

**INTERNATIONAL CRIMINAL LAW  
& PRACTICE  
TRAINING MATERIALS**

# **VICTIMS & WITNESSES**

*Supporting the Transfer of Knowledge and Materials  
of War Crimes Cases from the ICTY to National  
Jurisdictions, funded by the European Union*

Developed by International Criminal Law Services

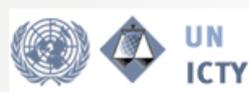
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# MODULE 14: VICTIMS AND WITNESSES: SUPPORT, PROTECTION, COMPENSATION AND PARTICIPATION

*Part of the OSCE-ODIHR/ICTY/UNICRI Project “Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions”*

**Developed by International Criminal Law Services**

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## 14. VICTIMS AND WITNESSES: SUPPORT, PROTECTION, COMPENSATION AND PARTICIPATION

### 14.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI “War Crimes Justice Project”, funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve primarily as a training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions in the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each Module provides a general overview of the international criminal law relevant to the Module’s topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

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#### 14.1.1. MODULE DESCRIPTION

This Module covers all of the laws and rules relating to the protection of victims and witnesses in criminal proceedings before international criminal courts as well as the domestic courts in the region. The direct participation of victims in these proceedings is also examined, taking into account that it is only before the ICC and the ECCC<sup>1</sup> that victims are entitled to participate directly in the proceedings. This section will also cover the various forms of victim compensation, reparations and restitution, which are provided in both international and the domestic jurisdictions of BiH, Croatia and Serbia. The difference between these systems will be highlighted, and participants should be encouraged to consider the different models and assess their strengths and weaknesses.

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<sup>1</sup> The victim participation regime before the ECCC is not dealt with in any detail in this Module. Should participants wish to discuss these provisions, trainers should make available to them the laws and rules applicable before that court. A list of reading materials relevant to witness protection and victim participation issues, including the provisions of the ECCC, is set out at the end of this Module in the Further Reading section.

### 14.1.2. MODULE OUTCOMES

At the end of this Module, participants should understand:

- The rights of victims and witnesses under international criminal law and procedure, both in respect of protection and participation;
- With respect to witness protection, the procedure for applying for protective measures and the implementation of such measures before international courts and domestic courts in the region;
- With respect to victim participation in the proceedings, the procedure for applying to participate and the modalities of such participation before the ICC;
- The various pre-trial and trial protective measures that are available for witnesses before international courts and domestic courts in the region;
- The various forms of victim compensation, reparations and restitution in both international and domestic jurisdictions in the region; and
- The differences between international courts and domestic jurisdictions for the protection of victims and witnesses, victim participation, and victim compensation.

*Notes for trainers:*

- It is most important that participants distinguish between:
  - The witness protection measures that are applicable before international and national courts;
  - The ways in which victims may participate directly in the criminal proceedings; and
  - The various forms of victim compensation, reparations and restitution that are available before international and national courts.
- This Module is therefore structured to deal with each of these topics separately under the international law section, and thereafter, to consider the same topics to the extent that they are applicable, in the domestic systems of BiH, Croatia, and Serbia.
- The manner in which the rights of victims and witnesses should be observed must be consistent with the rights of the accused. This is a central feature of all of the laws, rules and case law on victim and witness protection and victim participation.
- Participants should be informed from the outset that although witness protection measures are applicable in all international and domestic jurisdictions discussed in these materials, direct victim participation in the criminal proceedings of international courts is only permitted before the ICC and ECCC. It should be noted that before the Court of BiH, victims are entitled to participate in the proceedings, but only to the extent that their representations apply to compensation, reparations and restitution. In Croatia and Serbia, victims have more extensive rights of participation in the investigations and the trial proceedings.

*Notes for trainers (continued):*

- Participants should be encouraged to discuss the similarities and differences between the various international criminal courts and the domestic jurisdictions in the region. It would be helpful to engage participants in training this Module by requesting that they assess the adequacy of witness protection measures that are employed in each system, and to discuss the scope of victim participation in each of their jurisdictions.
- In order to achieve these objectives you will find “Notes to trainers” in boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues and to stimulate discussion, and make references to the parts of the case study that are relevant and which can be used as practical examples to apply the legal issues being taught. Furthermore, questions that participants could be asked to consider are as follows:
  - Are there any circumstances in which anonymous witnesses should be permitted to testify, and if so, what might these be?
  - In what circumstances should the identity of a witness be withheld from the accused before the witness testifies?
  - How long before a witness testifies must an accused be notified of the witness’ identity?

## 14.2. OVERVIEW OF THE RIGHTS OF VICTIMS AND WITNESSES UNDER INTERNATIONAL LAW

### *Notes for trainers:*

- The international law section of this Module is divided into three parts:
  - Witness protection and support;
  - Victims participation in the criminal proceedings; and
  - Victim compensation, reparations and restitution.
- It is essential that participants have an overview of all of the laws and rules applicable to victims and witnesses. In this section, the essential provisions applicable before the ICTY, ICTR and ICC are outlined so that participants can have these provisions in mind as they progress through the rest of the Module.
- Trainers should be careful to explain to participants when introducing this Module the distinctions between the various rights and procedures that are available to victims and witnesses. Thereafter, each of the particular categories of protection, compensation and participation can be examined in more detail.

Victims have a number of important rights under international law, some of which are discussed below. This discussion is not exhaustive, but is meant to demonstrate some of the sources of victims' rights under international law.

Before the ICTY and the ICTR<sup>2</sup>, provisions are made for victim and witness protection and support. The relevant provisions are the following:

### **ICTY Statute Article 20 (1): Commencement and conduct of trial proceedings**

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

<sup>2</sup> The relevant provisions in the Statute of the International Criminal Tribunal for Rwanda are Art. 19(1) and Art. 21.

**ICTY Statute Article 22: Protection of victims and witnesses**

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

**ICTY RPE Rule 69: Protection of Victims and Witnesses**

(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed insufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 75 on the measures for the protection of victims and witnesses is included in Annex I to this Module.

Before the ICTY and ICTR, there is a provision for the restitution of property and compensation to victims. The relevant provisions are Rules 105 and 106, also included in Annex I to this Module.

No provision is made in the Statute and Rules of the ICTY and ICTR for victims to participate directly in the proceedings as parties to the proceedings. Clearly witnesses who are victims who are called to testify by the prosecution, defence or the chambers do participate in the proceedings, but they are not entitled to be represented separately in the proceedings as parties.

Before the ICC, however, there are provisions for victim and witness protection, as well as for victim participation as parties. The scope of participation of victims in the proceedings before the ICC is limited to issues that directly affect their personal interests. They are not permitted by the statutory rules to participate in the proceedings as full parties to the same extent as the prosecution and defence, as their rights of representation are limited to those issues that directly affect their interests.<sup>3</sup>

The relevant provisions before the ICC in respect of victims and witnesses are the following:

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<sup>3</sup> See section 14.5 below for discussion of the scope of victim participation and the relevant case law.

**Rome Statute Article 68: Protection of the victims and witnesses and their participation in the proceedings**

1. 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.

2. 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.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

**Rome Statute Article 68: Protection of the victims and witnesses and their participation in the proceedings (continued)**

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.

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.

**Rome Statute Article 75: Reparations to victims**

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

**Rome Statute Article 75: Reparations to victims (continued)**

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

The relevant rules are Rules 85 – 99, which are included in Annex I.

It could also be useful to refer to UN principles and guidelines related to victims and witnesses, including:

- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>4</sup>
- Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>5</sup>

However, it is important to note, that these principles and guidelines:

[...] do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.<sup>6</sup>

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<sup>4</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005).

<sup>5</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (Nov. 29 1985).

<sup>6</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble.

### 14.3. VICTIM AND WITNESS PROTECTION AND SUPPORT

#### *Notes for trainers:*

- This section discusses all measures that can be used to protect and support victims and witnesses involved with international criminal courts in both pre-trial and trial proceedings.
- This section is structured in three parts.
  - An overview which includes general considerations applicable to witness protection and support. These considerations are drawn from the experience of practitioners before all the international courts, and are included here to provide assistance to practitioners in how to most effectively guarantee witness and victim protection while ensuring that the rights of the accused are observed.
  - The protections available at the ICTY and ICTR.
  - The protections available at the ICC.
- It is important for participants to understand the tests that must be met for witness protection measures to be made available. It is also important that participants understand the extent to which such measures should be consistent with the rights of the accused to a fair trial.
- Participants should also discuss the modalities and practical methods of protecting witnesses that are available and assess the extent to which these have been or could be used within their domestic jurisdictions.
- It would be helpful to engage participants in a discussion about appropriate measures for protecting witnesses by reference to the case study. Participants could be asked to discuss what evidence could be used from the case summary to justify applications for protective measures both before and during trial. Participants could also consider whether there would be any basis for the accused to object to such measures being imposed, and what counter-arguments could be used by the prosecution. Furthermore, questions that participants could be asked to consider are as follows:
  - Are there any circumstances in which anonymous witnesses should be permitted to testify, and if so, what might these be?
  - In what circumstances should the identity of a witness be withheld from the accused before the witness testifies?
  - How long before a witness testifies must an accused be notified of the witness' identity?

### 14.3.1. OVERVIEW

Witness and victim protection and support are critical aspects of any cases involving war crimes, crimes against humanity and genocide. The protection international courts afford to victims who testify as witnesses or participate as victim-participants (such as at the ICC) have improved significantly since the creation of international criminal tribunals. Each court places great importance on providing protective measures in appropriate circumstances. Such measures include:

- The non-disclosure of identity until necessary for the adequate preparation of the defence;
- Protection from the public and media;
- Protection from confrontation with the accused; and
- Special measures for victims of sexual violence.

At all international courts, both prosecution and defence witnesses can be afforded protective measures. Any witness, who has a legitimate need for protection, including witnesses who are not victims, can receive protective measures.<sup>7</sup>

All of the international courts allow judges to grant pre-trial and in-court protective measures. These measures will be discussed as they apply before the ICTY, ICTR and the ICC, below.

#### 14.3.1.1. GENERAL CONSIDERATIONS TO WITNESS AND VICTIM PROTECTION

##### *Notes for trainers:*

- This section has been developed based on the Commonwealth Secretariat's "Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice Process". It includes general recommendations from a practitioner's perspective. Participants could be asked to discuss these general considerations to witness and victim protection in light of the particular rules and contexts encountered in their national jurisdictions, and drawing upon their own experiences in dealing with these issues.

Participation in proceedings can carry a level of risk to victims and witnesses. This applies to participation at all stages of proceedings, including the investigative stage.

Addressing victims' and witnesses' fears of participating in proceedings, arising from both real risks to their safety and perceptions of threats to their safety, is important and can ensure their participation in proceedings.<sup>8</sup> This can be done using a range of supportive and protective measures,

<sup>7</sup> Vojislav Šešelj, Case No. IT-03-67-T, Decision on Vojislav Šešelj's Motion for Reconsideration of the Decision of 30 Aug. 2007 on Adopting Protective Measures, 11 Jan. 2008, ¶ 14.

<sup>8</sup> Commonwealth Secretariat, Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice Process, Meeting of Commonwealth Law Ministers and Senior Officials, Provisional Agenda Item 4(d),

which range from simple measures such as the provision of accurate information, to more intrusive measures such as temporary or permanent relocation.

Any protective or support measures should only be implemented with the voluntary and informed consent of the individual concerned. This can be difficult to ensure, for example, in cases of minors or in situations of considerable stress when the safety of the individual is at risk.<sup>9</sup>

*Protective measures should be aimed at the best interests of the individual and ensuring that no further harm is caused to them as a result of their participation in proceedings.*

Protective measures should be aimed at the best interests of the individual and ensuring that no further harm is caused to them as a result of their participation in proceedings.<sup>10</sup>

Because protective measures may have a significant impact on the lives of the participating victims/witnesses and their families, any such measures should be carefully considered and chosen to meet the specific needs of the individual, and implemented only in response to a real and assessed level risk of risk.<sup>11</sup> In the course of this preliminary risk assessment, ensuring the reliability of information and intelligence is important.

*It is vital to ensure that individuals understand that protective measures are intended to respond to real and credible threats to an individual's safety resulting from their participation in court proceedings.*

It is also very important to ensure that witnesses and victims do not have unrealistic expectations of protective and support measures. It is vital to ensure that individuals understand that protective measures are not a reward for testimony and are not routine practice, but that protective measures are intended to respond to real and credible threats to the individual's safety resulting from their participation in court proceedings. Any such measures should be clearly discussed with the individual, to determine specifically which protective measures are best suited to each individual. Witnesses and victims should also be made aware of the limitations of protective measures and the steps required to enable them to protect themselves.<sup>12</sup>

It is also important to ensure that individuals do not confuse the term "protective measures" with the status of a "protected witness". It is important to ensure that individuals understand that there is a range of protective measures available, and that the most appropriate protective measures will be employed to respond to real and credible threats to the individual's safety—and this will only rarely be temporary or permanent relocation.<sup>13</sup>

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LMM(11)(14 14 July 2011 (hereinafter "Victim/Witness Best Practices Guide"), available at [http://www.thecommonwealth.org/document/181889/34293/35232/238332/clmm\\_2011.htm](http://www.thecommonwealth.org/document/181889/34293/35232/238332/clmm_2011.htm).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

## 14.3.1.1.1. PROTECTIONS DURING INVESTIGATIONS

During the investigative phase, investigators should be aware that their mere contact with victims and witnesses may place them in jeopardy. Investigators may therefore need to employ protection measures in their initial and on-going contacts with victims and witnesses in these early pre-trial stages of proceedings, throughout the course of investigations of the crimes.

*During the investigative phase, investigators should be aware that their mere contact with victims and witnesses may place them in jeopardy.*

Such measures will need to take account of the current and local context, including the environmental, social and cultural situation, the security situation and the availability of security and policing, and the potential threats.

These measures may include:

- Conducting an initial assessment to identify potential key witnesses, identify potential threats and current risks, and develop a strategy if needed;
- Considering and developing a strategy around the number, mode and duration of contacts needed;
- Considering the ability of witnesses to be interviewed;
- Considering the location of interviews;
- Developing cover stories for witnesses to be interviewed (for example, visiting relatives or friends);
- Ensuring that investigators behave discreetly; and
- Informing witnesses of the importance of maintaining confidentiality, for the safety of other witnesses and themselves.<sup>14</sup>

The measures adopted will need to be based on an accurate preliminary assessment of the potential risks to the safety of victims and witnesses, the support needs of victims and witnesses and the available resources. It is important that the assessment of the potential risks to the safety of victims and witnesses is based on reliable information, in order to accurately assess the potential threats.<sup>15</sup>

Providing assistance to investigators can be a stressful experience for victims and witnesses. Supportive measures are thus often needed to ensure the individuals' continued participation in proceedings and the provision of testimony in the trial stage.

*Providing assistance to investigators can be a stressful experience for victims and witnesses.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

#### 14.3.1.1.2. PREPARING WITNESSES AND VICTIMS FOR PARTICIPATING IN THE TRIAL

An important aspect of preparing victims and witnesses for trial is providing them with detailed information about the proceedings, and the role they will play in them, to enable them to fully understand the function of their involvement in proceedings. It is also important to ensure that victims and witnesses have realistic expectations about their involvement in proceedings. Unrealistic expectations, goals or demands may negatively impact on the individuals' cooperation and testimony, or cause them to feel disappointed or betrayed by the system and possibly lead to further psychological harm.<sup>16</sup>

*An important aspect of preparing victims and witnesses for trial is providing them with detailed information about the proceedings, and the role they will play in them, and to enable them to fully understand the function of their involvement in proceedings.*

Various factors may affect a victim's or witness' capacity to participate in proceedings and give truthful and accurate statements to investigators, as well as cope with testifying, questioning and cross-examination at trial. Victims and witnesses may be particularly vulnerable or face psychological difficulties participating in proceedings due to:

- Age;
- Disability;
- Previous experiences;
- The nature of the crime perpetrated against them; and
- Personality and coping skills.<sup>17</sup>

The extent of supportive measures required will depend on the particular circumstances of the individual. Especially vulnerable individuals may need specialised support in order to prepare them for the experience of testifying at trial. Potentially vulnerable victims and witnesses should be identified as early as possible.

*Traumatised witnesses and victims of crime who are required to recount the events that victimised them may show reactions to the stress of testifying at trial.*

Traumatised witnesses and victims of crime who are required to recount the events that victimised them may show reactions to the stress of testifying at trial. It is therefore vital that vulnerable witnesses are identified and that support measures are put in place before, during, and if needed, after the trial.<sup>18</sup>

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

#### 14.3.1.1.3. BALANCING THE RIGHTS OF THE ACCUSED

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Protective and support measures for victims and witnesses participating in proceedings must be balanced with the rights of the accused to a fair trial. For example, granting full anonymity to victims and witnesses is a particular issue. There is a general principle that a conviction cannot be based solely or to a decisive extent on testimony of an anonymous witness, and the defendant must be able to put questions to an anonymous witness during testimony.<sup>19</sup>

#### 14.3.1.1.4. LONG-TERM PROTECTIVE AND SUPPORT MEASURES

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It may also be necessary to provide witness protective and support measures after the witness' testimony, and after the trial on a long-term basis. It is important to assess the need for long-term measures, and ensure the witness receives clear information about the progress of the trial and further steps that might be taken.<sup>20</sup>

Threats to individuals' safety resulting from their participation in proceedings may not always be evident at the time of their participation. For example, witnesses who have been afforded protective measures during testimony at trial, such as facial and voice distortion, and who then return to their local communities, may subsequently face threats and intimidation upon their return. While these threats may not reach the criteria for relocation, it is nonetheless important to track witnesses and any threats to their safety that may arise after their participation in the trial. Such situations may require on-going involvement of local police, or on-going monitoring by the court's witness protection organs, or subsequent investigations of threats that arise later in time. Thus, there may be a need to vary or implement protective measures sometime subsequent to an individual's participation in proceedings.<sup>21</sup>

On-going communication between the court and an individual may pose a risk to a witness who has previously participated in proceedings, particularly when witnesses have been granted protective measures such as facial and voice distortion and use of pseudonyms during testimony at trial. Such communication (for example, official letters of support or official letters required by local authorities to permit travel to The Hague) may identify an individual, and may thereby pose a threat to their safety. Protective measures may therefore affect the implementation of broader operational and witness support measures.<sup>22</sup>

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

## 14.3.2. ICTY

*Notes to trainers:*

- This section covers the following topics:
  - Protections available at the pre-trial stage;
  - Protections at the trial stage;
  - Witness support; and
  - Certain other matters relating to witness protection measures.
- It is important for participants to understand the legal tests that are applicable for the granting of protective measures at both the pre-trial and trial stages.
- The participants should discuss the manner in which the trial chambers of the ICTY have considered applications for protective measures, especially in light of accused's' rights to a fair trial. Participants should consider how such matters would be adjudicated within their national jurisdictions.

