

 **CHAPTER VI**

PROTECTION, SUPPORT AND ASSISTANCE

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Unless otherwise specified:

“Article”: refers to the Rome Statute

“Rule”: refers to the Rules of Procedure and Evidence

“Regulation”: refers to the Regulations of the Court

“Regulation (RR)”: refers to the Regulations of the Registry

“Regulation (VTF)”: refers to the Regulations of the Trust Fund for Victims

INTRODUCTION

Under the Rome Statute, the Court **as a whole** has a duty to provide appropriate measures to victims and witnesses to protect their safety, physical and psychological well-being, dignity and privacy¹. Protection, assistance and support are an integral part of the Court's mandate **at all stages of the proceedings**.

Providing protection, support and assistance to victims throughout the justice process is essential to ensure victims' access to justice, as provided for in many international instruments². A lack of adequate protection will dissuade victims from participating in proceedings and thereby jeopardise the capacity of the Court to establish the truth and deliver justice.

The effective exercise of the rights of victims to participate in proceedings before the Court and to reparation requires the establishment of a sophisticated protection regime in the courtroom and in the field, with the capacity to prevent and react to any threat to their physical and psychological integrity. Identifying and implementing such measures is one of the most important and challenging tasks of the Court. At this stage in the Court's operations, concerns remain as to whether adequate measures for protection are in place.

This chapter outlines the general provisions establishing the duties of the Chambers, the Prosecutor, the Registry, as well as States Parties, with regards to the protection, support and assistance of victims.

It then explores in detail two types of measures that depend on an order of a Chamber: protective measures under Rule 87 and special measures, under Rule 88. **Protective measures** and **special measures** are measures of protection and support ordered by a Chamber, at the request of the prosecution, defence, witnesses, victims or their legal representatives, or on the Chamber's own initiative. The Chambers have a wide discretion in defining appropriate protective and special measures. Protective measures can include measures aimed at concealing the identity and whereabouts of victims, witnesses and "other persons at risk on the account of the testimony of a witness" from the public and the media. Special measures can include measures taken in respect of particularly vulnerable witnesses and victims, such as children, elderly persons, and victims of sexual violence, during proceedings before the Court, to assist them in giving evidence.

Finally, this chapter sets out the role of the **Victims and Witnesses Unit (VWU)** providing protection, support and assistance to victims at all stages of the proceedings. Measures implemented by the VWU do not always depend on a prior order of a Chamber. They include protecting the

1. Article 68(1).

2. UN Declaration on Justice for Victims 1985, principles 6, and 14-17; Van Boven/ Bassiouni, principles 10 and 12; *UN Handbook on Justice for Victims*, Chapter II, D; see further Chapter I, *The Evolution of Victims' Access to Justice*.

physical safety of those involved in the Court's proceedings, providing psychological support and medical assistance, and providing assistance in making practical arrangements for effective involvement in the Court's proceedings.

However, the availability of adequate measures of protection, support and assistance will depend heavily on the allocation of sufficient resources to the VWU and on the extent of its field presence. Many organizations, including FIDH, have expressed their concern that the current budget allocated to the VWU to provide these essential services is inadequate.

Whilst recognising that the VWU does not currently have sufficient resources, it is vital that the VWU interprets its function to include not only responding to requests for measures of protection and assistance, but also making requests and adopting measures on its own initiative. Furthermore, the VWU must not limit its focus to protecting and supporting witnesses and victims travelling to the seat of the Court. FIDH and other non-governmental organisations continue to emphasise the need to ensure that victims are protected and supported and to campaign for the VWU to effectively fulfil its wider mandate³.

3. See for example, FIDH, *Position Paper, n°10, Fourth Session of the ICC Assembly of States Parties*, November 2005.

I. GENERAL PRINCIPLES

1. Overview of responsibilities for providing protection, support and assistance

Article 68 (1) sets out the general obligation of the Court to protect and support victims and witnesses:

“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender...and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children...These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

Rule 86 establishes, as a general principle, that all organs of the Court in exercising their functions must take into account the needs of victims and witnesses:

*“A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of **all victims and witnesses**...in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence”.*

Specific provisions set out the duties of each organ of the Court: the Registry, the Chambers, and the Prosecutor. States Parties and international organisations also have a vital role in ensuring the protection of victims and witnesses.

1.1. The Registry

Within the Registry, the **Victims and Witnesses Unit** (VWU) was created, in accordance with article 43 (6), in order to provide “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses⁴”. The VWU’s duties include formulating long and short-term plans for their protection⁵ and assisting them in obtaining medical and psychological assistance⁶ The VWU also has a vital role in advising and training the other organs of the Court on protection issues⁷.

The Registry has a duty to inform victims of the existence of the VWU and the services that it can provide⁸. It has a particular duty towards victims of sexual violence to take gender sensitive measures to facilitate their participation at all stages of proceedings⁹. It is also the organ responsible for negotiating agreements with states for the provision of protection and support services on their territory, including relocation agreements¹⁰.

1.2. The Chambers

The Chambers have a duty to order necessary measures of protection and to ensure that such measures have been put in place by the other organs of the Court. **Article 57 (3) (c)** sets out the general obligation of the **Pre-Trial Chamber** to ensure “the protection and privacy of victims and witnesses”. This

4. See Chapter II, Introduction to the ICC and section III below.

5. Rule 17(2)(a)(i).

6. Rule 17(2)(a)(iii).

7. Rule 17(2)(a)(ii).

8. Rule 16(2)(a).

9. Rule 16(1)(d).

10. Rule 16(4).

applies to all proceedings before the Pre-Trial Chamber¹¹. The Pre-Trial Chamber has a duty to ensure that effective measures are in place at the preliminary and investigation stages.

The Pre-Trial Chambers allocated to the situations in Uganda, the DRC and Sudan (Darfur) have held closed hearings and made specific orders for the evaluation of the security situation on the ground and of the effectiveness of the protection systems in place.



ICC JURISPRUDENCE

Uganda

Before issuing the first warrants for arrest, Pre-Trial Chamber II convened a hearing on the protection of victims and witnesses¹².

Democratic Republic of Congo (DRC)

At the outset of the investigation in the DRC, Pre-Trial Chamber I decided to convene two closed hearings with the principal aim of ensuring that measures were in place for the protection of victims and witnesses and the preservation of evidence¹³.

In respect of the first six victims applying to participate in proceedings before the Court (VPRS 1 - 6), Pre-Trial Chamber I made specific orders for their protection, before deciding whether to grant their applications, including: the use of pseudonyms to refer to the victims; communicating a redacted version of their applications for participation to the defence, in which the victims' identities, the places and times of events to which they referred were deleted; an order to all organs of the Court not to contact the victims directly and for contact to be made only through the victims' legal representative and if strictly necessary¹⁴.

Sudan

On 24 July 2006, Pre-Trial Chamber I invited the UN High Commissioner for Human Rights, Louise Arbour, and the Chairperson of the International Commission of Inquiry on Darfur, Antonio Cassese, as well as the Prosecutor and ad hoc Defence counsel, to submit written observations on issues concerning the protection of victims and the preservation of evidence in Darfur¹⁵.

Article 64 (2), provides that the **Trial Chamber** has a duty to ensure that the issue of protection of victims and witnesses is taken into account **at all stages of the trial**: "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Article 64 (6)(e) provides that the Trial Chamber, both prior to trial and during the course of trial, "may, as necessary... provide for the protection of the accused, witnesses and victims".

¹¹. Rule 107 (3) expressly provides that in conducting a review of a decision of the Prosecutor, under Article 53(3), not to investigate or prosecute, the Pre-Trial Chamber has a specific obligation to "protect the safety of witnesses and victims and members of their families".

¹². *Decision to Hold a Hearing on the Protection of Victims and Witnesses in connection with the Prosecutor's Application for Warrants of Arrest and the Prosecutor's Application dated 13 June 2005, 17 June 2005*, ICC-02/04-13.

¹³. *Decision to convene a status conference on the situation in the DRC, 17 February 2005; Hearing concerning the protection of victims in DRC, 8 July 2005*, see Press release http://www.icc-cpi.int/cases/RDC/so104/so104_pr20050708&l=en.html.

¹⁴. *Decision on protective measures requested by applicants 01/04-1/dp to 01/04-6/dp, 21 July 2005*.

¹⁵. *Decision inviting observations in application of rule 103 of the Rules of Procedure and Evidence, 24 July 2006; and Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC, 31 August 2006*, ICC-02/05-14.

1.3. The Office of the Prosecutor

Article 54 (1)(b) requires the Prosecutor, in carrying out investigations and prosecutions, to “respect the interests and needs and personal circumstances of victims and witnesses”, and provides a non-exhaustive list of the factors to be taken into consideration, including: age, gender, health, the nature of the crime, in particular whether it involves sexual violence, gender violence or violence against children. Article 68 (1) requires the Prosecutor to take appropriate measures to protect victims and witnesses “particularly during the investigation and prosecution of such crimes”¹⁶. The OTP should work in close collaboration with the VWU to ensure the necessary measures are in place for the protection of those with whom it comes into contact.

Under these provisions the term “witnesses” must be interpreted to include potential witnesses. Those interviewed by the Prosecutor during the investigation stage may in some cases be at risk simply by virtue of being in contact with OTP investigators. In order to limit the risks posed to potential witnesses, the OTP has stated its intention to limit the number of witnesses contacted. Furthermore it has been indicated that, where possible, investigators will attempt to work with witnesses “outside areas of conflict, whether in other countries or more secure parts of the same country” and that interviews will be conducted “only following a clear assessment of protection issues and through means and in locations where exposure is minimized”¹⁷.

The Report to the Assembly of States Parties of 2005 states that, in the context of the investigations in Uganda and the DRC, the VWU and the OTP have developed “response systems to ensure witnesses know whom to contact and what to do should their security be threatened. Mechanisms and policies have been put into place to ensure 24-hour protection and psychological assistance for victims and witnesses”¹⁸. For obvious reasons, the details of such systems are kept confidential.



