each provision. By noting the benefits and understanding the possible shortcomings of each specific provision, the ICC will be better able to implement the provisions deemed necessary for the victims and witnesses whose lives have been impacted by the crimes that come before this Court.

[201] Dieng, Adam, *International Criminal Justice: From Paper to Practice – A Contribution From the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court*, 25 Fordham Int'l L.J. 688, 701 (2001-02). [Reproduced in accompanying notebook at Tab 58]

APPENDIX 1

	ICC	ICTY	ICTR	SCSL
Non-Disclosure of Identity	Rule 76 allows for this, though it does not specifically state the deadline for disclosing identification to the opposing party.	Rule 69 allows for this, though, only the Prosecutor may request this. The Court in *Prosecutor v. Perisic* stated that prosecutor must disclose no later than 30 days before trial.	Article 21 allows for this, and either party can apply to the trial chamber for this under Rule 60. Rule 60 also allows the trial chamber to consult with the Victims and Witnesses Support Unit. The Court in *Prosecutor v. Kajelijeli* ruled that disclosure must occur no later than 21 days before trial.	Rule 69 allows for this, and either party can apply to the trial chamber for this. The Court in *Prosecutor v. Gbao* ruled that disclosure will occur on a rolling basis and must occur no later than 42 days prior to the testimony of the witness. This was shortened in *Prosecutor v. Norman* to a 21 day rolling basis.
Protection from Media and Public	Rule 87(3) specifically allows for this protection, similarly to the ICTY and ICTR.	Rule 75 specifically allows for this protection.	Rule 75 specifically allows for this protection.	Rule 75 specifically allows for this protection, but adds "video link or other technology" to possible testimony procedures.
Protection from Confrontation with Accused	Rule 87(3)(c) allows for testimony through videoconferencing and closed-circuit television.	The Court in *Prosecutor v. Tadic* ruled that even though Rule 75 allows for testimony through closed circuit television, the Court would install screens to protect witnesses from seeing the accused.	Rule 75 allows for appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.	The Court in *Prosecutor v. Sesay* allowed witnesses to testify from behind screens. Also, Rule 75 allows for witnesses to testify from outside of the courtroom via video link.
Anonymity	This is not specifically stated in the Rules of Procedure and Evidence. However, Article 68 of the Rome	Article 20(1) states that witness protection measures must be in full respect for the rights of the accused. But, the Court in	The Court has not yet ruled on this issue	The Court has not yet ruled on this issue

	Statute states that protection measures must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.	*Prosecutor v. Tadic* ruled that anonymity is allowed. The court created 5 criteria in deciding to allow for anonymous testimony as well as 4 guidelines to be followed during anonymous testimony.		
Protections for Victims of Sexual Assault	Rule 68(1) states that the nature of the crime must be considered when granting protective measures. Rule 68(2) states that measures of protection *shall* be implemented for victims of sexual assault. Rule 43(6) states that the Victims and Witnesses Unit shall include staff with expertise in sexual violence crimes.	Rule 96 states that no corroboration of the victim's testimony shall be required and no prior sexual conduct of the victim shall be admitted.	Rule 96 states that no corroboration of the victim's testimony shall be required and no prior sexual conduct of the victim shall be admitted.	No sexual conduct of the victim shall be admitted. The Victims and Witnesses Unit shall include staff with expertise in sexual violence crimes.
Reparations to Victims	Rule 75 allows for reparations to victims, including restitution, compensation and rehabilitation. Rule 79 specifically calls for the establishment of a trust fund.	Rule 105 states that restitution may be ordered. However, this has never been administered.	Rule 105 states that restitution may be ordered. However, this has never been administered.	Does not allow for reparations