## 14.3.2.1. INTRODUCTION

At the ICTY and ICTR, victims cannot directly participate in the proceedings unless they are called as witnesses. This section therefore only addresses witness protection and support. However, the approaches used by the ICTY and ICTR in dealing with witnesses could be applied to protecting participating victims as well, as will be demonstrated in the ICC section, below.

*At the ICTY and ICTR, victims cannot directly participate in the proceedings unless they are called as witnesses.*

The provisions regarding witness protection in the Statutes and Rules of the ICTY and ICTR are general in nature, but have been developed through practice and jurisprudence.

The relevant statutory provisions are Articles 20 and 22, as cited above. These articles require the ICTY as an institution to take measures to protect victims and witnesses.

The ICTY and ICTR provide protections for victims and witnesses during the pre-trial stage (Rule 69 of the RPE) and during the trial stage of any case (Rule 75 of the RPE).

Witness protection measures are decided on a case-by-case basis. Under Rule 75, a judge or a chamber, *proprio motu*, may order appropriate measures for the protection of victims and witnesses provided that such measures are consistent with the rights of the accused. Either the prosecution or the defence, or the victim or witness concerned or the VWS, may apply for such measures.<sup>23</sup>

<sup>23</sup> *But see* Ramush Haradinaj et al., Case No. IT-04-84, Decision on Motion by Witness 28 to Set Aside Subpoena or Alternate Relief, 5 Sept. 2007, ¶ 9, in which the trial chamber held that it was for the party calling the witness to apply to the court for protective measures for the witness concerned.

The principal witness protections provisions for the ICTY and ICTR mirror each other and influenced those of the ICC. Protective measures available before the ICTY and ICTR include:

- The use of pseudonyms;
- Non-disclosure of the identity of the witness until necessary for adequate preparation of the defence;
- Image-or voice-altering devices;
- Testifying behind a screen;
- Testifying via closed circuit television; and/or
- Testifying in closed sessions (either completely closed or partially closed).

A witness' identity can be protected from the accused and/or from the public and media. Only in one case at the ICTY has a witness remained anonymous to the accused throughout the proceedings.<sup>24</sup> However, witnesses' identities are often not disclosed to the public and media.

*A witness' identity can be protected from the accused and/or from the public and media.*

In considering and ordering protective measures, chambers may, and usually do, consult the Victims and Witnesses Section, which is part of the Registry.<sup>25</sup>

#### 14.3.2.2. PRE-TRIAL PROTECTIONS

Rule 69 of the RPE of the ICTY and ICTR, as outlined above, provides that potential witnesses and victims can be granted protective measures during the pre-trial stages of a case.<sup>26</sup>

##### 14.3.2.2.1. TEST UNDER RULE 69 FOR PROTECTIVE MEASURES

An application for protective measures must demonstrate that:

- The testimony of the witness is relevant and important to the party's case; and
- There is a real, objective fear for the safety of the witness,<sup>27</sup> in the sense of "an objectively grounded risk to the security or welfare of the witness or witness' family, should it become publicly known that the witness gave evidence".<sup>28</sup>

Only the least restrictive measure should be applied.<sup>29</sup>

<sup>24</sup> See Duško Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug. 1995 (J. Stephen dissenting).

<sup>25</sup> Radovan Karadžić, Case No. IT-95-5, Decision on Accused's Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ942, 25 Mar. 2010, ¶ 13.

<sup>26</sup> ICTY and ICTR Rules of Procedure and Evidence ("RPE"), Rule 69.

<sup>27</sup> Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 62.

<sup>28</sup> Milan Mortić, Case No. IT-95-11-T, Decision on Defence motion for protective measures for witnesses MM-096, MM-116 and MM-090, 18 Aug 2006, pp. 2-3.

<sup>29</sup> Théoneste Bagosora et al., Case No. ICTR-96-7, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 Oct. 2005, ¶ 19.

Assessment of the risks and dangers faced by witnesses must be undertaken on a witness-by-witness basis, and the party seeking protective measures bears the burden of establishing that exceptional circumstances warrant pre-trial protective measures.

Some important considerations relating to Rule 69 test are:

- Relevant and important testimony is testimony that provides some relevance and importance to the case.<sup>30</sup>
- There must be evidence that the particular witness will be interfered with in order to justify protections afforded under Rule 69.
- There must be a real fear for the safety of the witness and his or her family, and there must be an objective justification for this fear.<sup>31</sup>
- The assessment of this risk and danger must be undertaken on a witness-by-witness basis, and the party seeking protective measures bears the onus of establishing “exceptional circumstances”.<sup>32</sup>
- In order to determine whether protective measures are appropriate, and if so, which kind, the trial chamber must evaluate the entire security situation affecting the witness—it is not sufficient to rely on the submission of the parties.<sup>33</sup>

If it is established that there is a likelihood that a particular victim or witness may be in danger or at risk, the trial chamber will allow the identity of the victim or witness to be withheld from the defence until it is required to disclose the information so as to provide adequate time for the defence to prepare before trial.<sup>34</sup>

*The defence may also seek protective measures for defence witnesses and will have to provide independent grounds justifying the alleged subjective fear of its witnesses.*

The defence may also seek protective measures for defence witnesses. If the defence seeks protective measures, it cannot rely on the specific circumstances faced by prosecution witnesses; the defence will have to provide independent grounds justifying the alleged subjective fear of witnesses. However, out of an abundance of caution or out of a respect for trial fairness,<sup>35</sup> the court may nevertheless decide to grant the same protective measures as

<sup>30</sup> Pauline Nyiramasuhuko et al., Case No. ICTR-97-21, Decision on Nyiramasuhuko’s Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005, ¶ 23.

<sup>31</sup> See, e.g., Milan Lukić et al., Case No. IT-98-32/1, Order on Milan Lukić’s Request for Protective Measures, 23 July 2008, pp. 3 – 4; Aloys Simba, Case No. ICTR-01-76, Decision on Defence Request for Protection of Witnesses, 25 Aug. 2004, ¶ 5.

<sup>32</sup> See, e.g., Radoslav Brđanin, Case No. IT-99-36, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, ¶¶ 13, 16 – 18, 22 – 28.

<sup>33</sup> Ignace Bagilishema, Case No. ICTR-95-1, Decision on Prosecutor’s Motion for Witness Protection, 17 Sept. 1999, ¶ 6.

<sup>34</sup> See, e.g., Tadić, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 72.

<sup>35</sup> Bizimungu et al., Case No. ICTR-99-50, Decision on Prosper Mugiraneza’s Motion for Protection of Defence Witnesses, 2 Feb. 2005, ¶ 13.

applicable to prosecution witnesses, which favours equal treatment of defence and prosecution witnesses.<sup>36</sup>

#### 14.3.2.2.2. “EXCEPTIONAL CIRCUMSTANCES”

As provided for in Rule 69, the trial chamber will only grant a request for non-disclosure of the identity of a victim or witness where the party seeking non-disclosure demonstrates the existence of exceptional circumstances. This is shown by:

- Specific evidence;
- Of an identifiable risk;
- To the security and welfare;
- Of the particular witness; and
- Or his or her family.

In general, the following do not constitute “exceptional circumstances”:

- General allegations of dangerous conditions or threats to the welfare of victims and witnesses.<sup>37</sup>
- The fear that the prosecution may have difficulties in finding witnesses who are willing to testify in future cases.<sup>38</sup>

The fears of a potential witness are not in themselves sufficient to establish a real likelihood that the witness may be in danger. Something more than a generalised fear must be demonstrated before non-disclosure of the witness’ identity to the accused is warranted.<sup>39</sup>

*The fears of a potential witness are not in themselves sufficient to establish a real likelihood that the witness may be in danger.*

The prosecution must show that the witness may be put in danger or at risk if the witness’ identity is disclosed to the accused and his defence team at the pre-trial stage, despite the obligations of the accused and his counsel not to disclose it to the public.

The prosecution must provide:

<sup>36</sup> See, e.g., *Bagosora*, Decision on Kabiligi Motion for Protection of Witnesses, 1 Sept. 2003, ¶ 2.

<sup>37</sup> *Haradinaj et al.*, Decision on Second Haradinaj Motion to Life Redactions of Protected Witness Statements, 22 Nov. 2006, ¶ 2.

<sup>38</sup> *Brđanin*, Decision on Motion by Prosecution for Protected Measures, 3 July 2000, ¶ 30.

<sup>39</sup> *Brđanin*, First Decision on Motion by Prosecution for Protected Measures, 21 July 2000, ¶ 26; Second Decision on Motion by Prosecution for Protected Measures, 27 Oct. 2000, ¶ 19; Third Decision on Motion by Prosecution for Protected Measures, 8 Nov. 2000, ¶¶ 13 and 16); see also Radovan Karadžić, Case No. IT-95-5, Decision on Protective Measures for Witnesses, 30 Oct. 2008, ¶ 32.

‘[S]pecific evidence of such a risk relating to particular witnesses’ rather than an indeterminate risk relating to witnesses in general. The trial chamber must be satisfied that the prosecution’s request is made in order to protect individual victims and witnesses in the particular trial, rather than generally to encourage potential witnesses to come forward and testify, thus making it easier to bring prosecutions against other persons in the future.<sup>40</sup>

The risk to witnesses testifying before the tribunal is assessed according to the specific circumstances of a particular witness.<sup>41</sup>

Objective grounds justifying the subjective fear of a witness can be demonstrated by the submission to the trial chamber of a document setting out the personal circumstances of the witness, including:

- whether the witness still resides in the area where the alleged events occurred;
- any family or business connections;
- any need to return to the area;
- ethnicity; and
- any specific threats that have been made to the witness or the witness’ family.<sup>42</sup>

#### 14.3.2.2.3. “REASONABLE TIME BEFORE TRIAL”

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What constitutes a “reasonable time before trial” will depend on the circumstances of each witness for which protection has been granted under Rule 69. Witnesses who directly implicate the accused are more important to the accused than those who prove the underlying offences.<sup>43</sup>

This issue has been decided differently by various trial chambers. It is largely discretionary and depends on the circumstances of each case. In *Šešelj*, the ICTY Appeals Chamber held that:

The purpose of Rule 69(C) is to allow a Trial Chamber to grant those protective measures that are necessary to protect the integrity of its victims and witnesses, subject to the caveat that such measures are consistent with the right of the accused to have adequate time for the preparation of his defence. There is no rule that the rights of the defence to have adequate time for preparation mandate that delayed disclosure be granted only with reference to the beginning of the trial. The matter rather falls under the discretion of the Trial Chamber.<sup>44</sup>

<sup>40</sup> *Karadžić*, Decision on Protective Measures for Witnesses, ¶ 32.

<sup>41</sup> *Brđanin*, Second Decision on Motion by Prosecution for Protected Measures, ¶ 21.

<sup>42</sup> *Lukić et al.*, Order on Milan Lukić’s Request for Protective Measures, p. 4.

<sup>43</sup> *Brđanin*, Decision on Motion by Prosecution for Protective Measures, July 3, 2000, ¶ 34.

<sup>44</sup> *Šešelj*, Decision on Vojislav Šešelj’s Appeal Against the Trial Chamber’s Oral Decision of 7 Nov. 2007, 24 Jan. 2008, ¶ 15.

*The term “adequate” must be assessed in light of the rights of the accused and determined on a case-by-case basis.*

The term “adequate” must be assessed in light of the rights of the accused and determined on a case-by-case basis.<sup>45</sup>

In some cases, the chamber requires full disclosure before a trial,<sup>46</sup> or a period before the trial session during which the witness in question is to testify.<sup>47</sup> In other cases, disclosure is ordered on a rolling basis 35, 30 or 21 days before a

witness testifies.<sup>48</sup>

#### 14.3.2.2.4. NON-DISCLOSURE TO THE PUBLIC

When a witness’ identity is not disclosed to the accused, it is also not disclosed to the public. However, where the witness’ identity is known to the accused, that witness can still have their identity protected from the public in the pre-trial phase. Some examples of orders made in this regard include:

- Prohibiting the defence from sharing confidential documents provided by the prosecutor with the media;
- Prohibiting the defence from disclosing to the public information about the witnesses concerning their identity or location or any confidential evidence;
- If such disclosures are necessary for the preparation of the defence case, it must inform the recipient of the materials that they are forbidden to copy, reproduce or publicise the information and requiring the recipient to return the information to the defence;
- Requiring the defence to keep a log of the name, address, and function of any person or entity receiving confidential information and the date of disclosure;
- If a member of the defence team withdraws from the case, that person must return any confidential materials in his or her possession to the lead defence counsel; and
- The defence must return all confidential information in its possession to the Registry of the tribunal upon completion of the case.<sup>49</sup>

#### 14.3.2.3. PROTECTIONS DURING TRIAL

At trial, parties—both the prosecution and defence—can apply for protective measures under Rule 75 or 79 of the RPE (the Rules are the same for both the ICTY and ICTR).<sup>50</sup>

<sup>45</sup> *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber’s Decision and Scheduling Order of December 5, 2001, 18 July 2003, ¶¶ 13, 15.

<sup>46</sup> See, e.g., *Simba*, Decision on Prosecution Request for Protection of Witnesses, 4 March 2004.

<sup>47</sup> See, e.g., *Ndindiliyimana et al.* Case No. ICTR-00-56, Decision on Bizimungu’s Motion for Reconsideration of the Chamber’s 19 March 2004 Decision on Disclosure of Prosecution Witnesses, Aug. 29, 2005, ¶ 11.

<sup>48</sup> *Bagosora et al.*, Decision and Scheduling Order on the Prosecution Motion for Harmonization and Modification of Protective Measures for Witnesses, Dec. 5, 2001, ¶ 22.

<sup>49</sup> See, e.g., *Enver Hadžihasanović et al.*, Case No. IT-01-47, Order on Protective Measures, 1 Feb. 2002.

<sup>50</sup> ICTY and ICTR RPE, Rule 75.

*The trial chamber may order protective measures at trial on its own initiative, or at the request of a party.*

Rule 75 provides that the trial chamber may order protective measures at trial on its own initiative, or at the request of a party. This means that the chamber is not obliged to grant protective measures to witnesses and victims.

Rule 79 of both the ICTY and ICTR RPE provides that the trial chamber can order closed sessions for the reasons of:

- Public order or morality;
- Safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
- The protection of the interests of justice.

Key considerations with regards to protections during trial include:

- Some pre-trial protective measures may continue to apply during the trial stage, depending on the original order.
- The Victims and Witnesses Section must ensure that the witness has been informed before giving evidence that his or her testimony or identity may be disclosed at a later date in another case.<sup>51</sup>
- Chambers must control the manner of questioning witnesses to ensure that witnesses are not harassed or intimidated.<sup>52</sup>

*The Victims and Witnesses Section must ensure that the witness has been informed that his or her testimony or identity may be disclosed at a later date in another case before giving evidence. Chambers must control the manner of questioning witnesses to ensure that witnesses are not harassed or intimidated.*

Protective measures applied by the judges during trial include:

- measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness, such as:
  - expunging names and identifying information from the tribunal's public records;
  - non-disclosure to the public of any records identifying the victim or witness;
  - testifying through image- or voice- altering devices or closed circuit television; and
  - assignment of a pseudonym;
- closed sessions, in accordance with Rule 79; and
- appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

Once protective measures have been ordered with respect to a victim or witness in any proceeding before the ICTY, those measures continue to have effect *mutatis mutandis* in any other proceeding before the ICTY or any other jurisdiction, unless and until they are rescinded, varied, or augmented

<sup>51</sup> ICTY RPE, Rule 75(C).

<sup>52</sup> *Ibid.*, Rule 75(D).

in accordance with the RPE.<sup>53</sup> Protective measures cannot prevent the prosecutor from discharging his or her disclosure obligations in later proceedings, as long as the prosecutor notifies the relevant defence team of the nature of the protective measures ordered in the original proceedings.<sup>54</sup>

Witness protection measures may be granted to a group of witnesses en masse. For example, in *Krnojelac*, the trial chamber issued an order allowing twenty-six witnesses to testify using pseudonyms, facial distortion and utilizing a protective screen, which shielded the witness from the public.<sup>55</sup> At other times, the judges consider granting protective measures for witnesses individually before each is called to testify.<sup>56</sup>

Hearings that deal with protective measures are usually done *in camera* since the subject matter of the applications usually involves witnesses' particular circumstances and sensitive information.

#### 14.3.2.3.1. TEST FOR GRANTING PROTECTIVE MEASURES DURING TRIAL

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The chamber will evaluate granting protective measures on a case-by-case basis, according to the particular circumstances of each witness.<sup>57</sup>

Protective measures keeping the identity of the witnesses anonymous from the public are routinely granted. However, at the ICTY, a trial chamber has granted anonymity from the accused in only one case.<sup>58</sup>

In requesting protective measures keeping the identity of the witness from the public, the moving party must show:

- That the witness has a legitimate fear of a security threat or danger;
- The security threat or danger has been identified;
- The security threat or danger requires protective measures; and
- The effect of the protective measures on the public nature of proceedings would be justified in the circumstances.<sup>59</sup>

#### 14.3.2.3.2. RIGHTS OF THE ACCUSED

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When considering the appropriate protective measures to grant victims and witnesses, the chambers must ensure that the measures are consistent with the rights of the accused. In practice,

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<sup>53</sup> *Ibid.*, Rule 75(F).

<sup>54</sup> *Ibid.*

<sup>55</sup> Milorad Krnojelac, Case No. IT-97-25, Order on Protective Measures for Witnesses at Trial, 26 Oct. 2000.

<sup>56</sup> See *Kordić*, Case No. IT-95-14/2, Transcript, 20 Jan. 2000.

<sup>57</sup> Anto Furundžija, Case No. IT-95-17/1, Decision on Prosecutor's Motion Requesting Protective Measures for Witnesses "A" and "D" at trial, 11 June 1998, ¶ 8.

<sup>58</sup> *Tadić*, Decision on the Prosecution's motion requesting protective measures for victims and witnesses; see also Tihomir Blaškić, Case No. IT-95-14-T, Decision on the application of the prosecutor dated Oct. 17, 1996 requesting protective measures for victims and witnesses, 5 Nov. 1996.

<sup>59</sup> See, e.g., Slobodan Milošević, Case No. IT-02-54, Decision granting protective measures for individual witnesses, Feb. 19, 2002; *Krnojelac*, Order on Protective Measures for Witnesses at Trial, 26 Oct. 2000.