In 2004, a **Gender and Children Unit (GCU)** was set up within the Investigation Division of the OTP to establish the capacity and design policies to deal appropriately with vulnerable potential witnesses, in particular children and victims of sexual assault¹⁹. This Unit is required to “ensure that there will be a professional response within the Office of the Prosecutor to operational issues relevant to victims. These issues include statement-taking techniques relevant to traumatized potential witnesses, in particular children and victims of sexual assault...”²⁰. The GCU is required to conduct pre-interview assessments, face to face with vulnerable victims and witnesses, to evaluate their condition and determine whether they are psychologically fit to be interviewed without causing any retraumatization. It can recommend that interviews should not be conducted if it considers that a witness is too vulnerable. The GCU can also refer victims and witnesses to the VWU for psychological support and care.

At the time of writing the GCU has 4 staff members and has developed a list of psychologists.

¹⁶. Article 54(3) (f) also provides for the Prosecutor to “take necessary measures, or request that measures be taken, to ensure...the protection of any person” during investigations.

¹⁷. *Report to the Assembly of States Parties on the Activities of the Court*, 16 September 2005, ICC-ASP/4/16, § 52.

¹⁸. *Ibid.* § 69.

¹⁹. *Draft Programme Budget for 2004*, Assembly of States Parties, ICC-ASP/2/2, 23 May 2003, p.49.

²⁰. *Ibid.*

1.4. States Parties and international organisations

The cooperation of States Parties is vital to secure the necessary protection for victims and witnesses. States Parties are obliged to comply with requests by the Court to provide assistance in the protection of victims and witnesses²¹. This is part of the general obligation to cooperate with the Court and must therefore be fully implemented in national legislation²².

The VWU is required where necessary to co-operate with states²³, and should also cooperate with relevant international organisations, such as UN agencies present in the field of operations, in the implementation of protection measures.

2. Respecting the rights of the accused

The Court must pay particular attention to ensuring that measures taken to protect victims and witnesses do not jeopardise the right of the accused to a fair trial.

Article 67 sets down the rights of the accused, as established under international law. The accused is entitled to a **public hearing**, a **fair hearing conducted impartially** and certain **minimum guarantees** including: to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing; to examine, or have examined, the witnesses against him or her and to obtain the examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

Articles 64 (2), 68 (1) and (5) and 69 (2) emphasise that measures of protection must not interfere with the rights of the accused. In some cases this will necessitate a delicate balancing exercise.

3. Relevant factors in determining appropriate measures

The Court is required to take account of the needs and well-being of all victims and witnesses, paying attention to "all relevant factors" in order to determine appropriate measures of protection, support and assistance.

Article 68 (1) and Rule 86 contain non-exhaustive lists of factors to be taken into consideration by the Court, focussing on categories of particularly vulnerable victims. These factors are age, gender, health, disability and the nature of the crime. The Court is required to pay particular attention to the needs of children and victims of crimes of sexual or gender violence.

21. Article 93(1)(j).

22. See Amnesty International, *International Criminal Court: Guidelines for Effective Implementation of the Rome Statute* (AI Index: IOR 40/013/2004), *International Criminal Court: Checklist for Effective Implementation* (AI Index: IOR 40/11/00), available at <http://web.amnesty.org/pages/icc-implementation-eng>.

23. Rule 17(2)(a)(vi).



The need to pay special attention to victims of sexual violence was emphasized by the Trial Chamber of the ICTY, in the case of *Tadic*²⁴ and several subsequent cases²⁵. The Chamber referred to the report of the United Nations Secretary General, recommending the establishment of the ICTY²⁶, which notes that, “rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent, detrimental impact on the victim. [...] In addition, traditional court practice and procedures have been known to exacerbate the victim’s ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time”²⁷. The report concludes that protection of victims and witnesses should be granted “especially in cases of rape or sexual assault”²⁸. The ICTY Trial Chamber agreed with this conclusion, stating that, “measures to prevent re-traumatization are particularly important for victims and witnesses of sexual assault”²⁹.

The Court will have to assess the particular needs of individual victims and witnesses on a case-by-case basis.

II. MEASURES ORDERED BY THE CHAMBERS

Protective measures, under Rule 87, and special measures, under Rule 88, are measures ordered by the Chambers to protect victims, witnesses and “other persons at risk on account of testimony given by a witness”, and to assist victims and witnesses giving testimony before the Court. They are based principally on Articles 68 (1) and (2) and 69 (2) and apply to all stages of the proceedings³⁰. The Statute and RPE of the ICTY and ICTR contain similar provisions³¹.

These types of measures must be ordered by a Chamber to ensure that they are consistent with the rights of the accused³². Indeed, some of the measures available form exceptions to the general rule that all proceedings must be held in public³³. In deciding on whether to order protective or special measures and the form of those measures, the Chambers are required to ensure that limits to the right of the accused to public justice are imposed only to the extent necessary to ensure the protection of victims and witnesses.

It should be underlined that the Chambers are required to seek to obtain the **consent** of the person in respect of whom protective or special measures are ordered whenever possible, before an order is made³⁴.

²⁴ *Tadic*, IT-94-1, *Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses*, 10 August 1995.

²⁵ For example, *Delacic et al*, IT-96-21-T, *Decision on the motion of the Prosecution for Protective Measures for Prosecution Witnesses Pseudonymed “B” through to “M”*, 28 April 1997, § 40; *Furundzija*, IT-95-17/1-T, *Decision on Prosecutor’s Motion Requesting Protective Measures for Witnesses “A” and “D” at Trial*, 11 June 1998, § 6.

²⁶ *Report of the Secretary-General of 3 May 1993*, U.N Doc. S/25704.

²⁷ *Tadic*, IT-94-1, 10 August 1995, § 46.

²⁸ *Report of the Secretary-General of 3 May 1993*, U.N Doc. S/25704, § 108.

²⁹ *Tadic*, IT-94-1, 10 August 1995, § 45.

³⁰ Rules 87 and 88 fall under Section III (*Victims and witnesses*) of Chapter 4 (*Provisions relating to various stages of the proceedings*) of the RPE. These provisions were originally placed in the chapter on *The Trial* but were moved to the Chapter on *Victims and Witnesses* in the Mount Tremblant Document, resulting from the Mount Tremblant meeting in April–May 2000; PCNICC/2000/WGRPE/INF/1 (24 May 2000).

³¹ Article 22, Statute ICTY; Article 21, Statute ICTR; Rules 69, 75, 79 RPE of both tribunals. See further Chapter I. *The Evolution of Victims’ Access to Justice*.

³² Article 68(1) and Article 64(2).

³³ See Articles 64 (7), 67 (1) et 68 (2), and Regulation 20.

³⁴ Rule 87(1).

1. Protective measures under Rule 87

1.1. Who is eligible for protective measures?

Rule 87 (1) provides that measures may be ordered to protect a **“victim, witness or another person at risk on account of testimony given by a witness”**.

Under Rule 87, the term **“victim”** is used without qualification, unlike several of the provisions dealing with the functions of the VWU, which refer to “victims who appear before the Court”³⁵. Rule 87 must be interpreted in accordance with the definition of victims under Rule 85. All victims who apply to participate proceedings, whether or not they travel to the seat of the Court, and whether or not their applications for participation are eventually accepted, should therefore be eligible for protective measures.

There is no definition of **other persons at risk on account of testimony given by a witness** (*‘other persons at risk’*) and it will therefore be for the judges to define this category. It should be interpreted broadly to cover all those whose physical or psychological wellbeing is at risk as a result of testimony before the ICC, including but not limited to witnesses’ families, dependents, and persons indicated in the course of testimony. It should cover persons at risk on account of having given testimony who are not subsequently relied upon as witnesses. It can also include “accompanying support persons³⁶” (who are persons authorised by the Registry to accompany victims and witnesses to Court to provide support in testifying).

1.2. Types of protective measures

Rule 87 does not provide an exhaustive list of the forms of protective measures that can be ordered by the Chambers and the judges therefore have a wide discretion to determine appropriate measures in the particular context of each case, in accordance with the general obligation of the Court under Article 68. The Chamber will need to take into account the specific circumstances of the victim, witness or other person at risk, and determine measures accordingly.

Rule 87 (3) provides some examples of measures that can be ordered to “prevent the release to the **public or press and information agencies**, of the **identity** or the **location** of a victim, a witness or [other person at risk]”. These measures are not aimed at concealing such information from the defence (see below, *Protecting victims and witnesses from the accused*, section II (3)). Protective measures can be ordered individually or in combination.

The following examples of protective measures are listed in Rule 87(3).

- That the name of the victim, witness, or other person at risk, or any information which could lead to his or her identification be deleted from the public records of the Chamber³⁷.

Public records include transcripts, orders, decisions and judgements. This is an exception to the principle that all documentary evidence and other evidence submitted to the Chamber during a public hearing can also be released to the public.

- That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing [the name of the victim, witness, or other person at risk, or any information which could lead to his or her identification] to a third party³⁸.

These measures prevent the release of information to anyone not directly involved in the case.

³⁵. Article 43, Rules 17, 18(c), Regulations (RR) 92-95.

³⁶. Regulation (RR) 91. See below section III (2.2.1).

³⁷. Rule 87(3) (a).

³⁸. Rule 87(3)(b).

- That a pseudonym be used³⁹.

Pseudonyms, usually letters and/or numbers, can be used throughout proceedings and in official documents.

The following two types of measures form exceptions to the general principle requiring public hearings, as set down in Article 67 (1)⁴⁰. The right of the accused to a public trial is a fundamental principle of justice: “By rendering the administration of justice visible, publicity contributes to the achievement of the aim of [...] a fair trial, the guarantee of which is one of the fundamental principles of any democratic society [...]”⁴¹. The following measures will therefore be ordered only to the extent necessary.

- That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures⁴² or voice⁴³, the use of audio-visual technology, in particular video-conferencing and closed circuit television, and the exclusive use of sound-media⁴⁴.

These measures are also intended to protect the identity of victims and witnesses from the public and the press. In addition, measures such as video-conferencing help to protect against re-traumatization by enabling victims and witnesses to give their testimonies outside the courtroom and without seeing the accused and by enabling them to remain in their living place. There is a presumption in favour of the use of such measures in cases of victims of sexual violence and in respect of victims or witnesses who are children⁴⁵.

Measures permitting testimony to be given by video-link and prior-recorded testimony are exceptions to the general principle that “[t]he testimony of a witness at trial shall be given in person”⁴⁶. Rules 67 and 68 set out the procedures for implementing such measures and set out specific guarantees to protect the rights of the accused.