*When considering the appropriate protective measures to grant victims and witnesses, the chambers must ensure that the measures are consistent with the rights of the accused.*

the chambers engage in a delicate process of balancing these sometimes-competing interests and “in principle the rights of the defence shall take precedence, but the protection of the witnesses will at times, also claim its right”.<sup>60</sup>

When the interests are irreconcilable, the chamber must ensure that the rights of the accused are protected. If the court does not grant the requested protective measures, the party requesting the measures can decide to not call the particular witness to testify.

#### 14.3.2.3.3. TESTIMONY IN CLOSED SESSION

A trial chamber will normally only grant requests to hear testimony in closed session after it has had the opportunity to ask questions to the witness about the nature of his security concerns.<sup>61</sup>

*If the court does not grant the requested protective measures, the party requesting the measures can decide to not call the particular witness to testify.*

Sometimes, the chambers will go into private session only for questions on a particular subject that may identify the witness, with the rest of testimony being given in open session. Requests for all testimony to be given in closed session will only be granted if it is impracticable to separate the testimony into closed sessions, when the identity of the witness would be revealed, and public sessions, when matters other than the witness’ identity are being discussed. However, the contents of witness testimony may be such that the witness’ identity is intertwined with the substantive matters. If some parts of the witness’ testimony that disclose the witness’ identity are so intertwined with substantive parts, separation between public and closed hearings may be impracticable.<sup>62</sup>

The trial chamber is required to publically state its reasons for ordering the private session.

#### 14.3.2.3.4. VARIATION OF WITNESS PROTECTIVE MEASURES

*It is possible to add to or remove protective measures once they have been granted by the court.*

It is possible to add to or remove protective measures once they have been granted by the court.

A party seeking to vary protective measures granted to a witness should present supporting evidence to justify the variation.

Protective measures can be lifted in a number of circumstances, such as:

<sup>60</sup> *Blaškić*, Decision on the Application of the Prosecutor dated 17 Oct. 1996 Requesting Protective Measures for Victims and Witnesses, ¶ 39.

<sup>61</sup> *Bagosora et al.*, Decision on Requests to Hear Testimony in Closed Session, 18 Oct. 2006.

<sup>62</sup> *Ibid.*, Decision on Motion to Unseal Testimony of Witness RAS-1, 24 May 2006.

- When there is no longer a need for protective measures in light of the time elapsed since the witness' testimony, the willingness of the witness to lift the measures, and the need to use the protected information in another case involving contempt for disclosure of public information;<sup>63</sup> or
- Where the defence demonstrates that its right to adequately prepare for a defence by conducting efficient investigations is infringed by continued non-disclosure of the identities of prosecution witnesses.<sup>64</sup>

#### 14.3.2.4. DISCLOSURE OF CONFIDENTIAL INFORMATION IN OTHER JURISDICTIONS

The interests of justice may require that the chambers offer access to confidential materials to courts and parties in other jurisdictions who are dealing with the same subject matter where such access is necessary to the proceedings pending within the other jurisdictions.

Confidential *inter partes* materials may be disclosed to a party to a case in another jurisdiction provided that the applicant demonstrates that it is likely or there is a good chance it would materially assist its case. This standard is met by showing that there is a factual nexus between the two cases.<sup>65</sup>

Disclosure of closed session transcripts to the defence in extradition proceedings, for example from the UK to Rwanda, would be authorised where the testimony was given by a person who is the subject of the extradition proceedings in question, subject to protective measures where the request specifically identifies witnesses common to both cases.<sup>66</sup>

The ICTY authorised disclosure of testimony to the Court of BiH to enable it to disclose those testimonies to the parties in that court in accordance with protective measures in a case connected to the ICTY case.<sup>67</sup>

Disclosure has also been made to prosecutors from other states, such as Denmark and the Netherlands.<sup>68</sup>

<sup>63</sup> *Blaškić*, Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v. Šešelj and Margetić Case, 24 Jan. 2006.

<sup>64</sup> *Haradinaj et al.*, Decision on Second Haradinaj Motion to Life Redactions of Protected Witness Statements, Nov. 22, 2006, ¶ 16.

<sup>65</sup> Mikaeli Muhimana, Case No. ICTR-95-1, Decision on Prosecution's Urgent Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses, 13 Aug. 2008, ¶ 7.

<sup>66</sup> *Simba*, Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses before the Tribunal, 9 April 2008.

<sup>67</sup> Vidoje Blagojević et al., Case No. IT-02-60, Decision on Request of the Court of BiH for Variation of Protective Measures Pursuant to Rule 75(H), 13 Dec. 2007.

<sup>68</sup> *Nyiramasuhuko et al.*, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA, 1 Nov. 2006; *Muhimana*, Decision on Prosecution's Urgent Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses.

When such disclosure is ordered by the chamber that originally granted the protective measures, the party obtaining access is ordered to abide by similar protective measures and can be ordered to comply with additional measures.<sup>69</sup>

#### 14.3.2.5. TEMPORARY OR PERMANENT RELOCATION

At the ICTY and ICTR, certain witnesses and victims, as well as their families, have been temporarily or permanently relocated to third countries. The assessment as to whether a witness qualifies for such relocation is done on a case-by-case basis and usually will only apply to the most vulnerable witnesses and those who are found to face the most serious security risks.

*The assessment as to whether a witness qualifies for such relocation is done on a case-by-case basis and usually will only apply to the most vulnerable witnesses and those who are found to face the most serious security risks.*

Sometimes the relocation itself can provide the necessary protection, with the third country providing a range of services to assist in the resettlement of the relocated witness in the new country. However, in the case of the most threatened witnesses, certain third countries have provided for the change of identity for the witnesses and their families as well as additional on-going measures. At the ICTY and ICTR, relocations have been within the exclusive purview of the registrar, and the respective chambers are not involved in either arranging or monitoring such relocations.<sup>70</sup>

Witness relocation is expensive and may be stressful for the witness and their family, as it requires them to make a very difficult transition. Other, less intensive, witness protection measures should therefore be considered as a first option when evaluating each witness' security plan.

#### 14.3.2.6. WITNESS SUPPORT

The experience of separate victim and witness units at the ICTY, ICTR, SCSL and the ICC demonstrate that an important aspect of effective and fair trials is proper witness support, including logistical assistance and emotional and psychological support during the time of testimony. Support is particularly important for vulnerable witnesses, such as victims of sexual violence and children.

The victim and witness units at, for example, the ICTY and ICTR, have developed a number of mechanisms to provide support to witnesses and their families, particularly for those witnesses who are also victims.

Supporting witnesses also means making sure they are informed about the process and the protective measures they may be granted. Thus, it is important to ensure that:

- When considering witness safety and security, the witness must always be fully informed and consulted. Witnesses must be treated with respect and their needs always considered.

<sup>69</sup> See, e.g., *Hadžihasanović et al.*

<sup>70</sup> The SCSL has also used relocation inside and outside Sierra Leone as a protective measure.

- The witness is not given unrealistic promises, and is consulted on which witness protective measures are best suited to each individual.
- Witnesses should be made aware of the limitations of protective measures and steps for how the witness can protect himself should be reviewed.

### 14.3.3. ICC

#### *Notes to trainers:*

- This section will deal with the protective measures provided to witnesses before the ICC. In a separate section, 14.5, the rules applicable to victim participation will be considered.
- The types of protective measures that are available before the ICC are similar to those applied before the ICTY and ICTR. The manner in which applications for protective measures are made before the ICC should be considered by participants.
- In addition, the special measures for the protection for victims of sexual violence are considered in this section.”

#### 14.3.3.1. INTRODUCTION

According to the Rome Statute, the ICC bears full responsibility for ensuring that victims and witnesses are not placed at undue risk because of their participation in the proceedings.<sup>71</sup> The entire court has a duty to protect victims and witnesses.

The ICC’s Victims and Witnesses Unit (“VWU”) is responsible for specific aspects of witness protection. The prosecution has a more general mandate in relation to protection matters under Articles 54(3)(f) and 68(1) of the ICC Statute. This includes the responsibility to take protective measures during the investigation and prosecution stages, although this does not extend to the preventive relocation of witnesses. Although the judges can take the initiative to raise witness protection issues, ultimately it is the party calling the witness that is responsible for requesting witness protection measures.

The ICC mechanisms for the protection of victims and witness are comprehensive. The ICC may order protective measures upon the application of the prosecution, defence or the victim/witness, after having consulted with the VWU.

The Registry is mandated to provide protective measures and security arrangements for participating victims and witnesses.<sup>72</sup> Thus, the creation and maintenance of a witness protection programme is the responsibility of the Registry. This covers both prosecution and defence witnesses,

<sup>71</sup> Rome Statute, Art. 68(1).

<sup>72</sup> Rome Statute, Art. 43(6).

as well as “accompanying support persons” and others who may risk harm or death because of a witness’ testimony or involvement with the court.<sup>73</sup>

Many of the pre-trial and in-court protective measures are similar to the practice at the ICTY, including non-disclosure of witnesses’ identities to the accused and to the public. The major differences in the ICC approach to victim and witness protection are discussed below.

#### 14.3.3.2. APPLICATIONS FOR PROTECTION

Pursuant to Article 64 of the ICC Statute and with respect to Rules 87 and 88 of the RPE, the chamber is responsible for ensuring that appropriate steps are undertaken to protect victims and witnesses, and particularly those who have suffered trauma or who are in a vulnerable situation.

Under Rules 87 and 99 of the RPE, the chamber will determine the merits of individual applications for protection, taking into account, inter alia, whether:

- The testimony of a vulnerable witness is to be treated as confidential and therefore the parties and participants would have limited access to this information;
- Evidence, in appropriate circumstances, can be given out of the direct sight of the accused or the public;
- A witness should be able to control his or her testimony, and, if so, to what extent; or
- Breaks in the evidence should be allowed as and when requested.<sup>74</sup>

One ICC trial chamber has noted that although “the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial”.<sup>75</sup>

#### 14.3.3.3. PROTECTION OF WITNESSES AND PARTICIPATING VICTIMS

Rules 16 and 17 of the ICC RPE provide that the VWU will provide support, assistance, and protection to all victims “who appear before the court”. This includes victim participants and extends to all stages of the proceedings and, as may be necessary and appropriate, after proceedings have concluded.<sup>76</sup>

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<sup>73</sup> International Criminal Court, Regulations of the Registry, ICC-BD/03-01-06, 6 March 2006, Regulation No. 96(1).

<sup>74</sup> Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on various issues related to witness’ testimony during trial, 28 Jan. 2008, ¶ 35.

<sup>75</sup> *Lubanga*, Case No. ICC-01/04-01/06-1119, Decision on victims’ participation, 18 Jan. 2008, ¶¶ 130 – 131.

<sup>76</sup> International Criminal Court Rules of Procedure and Evidence (“ICC RPE”), Rules 16 – 17.

*Participating victims who do not appear before the court as witnesses may also need protective measures.*

Participating victims who do not appear before the court as witnesses may also need protective measures. In *Lubanga*, the trial chamber acknowledged that victims may face risks that begin before the trial proceedings begin. Such risks may begin as early as the first steps taken by victims to be involved in the proceedings. The trial chamber in that case held that the statutory obligation of the Registry under Article 43(6) begins when a completed application for victim participation reaches the court.<sup>77</sup>

Protective measures that apply to participating victims extend to the victims who are applying to participate. Indeed, one chamber distinguished between non-disclosure of the identity of victim applicants during the two different phases:

- The application for participation procedure, in accordance with Article 68(1) of the Rome Statute and Rule 89(1); and
- Once they have been granted the status of victim in the case and the manner in which they will participate has been defined, in accordance with Rules 87 and 99 of the RPE.

The court held that not disclosing the identity of the applicants to the defence “does not constitute an infringement of the presumption of innocence, but constitutes a measure allowing the applicants to make an application for participation whilst protecting their security and well-being”.<sup>78</sup>

A pre-trial chamber has held that when required for the safety of an applicant, the pre-trial chamber can order the Registry to provide the parties with a copy of the application that has identifying information redacted.<sup>79</sup>

Moreover, in order to minimise risks, victim applicants should only be contacted through their legal representatives, the Victims Participation and Reparation Section, if they are not yet represented, or the VWU, if necessary.

*Moreover, in order to minimise risks, victim applicants should only be contacted through their legal representatives, the Victims Participation and Reparation Section, if they are not yet represented, or the VWU.*

Another way that the court has attempted to minimise the risk inherent to victims participating in the proceedings is to not disclose the victims’ identities to the public or media.<sup>80</sup>

<sup>77</sup> Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Trial Chamber I, 18 Jan. 2008, ¶ 137.

<sup>78</sup> Situation in the Democratic Republic of the Congo (DRC Situation), Case No. ICC-10/04, Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation, 6 Nov. 2006, ¶ 4.

<sup>79</sup> *Lubanga Dyilo*, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, 29 Sept. 2006, p. 3.

<sup>80</sup> Germain Katanga et al., Case No. ICC-01-047-01/07-474, Pre-Trial Chamber I, 13 May 2008, ¶¶ 20 – 22.

#### 14.3.3.4. TYPES OF PROTECTIVE MEASURES

At the ICC, as at the ICTY and ICTR, there are both pre-trial protective measures and in-court protective measures. Protective measures at the ICC include many of the same measures applied at the ICTY and ICTR, but in some respects could extend further than ICTY protective measures.

Examples of protective measures applied by the ICC include:

- Filing proceedings under seal;<sup>81</sup>
- Disclosing redacted filings and documents (after expunging names and identifying details from the record);
- Ordering specific instructions for accessing and handling information;
- Participants being prohibited from disclosing identifying information;
- Non-disclosure or delayed disclosure of witness identities and other information identifying the witness to the defendant;
- Testimony via electronic means (such as video-link);
- Testimony from behind a screen;
- Testimony using voice/image distortion;
- The use of pseudonyms throughout the proceedings;
- Proceedings held in camera (private sessions);
- Reading all or part of a witness' statement in private session;<sup>82</sup>
- Evacuating victims from an area where they may be in danger;<sup>83</sup> and
- Permitting a legal representative, psychologist or family member to attend court during the testimony of the victim or witness.

During trial, the court must also control the manner of questioning a witness or victim so as to avoid any harassment or intimidation.<sup>84</sup>

Protective measures, especially the use of pseudonyms and image or voice distortion, are widely used at the ICC. The judges will also go into a private session if particular elements of a witness' testimony will identify the witness or another protected witness or victim.

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<sup>81</sup> ICC RPE, Rules 87(2)(e), 88(4); DRC Situation, Case No. (ICC-01/04), Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ¶¶ 21 – 23.

<sup>82</sup> This is a "special measure" as provided under ICC RPE, Rule 88; *Lubanga*, Case No. ICC-01/04-01/06, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 Jan. 2009, ¶ 17.

<sup>83</sup> See, e.g., Report on programme performance of the International Criminal Court for the year 2007, ICC-ASP/7/8/Add.1, ¶¶ 9 – 10.

<sup>84</sup> ICC RPE, Rule 88(5).

## 14.3.3.5. TEST FOR APPLYING PROTECTIVE MEASURES

At the ICC, requests for protective measures must be based on objective grounds, such as actual threats. Personal beliefs about threats or subjective fears may be considered by the court, but they are not sufficient on their own as a basis for protective measures.

For example, in the *Lubanga* trial, the prosecution requested protective measures for one of its witnesses, a judge from the Democratic Republic of Congo. The judge asked to be given protective measures after he arrived in The Hague to testify. The prosecution's arguments in favour of protective measures were based on the witness' subjective fears of being placed in danger because his testimony would include sensitive information about the government and president of the Democratic Republic of Congo. The protective measures were denied, because the witness had previously agreed to testify in the open and the court felt there were no objective reasons for applying for the protective measures. In denying the application, the presiding judge said:

[T]he principle of open justice is of high importance and requests for anonymity should not be lightly granted. This witness is in a very different category from the previous witnesses in this trial who have enjoyed a high level of protection, and it is important that these applications are not routinely made in the expectation that they will be routinely granted.<sup>85</sup>

The chamber in *Lubanga* emphasised that decisions involving the provision of protective measures are necessarily fact-specific and therefore no uniform model of decision-making can apply in all cases.<sup>86</sup>

In determining appropriate protective measures, the VWU "assesses the level of any threat, the likelihood of harm and the overall risk to the particular applicant; and then it considers each application on its individual merits, on a fact-sensitive rather than a mechanical or formulistic basis".<sup>87</sup> The court considered that the test of a "high likelihood of harm", applied by the VWU, "should be interpreted in a sufficiently flexible and purposive manner to ensure proper protection for any witness who, following careful investigation, faces an established danger of harm or death".<sup>88</sup>

If the VWU has applied an incorrect approach or the wrong criteria in determining protective measures, the chamber can strike them down. The chamber can also strike down conclusions of the VWU if, after assessing the facts, they are "plainly wrong".<sup>89</sup>

<sup>85</sup> *Lubanga*, Case No. ICC-01/04-01/06, Transcript, 24 March 2009, p. 63.

<sup>86</sup> *Lubanga*, Case No. ICC-01/04-01/06, Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, 24 April 2008, ¶ 77.

<sup>87</sup> *Ibid.* at ¶ 78.

<sup>88</sup> *Ibid.*, at ¶ 79.

<sup>89</sup> *Lubanga*, Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, ¶ 82.

### 14.3.3.6. THE ICC PROTECTION PROGRAM

The VWU has established the ICC protection program (ICCPP). Participation in this program must be assessed based on a referral from the prosecution, defence or legal representatives of victims.<sup>90</sup> After a referral is received, the VWU will conduct a lengthy assessment, taking two or three months.<sup>91</sup> The VWU will then submit its recommendation about participation in the ICCPP to the Registrar, who will make the final decision about whether a person can be admitted to the system.<sup>92</sup>

*During the ICCPP assessment period, interim protection measures are available, including temporary relocation. The VWU requires that there is a “high likelihood that the witness will be harmed or killed unless action is taken” in order for a person to be admitted to the ICCPP”.*

During the ICCPP assessment period, interim protection measures are available, including temporary relocation.<sup>93</sup>

Specific criteria for participation in and information about the ICCPP are confidential.<sup>94</sup>

The VWU requires that there is a “high likelihood that the witness will be harmed or killed unless action is taken” in order for a person to be

admitted to the ICCPP”.<sup>95</sup> The risk must arise out of interaction with the court.<sup>96</sup>

Participation in the ICCPP generally involves relocation, usually inside the country of the participant’s residence, but in some cases abroad. Protection programs such as the ICCPP are complex and expensive to administer, and may be traumatic to witnesses and their families; they should therefore be considered a measure of last resort, and only when there is a real and substantial risk to the witness that requires entry into a protection program.<sup>97</sup>

As life in a protection program may be extremely stressful and traumatic for a witness and their family, the suitability of witnesses to enter into a protection program, and in particular, their ability to adapt to the realities of participating in such a program and to re-integrate into a new community, should also be assessed.<sup>98</sup>

<sup>90</sup> Regulations of the Registry, Regs. 80, 96.