LIVE TESTIMONY BY MEANS OF AUDIO OR VIDEO-LINK TECHNOLOGY

Rule 67 enables witnesses to testify from locations outside the court (**‘video conferences’⁴⁷**), or from a separate room (**‘remote witness room’⁴⁸**) located in another part of the Court premises. In order to protect the rights of the accused, Rule 67 provides that the use of audio or video technology must allow the Chamber, the defence, and the Prosecutor to question the witness at the time that he or she testifies⁴⁹. Furthermore, the Chamber, with the assistance of the Registry, has a duty to ensure that the place where testimony is given is “conducive to the giving of truthful and open testimony”. The venue must also be conducive to the “safety, physical and psychological well-being, dignity and privacy of the witness”⁵⁰.

³⁹. Rule 87(3)(d) ; see also Regulation (RR) 103(1)(a).

⁴⁰. See Article 68 (2). See also Article 64 (7) and Regulation 20.

⁴¹. Eur. Ct. H.R., *Sutter v. Switzerland*, Séries A, no. 74, 22 February 1984, § 26, decision cited by the ICTY in. *Tadic*, (IT-94-1-T), *Decision on the Prosecutor’s Motion Requesting Measures for Victims and Witnesses*, 10 August 1995, §32.

⁴². See also Regulation (RR) 103(1)(b).

⁴³. See also Regulation (RR) 103(1)(c).

⁴⁴. See also Article 68(2).

⁴⁵. Article 68(2).

⁴⁶. Article 69(2).

⁴⁷. Regulation (RR) 103(1)(f).

⁴⁸. Regulation (RR) 103(1)(g).

⁴⁹. Rule 67(1).

⁵⁰. Rule 67(3).



PRIOR RECORDED TESTIMONY

Under **Rule 68** the Trial Chamber can permit the introduction of “previously recorded audio or video testimony, or the transcript or other documented evidence of such testimony”, subject to the condition that the Prosecutor and defence have the opportunity to question the witness. If the witness who gave the testimony is not present before the Trial Chamber, the Prosecutor and the defence must have had the opportunity to question him or her during the recording⁵¹. If the witness concerned is present before the Trial Chamber, the admission of the pre-recorded statement is subject to the conditions that the witness does not object, and that the Trial Chamber, the Prosecutor and the defence have the opportunity to question the witness during the proceedings⁵².

- That a Chamber conduct part of the proceedings in camera: closed hearings⁵³

Article 64 (1) provides that there must be “special circumstances” justifying the imposition of such an order. This measure is exceptional because of its impact on the right of the accused to a fair and public trial⁵⁴. When the Chamber makes such an order, it must make public its reasons for doing so⁵⁵.

Article 68 (2) imposes a presumption in favour of closed hearings for victims of sexual violence, children who are victims or witnesses. The Chamber can order otherwise but must take into account all the circumstances and in particular the views of the victim or witness.

Regulation 20 (3) authorises the Chamber to order the disclosure of all or part of the record of the closed proceedings “when the reasons for ordering its non-disclosure no longer exist”.



BOTH THE ICTY AND THE ICTR PERMITTED CLOSED HEARINGS.

In the case of *Tadic*, before the ICTY, the Trial Chamber, whilst recognising that the presence of the public and the media contribute to ensuring that the trial is fair, held that the fear of reprisals was significant enough to warrant confidentiality:

“With regard to the limitation on the accused’s right to a public trial, this Trial Chamber has to ensure that any curtailment of the accused’s right to a public hearing is justified by a genuine fear for the safety of witness R and/ or the members of witness R’s family... In balancing the interests of the accused, the public and witness R, this Trial Chamber considers that the public’s right to information and the accused’s right to a public hearing must yield in the present circumstances to confidentiality in light of the affirmative obligation under the Statute and the Rules to afford protection to victims and witnesses”⁵⁶.

51. Rule 68(a).

52. Rule 68(b).

53. Rule 87(3)(e).

54. Closed hearings are explicitly permitted in limited circumstances under article 14 of the International Covenant on Civil and Political Rights (ICCPR): “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order... or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

55. Article 64(1).

56. *Tadic*, (IT-94-1-T), *Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R*, Trial Chamber II, 31 July 1996, §6.



ORDERS AGAINST THE PUBLIC RELEASE OF TRANSCRIPTS AND RECORDINGS

The general rule is that proceedings before the Court are broadcast live and that all documentary evidence and other evidence introduced at a public hearing can be released to the public. However, a Chamber can order otherwise⁵⁷. Objections to the release of information can be raised by **any participant, the Registry, or the Chamber can make such an order on its own motion**⁵⁸. Such objections should be made “no later than the commencement of the session at which the witness or participant is to appear”⁵⁹. The decision to order that information is not released must be based on “the interests of justice” in that such information is “likely to present a risk to the security or safety of victims, witnesses or other persons”.

In order for sensitive information, such as the identity or location of victims or witnesses, to be edited, Regulation 21 (2) establishes that broadcasts of all hearings must be delayed by at least 30 minutes.



OTHER EXAMPLES OF PROTECTIVE MEASURES

In the case of *Blaskic* before the ICTY, following the mistaken disclosure of a prosecution witness statement to the media, the Trial Chamber ordered a series of measures to prevent the recurrence of such an event. These measures included: prohibiting the accused, his counsel and representatives from disclosing names to the public except where it was “absolutely necessary” to do so in order to prepare a defence; maintaining a log of the details of those persons who had received copies of witness statements; instructing those persons who received copies of statements not to reproduce them “under pain of sanction for contempt of the Tribunal” and to return the documents as soon as no longer required”⁶⁰.

1.3. Procedure

1.3.1. Who can initiate orders for protective measures?



Protective measures can be requested by:

- the **Prosecutor**; or
- the **defence**; or
- **witnesses, victims** or their **legal representatives**; or

These measures can also be ordered on the **Chamber's own initiative**.

The **Victims and Witnesses Unit** has a consultative role with respect to both types of measures. Rule 87 (n) provides that the Chamber may order measures “after having consulted with the Victims and Witnesses Unit, as appropriate”.

However, it should be underlined that the VWU can bring matters to the attention of the Chambers on its own initiative and does not have to wait to be consulted. Rule 17 (2) (a) (ii) authorises the VWU to advise the court on appropriate measures and Regulation 41 allows the VWU to “draw any matter to the attention of a Chamber where protective or special measures require consideration”.

⁵⁷. Regulation 21(7).

⁵⁸. Regulation 21(8).

⁵⁹. Regulation 21(4).

⁶⁰. *Blaskic*, Trial Chamber I, Decision of 6 June 1997.

1.3.2. Consent

The Chamber must seek to obtain the consent of the person in respect of whom protective or special measures are ordered, whenever possible, before an order is made⁶¹. To this end, a request affecting a particular witness or victim must be served on that witness or victim or his or her legal representative, and they must be given an opportunity to respond⁶².

1.3.3. Procedure on request

Due to their potential impact on the rights of the accused to a fair and impartial trial, and in accordance with Article 68 (1), applications for protective measures under Rule 87 cannot be submitted *ex parte*⁶³. This means that the other parties must always be notified.

There are no application forms for requesting protective measures. If measures are requested by a victim or a witness, or by his or her legal representative, **notice must be served on both the Prosecutor and the defence** and both must be given an opportunity to respond⁶⁴.

Rule 87 (3) provides that the Chamber *may* hold a hearing in order to determine whether to order protective measures to conceal the identity or location of a victim, witness or other person at risk, but it is not obliged to do so. If the Chamber does decide to hold such a hearing, it must be conducted in *camera*, meaning in a courtroom closed to the public. Clearly, a public hearing would be contrary to the aim of such measures.

1.3.4. Procedure on a Chamber's own initiative

When the Court proceeds on its own motion, notice and an opportunity to respond must be given to the Prosecutor and the defence, and to any witness (or his or her legal representative) who would be affected by such a protective measure⁶⁵.

1.3.5. Evidence and standard of proof

The RPE do not specify the evidence which must be shown by a victim or witness in order to receive protective measures, nor the threshold to be applied in granting such measures. These aspects will therefore be left to the judges' discretion. In developing criteria on protective measures, the Chambers should draw on the experiences and, some of the case law of the ICTY and ICTR.

61. Rules 87(1).

62. Rules 87(2)(c).

63. Rule 87(2)(a).

64. Rule 87(2)(b).

65. Rule 87(2)(d).



The case law of the ICTR requires protective measures to be objectively grounded and not exclusively based on the subjective fear of the witness concerned, underlining the exceptional nature of such measures⁶⁶. However, in practice, these criteria have been applied very flexibly, to the point that protective measures for witnesses before the ICTR are the rule rather than the exception⁶⁷. In numerous cases concerning both prosecution and defence witnesses, the Tribunal held that the general climate of insecurity justified the adoption of protective measures without the need to examine the individual circumstances of each witness. For example in the *Bagilishema* case⁶⁸, concerning the prosecution's request for blanket measures of protection for prosecution witnesses, the Trial Chamber stated: "the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed, their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses". The Chamber went on to cite various sources⁶⁹ which described "a particularly volatile security situation at present in Rwanda and in neighbouring countries" and concluded that "[t]his volatile security situation risks to endanger the lives of those persons who may have, in one way or another, borne witness to the events of 1994 in Rwanda". Taking into account "the present security situation affecting the prosecution witnesses", the Chamber found the measures of protection requested by the Prosecutor to be justified.

1.3.6. Application and variation of protective measures

Once protective measures have been ordered, they "continue to have full force and effect" in relation to other proceedings before the Court and remain in place after the proceedings have ended, subject to revision by a Chamber⁷⁰.

Regulation 42 sets out the procedure for applications to be made in order to "vary, rescind or augment" a protective measure. Such applications should be made first to the Chamber which issued the order, but if that Chamber is no longer seized of proceedings in which the measure was ordered, the application can be submitted to the Chamber before which the varied measure would be implemented⁷¹. This provision does not specify which parties are entitled to make such an application to vary, rescind or augment a protective measure. However, it would be logical to interpret it as permitting applications to be made by all those who can request such measures under Rule 87 (prosecution, defence, witnesses, victims or their legal representatives).

Before revising an order, the Chamber must again seek to obtain, whenever possible, the consent of the person benefiting from the protective measure.

⁶⁶. See for example, *Rutaganda*, (ICTR-96-3-T), *Decision on Protective Measures for Defence Witnesses*, 13 July 1998, § 9; *Nteziyayo*, (ICTR-97-29-T), *Decision on the Defence Motion for Protective Measures for Witnesses*, Trial Chamber II, 18 September 2001, § 6; *Nyiramashuko and Ntahobali*, (ICTR-97-21-T), *Decision on Arsène Shalom Ntahobali's Motion for Protective Measures for Defence Witnesses*, Trial Chamber II, 3 April 2001, § 10; *Simba* (ICTR-01-76-I), *Decision on Defence Request for Protection of Witnesses*, Trial Chamber I, 25 August 2004, § 5.

⁶⁷. See Sluiter, G. "The ICTR and the Protection of Witnesses", *Journal of International Criminal Justice*, Vol. 3, (2005) pp. 962-976, p.968.

⁶⁸. *Bagilishema*, (ICTR-95-1A1-I), *Decision on the Prosecutor's Motion for Witness Protection*, Trial Chamber I, 17 September 1999, §§ 6-8; see also *Nyiramashuko and Ntahobali*, (ICTR-97-21-T), *Decision on Arsène Shalom Ntahobali's Motion for Protective Measures for Defence Witnesses*, Trial Chamber II, 3 April 2001, §§ 11-12; and *Simba* (ICTR-01-76-I), *Decision on Defence Request for Protection of Witnesses*, Trial Chamber I, 25 August 2004, § 6.

⁶⁹. In particular, United Nations High Commissioner for Human Rights Field Operation in Rwanda, Status Reports, HRFOR/STRPT/33/1/24 January 1997/E et HRFOR/STRPT/56/1/28 August 1997/E.

⁷⁰. Regulation 42(1).

⁷¹. Regulation 42(3).

2. Special measures under Rule 88

2.1. Who is eligible for special measures?

Rule 88 does not specify those eligible for special measures. Specific reference is made to traumatised victims and witnesses, children, elderly persons and victims of sexual violence, however, this is not an exhaustive list. The Chamber should refer to the general principle under Rule 86.

2.2. Types of special measures

Special measures under Rule 88 are not defined, although some examples are given. This leaves the Chambers with a wide discretion to determine appropriate measures of protection and assistance. Specific reference is made to **measures to facilitate testimonies** of traumatised victims or witnesses, a child, an elderly person or a victim of sexual violence. Special measures therefore include but are not limited to measures designed to assist vulnerable witnesses and victims giving evidence before the Court. No distinction is made between psychological and practical support, and Rule 88 should therefore be interpreted as covering both types of measures.

Rule 88 (2) provides that the Court can order the **presence of an assistant**, for example a relative, or a psychologist, to attend the hearing during which the witness will testify.

Under Rule 88 (5), the **Chambers have a duty to “be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation”**. The Chambers must pay particular attention to attacks on victims of crimes of sexual violence. This provision is particularly important in the light of the experiences of many witnesses giving evidence before the ICTY and ICTR.

2.3. Procedure

2.3.1. Who can initiate orders for special measures?



As with protective measures, special measures can be requested by:

- the **Prosecutor**; or
- the **defence**; or
- **witnesses, victims** or their **legal representatives**; or

These measures can also be ordered on the **Chamber's own initiative**.

The **Victims and Witnesses Unit** again has a consultative role⁷², although it can also bring matters to the attention of the Court on its own initiative.

2.3.2. Consent

As with protective measures, the Chambers must seek to obtain the consent of the person in respect of whom protective or special measures are ordered, whenever possible, before an order is made⁷³. Requests affecting a particular witness or a particular victim must be served on that witness or victim or his or her legal representative, and they must be given an opportunity to respond⁷⁴.

In addition to seeking to obtain the victim's or witness's consent, Rule 88 (1) imposes a further requirement that the Chamber **takes into account the views of the victim or witness** in respect of whom the order for special measures is made, before making such an order.

⁷². Rule 88(1).

⁷³. Rules 87(1) and 88(1).

⁷⁴. Rules 87(2)(c) and 88(3).

2.3.3. Procedure on request

In contrast to the procedure for protective measures, special measures can also be requested *ex parte*, meaning without notifying the other parties to the proceedings⁷⁵. No procedure for submitting *ex parte* requests is specified.

In relation to *inter partes* requests, Rule 88 (3) provides that the provisions of Rule 87 on notification⁷⁶ apply “*mutadis mutandis*”, ie. in their totality (See Section II (1.3.3) above).

Under Rule 88 (2), the Chamber may hold a hearing to decide whether to order special measures. This can be a closed hearing “if necessary”.

2.3.4. Procedure on a Chamber’s own initiative

As with protective measures, when the Court proceeds on its own motion, notice and an opportunity to respond must be given to the Prosecutor and the defence, and to any witness (or his or her legal representative) who would be affected by such a protective measure⁷⁷.

3. Protecting victims and witnesses from the accused

3.1. The issue of anonymous witnesses

One potential measure for protecting victims and witnesses is to order their anonymity, meaning the non-disclosure of their identities to the accused and his or her legal representatives. This type of measure goes a step further than those listed in Rule 87 (3) and raises controversy due to the potential for interference with the rights of the accused to a fair trial, in particular the right to examine a witness against him or her.

The issue of anonymous witnesses gave rise to intense discussions during the negotiations of the ICC Statute⁷⁸. This debate provides a clear illustration of the potential conflicts between the rights of the accused and the rights of victims and witnesses to protection.



At the time of negotiations, the principle of anonymous witnesses had been accepted by the ICTY in the *Tadic* case⁷⁹. During initial debates on the provisions of the Rome Statute, the Italian delegation introduced a proposal allowing the Court, in exceptional circumstances, to withhold the identity of a witness or witnesses from the accused at trial. It was proposed that the Court could appoint an “independent guardian” of the witness’s identity to protect the rights of the defence: “The guardian would have certain investigatory powers to establish the reliability of the witness and to protect his or her identity, and would report his or her findings to the defence or the Registrar”⁸⁰. It was argued that a “fair trial” does not

75. Rule 88(2).

76. Rule 87(2)(b) to (d).

77. Rule 87(2)(d).

78. See Brady, H., “The Vexed Question of Anonymous Witnesses, in Protective and special measures for victims and witnesses”, in Lee, R. (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, p.450.

79. *Tadic*, IT-94-1, *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995.

80. PCNICC/1999/WGRPE/DP.20 (28 July 1999) and see Brady, H., op cit. p.450.

necessarily include an absolute right to know the identity of the witnesses, provided this can be counter-balanced by other safeguards provided by the Court. Several delegations strongly opposed the proposal⁸¹, arguing that the accused has a fundamental right under international law to know his accusers as an element of the right to a fair trial. It was eventually decided to avoid any reference to anonymous witnesses in the Statute and to leave the issue for the Court to decide⁸².



The question whether to allow for the identities of witnesses to be concealed from the defence has been discussed in several cases before the ICTY⁸³. However, it was only in *Tadic* case⁸⁴ that such measures were granted. The prosecution requested the identity of four witnesses to be concealed from the defence. The Trial Chamber granted the prosecution request and allowed the witnesses to remain anonymous, holding that the principle of a fair trial required not only the protection of the accused but also the protection of victims and witnesses⁸⁵. Recognising the exceptional nature of such measures, the Chamber concluded: “The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*”.

The Chamber considered that, although the accused has a right to examine, or have examined, the witness against him, anonymity only restricts this right to a limited and permissible extent considering the importance of witness protection, especially in the case of victims of gender violence⁸⁶. The Chamber restricted the availability of this form of protection to cases in which other measures would be insufficient to grant the necessary protection: “any measures taken should be strictly necessary”⁸⁷.

Drawing on the case law of the European Court of Human Rights and of national courts, the Chamber set out four factors to be applied when deciding whether anonymity should be granted⁸⁸, and a further series of guidelines underlining the exceptional nature of such measures⁸⁹.

81. Including Denmark, Singapore, Argentina, the Russian Federation, Finland, Spain, South Africa, Mexico, Australia, and the United Arab Emirates.

82. See Brady, H., *op cit.*, p.450.

83. See for example, *Tadic*, IT-94-1, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995; *Blaskic*, Trial Chamber I, *Decision on the requests of the Prosecutor of 12 and 14 May 1997 in respect of the protection of witnesses*, 6 June 1997; *Delacic*, *Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses*, 18 March 1997.

84. *Tadic*, IT-94-1, *op cit.*, Conclusions 11 and 12.

85. *Tadic*, IT-94-1, *ibid.*, §55.

86. *Tadic*, IT-94-1, *ibid.*, § 67.

87. *Tadic*, IT-94-1, *ibid.*, §66.

88. “First and foremost, there must be real fear for the safety of the witness or her or his family...; Secondly, the testimony of the particular witness must be important to the Prosecutor's case...; Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy...; fourthly, the ineffectiveness or non-existence of a witness protection programme ... has a considerable bearing on any decision to grant anonymity in this case”, *Tadic*, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995, §§62-65. These conditions were approved in *Blaskic*, *Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses*, § 41, although in that case no such measures were ordered.

89. “Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony. Secondly, the Judges must be aware of the identity of the witness, in order to test the reliability of the witness. Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable [...]. Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness”, *Tadic*, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995, § 71.

There are no provisions in the instruments governing the ICC specifically dealing with the issue of anonymous witnesses. It is clear that Rule 87 does not allow for the possibility of withholding the identity of witnesses from the defence, since this provision does not allow for protective measures to be requested *ex parte*, ie. without notifying the other parties. Any such measure would therefore have to be ordered as a special measure under Rule 88, and whether such measures will be allowed will depend on the exercise of the judges' discretion. In any case, measures cannot be ordered which are inconsistent with the rights of the accused.

It should, however, be noted that anonymous witnesses have not been permitted in any subsequent cases before the ICTY and that the decision in *Tadic* has been severely criticised as jeopardising the right of the accused to a fair trial. Anonymous witnesses have never been permitted before the ICTR. Furthermore, in contrast to the ICC, at the time of the *Tadic* decision there were no provisions in place for relocating witnesses, and the ICTY therefore needed to find other means to protect witnesses from reprisals⁹⁰.