<sup>91</sup> *Katanga et al.*, Case No. ICC-01/04-01/07, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Art. 67(2) of the Statute and Rule 77 of the Rules (Public Redacted Version), 25 April 2008, ¶ 61 (“Decision on Evidentiary Scope”).

<sup>92</sup> Regulations of the Registry, Reg. 96(4).

<sup>93</sup> Victims and Witness Unit (VWS) Considerations on Preventive Relocation, ¶ 16.

<sup>94</sup> Regulations of the Registry, Reg. 93(2); Under the Registry’s regulations, the registrar may consider “the involvement of the person before the Court”, “whether the person himself or herself, or his or her close relatives are endangered because of their involvement with the Court”, and “whether the person agrees to enter the protection programme”. Regulations of the Registry, Reg. 96(3).

<sup>95</sup> *Lubanga*, Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, ¶¶ 38, 43, annex 2 to Decision issuing a confidential and a public redacted version of “Decision on disclosure issues, responsibilities for protective measures and other procedural matters”, May 8, 2008 (“Decision on Disclosure Issues”).

<sup>96</sup> VWS Considerations on Preventive Relocation, ¶ 18.

<sup>97</sup> Victim/Witness Best Practices Guide.

<sup>98</sup> *Ibid.*

It is important that participants enter into a protection program voluntarily, and with full knowledge of what a life in such a protection process entails and requires.<sup>99</sup> The participants in the ICCPP must sign a document with the VWU agreeing to keep details of the program confidential, not compromise the program's security measures, and to avoid communication with family and friends except through VWU staff. Participants receive physical protection and material and psychosocial assistance, with the aim of eventually becoming self-sufficient. The participants are in frequent contact with VWU protection and support officers.<sup>100</sup>

*It is important that participants enter into a protection program voluntarily, and with full knowledge of what a life in such a protection process entails and requires.*

#### 14.3.3.7. SPECIAL MEASURES FOR VICTIMS OF SEXUAL VIOLENCE

At the ICC, the court has noted that in applying witness protection measures, it must also consider the needs of children, elderly persons, persons with disabilities and victims of sexual or gender violence, as provided by Rule 86 of the RPE.

Special measures may be ordered for victims of sexual or gender-based violence under Rule 88.

*Special measures may be ordered for victims of sexual or gender-based violence under Rule 88.*

Protective and special measures can provide means to protect such victims' rights to safety, physical and psychological wellbeing, dignity and private life in accordance with Article 68(1) of the Rome Statute.<sup>101</sup>

For example, the ICC RPE instruct the judges to "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".<sup>102</sup>

#### 14.3.3.8. PROTECTION OF INTERMEDIARIES

**Note:** This is an incredibly detailed and complicated area, under development at the time of writing, that will only be dealt with briefly here. Participants who are interested in this issue should be encouraged to refer to ICC jurisprudence and policies, including some of the documents suggested in the Further Reading section, section 14.10 below.

Intermediaries may include local non-governmental organisations (NGOs) or grassroots organisations, persons, or others who in some way link victims and witnesses to their legal representatives or the court.

<sup>99</sup> *Ibid.*

<sup>100</sup> HUMAN RIGHTS WATCH, COURTING HISTORY, Report, Human Rights Watch interview with ICC staff, May 1, 2007, available at [http://www.hrw.org/es/node/62135/section/10#\\_ftnref521](http://www.hrw.org/es/node/62135/section/10#_ftnref521).

<sup>101</sup> See *Lubanga*, Decision on victims' participation, ¶¶ 127 - 8.

<sup>102</sup> ICC RPE, Rule 88(5).

The OTP, Registry and Trust Fund for Victims rely on intermediaries extensively. There is no ICC-wide policy on how to work with the intermediaries, who can help each of these departments fulfil their specific mandates.

The OTP relies on intermediaries to help with investigations, including identifying and contacting possible witnesses and gathering evidence. The OTP has indicated that due to its lack of a police force, intermediaries are crucial to their investigations.<sup>103</sup>

Intermediaries also help the Registry's Victims Participation and Reparations Section (VPRS) by disseminating information to victims concerning their rights to participate in proceedings, applications to participate, and helping facilitate contact between the court and the victim participants and applicants. They can also help Legal Representatives for victims share information with the victims, and vice versa.

The Rome Statute and other legal texts of the ICC do not mention intermediaries, so the court's statutory obligations in this regard are unclear. However, the appeals chamber has held that the court has an obligation to protect persons "at risk on account of the activities of the Court"<sup>104</sup> under Rule 81(4), and that this rule must be read broadly.<sup>105</sup>

The trial chamber in the *Lubanga* case explicitly extended this protection to intermediaries, holding that "any individual still living or working in the DRC who assists during interviews, or who acts as an intermediary or a source, may well be affected if his or her cooperation with, or assistance to, the Court is revealed, and such people would thus be at risk on account of the activities of the Court".<sup>106</sup>

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<sup>103</sup> *Lubanga*, Case No. ICC-01/04-01/06-2310-Red, Prosecution's Submission in Response to Trial Chamber's Oral Request of 10 Feb. 2010, 25 Feb. 2010, ¶¶ 12 – 13.

<sup>104</sup> Germain Katanga et al., Case No. ICC-01/04-01/07-475, Pre-Trial Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ¶ 1.

<sup>105</sup> *Ibid.*

<sup>106</sup> Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information of 5 Dec. 2008", April 9, 2009, ICC-01/04-01/06-1814-Conf as referred to in 'Redacted Decision on the application to disclosure the identity of intermediary 142', 10 Dec. 2009, ICC-01/04-01/06-2190-Red.

## 14.4. VICTIM COMPENSATION, REPARATIONS AND RESTITUTION

## 14.4.1. OVERVIEW

While domestic systems have commonly allowed victims of crimes to obtain compensation from perpetrators through separate civil claims or as restitution as a criminal sanction, this is a somewhat new practice in international criminal law.

In 1985, the UN adopted the UN Victims Declaration<sup>107</sup> and twenty years later, in 2005, the General Assembly adopted basic principles and guidelines on reparations for victims of international crimes and human rights violations.<sup>108</sup> The UN Economic and Social Council,<sup>109</sup> the Council of Europe,<sup>110</sup> and the European Union<sup>111</sup> have also adopted guidelines on victim reparations.

Some of the international tribunals also offer various mechanisms for victims' compensation, reparations or restitution.

## 14.4.2. ICTY

At the ICTY and ICTR, prosecutors or judges may raise the issue of victim restitution.<sup>112</sup> A special hearing will be held to determine whether property or the proceeds of property obtained through the criminal activities of the accused should be given to victims. This extends to property or its proceeds in the hands of third parties unrelated to the crimes.<sup>113</sup> The trial chamber must determine the rightful owner of the property on a balance of probabilities. Based on this finding, it can order the restitution of the property or proceeds to the victim, or make any other appropriate order. If the chamber cannot determine the rightful owner of the property, it can notify the relevant national authorities and request them to make the determination.

*The trial chamber must determine the rightful owner of the property on a balance of probabilities. Based on this finding, it can order the restitution of the property or proceeds to the victim, or make any other appropriate order.*

<sup>107</sup> Declaration of Basic Principles for Victims of Crime and Abuse of Power, UNGA Res. 40/34 of, 29 Nov. 2005.

<sup>108</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

<sup>109</sup> Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime of 22 July 2005.

<sup>110</sup> European Convention on the Compensation of Victims of Violent Crimes of 24 Nov. 1983 (ETS 116), and Recommendation of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure of 28 June 2005 (R(85)11).

<sup>111</sup> Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA of 15 March 2001) and Council Framework Decision on combating trafficking in human beings (2002/629/JHA of 19 July 2002).

<sup>112</sup> ICTY and ICTR RPE, Rule 105.

<sup>113</sup> *Ibid.* at Rule 105(B).

The ICTY and ICTR also allow victims to claim compensation from relevant national courts. For these purposes, the Registrar will transmit the judgement to the national authorities, which will be binding as to the criminal responsibility of the convicted person for injury to the victims.<sup>114</sup>

The ICC, on the other hand, has an extensive system for victim reparations, discussed below.<sup>115</sup>

#### 14.4.3. ICC

##### *Notes to trainers:*

- The Statute and Rules of the ICC establish an elaborate system for victims to apply and obtain reparations and compensation. To date, however, there have been no cases in which victims have applied for such measures. In the section that follows, the main provisions applicable before the ICC have been included for information purposes.
- In addition, other instruments that provide for such compensation have been outlined at the end of this section.

*Article 75 of the Rome Statute gives the ICC the power order reparations to, or in respect of, victims. These reparations can include restitution, compensation and rehabilitation.*

Article 75 of the Rome Statute gives the ICC the power to order reparations to, or in respect of, victims. These reparations can include restitution, compensation and rehabilitation. The judges can establish principles and determine the scope and extent of any damage, loss or injury to victims.<sup>116</sup>

The process for obtaining reparations under Article 75 of the Rome Statute is generally started by victims themselves. Either “natural

persons” or eligible organisations can obtain such reparations.

Victims may apply for reparations at any time, although they are not required to do so. Judges can order reparations for victims whether the victim has applied or not. Victims apply using a standardised form and submitting it to the Victims Participation and Reparation Section.

*Reparations proceedings, separate from the criminal proceedings, take place after a guilty verdict is delivered.*

Reparations proceedings, separate from the criminal proceedings, take place after a guilty verdict is delivered. Before making an order regarding reparations, the judges may invite and must take account of submissions from the convicted person, victims, or other interested persons or interested

<sup>114</sup> ICTY and ICTR RPE, Rule 106.

<sup>115</sup> This system has been mirrored by the ECCC. However, a discussion of the ECCC is beyond the scope of these materials.

<sup>116</sup> ROBERT CRYER, et al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 490 (2010).

states.<sup>117</sup> At the request of victims or the convicted person, or of their own accord, judges can appoint experts to assist the court in determining the scope and extent of damage to the victims and to suggest various options for appropriate reparations. The victims and convicted persons, or their representatives, can make observations on the reports of the experts.<sup>118</sup> The decision of the judge concerning reparations is subject to appeal.<sup>119</sup>

Judges may order monetary compensation to be paid to the victim through the Trust Fund for Victims. Judges can order reparations to individual victims and/or collective reparations to a whole group or community. In the event a judge orders collective reparations, she can only order the reparation to be made through the Trust Fund for Victims and the reparation may then also be paid to an inter-governmental, international or national organization. The judges may also seek cooperation from Rome Statute State Parties, for example to seize property of a convicted person, when making determinations on this issue.<sup>120</sup>

The Trust Fund for Victims was established by the Assembly of States Parties in September 2002 as per Article 79 of the Rome Statute. The Trust Fund for Victims administers reparations ordered by the ICC and uses other resources to benefit victims. The ICC can order money and other property collected through fines or forfeiture to be transferred to the Trust Fund.<sup>121</sup> If an accused ordered to pay reparations is indigent, the court may use funds from the Trust Fund to pay the reparations.

#### 14.4.4. OTHER SOURCES OF INTERNATIONAL LAW

As noted above, the UN has also published principles and guidelines on the rights of victims to a remedy and reparations for gross violation of international human rights and humanitarian law.

The UN principles define victims as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law”.<sup>122</sup> In accordance with domestic law, and where appropriate, immediate family members or dependants of the direct victims and persons who have suffered harm in intervening to assist victims or prevent victimization can also be considered “victims”.<sup>123</sup>

Remedies include the victim’s right to the following as provided for under international law:

- Equal and effective access to justice;

<sup>117</sup> Rome Statute, Art. 75(3).

<sup>118</sup> ICC RPE, Rule 97.

<sup>119</sup> Rome Statute, Art. 82(4). Owners of property affected by orders of reparations can also appeal the decision.

<sup>120</sup> Rome Statute, Art. 79(4). The Pre-Appeals Chamber has requested states parties to freeze assets of persons subject to ICC arrest warrants. *See, e.g., Lubanga*, Case No. ICC-01/04-01/06, PT. Ch. I, 2 Oct. 2006, ¶¶ 130 – 41.

<sup>121</sup> Rome Statute, Art. 79(2); Art. 93(1).

<sup>122</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 8.

<sup>123</sup> *Ibid.*

- Adequate, effective and prompt reparation for harm suffered;
- Access to relevant information concerning violations and reparation mechanisms.<sup>124</sup>

Under the UN principles, reparations include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>125</sup>

The UN principles state that reparations should be proportional to the gravity of the violation and harm suffered.<sup>126</sup> Moreover, under the principles, statutes must enforce domestic judgements for reparations and endeavour to enforce valid foreign legal judgements for reparations.<sup>127</sup>

*The UN principles state that reparations should be proportional to the gravity of the violation and harm suffered.*

The principles further state that:

Restitution should, when possible, restore the victim to the original situation before the violation. Restitution can include: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.<sup>128</sup>

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.<sup>129</sup>

Rehabilitation should include medical and psychological care as well as legal and social services.<sup>130</sup>

Satisfaction should include, where applicable, any or all of the following:

- Effective measures aimed at the cessation of continuing violations;
- Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- Public apology, including acknowledgement of the facts and acceptance of responsibility;
- Judicial and administrative sanctions against persons liable for the violations;

<sup>124</sup> *Ibid.* at ¶ 11.

<sup>125</sup> *Ibid.* at ¶ 18.

<sup>126</sup> *Ibid.* at ¶ 15.

<sup>127</sup> *Ibid.* at ¶ 17.

<sup>128</sup> *Ibid.* at ¶ 19.

<sup>129</sup> *Ibid.* at ¶ 20.

<sup>130</sup> *Ibid.* at ¶ 21.

- Commemorations and tributes to the victims; and
- Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.<sup>131</sup>

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<sup>131</sup> *Ibid.* at ¶ 22.

## 14.5. VICTIM PARTICIPATION IN PROCEEDINGS

### 14.5.1. OVERVIEW

Victims who participate in proceedings may play a significant role in the proceedings. Victims fulfil an essential role as witnesses, and in some international tribunals and domestic systems, as a participant in the proceedings.

Before the ICC and ECCC, victims may be represented as independent parties in the proceedings. This section deals exclusively with the law and practice at the ICC. Key decisions on victim participation from the ECCC have been included in the Further Reading Section, section 14.10, below. A good exercise for trainers would be to have participants read and compare these judgements with the jurisprudence of the ICC, to understand the similarities and differences in how the two courts approach victim participation.

### 14.5.2. ICC

#### *Notes for trainers:*

- In the domestic jurisdictions in the region, victims are not permitted to participate in criminal proceedings in the same way as at the ICC. Trainers should thus be aware that participants will have limited knowledge of victim participation in the way that it occurs before the ICC. It is however important that the provisions and case law of the ICC are discussed so that participants are aware of the way in which proceedings are conducted before the ICC. Trainers may also use this as an opportunity to prompt discussion about the feasibility of victim participation in the region.

The key provisions on victim participation at the ICC, as outlined above, are Article 68(3) and 75. The procedure for applying for victim participation and the scope of such participation are discussed below. In addition, the relevant case law from the ICC is summarised.

#### 14.5.2.1. APPLYING TO BE A VICTIM PARTICIPANT

##### 14.5.2.1.1. IS THE APPLICANT A “VICTIM”?

In order to participate in the proceedings as a victim before the ICC, an applicant must show:

- He or she is a natural person or a representative of an eligible organisation;
- He or she suffered harm;
- The crime that caused this harm is in the jurisdiction of the court; and

- The harm is a result of the commission of the crime(s).<sup>132</sup>

Once an applicant has established that he meets these requirements, the court must then assess whether the victim's personal interests are affected and if so, whether the victim's participation would be appropriate.<sup>133</sup> The court must then ensure that the manner of participation is not prejudicial to or inconsistent with the rights of the accused, including the right to a fair and impartial trial.<sup>134</sup>

This is assessed differently at the situation phase and the case phase.<sup>135</sup> For the purposes of these materials, only the case phase will be discussed, as it is most relevant to trials in national jurisdictions where victims may participate.

The appeals chamber has held that participation under Article 68(3), although affording victims an opportunity to be heard, “does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber”.<sup>136</sup>

*Participation under Article 68(3), although affording victims an opportunity to be heard, “does not equate them to parties to the proceedings before a Chamber”.*

#### 14.5.2.1.2. IS THE VICTIM A “NATURAL PERSON” OR REPRESENTING AN ELIGIBLE ORGANISATION?

Victims may be “natural persons”, or may also be organizations or institutions that have suffered direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.<sup>137</sup>

Victims as “natural persons” will be the focus of these materials.

#### 14.5.2.1.3. DID THE VICTIM SUFFER HARM?

A participating victim must have suffered some kind of harm as a result of a crime within the jurisdiction of the court.

<sup>132</sup> ICC RPE, Rule 85.

<sup>133</sup> Rome Statute, Art. 68(3).

<sup>134</sup> *Lubanga*, Case No. ICC-01/04-01/06-1335, Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled “Decision on Victims' Participation”, 16 May 2008, ¶ 36.

<sup>135</sup> See Module 12 for a discussion of the difference between situations and cases at the ICC.

<sup>136</sup> *Lubanga*, Case No. ICC-01/04-01/06-925, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 Feb. 2007, 13 June 2007, ¶ 28.

<sup>137</sup> ICC RPE, Rule 85(b).

According to an ICC trial chamber, “only victims of the crimes charged may participate in the trial proceedings pursuant to Article 68(3)”.<sup>138</sup>

Victims may have suffered harm either directly or “indirectly”.

The following types of personal harm are considered within the scope of Rule 85(a):

- Material harm;
- Physical harm; and
- Psychological harm.<sup>139</sup>

*A participating victim must have suffered some kind of harm as a result of a crime within the jurisdiction of the court.*

Harm suffered may be both personal and collective in nature.<sup>140</sup>

For persons who are indirect victims, the harm suffered must be personal to the individual.<sup>141</sup>

Trial Chamber I in *Lubanga* held that “indirect victims” must establish that the harm suffered arises out of the loss, injury, or damage suffered by direct victims, as a result of the commission of the crimes charged.