3.2. Delaying disclosure to the defence and the concept of 'rolling disclosure'

It is clear under the Statute and the RPE that disclosure to the defence can be delayed on the basis of ensuring the protection and security of victims, witnesses and their families. These provisions apply to proceedings prior to the start of trial. Under Article 68 (5) "[w]here the disclosure of evidence or information...may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of trial, withhold such evidence or information and instead submit a summary thereof..."⁹¹. Furthermore, Rule 81 (4) provides: "The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information...to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial"⁹². No time limit is specified.



The ICTR and the SCSL, whilst not permitting anonymous witnesses, have in several cases authorised disclosure of the identity of witnesses to be delayed beyond the start of trial proceedings, applying a system of 'rolling disclosure'. This system requires the identity of individual witnesses to be revealed within sufficient time prior to the witness giving evidence to permit the accused to adequately prepare his or her defence. The timing of disclosure is measured back from the date on which the particular witness is expected to testify⁹³. For example, in the *Bagosora* case⁹⁴ the Chamber allowed the Prosecutor not to disclose the identities of the witnesses until 35 days before the witness was called to give evidence.

⁹⁰. See Jones, J., "Protection of Victims and Witnesses", in Cassese, A., Gaeta, P., et Jones, J., *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, (2002), CXL, 2018 p., vol. 2, pp. 1355 - 1370, p. 1365.

⁹¹. Emphasis added.

⁹². Emphasis added.

⁹³. See for example, *Bagosora, Nsengiyumva, Kabiligi et Ntabakuze* (ICTR-98-41-I), *Decision and scheduling order on the prosecution motion for harmonisation and modification of protective measures for witnesses*, Trial Chamber III, 5 December 2001, §22; *Gbao*, (SCSL-2003-09-PT), *Decision on the prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure*, 10 October 2003, §58, ruling that disclosure shall be made 42 days prior to the testimony of a particular witness.

⁹⁴. *Bagosora, Nsengiyumva, Kabiligi et Ntabakuze* (ICTR-98-41-I), *Decision and scheduling order on the prosecution motion for harmonisation and modification of protective measures for witnesses*, Pre-Trial Chamber III, 5 December 2001, §22.

These measures have been criticised as jeopardising the right to a fair trial by significantly reducing the amount of time the defence has to prepare its case⁹⁵. The provisions governing disclosure before the ICC appear to require disclosure to be made by the outset of trial proceedings. However, it should be noted that at the time of the decision in *Bagasora*, the RPE of the ICTR also specified that disclosure must be made prior to trial, (although Rule 69 (C) of the RPE was subsequently amended to confirm the basis for such decisions).

III. THE ROLE OF THE VICTIMS AND WITNESSES UNIT

The VWU is the main body responsible for ensuring the implementation and co-ordination of measures of protection, support and assistance to benefit victims and witnesses and other persons at risk, at all stages of the proceedings and after their conclusion, both within and outside the Court⁹⁶. Drawing on the lessons learnt from the experiences of the ICTY and ICTR, which only recognised the need for such a body after the tribunals had begun their activities, the ICC Statute, under Article 43 (6), provided for the establishment of the VWU from the outset⁹⁷. The VWU has a vital role in ensuring the effective exercise of the rights of victims under the ICC Statute.

In exercising its functions, at all stages of proceedings, the VWU is required to pay particular attention to the needs of children, elderly persons and persons with disabilities⁹⁸ and victims of sexual violence⁹⁹.

The members of staff of the VWU are to include persons with expertise in trauma, including trauma related to crimes of sexual violence. It should also include staff with experience in the following areas: witness protection and security; children, in particular traumatized children; elderly persons, in particular in connection with armed conflict and exile trauma; persons with disabilities, social work and counselling, and health care¹⁰⁰. Staff must receive training in ensuring the security, integrity and dignity of victims and witnesses¹⁰¹.

Whilst it must be recognised that the challenges faced by the ICC in providing such services are greater than those confronted by the ad hoc tribunals, in view of the wider jurisdiction of the Court as well as the range of backgrounds of victims and witnesses, and the languages spoken, the VWU should draw on their experiences and seek to implement similar programmes.

At the time of writing, the range of measures available to the VWU and the criteria to be applied in their implementation are unclear. To some extent, this is due to the necessary confidentiality of such measures. However, NGOs, including FIDH, have expressed serious concerns that the VWU is not fulfilling its responsibilities to the extent necessary, in particular in relation to victims. It is recognized that the situations investigated and prosecuted by the Court will often be situations of ongoing conflict, the Court's resources are limited, and the VWU cannot be expected to provide protection, support and

⁹⁵. See for example, *Bagosora, Nsengiyumva, Kabiligi et Ntabakuze* (ICTR-98-41-I), Separate dissenting opinion of Judge Pavel Dolenc on the decision and scheduling order on the prosecution motion for harmonisation and modification of protective measures for witnesses, 5 December 2001.

⁹⁶. Article 43(6), Rule 17(2)(a)(i) and Regulation (RR) 92.

⁹⁷. The equivalent units of the ad hoc tribunals were not provided for in the Statutes of the tribunals, and were established by later inserting provisions in the Rules of Procedure and Evidence.

⁹⁸. Rule 17(3).

⁹⁹. Rule 17(2).

¹⁰⁰. Rule 19.

¹⁰¹. Rule 18(1)(d).

assistance to all victims in each situation. However, the VWU must ensure that effective measures of protection, support and assistance are in place for those victims who exercise their right to participate in proceedings before the ICC.



THE VWU'S MISSION STATEMENT

“The Victims and Witnesses Unit facilitates the interaction of victims and witnesses with the Court. The Unit provides support, protection and other appropriate assistance to witnesses, victims who appear before the Court and others at risk at all stages of proceedings. The Unit ensures respect for their dignity and guards them against further harm. In addition, the Unit will provide advice, training and other assistance to the organs of the Court in matters falling under the mandate of the Unit.

The VWU adheres to the highest level of confidentiality and impartiality in all matters related to victims, witnesses and the work of the Court. The VWU strives to be at the forefront of best international practice in all its operations, both within the Court and in the field¹⁰².

1. Advice and training

The VWU is required to advise other organs of the Court, including the Chambers and the Prosecutor, on appropriate protective measures, security arrangements, counselling and assistance¹⁰³ and provide more general advice, training and assistance to all organs of the Court and the parties to proceedings on issues affecting the safety and well-being of victims and witnesses, including trauma, sexual violence, security and confidentiality¹⁰⁴.

Regulation 41 underlines the role of the VWU in initiating consideration of protection issues by the Chambers, authorising the VWU to “draw any matter to the attention of a Chamber where protective or special measures require consideration”.

2. Designing and implementing measures of protection, support and assistance

2.1 Who is eligible for measures of protection, support and assistance?

The categories of persons who are eligible vary according to the type of measure. In general, they are available to “**victims who appear before the Court**”, witnesses, and other persons at risk. The term “victims who appear before the Court” is not defined. In order to ensure the effectiveness of the Court’s regime for the participation of victims, and in accordance with the general obligation under Article 68, “victims who appear before the Court” should be interpreted broadly, to encompass all victims involved in the Court’s proceedings, including those who have submitted applications to participate. This interpretation is also consistent with the duty of the VWU to provide measures of protection in the field. Furthermore, such an interpretation is essential in order to enable victims to exercise the rights granted to them under the ICC Statute.

In respect of “witnesses”, it should be noted that the VWU is required to provide protection to both **prosecution and defence witnesses**, and **witnesses of victims** if their participation in the proceedings is accepted by the Chamber.

¹⁰². Victims and Witnesses Unit, Powerpoint Presentation.

¹⁰³. Article 68(4), Rule 17(2)(a)(ii), and Regulation 41.

¹⁰⁴. Rule 17(2)(a)(iv).

2.2. Types of measures of protection, support and assistance

According to Rule 17 (2)(a), the VWU is responsible for providing witnesses, victims who appear before the court, and other persons at risk with “adequate protective and security measures and formulating long and short-term plans for their protection”¹⁰⁵ and for “assisting them in obtaining medical, psychological and other appropriate assistance”¹⁰⁶. Other assistance includes making practical arrangements for their effective involvement in the Court’s proceedings, such as such as travel and accommodation.

These measures do not depend on a prior order of a Chamber and the VWU therefore has a wide discretion in the choice of appropriate measures.

2.2.1. At the seat of the Court

Travel

Under, Regulation (RR) 81 (1), the VWU is required to make travel arrangements for **witnesses and victims who appear before the Court**, as well as **persons at risk** when they are required by order of a Chamber to travel for the purposes of giving testimony or to receive support and protection.

The mode of transportation is required to be determined according to the specific circumstances of each individual case, taking into account protection, safety and health considerations¹⁰⁷. In accordance with its general duty to ensure that the process of testifying does not cause further trauma to those participating in the Court’s proceedings, the VWU should take every measure to minimize their inconvenience. In some circumstances, individuals may require door-to-door transportation, personal escorts, and travel documents may have to be issued to protect a victim or witness’s identity.

Accommodation

Under Regulation (RR) 82 (1), the VWU is responsible for arranging appropriate accommodation for **witnesses, victims who appear before the Court**, and **other persons at risk** “where required for the purposes of the Court”. The Court will have to ensure that the place of accommodation is secure.



The Victims and Witnesses Units of the ad hoc international tribunals have in some cases provided a 24 –hour live-in support programme at the place of accommodation with “witness assistants” responsible for providing support. These assistants speak the native language of the witnesses and accompany them during the day, acting as interpreters in activities unrelated to the Court¹⁰⁸.

Protection and support

The VWU is required to make arrangements to ensure that there is an appropriate physical separation of prosecution and defence witnesses at Court¹⁰⁹.

The VWU has a general duty to provide assistance to **witnesses called to testify before the Court**, which must be interpreted to encompass victims participating as witnesses¹¹⁰. Furthermore, under Regulation (RR) 79, the VWU is required to “implement policies and procedures to enable witnesses

105. Rule 17(2)(a)(i).

106. Rule 17(2)(a)(iii).

107. Regulation (RR) 81(2).

108. Ingadottir, T., Ngendahayo, F., Sellers, P. V., *The International Criminal Court: the Victims and Witnesses Unit (Article 43.6 of the Rome Statute)*, a Discussion Paper, Project on International Courts and Tribunal (PICT), March 2000, p. 31.

109. Rule 18(1)(b)

110. Rule 17(2)(b)(ii).

to testify in safety, so that the experience of testifying does not result in further harm, suffering or trauma for the witness”.