“Indirect” victims can include those who suffered harm as a result of harm suffered by direct victims. This includes:

- parents or those with a close personal relationship to the direct victim;

<sup>138</sup> *Lubanga*, Case No. ICC-01/04-01/06-1813, Redacted version of “Decision on ‘indirect victims’”, 8 April 2009, ¶ 49-52. As such, the Chamber held that “indirect victims” are restricted to those whose harm is linked to the harm of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise, *id.*

<sup>139</sup> *Lubanga*, Case No. ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, 11 July 2008, ¶ 1. The Appeals Chamber has also held that an applicant who suffered emotional harm as the result of the loss of a family member requires proof of the identity of the family member and their relationship with the applicant; Joseph Kony et al., Case No. ICC-02/04-179, Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II, 23 Feb. 2009, ¶¶ 1, 36 and 38. The same criteria have been applied for trial proceedings; *Katanga et al.*, Case No. ICC-01/04-01/07-1491-Red, Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure, 23 Sept. 2009, ¶ 37.

<sup>140</sup> *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, ¶ 35.

<sup>141</sup> *Ibid.* at ¶¶ 1, 32. Pre-Trial Chamber I in the *Katanga* case also found that in order to be granted victim status, the applicant must show that he or she suffered harm either (i) as a result of the crimes which were committed during the joint FRPI/FNI attack on the village of Bogoro or (ii) in intervening to assist direct victims in the case at hand, or to prevent their victimisation as a result of the commission of the said crimes. See *Katanga et al.*, Case No. ICC-01/04-01/07-357, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 02 April 2008, p.8; *Katanga et al.*, Case No. ICC-01/04-01/07-579, Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’, 10 June 2008, ¶ 66.

- those who attempted to assist victims and were hurt while doing so; and
- victims of crimes directed at the general civilian population.<sup>142</sup>

However, it does not extend so far as to include, for example, persons who suffered harm due to the actions of other victims.<sup>143</sup>

*“Indirect” victims can include those who suffered harm as a result of harm suffered by direct victims.*

#### 14.5.2.1.4. DID THE HARM RESULT FROM THE CRIME?

According to ICC jurisprudence, in order for a victim to participate in pre-trial or trial proceedings in a particular case, “the harm alleged by a victim must be linked with the charges”.<sup>144</sup>

For a victim to participate in the pre-trial phase of a case, the pre-trial chamber must be satisfied that there are “reasonable grounds to believe” that the harm suffered by them is directly linked to the crimes included in the arrest warrant.<sup>145</sup>

*There only needs to be one instance of harm to meet this threshold. It can be shown by circumstantial or indirect proof.*

In order to establish this link, the victim must show that “the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least [seem] to be compatible and not clearly inconsistent”.<sup>146</sup>

There only needs to be one instance of harm to meet this threshold. It can be shown by circumstantial or indirect proof.<sup>147</sup>

<sup>142</sup> *Lubanga*, Case No. ICC-01/04-01/06, Redacted version of ‘Decision on “indirect victims”’, 8 April 2009, ¶¶ 50 – 51.

<sup>143</sup> *Lubanga*, Redacted version of ‘Decision on “indirect victims”’, ¶ 52.

<sup>144</sup> *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, ¶ 2; *Katanga et al.*, Case No. ICC-01/04-01/07-579, Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’, 10 June 2008, ¶¶ 66-67; Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-121, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 Sept. 2009, ¶¶ 12-13. The Appeals Chamber also confirmed that any modification of the legal characterisation of the facts by the Trial Chamber pursuant to regulation 55 of the Regulations of the Court must be limited to the facts and circumstances described in the charges and any amendments thereto; *Lubanga*, Case No. ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, 8 Dec. 2009.

<sup>145</sup> *DRC Situation*, Jan. 2006 Decision on Victims’ Participation, ¶ 98; *Lubanga*, Case No. ICC-01/04-01/06, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo (Public Redacted Version), 29 June 2006, p. 6.

<sup>146</sup> *Situation in Uganda*, ICC-02/04, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 Aug. 2007, ¶ 7.

<sup>147</sup> *Situation in Uganda*, ICC-02/04, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 Aug. 2007, ¶ 15; *DRC Situation*, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3,

#### 14.5.2.1.5. ARE THE PERSONAL INTERESTS OF THE VICTIM AFFECTED?

In addition to meeting the criteria of a “victim”, applicants must also have their “personal interests” affected by the trial, as set out in Article 68(3).<sup>148</sup>

If a victim has established that the harm they suffered is linked to the crimes charged, according to the Rule 85 test, then they have also shown that his or her personal interests are affected.<sup>149</sup>

In determining whether the personal interests of victims are affected by a proceeding, the chamber in each case assesses “whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the prosecutor”, by requiring a showing that the affected personal interests are connected to the charges in that particular proceeding.

Pre-Trial Chamber I, in the *Katanga et al.* and *Abu Garda* cases, considered that the personal interest of the victims may flow from:

- the desire to have a declaration of truth by a competent body (right to truth);
- their wish to have those who victimised them identified and prosecuted (right to justice); and
- the right to reparation.<sup>150</sup>

#### 14.5.2.2. WHEN CAN VICTIMS PARTICIPATE?

Victims can participate at various stages of the proceedings:

*Preliminary examination:* Victims may provide information on alleged crimes to the OTP and make representations to the OTP related to their personal interests.<sup>151</sup>

*Investigations:* Victims cannot generally participate in investigations: “Article 68(3) of the Statute correlates victims’ participation to ‘proceedings’, a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the

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VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version), 17 Jan. 2006, ¶ 82 (“DRC Jan. 2006 Decision on Victims’ Participation”).

<sup>148</sup> *DRC Situation*, Case No. ICC-01/04-101-Corr, Public Redacted Version Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 Jan. 2006, ¶ 62.

<sup>149</sup> Pre-Trial Chamber II, has stated that “there seems to be little doubt, at least in principle (and unless the Chamber decides otherwise in relation to a specific proceeding), that this requirement is met whenever a victim (whether a natural person, an organization or an institution pursuant to rule 85 of the Rules) applies for participation in proceedings following the issuance of a warrant or arrest or of a summons to appear for one or more individuals”. See Uganda Aug. 2007 Decision on Victims’ Participation, ¶ 9.

<sup>150</sup> *Abu Garda*, Case No. ICC-02/05-02/09-121 Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 Sept. 2009, ¶ 3; See also *Katanga et al.*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ¶¶ 31-44.

<sup>151</sup> International Criminal Court, Office of the Prosecutor, Policy Paper, 13; See Arts. 15 and 53(1)(c).

Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible".<sup>152</sup>

*Pre-trial and trial stages:* Direct and indirect victims who meet the criteria for participation set out above can participate in the pre-trial phase of a case.<sup>153</sup>

It is not clear whether victims granted the right to participate during the pre-trial stage are automatically granted the right to participate during the trial stage.

In the *Lubanga* case, Trial Chamber I decided that it was required to reassess applications for participation accepted by the Pre-Trial Chamber.<sup>154</sup> However, Trial Chamber II in the *Katanga et al.* case held that:

[I]n the interest of the proper administration of justice, victims authorised to participate in the proceedings at the pre-trial stage must, in principle, and subject to the considerations set forth below, automatically be authorised to participate in the proceedings at the trial stage, without the need for their applications to be registered and assessed a second time.

In this case, the chamber also noted that the modalities of participation would have to be evaluated according to the stage of the proceeding and the charges that had been confirmed by the Pre-Trial Chamber.<sup>155</sup>

*Appeal:* Victims who have been previously approved for participation in pre-trial or trial stages must apply anew to participate in an appeal, and must demonstrate that their personal interests are affected by an issue on appeal.<sup>156</sup>

<sup>152</sup> DRC Situation, Case No. ICC-01/04-556 Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 Dec. 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 Dec. 2007, 19 Dec. 2008, ¶¶ 45, 58; The Chamber further noted that victims are not necessarily precluded from participation "in any judicial proceedings, including proceedings affecting investigations, provided that their personal interests are affected by the issues arising for resolution". It did not indicate precisely in what type of proceedings victims might be entitled to participate at the investigation phase. *Ibid.*, ¶ 56.

<sup>153</sup> See *Lubanga*, Case No. ICC-01/04-01/06, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of Congo (Redacted Public Document), July 28, 2006, p. 9.

<sup>154</sup> *Lubanga*, Decision on victims' participation, ¶ 112; *Katanga et al.*, Case No. ICC-01/04-01/06- 1556, Decision on the applications by victims to participate in the proceedings, 15 Dec. 2008, ¶¶ 54 to 59.

<sup>155</sup> *Katanga et al.*, Case No. ICC-01/04-01/07-933-tENG, Decision on the treatment of applications for participation, 26 Feb. 2009, ¶¶ 10-11.

<sup>156</sup> *Lubanga*, Case No. ICC-01/04-01/06, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo, ICC-01/04-01/06-824 , 13 Feb. 2007, ¶¶ 38 and 45; See also *Situation in Darfur, Sudan*, Case No. ICC-02/05-138, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 Dec. 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 Dec. 2007, 18 June 2008, ¶ 49; and *DRC Situation*, Case No. ICC-01/04-503, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 Dec. 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 Dec.

### 14.5.2.3. MODES OF PARTICIPATION BY VICTIMS

#### 14.5.2.3.1. SUBMISSION OF EVIDENCE AND CHALLENGES AGAINST THE ADMISSIBILITY OR RELEVANCE OF EVIDENCE:

Pre-Trial Chamber I has held that during the pre-trial stage, victim participants cannot present evidence.<sup>157</sup>

*Victims may be allowed to lead or challenge evidence during the trial stage, if they can demonstrate that their interests are affected by the evidence or issue at hand.*

Victims may be allowed to lead or challenge evidence during the trial stage, if they can demonstrate that their interests are affected by the evidence or issue at hand. The trial chamber will determine whether to allow victims to present evidence on a case-by-case basis.<sup>158</sup>

The appeals chamber has determined that in evaluating a victim's request to tender or examine evidence, the chamber

must evaluate:

- A discrete application by victims to that effect;
- Notice to the parties;
- Demonstration of personal interests that are affected by the specific proceedings;
- Compliance with disclosure obligations and protection orders;
- A determination of appropriateness; and
- Consistency with the rights of the accused and a fair trial.<sup>159</sup>

2007, 30 June 2008, ¶ 88; Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-566, Reasons for the 'Decision on the Participation of Victims in the Appeal against the 'Decision on Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', 20 Oct. 2009, ¶¶ 13-14.

<sup>157</sup> *Katanga et al.*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ¶ 113. The Chamber noted that according to Art. 61(7) of the Statute, the power of the Pre-Trial Chamber is confined to "requesting the consideration by the Prosecution of the opportunity to provide additional evidence" in contrast to Art. 69(3) which gives the competent Chamber "the authority to request the submission of all evidence that it considers necessary for the determination of the truth". *Ibid.*, ¶¶ 107- 109.

<sup>158</sup> *Lubanga*, Case No. ICC-01/04-01/06, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, ICC-01/04-01/06-1432, 11 July 2008, ¶ 3; For the submission of evidence, the Chamber based its decision on the authority of the Trial Chamber to request the presentation of all evidence necessary for determining the truth pursuant to Article 69(3). For the rights to challenge the admissibility or relevance of evidence, the Chamber relied on its general powers under Article 69(4) to declare evidence admissible or relevant and rule 91(3) under which the Chamber may authorise, upon request, the legal representatives to question witnesses or produce documents. *Ibid.*, ¶¶ 108-109.

<sup>159</sup> *Abu Garda*, Case No. ICC-02/05-02/09-136 Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, 6 Oct. 2009, ¶ 15; *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, ¶ 4.

This evidence can relate to the guilt or innocence of the accused, although victims do not have the right to present this type of evidence.<sup>160</sup>

Victim participants may testify at trial, including about the role of the accused in the crimes charged against them.<sup>161</sup> The appeals chamber held that this was “grounded in the trial chamber’s authority to request evidence necessary for the determination of the truth and is not per se inconsistent with the rights of the accused and the concept of a fair trial”.<sup>162</sup>

*Victim participants may testify at trial, including about the role of the accused in the crimes charged against them.*

When considering whether a victim participant should testify, the trial chamber must assess whether the testimony:

- Affects [the] victim’s personal interests;
- Is relevant to the issues of the case;
- Is necessary for the determination of the truth; and
- Whether the testimony would be consistent with the rights of the accused and a fair and impartial trial.<sup>163</sup>

Victim participants may lead incriminating evidence in the course of the trial even if that evidence was not disclosed to the accused before the trial began.<sup>164</sup> It is for the trial chamber to decide the appropriate measures to be taken so that the accused’s right to have adequate time and facilities for preparing his defence.<sup>165</sup> The trial chamber therefore will order disclosure of the evidence with enough advance notice that the defence can adequately prepare.<sup>166</sup>

#### 14.5.2.3.2. QUESTIONING OF PARTICIPATING VICTIMS AS WITNESSES

Witnesses who take the stand to testify should be questioned in a neutral manner. According to one trial chamber, there is “a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or

<sup>160</sup> *Katanga et al.*, Case No. ICC-01/04-01/07 OA 11, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 Jan. 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, ¶ 110; *Lubanga*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, ¶¶ 93, 94, 99.

<sup>161</sup> Art. 69(3).

<sup>162</sup> *Katanga et al.*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 Jan. 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, ¶ 3.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.* at 37.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.* at ¶ 55.

challenging questions, depending on the issues raised and the interests affected".<sup>167</sup> To depart from neutral questioning, an oral request must be made to the judges.<sup>168</sup>

#### 14.5.2.3.3. ACCESS TO RECORDS AND EVIDENCE

*Victims' representatives generally have access to public filings during the pre-trial phase. Access to confidential filings may be allowed, depending on considerations of factors including national security and victim and witness protection.*

Victims' representatives generally have access to public filings during the pre-trial phase. Access to confidential filings may be allowed, depending on considerations of factors including national security and victim and witness protection.<sup>169</sup>

Trial Chamber I has held that during the trial phase, a presumption exists that victims' representatives would only have access to public filings. If confidential filings were of material relevance to victims' personal interests,

however, the court has determined that it would give consideration to providing access to relevant victims, subject to any necessary protective measures.<sup>170</sup>

#### 14.5.2.3.4. PARTICIPATION OF ANONYMOUS VICTIMS

Victims can participate anonymously during the pre-trial stage but, in the absence of exceptional circumstances, are limited to accessing only public documents and attending only public hearings.<sup>171</sup> Anonymous victims may not add points of fact or evidence, nor question witnesses under Rule 91(3).<sup>172</sup>

Due to safety concerns, some victims have been allowed to participate anonymously—without their identity being revealed to the public or defence.<sup>173</sup> Therefore, in order to protect the rights of the accused, these victims have only limited rights of participation. For example:

<sup>167</sup> *Lubanga*, Case No. ICC-01/04-01/06-2127, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 Sept. 2009, ¶ 21; *Katanga et al.*, Case No. ICC-01/04-01/07-1788-tENG, Case No. Decision on the Modalities of Victim Participation at Trial, 22 Jan. 2010, ¶ 78.

<sup>168</sup> *Katanga et al.*, at ¶ 78.

<sup>169</sup> *Katanga et al.*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ¶ 128; *Katanga et al.*, Case No. ICC-01/04-01/07-579, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case', 10 June 2008, ¶ 146.

<sup>170</sup> *Lubanga*, Decision on victims' participation, 18 Jan. 2008, ¶ 106.

<sup>171</sup> *Lubanga*, Case No. ICC-01/04-01/06-4u62-tEN, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 Sept. 2006, p. 6.

<sup>172</sup> *Katanga et al.*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ¶¶ 182-183; *Lubanga*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, p. 8.

<sup>173</sup> *Lubanga*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing; Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and

- Legal representatives of anonymous victims may give opening and closing arguments and written submissions.<sup>174</sup>
- However, the legal representatives must seek the permission of the court for other oral interventions.<sup>175</sup>
- The anonymous victims may only access public documents in the proceedings.<sup>176</sup>

Victim participants who are not anonymous to the defendant, but whose identity is withheld from the public, may have different modalities of participation. For example:

- Non-anonymous victims have the right to access the case record kept by the Registry, including evidence filed by the parties, both before and during the confirmation hearings.
- These victim participants have the right to make submissions on all issues relating to the admissibility or probative value of evidence submitted by the parties for the confirmation hearing.
- They enjoy the right to examine the evidence submitted by the parties.
- These victim participants can examine witnesses (with some limitations).

They enjoy the right to make oral and written submissions to the court on any matter except those prohibited by the Rome Statute and RPE.<sup>177</sup>

During the trial stage, anonymous victims may participate, but Trial Chamber I in the *Lubanga* case indicated that it will “scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants” in order to “determine whether steps that fall short of revealing the victim’s identity can sufficiently mitigate the prejudice”.<sup>178</sup>

The greater the extent of participation in proceedings, the more likely it will be that the victim or witness will need to identify himself.<sup>179</sup>

While Trial Chamber II in the *Katanga et al.* case allowed for the participation of victims who wish to remain anonymous to the defence, such victims would not be allowed to testify.<sup>180</sup>

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a/0105/06, Oct. 20, 2006; *Katanga et al.*, Case No. ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, May 13, 2008, ¶ 184.

<sup>174</sup> ICC RPE, Rule 89(1).

<sup>175</sup> ICC RPE, Rule 91(3)(a).

<sup>176</sup> *Lubanga*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing.

<sup>177</sup> *Katanga et al.*, Case No. ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, May 13, 2008, ¶¶ 124 - 152.

<sup>178</sup> *Lubanga*, Decision on Victims’ Participation, ¶ 131.

<sup>179</sup> See, e.g., *ibid.*

<sup>180</sup> *Katanga et al.*, Case No. ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, 22 Jan. 2010, ¶¶ 92-93.

#### 14.5.2.4. LEGAL REPRESENTATION FOR VICTIM PARTICIPANTS

Rule 90(1) of the RPE provides that victims may choose a legal representative, as long as that person has ten years of relevant experience as a criminal lawyer, judge or prosecutor and is fluent in English or French.<sup>181</sup>

Where victims are unable to pay for their lawyer, the court may be able to provide some financial assistance.<sup>182</sup> Where the interests of justice so require, the court may also appoint a victims' legal representative. Minors under 18 years of age are automatically considered indigent and therefore eligible for legal assistance.

When there are many victims participating in a case, the chamber may recommend that the victims choose a common legal representative, or may request the Registrar to choose one or more legal representatives.<sup>183</sup> The distinct interests of the victims must be represented and conflicts of interest between the victims must be avoided.<sup>184</sup>

*When there are many victims participating in a case, the chamber may recommend that the victims choose a common legal representative, or may request the Registrar to choose one or more legal representatives.*

The Registry plays a central role in facilitating victim participation and representation through the Victims Participation and Reparations Section ("VPRS") and the Office of Public Council for Victims ("OPCV").