The VWU has a particular obligation towards **victims of sexual violence** to take gender-sensitive measures to facilitate their testimony at all stages of the proceedings¹¹¹. In respect of children, in order to facilitate their participation as witnesses, the VWU has the power to assign a suitable person to assist a child throughout proceedings (‘child-support person’)¹¹².

The Registry has a duty to provide **round-the-clock telephone access to officers of the court and legal representatives** for the purpose of initiating applications for protection and for making enquiries about the safety of victims, witnesses and other persons at risk¹¹³.

The Registry can permit **witnesses, victims who appear before the Court** and other persons at risk to bring someone to Court to support them during proceedings (an “**accompanying support person**”), whose expenses will be covered by the Registry¹¹⁴. The Registry is required to assess the suitability of the accompanying person to provide support¹¹⁵.

In deciding whether to permit an accompanying support person the Registry must take into account criteria related to the vulnerability of the victim, witness or other person at risk, including the following: whether the person has no surviving close family members; presence of severe trauma-related symptoms; existence of possible suicidal tendencies; potential for violence; fear or anxiety of the person to the extent that it would prevent him or her from attending the Court; age; whether the person is a victim of sexual assault; whether the person suffers from a pre-existing disease of a physical and/or psychological nature; and the severity of physical or psychological symptoms¹¹⁶.

Psychological and medical assistance

Under Regulation (RR) 83, the VWU is required to establish a support programme to provide, where necessary, “psychological, social assistance and advice to **victims, witnesses and their families, accompanying persons and persons at risk**”. Psychological assistance must in particular be provided to “children, the disabled, the elderly and victims of sexual violence¹¹⁷”.

The support programme is also required to provide, where appropriate, “round-the-clock assistance” for **victims who appear before the Court, witnesses and accompanying support persons**. This assistance is clearly limited to those attending proceedings at the seat of the Court and is to be provided for the duration of their stay.

The VWU is also responsible for assisting all **witnesses, victims who appear before the Court, and other persons at risk**, in obtaining medical assistance¹¹⁸. Regulation (RR) 89 (1) specifies that medical care and assistance must be made available, as appropriate, to **witnesses, victims who appear before the Court, and persons at risk** “for the duration of their stay at the seat of the Court or where proceedings are held”.

¹¹¹. Rule 17(2)(b)(iii).

¹¹². Rule 17(3).

¹¹³. Regulation (RR) 95.

¹¹⁴. Regulation (RR) 91(1).

¹¹⁵. Regulation (RR) 91(3).

¹¹⁶. Regulation (RR) 91(2).

¹¹⁷. Regulation (RR) 89(1)(b).

¹¹⁸. Rule 17(2)(a)(iii) and Regulation (RR) 89(1)(a).

Financial assistance

Financial assistance will be subject to the availability of resources and is likely to be minimal.

Allowance to cover expenses

Under Regulation (RR) 84, the Registry can provide an “incidental allowance” for personal expenses. This provision applies to **witnesses, victims and other persons at risk**, on a discretionary basis.

Dependant care

Under Regulation (RR) 90, the VWU has discretion to provide additional financial assistance to those **victims or witnesses** who have primary responsibility for caring for another person or persons, **where the lack of such assistance would prevent the victim or witness attending court to give evidence.**

Allowance to cover lost earnings and additional financial support

These provisions appear to apply only to **witnesses**. Under Regulation (RR) 85, witnesses are entitled to an “attendance allowance” to compensate them for wages, earnings and time lost as a result of testifying. There is no requirement to submit a request or supporting documents to receive this allowance.

The VWU has the discretion to provide an additional allowance (“extraordinary allowance”), under Regulation (RR) 86, to those witnesses who “suffer undue financial hardship” as a result of not being to earn money whilst required at the court. In order to obtain this additional allowance, witnesses must submit a request with any supporting documents to provide evidence of undue hardship.

2.2.2. In the field

2.2.2.1. Pre-trial until the conclusion of proceedings

Protection

Regulation 93 (RR) (1), entitled *local protection measures*, provides that the VWU is responsible for the implementation of measures “for the protection of witnesses, victims who appear before the Court and persons at risk on the territory of the State where an investigation is taking place”.

Field offices are vital to monitor effectively the situation in the country concerned and should be accessible to victims and witnesses for protection purposes. They should not be restricted to capital cities but should form a real permanent presence in the field of investigation. **Contact points**, including persons already known to victims, should be established to assist in emergencies and more generally enable victims and witnesses to communicate their concerns. Obviously this will require support from the VWU.

It should also be emphasised that the Registry is required, under Regulation (RR) 95, to provide **round-the-clock telephone access** to officers of the court and legal representatives for the purpose of initiating applications for protection and for making enquiries about the safety of victims, witnesses, victims and other persons at risk.

Other protective measures include making arrangements for potential witnesses to **give evidence in a third country.**

In order to enable the VWU to provide protective services on state territory the Registrar is responsible for concluding appropriate agreements with the government(s) concerned, in accordance with Rule 16 (4). All measures to be provided in the field are heavily dependent on the willingness of the governments concerned to cooperate with the Court.

The “protection programme”

Under Regulation (RR) 96, the Registry is required to maintain a protection programme for **witnesses**, including persons who accompany witnesses for support (“accompanying support persons”) and **“other persons considered to be at risk of harm and/or death as a result of their contact with the Court”**. This provision does not mention victims but this provision must be interpreted to include victims where they are “considered to be at risk of harm and/or death as a result of their contact with the Court”. Partly due to the need to preserve the confidentiality of such measures, the details of the measures to be provided as part of the protection programme have not been specified.

It appears that under Regulation (RR) 105, separate applications are required for entry into the witness protection programme. These can be filed by the Prosecutor or by counsel. It is unclear whether the VWU can take such measures on its own initiative. Applications are assessed by the VWU and the following factors, in addition to those set out in Article 68 (age, gender, health etc.) are taken into account in deciding whether to approve entry to the programme:

- (a) The involvement of the person before the Court;
- (b) Whether the person him or herself or his or her close relatives are endangered because of their involvement with the Court;
- (c) The person agrees to enter the protection programme.

Those entering protection programmes are required to sign an agreement with the Registry. Although it is not clear from the text of the Regulations, it appears that, due to budgetary constraints, protection programmes are currently considered by the Court to be measures of last resort. At the time of writing, it is also unclear when applications should be made.

Psychological and medical assistance

The support programme established by the VWU in accordance with Regulation (RR) 83, is to be made available to **“victims, witnesses and their families, accompanying persons and persons at risk”**, including **“in the field”**. Such support is to be provided **“at the earliest possible stage”**, which should be interpreted to mean from the moment of first contact. The VWU has not made public any details of its current support programme.

Under Rule 17 (2), the VWU is also responsible for assisting all **witnesses, victims who appear before the Court, and other persons at risk**, in obtaining medical assistance. Under Regulation (RR) 89, the Registry is required to “develop local networks to address the healthcare and well-being of witnesses, victims who appear before the Court and persons at risk, especially in the field”. Although it must be recognised that the resources of the VWU are limited, and at the time of writing are worryingly insufficient, the reliance on local networks creates a risk that such measures will not be adequate.

2.2.2.2. After the conclusion of proceedings

Rule 17 (a)(i) provides that the VWU must provide both short and long-term protection measures. However, the duties of the VWU post-trial are not specified in detail and the Court does not currently appear to have adequately analysed the potential problems and means to address them.

Relocation

The only provision specifically referring to post-trial measures concerns relocation. Relocation can either be internal or external. The Registrar is required to negotiate agreements with interested states for international relocation arrangements¹¹⁹. In view of the significant physical and emotional upheaval involved, relocation is generally considered to be a measure of last resort.

¹¹⁹. In accordance with Rule 16.

Other measures of protection and support

Prior to organising the victim's or witness's safe return to his or her country of origin, the Court should assess his or her security situation to establish the types of measures required to ensure their continued protection. The Court will also need to monitor the security of victims on a regular basis post-trial. It is unclear to what extent continued monitoring is foreseen by the VWU.

Psychological support and medical assistance

It is essential that victims and witnesses continue to receive support when they return to their daily routines after having re-experienced their trauma through testimony. Counselling, for example, which the Registry is obliged to provide under 43 (6), is a long-term treatment. Providing psychological assistance is not simply a matter of getting witnesses through their testimonies. Similarly, in most cases medical care limited to the duration of their stay at the court will not be sufficient. What will happen when victims and witnesses who have started treatment return home?

All post-trial measures will depend in large part on the availability of suitable local organisations. It is clear that the Court will not have the resources to provide indefinite support. In accordance with Regulation (RR) 89 (2), the VWU will need to cooperate with local organizations which can provide the necessary assistance. The VWU should identify referral organisations which could continue to provide the necessary support to victims on their return. The unpredictability of finding suitable existing organisations in the field capable of carrying out such work is of great concern.

3. Procedure

At the time of writing the procedure for requesting such measures has not been made clear. Regulation (RR) 80 (1) provides that “[i]n order to receive services provided by the Registry, Prosecutor and counsel shall complete a request for the provision of services form”. On the basis of this application, the VWU will assess the services to be provided in each individual case¹²⁰. It is unclear whether this applies to all forms of protection, support and assistance to be provided by the VWU. Furthermore, it is not specified whether the VWU can also provide services on its own initiative, however, in order to fulfil the general obligations of the Unit, the VWU cannot be restricted to responding to requests but must also be able to take initiative for the provision of services.

¹²⁰. Regulation (RR) 80.

 **CHAPTER VI**

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“Article”: refers to the Rome Statute
“Rule”: refers to the Rules of Procedure and Evidence
“Regulation”: refers to Regulations of the Court
“Regulation (RR)”: refers to Regulations of the Registry

RELEVANT PROVISIONS

GENERAL

Article 68 (1)

Protection of the victims and witnesses and their participation in the proceedings

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rule 86

General principle

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

The Registry

Article 43 (6)

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 68 (4)

The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

Rule 16 (1)(d) and (2) –(4)

Responsibilities of the Registrar relating to victims and witnesses

1. (d) [The Registrar takes] gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.
2. In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:
 - (a) Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit;
 - (b) Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.
3. For the fulfilment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.

4. Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential.

Regulation 41

Victims and Witnesses Unit

The Victims and Witnesses Unit may, pursuant to article 68, paragraph 4, draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.