The VPRS plays the following roles, amongst others, in helping facilitate victim participation:

- Administering the victims' applications for participation;
- Assisting victims in finding legal representation,<sup>185</sup> including by referring them to the list of approved counsel;<sup>186</sup>
- Notifying victim participants of court decisions that may be important to the victims' interests<sup>187</sup>; and
- Facilitating the participation of victims of sexual violence in all stages of the proceedings through gender-sensitive measures.<sup>188</sup>

<sup>181</sup> ICC RPE, Rule 90(1).

<sup>182</sup> *Ibid.* at Rule 90(5); See also Regulations of the Registry, International Criminal Court, Case No. ICC-BD/03-01-06Rev.1, Sept. 25, 2006, available at [http://www.icc-cpi.int/library/about/officialjournal/ICC-BD\\_03-01-06-Rev1\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-BD_03-01-06-Rev1_English.pdf) (accessed June 11, 2008), reg. 113(1) ("Regulations of the Registry"), stating that for the purpose of participation in the proceedings, the Registry has a duty to inform victims that they may apply for legal assistance paid by the court.

<sup>183</sup> ICC RPE, Rules 90(2) – (4).

<sup>184</sup> *Ibid.* at Rule 90(4).

<sup>185</sup> *Ibid.* at Rule 16(1)(b).

<sup>186</sup> *Ibid.* at Rule 90(2).

<sup>187</sup> ICC RPE, Rule 16(1)(d).

<sup>188</sup> *Ibid.* at Rule 16(1)(d).

The OPCV was created to provide support and assistance to victims and their legal representatives. This includes legal research and advice, and appearing before the court on specific issues.<sup>189</sup> The OPCV may be appointed by the court to provide free representation to victims or groups of victims.<sup>190</sup> The OPCV can provide such support to victims who have only applied for participation, but who do not yet have representation.<sup>191</sup>

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<sup>189</sup> ICC Court Regulations, Reg. 81(4).

<sup>190</sup> International Criminal Court, Court Regulations, Reg. 80(2); Pre-Trial Chamber II appointed Office of Public Counsel for Victims (“OPCV”) staff as legal representatives in the situation and the case under this provision. *See Situation in Uganda*, Case No. ICC-02/04, Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06, a/0112/06, a/0118/06, a/0119/06, and a/0122/06, 15 Feb. 2008.

<sup>191</sup> *DRC Situation*, Case No. ICC-01/04, Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation, Aug. 17, 2007, ¶¶ 43-44 (“DRC Aug. 2007 Decision on the Request of the Legal Representative of Applicants”).

## 14.6. REGIONAL LAW AND JURISPRUDENCE

### *Notes to trainers:*

- The Module now shifts to focus on the national laws of BiH, Croatia and Serbia. However, it is not recommended to discuss the regional sections in isolation while training this Module. For that reason, cross should be made between the international sections and the main regional laws and developments. The sections that follow provide a basis for more in-depth discussion about the national laws with practitioners who will be implementing them in their domestic courts.
- This Module deals with the laws applicable in BiH, Croatia and Serbia in separate sections so that participants from any of these countries need only focus on their jurisdiction. Where available, the most relevant jurisprudence has also been cited. Participants should be encouraged to use their own cases to discuss the application of the laws and procedures being taught.
- In all three domestic jurisdictions, witness protection measures are available. These measures and the support offered to victims are discussed in this part of the Module for each jurisdiction. Victim participation directly in the criminal proceedings does not occur in the regional domestic jurisdictions in the same way that it applies before the ICC and ECCC. For example, before the courts of BiH, victims are entitled to participate in the proceedings but only in respect of matters that concern reparations and compensation, whereas in Croatia and Serbia, victims have more extensive rights of participation in the investigations and the trial proceedings.
- The structure for the parts of this Module that deal with each of the domestic jurisdictions is therefore as follows:
  - Victim and witness protection and support;
  - Victim reparations and compensation; and
  - Victim participation.
- **Tip to trainers:** One effective method to engage the participants is to ask them to analyse one of the most important cases that concerns victims and witnesses in their domestic jurisdiction. Some cases have been cited below, but others may be raised by the participants themselves or provided by the trainers.

## 14.7. BIH

## 14.7.1. VICTIM AND WITNESS PROTECTION AND SUPPORT

*Notes for trainers:*

- This section deals with the provisions under the laws of BiH that deal with victim and witness protection. The different laws that apply before the Court of BiH and the entity level courts are discussed.
- To the extent that procedures regarding the rights of the accused are relevant to witness protection, these procedures as applied are discussed in this section.
- The relevant cases, as far as they are available, are also highlighted.
- Participants should be encouraged to assess whether sufficient measures have been taken to protect witnesses in war crimes cases. In addition, participants should discuss whether the provisions that allow for compensation and reparations provide adequate justice to the victims of war crimes. Participants can also be asked to discuss whether the extent of victim participation in the proceedings is adequate to represent their personal interests. They may wish to discuss ways in which victim participation can be extended, without undermining the central role of the prosecution and the rights of the accused.

## 14.7.1.1. RELEVANT PROVISIONS ON WITNESS PROTECTION

The protection of witnesses in proceedings conducted before The Court of BiH is regulated by the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses (“BiH Law on the Protection of Witnesses”). This Law was imposed by a decision<sup>192</sup> of the High Representative to Bosnia and Herzegovina in 2003, who considered that a legal framework allowing for witness protection measures in a clearly regulated manner was necessary to guarantee:

- the fair trial rights of accused under the European Convention on Human Rights;
- the appropriate outcome of trials where unlawful coercion is exerted against witnesses,
- the safety of witnesses under threat; and
- the well-being of witnesses who, as a result of the crime or otherwise, are under harmful psychological pressure.<sup>193</sup>

The Law was adopted by the Parliamentary Assembly of Bosnia and Herzegovina on 27 June 2003,<sup>194</sup> and later amended<sup>195</sup> and corrected.<sup>196</sup> Article 91 of the BiH CPC provides that with respect to

<sup>192</sup> Decision of the High Representative, No. 102/03; Bosnia and Herzegovina, Official Gazette, No. 3/03

<sup>193</sup> *Ibid.* at ¶ 11.

<sup>194</sup> BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, Bosnia and Herzegovina, Official Gazette, No. 21/03.

protected witnesses in proceedings before the Court of BiH, the provisions of the special law shall be applied. Therefore, the BiH Law on the Protection of Witnesses is *lex specialis* to the BiH CPC.

In 2004, the BiH Witness Protection Program Law was passed.<sup>197</sup> The purpose of this law is to provide for efficient protection of witnesses during and after criminal proceedings before the Court of BiH, in order to enable witnesses to testify freely and openly.<sup>198</sup>

In 2008, the Court of BiH adopted the Rulebook on Protection of Witnesses.<sup>199</sup> The purpose of the rulebook is to provide adequate protection and care to witnesses in the proceedings before the Court of BiH, in accordance with the BiH CPC and the BiH Law on the Protection of Witnesses.<sup>200</sup>

For the BiH 'entities and Brčko District, the laws applicable to witness protection, which were passed in 2003, are the following:

- FBiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses;<sup>201</sup>
- RS Law on the Protection of Witnesses in Criminal Proceedings;<sup>202</sup> and
- BD Law on the Protection of Witnesses under Threat and Vulnerable Witnesses.<sup>203</sup>

In addition to these laws, the BiH, FBiH, RS and BD Criminal Procedural Codes also contain provisions on witness' protection.<sup>204</sup>

#### 14.7.1.2. ICTY PROTECTIONS IMPLEMENTED UNDER BIH LAW

<sup>195</sup> Law on Amendments and Additions to the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, Bosnia and Herzegovina Official Gazette, No. 61/04.

<sup>196</sup> Correction of the Law on Amendments and Additions to the BiH Law on the Protection of Witnesses under Threat and Vulnerable Witnesses, Bosnia and Herzegovina Official Gazette, Bosnia and Herzegovina Official Gazette No. 55/05.

<sup>197</sup> Witness Protection Program Law, Bosnia and Herzegovina Official Gazette, No. 29/04.

<sup>198</sup> *Ibid.*, Art. 1.

<sup>199</sup> Rulebook on Protection of Witnesses, Court of Bosnia and Herzegovina (BiH) General Assembly, 29 Sept. 2008, Available at [http://www.sudbih.gov.ba/files/docs/Pravilnik\\_o\\_zastiti\\_svjedoka.pdf](http://www.sudbih.gov.ba/files/docs/Pravilnik_o_zastiti_svjedoka.pdf).

<sup>200</sup> *Ibid.*, Art. 1.

<sup>201</sup> Federation of Bosnia and Herzegovina, Official Gazette, No. 36/03.

<sup>202</sup> Republika Srpska, Official Gazette, No. 48/03.

<sup>203</sup> Brčko District, Official Gazette, No. 10/03.

<sup>204</sup> Bosnia and Herzegovina Criminal Procedure Code, BiH Official Gazette No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 ("BiH CPC"). The BiH CPC contains many provisions regarding rights and obligations of the witnesses. Some of those rights under the BiH CPC are dealt with in, e.g., Arts. 83, 84, 86(4) and (6), 87, 89, 90, 91, 122, 217(1), 227(1)(e), 235, 262(3), 267. See also the corresponding provisions under 2003 Federation of Bosnia and Herzegovina Criminal and Procedure Code ("FBiH CPC"), 2003 Republika Srpska Criminal Procedure Code ("RS CPC") and 2003 Brčko District Criminal Procedure Code ("BD CPC").

Pursuant to Rule 75(F) of the ICTY RPE, protective measures ordered by the ICTY “shall continue to have effect *mutatis mutandis* in any other proceedings before the ICTY or any other jurisdiction”.<sup>205</sup>

*In the Savić case, the trial panel granted protective measures to two witnesses because those witnesses had been granted protective measures before the ICTY.*

In the *Savić* case, the trial panel noted this ICTY rule and granted protective measures to two witnesses because those witnesses had been granted protective measures before the ICTY.<sup>206</sup> The Court of BiH gave the witnesses the same protective measures.<sup>207</sup>

In accordance with the legal provisions of the BiH Law on the Protection of Witnesses, the trial panel in the *Mejakić et al.* case granted protective measures to the majority of the witnesses at their request. The trial panel noted that a majority of the witnesses had testified before the ICTY and the ICTY had previously ordered protective measures for those witnesses.<sup>208</sup> The trial panel held that it was obliged to abide by those protective measures.<sup>209</sup>

#### 14.7.1.3. VICTIM AND WITNESS PROTECTION MEASURES

What follows is a discussion of the various measures, both under the BiH Law on the Protection of Witnesses as well as the BiH CPC, which can be employed in the proceedings to protect and support victims and witnesses, taking into account the rights of the accused.

<sup>205</sup> ICTY RPE, Rule 75(F).

<sup>206</sup> Court of BiH, Momir Savić, Case No. X-KR-07/478, 1st Instance Verdict, 3 July 2009, p. 9 (p. 8 BCS) (relevant part upheld on appeal).

<sup>207</sup> *Ibid.*

<sup>208</sup> Court of BiH, Željko Mejakić et al., Case No. X-KRŽ-06/200, 1st Instance Verdict, 30 May 2008, p. 32 (p. 31 BCS); *See also* Court of BiH, Mitar Rašević et al., Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 Feb. 2008, p. 36 (p. 36 BCS) (relevant part upheld on appeal).

<sup>209</sup> *Mejakić et al.*, 1st inst., p. 32 (p. 31 BCS); *See also* Court of BiH, Gojko Janković, Case No. X-KR-05/161, 1st Instance Verdict, 16 Feb. 2007, p. 17-18 (p. 17 BCS).

#### 14.7.1.3.1. TESTIMONY BY USING TECHNICAL MEANS FOR TRANSFERRING IMAGE AND SOUND

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Article 9 of the BiH Law on the Protection of Witnesses reads:

##### Article 9 of the BiH Law on the Protection of Witnesses

When determining whether there are justified reasons for examining a witness using technical means for transferring image and sound in such manner as to permit the parties and the defence attorney to ask questions although not in the same room as the witness, the need to provide for the protection of witnesses under threat and vulnerable witnesses shall also be taken into account.<sup>1</sup>

In the *Palija* case, the prosecutor requested additional protective measures for Witness A. The witness, a victim of rape, would not have been able to give her testimony in the presence of the accused or other persons in the courtroom. This was because of the trauma she suffered, and because she did not want her family or others learn about what had happened to her.<sup>210</sup> The prosecutor proposed that the court exclude the public during her examination and that she testify from a separate room via video-link.<sup>211</sup> The defence did not object to the exclusion of the public. The defence did, however, object to the witness testifying from a separate room, arguing that if she told the truth, the witness would be able to bear the presence of the accused in the same room.<sup>212</sup>

The panel granted the prosecution's motion, holding that the pseudonym the court had previously granted to the witness was not sufficient to protect her personal integrity.<sup>213</sup> The panel, considering Article 86(6) of the BiH CPC<sup>214</sup> and Article 9 of the BiH Law on the Protection of Witnesses, also found that testifying from another room was an entirely acceptable manner of conducting this witness' testimony.<sup>215</sup>

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<sup>210</sup> Jadranko Palija, Case No. X-KR-06/290, 1st Instance Verdict, 28 Nov. 2007, p. 16 (p. 16 BCS) (relevant part upheld on appeal).

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> Art. 86(6) of the CPC BiH reads: "Given age, physical and mental condition, or other justified reasons the witness may be examined using technical means for transferring image and sound in such manner as to permit the parties and the defence attorney to ask questions although not in the same room as the witness. An expert person may be assigned for the purpose of the examination".

<sup>215</sup> *Palija*, 1st inst., p. 16 (p. 16 BCS) (relevant part upheld on appeal).

The panel held that there was the technical capacity for this and that it would be less agonizing and less traumatic for the witness.<sup>216</sup> The panel believed that testifying from another room both completely achieved the purpose of protecting the witness (in this case an injured party) and respected the right of the accused to question those testifying against him.<sup>217</sup> The panel noted that this was the only witness granted such measures, which indicated the critical approach the panel had taken in deciding such issues. However, the panel noted, the application of these protective measures was absolutely necessary due to the severe trauma the witness still suffered.<sup>218</sup>

*The panel believed that testifying from another room both completely achieved the purpose of protecting the witness and respected the right of the accused to question those testifying against him.*

In the *Janković Gojko* case, the trial panel allowed a witness to be heard through video-link from a court in Denmark, where the witness would be accompanied by the appointed legal adviser and other staff from the Danish court.<sup>219</sup> The decision was based on the fact that the witness was not testifying about the guilt or actions of the accused, but to rebut the statement of a defence witness.<sup>220</sup> The panel also considered the subject matter of the testimony and the fact that the prosecutor did not find this subject matter critical for the charge against the accused. The panel therefore held that summoning the witness to testify directly in the courtroom would, apart from the high costs of appearance before the panel, represent additional mistreatment of the witness.<sup>221</sup> The panel decided to conduct the examination via video-link pursuant to Article 86(6) BiH CPC in conjunction with Article 9 of the BiH Law on the Protection of Witnesses.<sup>222</sup>

<sup>216</sup> *Ibid.* at p. 17 (p. 16 BCS) (relevant part upheld on appeal).

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> *G. Janković*, 1st inst., p. 28 (p. 28 BCS).

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.* pp. 28-29 (p. 28 BCS).

## 14.7.1.3.2. REMOVAL OF THE ACCUSED

Article 10 of the BiH Law on the Protection of Witnesses reads:

**Article 10 of the BiH Law on the Protection of Witnesses**

(1) Where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly, the Court may, either ex officio or upon the motion of the parties or the defence attorney, and after hearing the other party and the defence attorney, order that the accused be removed from the courtroom.

(2) If removed from the courtroom the accused shall be enabled to follow the testimony through technical means for transferring image and sound, or the testimony shall be recorded and presented to the accused.

(3) The defence attorney shall be present at the hearing. After the testimony has been presented to the accused but before the witness is released, the defence attorney and the accused shall have the opportunity to consult.

(4) A decision pursuant to paragraph 1 of this Article is subject to appeal by the parties and the defence attorney. The Panel of the Appellate Division shall consider the appeal within 72 hours following the day the appeal is received.

*If the public is excluded and the accused is removed from the courtroom during testimony while the accused is still able to hear the testimony, the accused's right to examine witnesses testifying against him is still respected. The accused's opportunity to prepare his defence is regarded as having not been reduced or violated.*

In the *Janković Gojko* case, the prosecution requested that two witnesses testify using a voice transfer, with the image only visible to the trial panel via video-link. The defence objected, arguing that the only reason the witnesses refused to confront the accused was because they were not testifying truthfully.<sup>223</sup> Based on Article 10 of the BiH Law on the Protection of Witnesses, the trial panel held that the public would be excluded and the accused removed from the courtroom during testimony.<sup>224</sup> However, the accused would be able to hear the testimony so that he could consult with his defence

<sup>223</sup> *Ibid.* at pp. 26-27 (pp. 26-27 BCS).

<sup>224</sup> *Ibid.* at pp. 26-27 (pp. 26-27 BCS); See also below, under 14.7.1.3.8. Exclusion of the public.

counsel regarding cross-examination.<sup>225</sup> The panel concluded that this method would respect the right of the accused to examine witnesses testifying against him, and that being unable to see the witnesses and only hear their testimony did not reduce the accused's opportunity to prepare his defence or violate his rights.<sup>226</sup>

#### 14.7.1.3.3. EXCEPTION TO THE DIRECT PRESENTATION OF EVIDENCE BY A WITNESS

Article 11 of the BiH Law on the Protection of Witnesses reads:

##### Article 11 of the BiH Law on the Protection of Witnesses

When determining whether the records on testimony given during the investigative phase may be read or used as evidence at the main trial, the Court shall also take into account the need to provide for the protection of a witness under threat who would expose himself or his family to great personal danger and the protection of a vulnerable witness who would expose himself to significant emotional distress by appearing at the main trial.

*An exception from the direct presentation of evidence was justifiable for vulnerable witnesses, such as victims who had serious mental and emotional problems as a result of their traumatic experiences.*

The trial panel in the *Mejakić et al.* case held that an exception from the direct presentation of evidence was justifiable for vulnerable witnesses, such as victims who had serious mental and emotional problems as a result of their traumatic experiences.<sup>227</sup> The trial panel found that such witnesses would be exposed to significant emotional distress by testifying at the main trial, and that accepting admission of their depositions in lieu of oral testimony was justified under Article 273(2) of the BiH CPC and Article 11 of the BiH Law on the Protection of Witnesses.<sup>228</sup>

<sup>225</sup> *Ibid.* at p. 28 (p. 27 BCS).