Regulation (RR) 79

General provisions

1. Pursuant to article 43, paragraph 6, the Registry shall develop and to the extent possible, implement policies and procedures to enable witnesses to testify in safety, so that the experience of testifying does not result in further harm, suffering or trauma to for the witnesses.
2. The registrar shall exercise his or her functions regarding witnesses, victims who appear before the Court and persons at risk with no distinction of any kind, whether of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Regulation (RR) 100

Protection and security of victims

1. Where the Registry is in direct communication with victims, it shall ensure that it does not endanger their safety, physical and psychological well-being, dignity and privacy. The Registry shall also take all possible measures to ensure that groups mentioned in regulation 105, sub-regulation 1, pursue the same objective in their communications with victims.
2. Where a victim wishing to participate in the proceedings or to claim reparations fears that his or her application is putting him or her at risk, or where the assessment undertaken under regulation 99, sub-regulations 1 and 2, concludes that such a risk might exist, the Registry may advise the Chamber on appropriate protective measures and/or security arrangements in order to protect the safety and the physical and psychological well-being of the victim.
3. The Registry may request non-publication of information in accordance with regulation 43, sub-regulation 3.

The Chambers

> Pre-Trial Chamber

Article 57 (3)(c)

In addition to its other functions under this Statute, the Pre-Trial Chamber may: [...]

- (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information.

Rule 107 (3)

Request for review under article 53, paragraph 3 (a)

The Pre-Trial Chamber shall take such measures as are necessary under articles 54, 72 and 93 to protect the information and documents referred to in sub-rule 2 and, under article 68, paragraph 5, to protect the safety of witnesses and victims and members of their families.

> Trial Chamber

Article 64 (2), (6)(e) and (7)

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: [...]
- (e) Provide for the protection of the accused, witnesses and victims.
7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

The Office of the Prosecutor

Article 54 (1)(b) and (3)(f)

1. The Prosecutor shall [...]:
- (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.
3. The Prosecutor may: [...]
- (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Regulation 101 (2)(f)

Restrictions to access to news and contact

2. The Prosecutor may request the Chamber seized of the case to prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel, if the Prosecutor has reasonable grounds to believe that such contact: [...]
- (f) Is a threat to the protection of the rights and freedom of any person.

States Parties

Article 93 (1) (j)

1. "States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: [...]
- (j) The protection of victims and witnesses and the preservation of evidence."

PROTECTIVE MEASURES UNDER RULE 87

Rule 87

Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs

1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.

2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:

- (a) Such a motion or request shall not be submitted ex parte;
- (b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;
- (c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;
- (d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and
- (e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal.

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:

- (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
- (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
- (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
- (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
- (e) That a Chamber conduct part of its proceedings in camera.

Article 68 (2)

Protection of the victims and witnesses and their participation in the proceedings

As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Rule 67

Live testimony by means of audio or video-link technology

1. In accordance with article 69, paragraph 2, a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

2. The examination of a witness under this rule shall be conducted in accordance with the relevant rules of this chapter.

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

Rule 68***Prior recorded testimony***

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

- (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

Regulation 20***Public hearings***

1. All hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber.
2. When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.
3. A Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.

Regulation 21***Broadcasting, release of transcripts and recordings***

1. The publicity of hearings may extend beyond the courtroom and may be through broadcasting by the Registry or release of transcripts or recordings, unless otherwise ordered by the Chamber.
2. In order to protect sensitive information, broadcasts of audio- and video- recordings of all hearings shall, unless otherwise ordered by the Chamber, be delayed by at least 30 minutes.
3. Witnesses and participants shall be informed that the public hearings of the Chamber are broadcast in accordance with this regulation. Any objection raised shall be ruled on by the Chamber in accordance with sub-regulations 4 and 5.
4. Any objection to the release of transcripts or recordings, or requests that certain testimony be excluded from broadcast, shall be made as soon as possible and, in any event, no later than at the commencement of the session at which the witness or participant is to appear.
5. The Chamber may decide to prohibit the broadcasting of any hearing of an objection until that objection has been ruled on.
6. The Chamber may order the termination of the broadcast of a hearing at any time.
7. All documentary evidence and other evidence introduced by a participant during a public hearing shall be available for broadcast, unless otherwise ordered by the Chamber.
8. At the request of a participant or the Registry, or proprio motu, and when possible within the time set out in sub-regulation 2, the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing.
9. The audio- and video-record of hearings shall be made available to the participants and the public in accordance with the procedures set out in the Regulations of the Registry, unless otherwise ordered by the Chamber.

Regulation 42***Application and variation of protective measures***

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.
3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.
4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

Regulation (RR) 45***Arrangements for live testimony by means of audio or video-link technology***

1. The Registry shall make the necessary arrangements whenever the Chamber orders that a witness be heard by means of audio or video-link technology, pursuant to article 69, paragraph 2, and rule 67.
2. The participant requesting testimony by means of audio or video-link shall do so at least 15 calendar days in advance, as a rule.
3. In choosing a venue for the conduct of the audio or video-link testimony pursuant to rule 67, sub-rule 3, the Registrar shall consider in particular the following locations:
 - (a) The offices of the Court abroad;
 - (b) A national court;
 - (c) An office of an international organisation; or
 - (d) An embassy or a consulate.

Regulation (RR) 46***Conduct of live testimony by means of audio or video-link technology***

1. The Registrar shall designate a representative of the Registry or any other suitably qualified person to ensure that the testimony by means of audio or video-link technology is taken in accordance with the Statute, Rules, Regulations of the Court and these Regulations.
2. When testimony is to be given by means of audio or video-link technology, the designated person shall establish audiovisual contact with the courtroom with the assistance of technicians, where required.
3. At the request of the Chamber, the designated person shall call the witness into the transmission room and have him or her make the solemn undertaking.
4. In the case of a video link, the witness shall be able to see and hear the judges, the accused and the person questioning him or her, as well as the relevant evidence as submitted in the courtroom. Likewise, the judges, the accused and the person questioning him or her shall be able to see and hear the witness as well as any evidence submitted from the remote location.
5. Unless otherwise ordered by the Chamber, testimony shall be given in the sole presence of the designated person and a member of the technical team and, where necessary and with the consent of the Chamber, silent observers for participants other than those provided in rule 88, sub-rule 2.
6. The designated person shall keep the Chamber informed at all times of the conditions under which the testimony is being given.
7. Once the witness has been discharged by the Chamber and has left the room, the designated person shall confirm to the Chamber the absence of apparent reasons preventing the testimony being given freely and voluntarily.

Regulation (RR) 47

Participation in the proceedings via video link of an accused or of persons to whom article 55, paragraph 2, or article 58 applies or of victims

Where the accused or persons to whom article 55, paragraph 2, or article 58 applies, or victims participate in the proceedings via video-link, a direct telephone connection between the said persons and their counsel shall be established in addition to the normal connection.

SPECIAL MEASURES UNDER RULE 88**Rule 88***Special measures*

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.
2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.
3. For inter partes motions or requests filed under this rule, the provisions of Rule 87, sub-rules 2 (b) to (d), shall apply mutatis mutandis.
4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to inter partes motions or requests filed under seal shall also be filed under seal.
5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

CONFIDENTIALITY AND DISCLOSURE**Article 68 (5) - (6)**

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Rule 43*Procedure applicable to the publication of documents of the Court*

The Court shall ensure that all documents subject to publication in accordance with the Statute and the Rules respect the duty to protect the confidentiality of the proceedings and the security of victims and witnesses.

Rule 46***Information provided to the Prosecutor under article 15, paragraphs 1 and 2***

Where information is submitted under article 15, paragraph 1, or where oral or written testimony is received pursuant to article 15, paragraph 2, at the seat of the Court, the Prosecutor shall protect the confidentiality of such information and testimony or take any other necessary measures, pursuant to his or her duties under the Statute.

Rule 81***Restrictions on disclosure***

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.
2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.
5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

Rule 82***Restrictions on disclosure of material and information protected under article 54(3)(e)***

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.
3. If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.

4. The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules 2 and 3.
5. A Chamber dealing with the matter may order, upon application by the defence, that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as set forth in article 54, paragraph 3 (e), and which is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules 1, 2 and 3.

Regulation (RR) 97

Confidentiality of communications

1. Where required for reasons of safety and security of the victim, the Registry shall take all necessary measures within its powers to ensure the confidentiality of the following communications: communications within the Court relating to specific victims, including communications within the Registry and between the Registry and other organs of the Court; between the Court and victims who have communicated with the Court; between the Court and victims' legal representatives; between the Court and persons or organisations acting on behalf of victims; and between the Court and persons or organisations serving as intermediaries between the Court and victims.
2. If a victim decides to withdraw an application for participation or reparations at any time, the Registry shall maintain the confidentiality of the communication.

Regulation (RR) 98

Protection of information and communications

1. For the purpose of regulation 97, the Registry shall maintain a secure electronic database for the storage and processing of information provided in applications from victims, any documentation or further information supplied by victims or their legal representatives, and any communications received from or in respect of such victims including communications or other information from or relating to specific victims that have been made available to the Registry by other organs of the Court.
2. The database referred to in sub-regulation 1 may only be accessed by designated staff members of the Registry and, where appropriate, by the Chamber and by participants.

Regulation (RR) 99

Assessment of the disclosure of information

1. Upon receipt of an application from a victim and pending any decision by the Chamber, the Registry shall review the application and assess whether the disclosure to the Prosecutor, the defence and/or other participants of any information contained in such application, may jeopardise the safety and security of the victim concerned.
2. Such review shall take into account the factors set out in article 68, paragraph 1, any request for non-disclosure made by the victim and, *inter alia*, the level of security in the area where the victim lives and the feasibility of implementing local measures for their protection and security and/or protective measures where necessary.
3. The Registry shall inform the Chamber of the results of the assessment.
4. If a victim requests that all or part of the information he or she has provided to the Registry not to be disclosed to the Prosecutor, the defence, or other participants, the Registry shall inform the victim that such requests may be granted or rejected by the Chamber. The Registry shall communicate the victim's request, together with the result of the assessment made pursuant to sub-regulations 1 and 2, to the Chamber and to the legal representative of the victim.