<sup>226</sup> *Ibid.*

<sup>227</sup> *Mejakić et al.*, 1st inst., p. 34 (p. 33 BCS).

<sup>228</sup> *Ibid.*

#### 14.7.1.3.4. LIMITATION OF THE RIGHT OF AN ACCUSED AND HIS DEFENCE ATTORNEY TO INSPECT FILES AND DOCUMENTATION

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Article 12 of the BiH Law on the Protection of Witnesses reads:

##### **Article 12 of the BiH Law on the Protection of Witnesses**

(1) In exceptional circumstances, if revealing some or all of the personal details of a witness or other details would contribute to identifying a witness, and would seriously endanger the witness under threat, the preliminary proceedings judge may, upon the motion of the Prosecutor, decide that some or all of the personal details of a witness, may continue to be kept confidential after the indictment is issued.

(2) The prosecutor shall immediately notify the accused and his defence attorney of the submission of the motion referred to in paragraph 1 of this Article.

(3) If possible, the preliminary proceedings judge shall hear the accused and his defence attorney prior to issuing the decision referred to in paragraph 1 of this Article. The decision of the preliminary proceedings judge must be issued within 72 hours following the day the motion is received.

(4) No appeal shall be permissible against the decision referred to in paragraph 1 of this Article.

(5) If the preliminary proceedings judge was unable to hear the accused and his defence attorney prior to the decision referred to in paragraph 1 of this Article, the Court shall hear them immediately upon receiving the indictment.

(6) The Court may revoke the decision referred to in paragraph 1 of this Article, either ex officio or upon the motion of the accused or his defence attorney.

(7) Upon the motion of the Prosecutor, the Court shall revoke the decision referred to in paragraph 1 of this Article.

(8) The Court shall at all stages in the proceedings be mindful of the need to release, as soon as possible, the information to which the decision referred to in paragraph 1 of this Article pertains. Sufficient details shall be released for the defence to prepare for examination of a witness. The information must be released at the latest when the witness testifies at the main trial.

In the *Janković Gojko* case, the court ordered that the personal details of a number of witnesses be kept confidential.<sup>229</sup> In these decisions, the court ordered the prosecutor's office to be mindful of its disclosure obligation under Article 12(8) of the BiH Law on the Protection of Witnesses.<sup>230</sup> The defence was informed of the identity of all the relevant witnesses, except for one witness (witness J), at least 30 days before the testimony of those witnesses at main trial.<sup>231</sup> The defence was also informed about the identity of witness J, although within a shorter period of notice—15 days before the witness' testimony at the main trial.<sup>232</sup> The trial panel concluded that the defence had been informed about the identity of the witnesses, as well as about the protective measures.<sup>233</sup>

#### 14.7.1.3.5. ADDITIONAL MEASURES TO PROVIDE FOR THE NON-DISCLOSURE OF THE IDENTITY OF THE WITNESS

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Article 13 of the BiH Law on the Protection of Witnesses reads:

##### **Article 13 of the BiH Law on the Protection of Witnesses**

(1) In exceptional circumstances, where there is a justified fear that if some or all of the personal details of the witness are released it would seriously endanger the personal security of a witness or his family, and the danger would persist after the testimony is given, the Court may, either ex officio or upon the motion of the parties or the defence attorney, decide that the personal details of the witness shall remain confidential for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final.

(2) The Court may, after hearing the parties and the defence attorney, decide that the identity of the witness is not disclosed by allowing the witness to testify behind a screen or utilizing electronic distortion of the voice of the witness or the image of the witness, or both the image and the voice, by using technical means for transferring image and sound.

(3) The Court may, at any time, revoke the decision from paragraph 1 of this Article, either ex officio or upon the motion of the parties or the defence attorney.

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<sup>229</sup> *G. Janković*, 1st inst., p. 18 (pp. 17-18 BCS).

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

In the *Mitrović* case, at the request of defence counsel, the trial panel granted protective measures to a number of defence witnesses.<sup>234</sup> The measures included:

- The use of pseudonyms;
- Protection of the personal details of the witnesses;
- Testifying from a separate room utilizing electronic distortion of the voice of the witness or the image of the witness (or both the image and the voice) through technical means for transferring image and sound; and
- A prohibition on the publication or broadcasting of photographs or video recordings of the image of the witnesses in electronic, print or other media or in any other way, without the prior approval of the Court of BiH.<sup>235</sup>

The panel ordered these measures as a less restrictive alternative to closing the proceedings to the public in accordance with Articles 4 and 13(2) of the BiH Law on the Protection of Witnesses, in conjunction with Article 235 of the BiH CPC.<sup>236</sup>

In the same case, the trial panel granted protective measures to two witnesses pursuant to Article 13 of the BiH Law on the Protection of Witnesses. The panel declared that information concerning their identity must be kept confidential and ordered that they testify from a separate room through video-link.<sup>237</sup>

*The fact that these witnesses were the sole survivors of the relevant event and were afraid of the possible consequences of their participation in the proceedings were extraordinary circumstances that warranted such protective measures.*

The panel found that the fact that these witnesses were the sole survivors of the relevant event and were afraid of the possible consequences of their participation in the proceedings were extraordinary circumstances that warranted such protective measures. The trial panel further noted that the defence counsel for all of the accused had waived their right to have the personal details of these witnesses disclosed to them at the main trial hearing.<sup>238</sup>

<sup>234</sup> Court of BiH, Petar Mitrović, Case No. X-KR-05/24-1, 1st Instance Verdict, 29 July 2008, p. 167 (p. 204 BCS) (upheld on appeal).

<sup>235</sup> *Ibid.* at p. 167 (pp. 204-205 BCS).

<sup>236</sup> *Ibid.* at p. 167 (p. 205 BCS).

<sup>237</sup> *Ibid.* at p. 167 (p. 204 BCS).

<sup>238</sup> *Ibid.*

In the *Ljubinac* case, the trial panel noted that although four witnesses were given pseudonyms as protective measures during preliminary proceedings, the trial panel was to decide the manner in which these witnesses would be examined.<sup>239</sup> The prosecution, pursuant to Articles 9 and 13 of the BiH Law on the Protection of Witnesses, requested that the examination of these witnesses be conducted from another room via video-link, as they were vulnerable witnesses who still felt the consequences of the events about which they testified.<sup>240</sup>

*The trial panel noted that although four witnesses were given pseudonyms as protective measures during preliminary proceedings, the trial panel was to decide the manner in which these witnesses would be examined*

The panel considered the accused's right to a public hearing and right to examine the witnesses who testify against him. Pursuant to Article 13(2) of the BiH Law on the Protection of Witnesses, the panel proposed that in addition to the pseudonyms, the witnesses testify from behind a screen. The panel opined that this would prevent the public from seeing their image.<sup>241</sup> The parties and defence counsel agreed to this.<sup>242</sup>

Prior to the testimony of one of the witnesses, the panel received notice from the Witness Support Section about the emotional disturbances suffered by the witness and suggested that another meeting with the accused could provoke additional trauma. The prosecutor requested that the witness testify in the presence of the counsel of the accused, but that the accused be removed from a courtroom, or, if technically feasible, that the accused be kept in the courtroom in a position from which he could not see the witness.<sup>243</sup> The panel decided that the accused would be kept in the courtroom, but would be seated so that the screen covering the witness from the public would also block the accused from the witness.<sup>244</sup> The panel also granted additional time to the accused and his defence counsel for consultation on cross-examination of the witness, given the distance of the accused's seat from his counsel during the witness' testimony.<sup>245</sup>

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<sup>239</sup> Court of BiH, Radisav Ljubinac, Case No. X-KR-05/154, 1st Instance Verdict, 8 March 2007, p. 14 (p. 13 BCS).

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

*The trial panel also granted witnesses the protective measure of testifying from behind a screen that shield the witness from the public but would allow for the witness to be seen by the parties, the defence counsel and the trial panel. The panel had found that this would provide the witnesses a feeling of security and put them in a position to testify freely in relation to the accused.*

In the *Janković Gojko* case, the trial panel also granted witnesses the protective measure of testifying from behind a screen that shielded the witness from the public but would allow for the witness to be seen by the parties, the defence counsel and the trial panel.<sup>246</sup> The panel had found that this would provide the witnesses a feeling of security and put them in a position to testify freely in relation to the accused.<sup>247</sup>

In the same case, the trial panel also found that there was a justified fear that the disclosure of some or all of the personal details of the witnesses

would seriously endanger the personal security of the witnesses or their families, even after they gave their testimony before the court.<sup>248</sup> The trial panel considered the efforts made to ensure that the protected witnesses appeared before the panel, and particularly the fact that each time the witnesses testified, they were exposed to a new trauma and returned to circumstances they had tried to escape.<sup>249</sup> Thus, the trial panel decided that the personal details of the witnesses must remain confidential for 15 years after the final verdict was rendered.<sup>250</sup>

#### 14.7.1.3.6. WITNESS PROTECTION HEARING

In exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony, the court may conduct a witness protection hearing in accordance with Articles 15 to 23 of the BiH Law on the Protection of Witnesses. Following the motion of a party,<sup>251</sup> the court will determine whether such a hearing is justified<sup>252</sup> based its determination on the facts presented in the motion and the documentation before the court. The decision of the court is subject to appeal.<sup>253</sup> The hearing is conducted in accordance with Article 19 of the law:

*In accordance with Article 14, in exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony, the court may conduct a witness protection hearing.*

<sup>246</sup> *G. Janković*, 1st inst., p. 18 (p. 18 BCS).

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.* at pp. 18-19 (p. 18 BCS).

<sup>250</sup> *Ibid.* at p. 19 (p. 18 BCS).

<sup>251</sup> BiH Law on the Protection of Witnesses, Art. 15.

<sup>252</sup> *Ibid.*, Art. 16.

<sup>253</sup> *Ibid.*, Art. 17.

- A witness protection hearing is conducted by the court in accordance with the provisions of the Criminal Procedure Code of Bosnia and Herzegovina on the hearing of witnesses, unless otherwise stipulated by this Law.
- The witness shall be informed that
  - He will be heard as a protected witness;
  - His identity shall not be revealed to any person other than the members of the court and the minute-taker of the court;
  - If designated as a protected witness, he shall not appear in person before the court at any hearing other than the witness protection hearing; and
  - He cannot be compelled to answer questions that would indicate his identity or the identity of the members of his family.
- The court shall hear a witness in detail on the circumstances.

The record of the hearing is confidential, and according to Article 20 of the BiH Law on the Protection of Witnesses:

- The record of the witness protection hearing shall not contain information relating to the identity of the protected witness.
- The record shall employ a pseudonym for the witness, as determined by the court, which shall be used during the criminal proceedings and in the decisions of the court.
- The members of the court and the minute taker of the court shall sign the record of the witness protection hearing.
- The court shall ensure the confidentiality of the record by
  - keeping the record separate from all other documentation of the criminal case in a secure place;
  - returning the record to the secure place after its use at the appropriate hearing in the criminal procedure and when the decision has become final; and
  - providing for long-term archiving of the record in a manner that limits access to the document only to the President of the Criminal Division for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final.

The use of the protected witness'' testimony is governed by Article 21 of the law:

- At the main trial of the criminal case, the court shall have the testimony of the protected witness read out loud from the record of the witness protection hearing.
- The court shall not need the agreement of the parties in the case to have the testimony read out loud.
- With the consent of the prosecutor and the accused and his defence attorney, the judge or the panel may waive the reading of the testimony out loud.
- The witness may not be called to give testimony other than the testimony at the witness protection hearing as prescribed under Article 19 paragraph 2 (c) of this Law.

Article 22 of the BiH Law on the Protection of Witnesses provides as follows:

- The court may, either *ex officio* or upon the motion of the prosecutor or of the accused or his defence attorney, decide that the protected witness be heard on additional questions:
  - to clarify previously given testimony; or
  - relating to information that was not covered by the previously given testimony and which is material to the case.
- The court shall conduct such additional witness protection hearing, in the manner provided for in Article 18 – 20 of the BiH Law on the Protection of Witnesses, as is necessary for the full and proper establishment of facts. The questions and the answers are recorded and read out in the manner provided for in Article 21 of the law.

In accordance with Article 23 of the Law, the court shall not base a conviction either solely or to a decisive extent on evidence provided according to Articles 11, or 14 through 22 of this law.

*The panel can pose questions to the witness in private session, withhold the witness' identity from the accused, his lawyer and the public, and that the transcript of the answers to those questions can then be read out in the main trial.*

In the *Lelek* case, the trial panel found that there were valid reasons for granting a prosecution motion that a witness' identity be withheld from the accused, his counsel and the public.<sup>254</sup> The panel noted that the BiH Law on the Protection of Witnesses and Article 91 of the CPC BiH<sup>255</sup> provided that under certain extreme circumstances, a witness's identity may be withheld from the accused and his counsel and that the witness may testify anonymously.<sup>256</sup> The panel explained that the procedure for providing witness anonymity is set out in Articles 14 to 22 of the BiH Law on Witness Protection. These articles provide that the panel can pose questions to the witness in private session, withhold the witness' identity from the accused,

his lawyer and the public, and that the transcript of the answers to those questions can then be read out in the main trial.<sup>257</sup> This process would preclude the prosecution and defence from questioning the witness in direct or cross-examination and from observing the witness' manner while giving testimony.<sup>258</sup>

The trial panel held that in order to follow this procedure, the panel must find that "exceptional circumstances" existed and that "there is manifest risk to the personal security of the witness or the witness' family, and that the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony".<sup>259</sup>

However, the panel considered that, although the prosecution request for anonymity was justified, refusing the parties' access to directly question the witness during direct and cross-examination was

<sup>254</sup> Court of BiH, Željko Lelek, Case No. X-KRŽ-06/202, 1st Instance Verdict, 23 May 2008, p. 20 (p. 24 BCS).

<sup>255</sup> Art. 91 of the BiH CPC reads: "With respect to protected witnesses in the proceedings before the Court, the provisions of the special law shall be applied".

<sup>256</sup> *Lelek*, 1st inst., at p. 20 (pp. 23-24 BCS).

<sup>257</sup> *Ibid.*, at p. 20 (p. 24 BCS).

<sup>258</sup> *Ibid.* at p. 20-21 (p. 24 BCS).

<sup>259</sup> *Ibid.* at p. 21 (p. 24 BCS).

not necessary to protect the witness. The panel, therefore, ordered that the witness' identity be withheld from the accused and his counsel, but that the witness testify and be subject to direct and cross examination by the parties and counsel. In order to protect the witness' anonymity, the panel ordered that the witness testify from a separate room with image and voice distortion. In reasoning this decision, the panel further noted that it was authorised to provide such protection by virtue of Articles 13(2) and 14 to 22 of the BiH Law on the Protection of Witnesses.<sup>260</sup>

In the *Paunović* case, the defence argued on appeal that the accused's right to a fair trial was violated because the trial panel had needlessly granted "protected witness" status so as to prevent the defence from fully cross-examining a witness.<sup>261</sup> The appellate panel concluded that this witness was granted certain protective measures during the trial, including the use of a pseudonym, protection of personal data, and permission to testify with voice and image distortion.<sup>262</sup> The appellate panel held that applying the above mentioned measures did not constitute granting the witness "protected witness" status in terms of Articles 14 to 22 of the BiH Law on the Protection of Witnesses. As the witness personally attended the main trial, testified directly and in front of the panel and was cross-examined by the defence counsel, the appellate panel concluded that the defence argument on this issue was groundless.<sup>263</sup>

#### 14.7.1.3.7. RELIANCE ON EVIDENCE OF ANONYMOUS WITNESSES

In the *Lelek* case, the prosecution appealed the trial panel's conclusion that no judgement may be based exclusively or decisively on the evidence gathered pursuant to Articles 11 or 14 to 22 of the BiH Law on the Protection of Witnesses.<sup>264</sup> The appellate panel dismissed this argument.<sup>265</sup>

The appellate panel explained that given the fact that the defence did not know the identity of the witness, it was irrelevant whether the protective measures under Articles 14 to 22 of the BiH Law on the Protection of Witnesses should have been applied.<sup>266</sup> The appellate panel continued that since the Article 12(8) disclosure requirement had not been satisfied, this case was dealing with more than the protective measures envisaged in Articles 5 to 13<sup>267</sup> of this law.<sup>268</sup>

<sup>260</sup> *Ibid.*

<sup>261</sup> Court of BiH, Dragoje Paunović, Case No. X-KR-05/16, 2nd Instance Verdict, 27 Oct. 2006, p. 2 (p. 2 BCS).

<sup>262</sup> *Ibid.* at p. 4 (p. 4 BCS).

<sup>263</sup> *Ibid.*

<sup>264</sup> Court of BiH, Željko Lelek, Case No. X-KRŽ-06/202, 2nd Instance Verdict, 12 Jan. 2009, ¶ 104.

<sup>265</sup> *Ibid.* at ¶ 106 – The Trial Panel in this case applied the procedure set out in Articles 14-22 in conjunction with Article 13 and on basis of Article 4 of the Law on the Protection of Witnesses, withholding the identity of the witness from the accused, his counsel and the public, but allowing examination in chief and cross examination of the witness by placing the witness in a different room with a distorted audio and video-link to the courtroom; *See Lelek*, 1st inst., p. 20 (p. 23-24 BCS).

<sup>266</sup> *Lelek*, 2nd inst., ¶ 106.

<sup>267</sup> Except Art. 11.

<sup>268</sup> *Lelek*, 2nd inst., ¶ 107.