THE VICTIMS AND WITNESSES UNIT

Rule 17

Functions of the Unit

1. The Victims and Witnesses Unit shall exercise its functions in accordance with article 43, paragraph 6.
2. The Victims and Witnesses Unit shall, inter alia, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:
 - (a) With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:
 - (i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;
 - (ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;
 - (iii) Assisting them in obtaining medical, psychological and other appropriate assistance;
 - (iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;
 - (v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organizations acting at the request of the Court, as appropriate;
 - (vi) Cooperating with States, where necessary, in providing any of the measures stipulated in this rule;
 - (b) With respect to witnesses:
 - (i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
 - (ii) Assisting them when they are called to testify before the Court;
 - (iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.
3. In performing its functions, the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate, and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings.

Rule 18

Responsibilities of the Unit

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

- (a) Ensure that the staff in the Unit maintain confidentiality at all times;
- (b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;
- (c) Have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate;
- (d) Ensure training of its staff with respect to victims and witnesses security, integrity and dignity, including matters related to gender and cultural sensitivity;
- (e) Where appropriate, cooperate with intergovernmental and non- governmental organizations.

Rule 19***Expertise in the Unit***

In addition to the staff mentioned in article 43, paragraph 6, and subject to article 44, the Victims and Witnesses Unit may include, as appropriate, persons with expertise, inter alia, in the following areas:

- (a) Witness protection and security;
- (b) Legal and administrative matters, including areas of humanitarian and criminal law;
- (c) Logistics administration;
- (d) Psychology in criminal proceedings;
- (e) Gender and cultural diversity;
- (f) Children, in particular traumatized children;
- (g) Elderly persons, in particular in connection with armed conflict and exile trauma;
- (h) Persons with disabilities;
- (i) Social work and counselling;
- (j) Health care;
- (k) Interpretation and translation.

Regulation (RR) 80***Services to victims and witnesses***

1. In order to receive services provided by the Registry, the Prosecutor and counsel shall complete a form requesting the provision of services. The Registry may request from the Prosecutor and counsel any additional information necessary for the provision of services.
2. Services such as relocation, accompanying support persons, dependent care, extraordinary allowances for lost earnings and clothing allowances shall be provided on a case-by-case basis, in accordance with an assessment made by the Registry.

Regulation (RR) 81***Travel***

1. The Registry shall arrange transportation for witnesses, victims who appear before the Court and persons at risk who, pursuant to an order of the Chamber, need to travel for testimony or for support or protection-related purposes.
2. The mode of transport shall be determined on a case-by-case basis, having regard to protection, safety and health considerations.
3. Unless otherwise justified for support or protection reasons, travel shall be based on:
 - (a) An economy class international round trip air ticket by the shortest route, subject to prior authorisation by the Registry; or
 - (b) The practice of the Court for staff members for all other means of transport.

Regulation (RR) 82***Accommodation***

1. The Court shall provide appropriate full board and accommodation in locations selected by the Registry for witnesses, victims who appear before the Court and persons at risk where required for the purposes of the Court.
2. Witnesses, victims who appear before the Court and persons at risk who have chosen not to accept full board and accommodation provided by the Court shall only receive an incidental allowance in accordance with regulation 84 and an attendance allowance in accordance with regulation 85.

Regulation (RR) 83***Support programme***

1. The Registry shall develop a support programme, which shall also apply in the field, in order to provide psychological, social assistance and advice to victims, witnesses and their families, accompanying persons and persons at risk at the earliest stage possible.

2. In addition, the support programme shall provide, where appropriate, and for the duration of their stay at the seat of the Court, or where proceedings are held, round-the-clock assistance to victims who appear before the Court, witnesses and accompanying persons.

Regulation (RR) 84

Incidental allowance

1. An incidental allowance for personal expenses may be provided to witnesses, victims who appear before the Court, persons at risk and accompanying support persons who require overnight accommodation at any stage of their journey.
2. The amount of the incidental allowance shall be determined by the Registrar and shall be reviewed annually. The Registrar shall publish the table of the rate of incidental allowance yearly on the website of the Court.

Regulation (RR) 85

Attendance allowance

1. Witnesses shall be provided with an attendance allowance as compensation for wages, earnings and time lost as a result of testifying. Witnesses shall not be required to submit a request or any supporting documentation in order to receive the attendance allowance.
2. The daily minimum wage rate shall be determined by dividing:
 - (a) The annual salary of the staff of the Court at the General Services, step 1 level 1 in the country in which the witness is residing at the time he or she testifies; by
 - (b) The number of days per year.
3. The attendance allowance shall be calculated by multiplying:
 - (a) A percentage rate of the daily minimum wage rate applicable for the staff of the Court in the country in which the witness is residing at the time he or she testifies. The percentage shall be determined by the Registrar and shall be reviewed annually. The Registrar shall publish yearly on the website of the Court the table of the rate of attendance allowance; by
 - (b) The number of days the witness is required at the seat of the Court or where proceedings are held, including travel days. For the purpose of calculating the attendance allowance, a part of a day used in connection with testifying shall be considered a full day.

Regulation (RR) 86

Extraordinary allowance for lost earnings

1. The Registrar may provide an extraordinary allowance for lost earnings for witnesses who suffer undue financial hardship as a result of being absent from legal income earning activities for the purposes of the Court.
2. Witnesses shall submit their request accompanied by any supporting documentation.
3. The Registrar shall inform the participants of any payment of such allowance.

Regulation (RR) 87

Expert witnesses

Transportation for expert witnesses who travel for testimony or for support or protection-related purposes shall be arranged by the Registry, in accordance with regulation 81. A daily subsistence allowance shall also be provided.

Regulation (RR) 88

Information management

1. The Registry shall keep information relating to witnesses, victims who appear before the Court and persons at risk, accompanying persons and family members in a secure environment.
2. A secure electronic database shall be maintained for any information relating to persons referred to

in sub-regulation 1. This database can only be accessed by designated staff members of the Registry and, where appropriate, by the Chamber and by participants.

Regulation (RR) 89

Healthcare and well-being

1. The Registry shall assist witnesses, victims who appear before the Court and persons at risk, by:
 - (a) Organising medical care and assistance, as appropriate, for the duration of their stay at the seat of the Court or where proceedings are held; and
 - (b) Providing psychological assistance, as appropriate, particularly for children, the disabled, the elderly and victims of sexual violence.
- (2) The Registry shall develop local networks to address the healthcare and well-being of witnesses, victims who appear before the Court and persons at risk, especially in the field.

Regulation (RR) 90

Dependent care

1. The Registry may provide dependent care to witnesses and victims who appear before the Court.
2. Dependent care is the provision of appropriate assistance to those who have the primary responsibility in caring for another person, the non-provision of which would prevent their attendance at the Court
3. The type of assistance shall be based on a case-by-case needs assessment.

Regulation (RR) 91

Accompanying support persons

1. Witnesses, victims who appear before the Court and persons at risk may be permitted to bring an accompanying support person with them to the Court. The Registry shall cover the costs of the accompanying support person, in accordance with regulations 81, 82 and 84.
2. In order to determine the eligibility of a witness, a victim who appears before the Court or a person at risk to bring an accompanying support person with him or her to the Court, the following criteria, shall be, inter alia, taken into account:
 - (a) The fact that the person has no surviving close family members;
 - (b) The presence of severe trauma-related symptoms;
 - (c) The existence of possible suicidal tendencies;
 - (d) The potential for violence;
 - (e) The fear or anxiety of the person to the extent that it would prevent him or her from attending the Court;
 - (f) The age;
 - (g) The fact that the person is a victim of sexual or gender violence;
 - (h) The fact that the person suffers from a pre-existing disease of a physical and/or psychological nature; and
 - (i) The severity of physical or psychological symptoms.
3. The Registry shall assess the suitability of the accompanying person to provide support.

Regulation (RR) 92

Security arrangements

1. The Registry shall implement and coordinate appropriate procedures and measures for the protection and security to ensure the safety of witnesses, victims who appear before the Court and persons at risk, including accompanying support persons.
2. Procedures and measures referred to in sub-regulation 1 shall be confidential.

Regulation (RR) 93

Local protection measures

1. The Registry shall implement measures for the protection of witnesses, victims who appear before the Court and persons at risk on the territory of the State where an investigation is taking place.
2. Procedures and measures referred to in sub-regulation 1 shall be confidential.

Regulation (RR) 94

Protective measures

Measures taken pursuant to an order of a Chamber under rule 87 to protect the identity of witnesses, victims who appear before the Court and persons at risk may include, inter alia:

- (a) Pseudonyms, where the person is assigned a pseudonym that is used during the proceeding instead of his or her real name;
- (b) Facial distortion, where the image of the person is rendered unrecognisable by an electronic mosaic in the audiovisual feed;
- (c) Voice distortion, where the voice of the person is rendered unrecognisable by electronic means in the audiovisual feed;
- (d) Private sessions, where the hearing is not open to the public and there is no audiovisual stream broadcast outside the Court;
- (e) Closed sessions, where the hearing is held in camera;
- (f) Videoconferences, where the person takes part in the proceeding via a direct video link;
- (g) Expunctions from the public record of the proceeding of any information which might lead to the identification of the victim, witness or person at risk; or
- (h) Any combination of the protective measures listed above or any modification of a measure ordered by the Chamber which is technically feasible.

Regulation (RR) 95

Protection arrangements

The Registry shall provide participants with round-the-clock telephone access for the purpose of initiating an application for protection or for any enquiry relating to the safety of witnesses, victims who appear before the Court or persons at risk of harm or death.

Regulation (RR) 96

Protection programme

1. The Registry shall take all necessary measures to maintain a protection programme for witnesses, including accompanying support persons, and others considered to be at risk of harm and/or death on account of a testimony given by such witnesses or as a result of their contact with the Court.
2. An application for inclusion in the protection programme may be filed by the Prosecutor or by counsel.
3. In assessing admission to the protection programme, in addition to the factors set out in article 68, the Registry shall consider, inter alia, the following:
 - (a) The involvement of the person before the Court;
 - (b) Whether the person himself or herself, or his or her close relatives are endangered because of their involvement with the Court; and
 - (c) Whether the person agrees to enter the protection programme.
4. Inclusion in the protection programme shall be subject to the decision of the Registrar after the assessment made under sub-regulation 3.
5. Before being included in the protection programme, the person or – where the person is under the age of 18 or otherwise lacks the legal capacity to do so – his or her representative, shall sign an agreement with the Registry.