Thus, the appellate panel concluded that regardless of the protective measures granted to the witness, the defence did not know the identity of the witness and so therefore the witness was in fact “anonymous”. This gave rise to the same procedural effect as the measures applied Articles 14 to 22, the panel held, including the impossibility of basing a conviction exclusively or to a decisive extent on the evidence gathered pursuant to the quoted articles.<sup>269</sup>

*Regardless of the protective measures granted to the witness, the defence did not know the identity of the witness and so therefore the witness was in fact “anonymous”. This gave rise to the same procedural effect as the measures applied Articles 14 – 22, the panel held, including the impossibility of basing a conviction exclusively or to a decisive extent on the evidence gathered pursuant to the quoted articles.*

*In balancing the effects of anonymity with the right to cross-examination, if the decision was to be based on evidence from a witness’ “to a decisive extent”, not being given the opportunity to observe that witness during direct and cross-examination or the possibility of confrontation would violate the accused’s fair trial rights.*

The appellate panel noted that the trial panel had provided sufficient rationale for its decision, in the context of guaranteeing a minimum right to the defence to examine the prosecution witness as required under Article 6(3) of the ECHR.<sup>270</sup> The appellate panel noted that part of this right involved having the necessary information about the witness’ identity.<sup>271</sup> The appellate panel added that in balancing the effects of anonymity with the right to cross-examination, the trial panel had considered that if the decision was to be based on evidence from a witness “to a decisive extent”, not being given the opportunity to observe that witness during direct and cross-examination or the possibility of confrontation would violate the accused’s fair trial rights.<sup>272</sup> The

appellate panel concluded:

It was exactly for these reasons that the Trial Panel rightly limited the role of the testimony of the protected witness by attaching it the importance of corroborating evidence [...] pursuant to Art. 23 of the Law on Protection of Witnesses. With such assessment the Trial Panel properly noted that where there is no other decisive Prosecution evidence that could be corroborated by a testimony of an anonymous witness, it is to be concluded that the prosecution failed to prove beyond a

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.* at ¶ 108 – *inter alia* thoroughly analysing and invoking the relevant provisions of: CPC BiH (Art. 91); the BiH Law on the Protection of Witnesses (Art. 4, Art. 13(2), Art. 14-22, Art. 23); European Court of Human Rights, Art. 6(1) on fair trial and Art. (3)(d)); International Covenant on Civil and Political Rights (ICCPR), Art. 14; the interpretation of the UN Human Rights Committee in the document UN CCPR/C/79Add.75 of 9 April 1997, ¶¶ 21 and 40; European Court of Human Rights judgements in *Kostovski v. The Netherlands*, ECHR 20-11-1989, 20 Nov. 1989; *Doorson v. The Netherlands* (26 March 1996) and *Van Mecheleni et al. v. The Netherlands* (23 April 1997).

<sup>271</sup> *Lelek*, 2nd inst., ¶ 109.

<sup>272</sup> *Ibid.* at ¶ 110 – referring to *Van Mecheleni et al. v. The Netherlands* (23 April 1997).

reasonable doubt the allegations in Count 1 of the Indictment, and therefore the Accused was cleared of these charges.<sup>273</sup>

#### 14.7.1.3.8. EXCLUSION OF THE PUBLIC

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Article 235 of the BiH CPC reads:

##### Article 235 of the BiH Criminal Procedure Code

From the opening to the end of the main trial, the judge or the Panel of judges may at any time, ex officio or on motion of the parties and the defence attorney, but always after hearing the parties and the defence attorney, exclude the public for the entire main trial or a part of it if that is in the interest of national security, or if it is necessary to preserve a national, military, official or important business secret, if it is to protect the public peace and order, to preserve morality in the democratic society, to protect the personal and intimate life of the accused or the injured party or to protect the interest of a minor or a witness.<sup>1</sup>

Article 237 of the BiH CPC reads:

##### Article 237 of the BiH Criminal Procedure Code

(1) The judge or the Panel of judges shall issue a decision on exclusion of the public. The decision in question must be explained and publicly announced.<sup>1</sup>

(2) The decision on exclusion of the public may be contested only in the appeal against the verdict.

In the *Kurtović* case, the trial panel held that Article 235 of the BiH CPC provided for the protection of information from the intimate and personal life of injured parties, and that any public disclosure of this information would seriously harm their privacy interests.<sup>274</sup> The panel was particularly mindful of the nature of the offence against the victims and the trauma they continued to suffer.<sup>275</sup> The panel concluded that despite measures protecting their identities, “public testimony would pose

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<sup>273</sup> *Lelek*, 2nd inst., ¶ 111.

<sup>274</sup> *Kurtović*, 1st inst., p. 13 (pp. 12-13 BCS).

<sup>275</sup> *Ibid.*

a risk of disclosing their identities, and thus endanger theirs and their family's intimate and personal life".<sup>276</sup>

*The panel closed the trial from the public during certain points of testimony when the identity of the witnesses could have been divulged, such as when a witness was being asked questions of a personal nature or concerning a particular event.*

In the *Stanković* case, the appellate panel upheld the trial panel's decision to exclude the public from the main trial in order to protect the personal and intimate life of the injured party and the morality and the interest of the witnesses.<sup>277</sup> The appellate panel held that the trial panel's reasoning included important reasons supporting the decision to exclude the public, including the fact that the witnesses testified about having survived extremely difficult and humiliating circumstances, and the accused's threat that he would divulge their identities.<sup>278</sup>

The trial panel in the *Mejakić et al.* case also applied Article 235 of the BiH CPC for the purpose of witness protection. The panel closed the trial from the public during certain parts of the testimony when the identity of the witnesses could have been divulged, such as when a witness was being asked questions of a personal nature or concerning a particular event.<sup>279</sup> The trial panel added that this protective measure was necessary only in the rare instance that specific matters in their testimony could have clearly revealed their identities.<sup>280</sup>

The trial panel in this case held that:

Reviewing the balance between a witness' right to the protection of private life and the right of the general public to accurate and timely information, and noting that the exclusion of the public was an exception to the rule of public nature of proceedings, the Court deemed that the exclusion of the public would bring about the desired goal as long as detrimental consequences for the witness could be prevented, while public information would be made possible in another, more acceptable way.<sup>281</sup>

In the *Fustar* case, the trial panel also found that when there was a possibility that responses to specific questions could jeopardise the confidentiality of witnesses' identities, the trial could be closed to the public.<sup>282</sup>

In the *Damjanović Dragan* case, the trial panel ordered that the public be excluded from a part of the trial during which witnesses testified about the rape of one of the witnesses and other

<sup>276</sup> *Ibid.*

<sup>277</sup> *Stanković*, 2nd inst., p. 6 (p. 7 BCS).

<sup>278</sup> *Ibid.* at p. 7 (pp. 7-8 BCS).

<sup>279</sup> *Mejakić et al.*, 1st inst., p. 32 (p. 31 BCS).

<sup>280</sup> *Ibid.* at p. 32 (pp. 31-32 BCS).

<sup>281</sup> *Ibid.* at p. 32 (p. 31 BCS); See also *M. Savić*, 1st inst., p. 10 (p. 9 BCS) (relevant part upheld on appeal).

<sup>282</sup> Court of BiH, Dušan Fuštar, Case No. X-KR-06/200-1, Verdict, 21 April 2008, p. 6 (p. 6 BCS) (final verdict).

humiliating acts of which they were victims.<sup>283</sup> The panel based its decision on provisions in Article 235 of the BiH CPC, about the protection of the personal and intimate life of the injured parties.<sup>284</sup> The panel considered that the testimony on delicate and sensitive issues created a risk for the private and personal life of the victim witnesses and that this justified its holding.<sup>285</sup> The panel also noted that their testimony and affect demonstrated that they continue to suffer “emotional and physical consequences of their victimization which would have been exacerbated by subjecting them to public recitation of their ordeal”.<sup>286</sup>

In the *Janković Gojko* case, the prosecution requested the panel to hear two witnesses by use of the technical devices for transferring the voice of the witnesses, with the witness’ image only visible to the trial panel.<sup>287</sup> The prosecution argued that the witnesses were vulnerable, were testifying for the first time, and that nobody “had been familiar with what their hardships were nor that they were summoned to testify before the panel”.<sup>288</sup> The prosecution submitted that the witnesses’ mental state meant that the testimony would be extremely traumatic.<sup>289</sup> The defence objected, arguing that the only reason for their refusal to confront the accused was because they were not going to tell the truth.<sup>290</sup>

The trial panel held that the witnesses would give evidence in the courtroom, but that the public would be excluded and the accused would be taken to a different room to hear the testimony. The panel granted the accused the opportunity to consult with his defence counsel for the purpose of cross-examination.<sup>291</sup> In this respect, the panel considered, *inter alia*, that:

- Although a public hearing is an essential feature of the right to a fair trial, the panel, pursuant to Article 235 BiH CPC, has the discretion to “exclude the public for the entire or part of the main trial to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness”.<sup>292</sup>
- The witnesses were women victims “who were to testify about rapes and other humiliating treatment”.<sup>293</sup>
- Some of the women were under-aged when the crimes were committed and some still suffered

*Although a public hearing is an essential feature of the right to a fair trial, the panel, pursuant to Article 235 BiH CPC, has the discretion to “exclude the public for the entire or part of the main trial to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness”.*

<sup>283</sup> Court of BiH, Dragan Damjanović, 1st Instance Verdict, 15 Dec. 2006, p. 8 (p. 8 BCS) (relevant part upheld on appeal).

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> *G. Janković*, 1st inst., p. 26 (p. 26 BCS).

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.* at p. 27 (p. 26 BCS).

<sup>291</sup> *Ibid.*, at p. 27 (pp. 26-27 BCS).

<sup>292</sup> *Ibid.* at p. 27 (p. 27 BCS).

<sup>293</sup> *Ibid.*

- physical and psychological problems as a result of the crimes perpetrated against them.<sup>294</sup>
- Since the crimes the witnesses made efforts to rebuild a private, family and social life.<sup>295</sup>
  - Testifying in public about such “delicate and traumatic matters”, even with protective measures hiding their identities, posed a risk to the “personal and intimate life of the witnesses, since there was a real risk that their identity would be revealed by the substance of [their] testimony from and about them, even if technical devices were used to distort their appearance and voice during testimony”.<sup>296</sup>
  - It was likely that the witnesses could name others linked to the crimes and which could be prosecuted, as well as names of other protected witnesses in the present case.<sup>297</sup>

The panel concluded:

Having heard the submissions of the parties on all proposed options with regard to the examination of these two witnesses, the Panel pursuant to Article 235 CPC BiH decided that the public be excluded during the testimonies of witnesses E and J, with the primary aim to protect their personal and intimate life. If these witnesses were to give evidence in public, those generally known facts about the sufferings in Foča would easily lead to the disclosure of their identity which could be devastating not only for them but also for their families.<sup>298</sup>

In the same case, the panel noted that pursuant to provisions of Article 236(2) of the BiH CPC,<sup>299</sup> the exclusion of the public did not apply to representatives of the OSCE, whose function was to monitor the proceedings to assure that they comply with international standards of human rights. Likewise, public officials were never excluded from any part of the trial.<sup>300</sup>

In the *Pekez et al.* case, the accused requested the panel to exclude the public during his testimony.<sup>301</sup> The defence argued that if the information the accused had and intended to disclose was made public, the safety of his family would be threatened. The prosecution objected, arguing that the information was known and that, therefore, there were no objective reasons to justify such motion.<sup>302</sup> The trial panel noted the defence submission that the accused intended, during his testimony, to reveal the identity of other persons who participated in the charged crimes and found that it was reasonable to expect that those persons, “if they learned about the testimony of the

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<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.*

<sup>299</sup> Art. 236 (2) of the CPC BiH reads: The judge or the Panel of judges may allow certain officials, scientists and public officials to be present at the main trial from which the public is excluded, and the judge or the Panel of judges, at the request of the accused, may allow the presence also to the accused’s spouse, or his extramarital partner and his close relatives.

<sup>300</sup> *G. Janković*, 1st inst., p. 28 (p. 28 BCS); *See also Mejakić et al.*, 1st inst., p. 8 (p. 8 BCS) (relevant part upheld on appeal); Court of BiH, Nikola Kovacević, Case No. X-KR-05/40, 1st Instance Verdict, 3 Nov. 2006, p. 16 (p. 15 BCS) (relevant part upheld on appeal).

<sup>301</sup> Court of BiH, Mirko Pekez et al., X-KRŽ-05/96-1, 1st Instance Verdict, 15 April 2008, p. 12 (p. 11 BCS) (relevant part upheld on appeal).

<sup>302</sup> *Ibid.*

accused, could exert their influence on or threaten members of the accused's close family".<sup>303</sup> The panel also considered that the persons the accused knew the persons he would refer to in his, that they resided in the same municipality as the accused's family and that, should they learn of the testimony, could realistically threaten the safety of the members of the accused's close family.<sup>304</sup> The panel found that all elements of Article 235 of the BiH CPC had been fulfilled, and decided to exclude the public from the part of the main trial pertaining to the testimony of the accused.<sup>305</sup>

In the *Mitrović* case, the trial panel excluded the public from the main trial on several occasions when protective measures for witnesses or the manner of examination of witnesses were discussed.<sup>306</sup> The public was also excluded during the a portion of the testimony of the accused Radovanović when the accused mentioned the names of protected witnesses.<sup>307</sup>

*Excluding the public from hearings is an exception to the rule that proceedings be open to the public. However, the panel found that excluding the public protected the witnesses from potentially irreparable damage. It also considered that the public could be informed about the trial in other, "more acceptable", ways.*

The panel observed that the BiH public had "received detailed information about the proceedings conducted before the Court of BiH through the media".<sup>308</sup> This, the panel noted, may have posed an "insurmountable obstacle for the witnesses to freely give their testimony".<sup>309</sup> The panel balanced the rights of the witnesses to protection of their privacy and the interests of the public in having accurate and timely information about the trials. The panel noted that excluding the public from hearings is an exception to the rule that proceedings are generally open to the public. However, the panel found that excluding the public protected the witnesses from potentially irreparable damage. It also considered that the public could be informed about the trial in other, "more acceptable", ways.<sup>310</sup>

The trial panel in the *Kovačević* case rejected the accused's request to exclude the public, in particular journalists, from the trial. The accused argued that he was afraid that journalists would not be informing the public objectively about the trial, which might negatively influence and prejudice the accused.<sup>311</sup> The panel refused the proposal because it did not contain any of the reasons to exclude the public provided for in Article 235 of the CPC and, secondly because the right of the public to be informed about the proceedings prevailed over waiving the right to a public trial.<sup>312</sup>

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.* at p. 12 (p. 12 BCS).

<sup>305</sup> *Ibid.* at p. 12 (pp. 11-12 BCS).

<sup>306</sup> *Mitrović*, 1st inst., p. 168 (p. 205 BCS) (relevant part upheld on appeal); *See also Rašević et al.*, 1st inst., pp. 14-15 (p. 9-10 BCS) (relevant part upheld on appeal).

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*; *Rašević et al.*, 1st inst., p. 15 (p. 10 BCS) (relevant part upheld on appeal).

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> *Kovačević*, 1st inst., p. 15 (p. 14 BCS) (upheld on appeal).

<sup>312</sup> *Ibid.*

Exclusion of the public has also been applied in the absence of a “less restrictive” additional protective measure that would provide full protection of the witness.<sup>313</sup> In the *Savić* case, for instance, the trial panel considered Article 3 of the BiH Law on the Protection of Witnesses, and found that because there was no capacity to allow for image or voice distortion during the witness’ testimony via video-link, the testimony would be heard during closed session.<sup>314</sup> The panel reasoned that this was the appropriate solution given that there were no “less restrictive” protective measures that would fully protect the witness.<sup>315</sup>

#### 14.7.1.4. SPECIAL EVIDENTIARY RULES WHEN DEALING WITH CASES OF SEXUAL MISCONDUCT

There are special evidentiary issues related to victims of sexual violence. Article 264 of the BiH CPC reads:

##### Article 264 of the BiH Criminal Procedure Code

(1) It shall not be allowed to ask an injured party about any sexual experiences prior to the commission of the criminal offence in question. No evidence offered to show the injured party’s involvement in any previous sexual experience, behaviour, or sexual orientation shall be admissible.

(2) Notwithstanding Paragraph 1 of this Article, evidence offered to prove that semen, medical documents on injuries or any other physical evidence may stem from a person other than the accused, is admissible.

(3) In the case of the criminal offense against humanity and values protected by the international law, the consent of the victim may not be used in a favour of the defence.

(4) Before admitting evidence pursuant to this Article, the Court must conduct an appropriate hearing in camera.

(5) The motion, supporting documents and the record of the hearing must be sealed in a separate envelope, unless the Court orders otherwise.

In the *Pinčić* case, the accused argued on appeal that the trial panel committed a procedural error by imposing strict limitations during cross-examination.<sup>316</sup> The defence submitted that it was improperly prevented from questioning Witness “A” about a rape she had suffered before being

<sup>313</sup> See also e.g. *Mitrović*, 1st inst., p. 167 (p. 205 BCS) (relevant part upheld on appeal).

<sup>314</sup> *M. Savić*, 1st inst., p. 11 (pp. 9-10 BCS) (relevant part upheld on appeal).

<sup>315</sup> *Ibid.*

<sup>316</sup> Court of BiH, Zrinko Pinčić, Case No. X-KRŽ-08/502, 2nd Instance Verdict, 2 Dec. 2009, ¶ 10.

raped by the accused.<sup>317</sup> The appellate panel found that the accused's arguments were unfounded and that the trial panel acted properly in limiting the questioning pursuant to Article 264 of the BiH CPC.<sup>318</sup> The appellate panel noted that, during cross-examination, defence counsel questioned the witness on various matters, but when counsel attempted to examine the witness concerning a prior rape she had suffered, the trial panel prevented him from doing so pursuant to Article 264 of the BiH CPC.<sup>319</sup> The appellate panel also observed that while the accused explained in his appellate brief why the trial panel should have allowed the line of questioning, he failed to do so at trial. The appellate panel therefore found that the accused failed to properly raise the issue before the trial panel and therefore denied the appeal.<sup>320</sup>

#### 14.7.1.5. IMMUNITY: FREE PASSAGE OF WITNESSES

In the *Janković Gojko* case, the defence requested the trial panel to guarantee that 17 witnesses, who were allegedly members of the same unit as the accused, would not be imprisoned, detained or apprehended by any authority of Bosnia and Herzegovina or in any other manner have their free movement restricted, regardless of whether there were other proceedings on-going against them or whether the restriction would be the consequence of actions or previous convictions.<sup>321</sup> The defence also requested that the immunity last 15 days before their appearance and 15 after their testimony.<sup>322</sup>

The defence submitted that this was in accordance with ICTY practice and that the panel was obliged to provide the accused a fair trial and respect the accused's right to defend himself and right to equality of arms.<sup>323</sup> The prosecution responded that it could not provide the full guarantee requested, but that as far as it knew, no warrant had been issued against the said witnesses, although the prosecution could not speak to warrants issued before lower courts.<sup>324</sup>

The panel rejected the defence request, reasoning that on the basis of Article 84(3) of the BiH CPC<sup>325</sup>, the panel was *de jure* excluded from deciding on prosecution immunity for witnesses, as this would form part of an agreement between the witness and the prosecutor's office.<sup>326</sup> The panel opined, therefore, that in the context of the prosecution's response and considering the provisions of Article 84(1)-(2) of the BiH CPC,<sup>327</sup> the witnesses had sufficient guarantees to appear before the panel without fear that they would be prosecuted (except in the possible case of perjury).<sup>328</sup>

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.* at ¶ 13.

<sup>319</sup> *Ibid.*

<sup>320</sup> *Ibid.* at ¶ 14.

<sup>321</sup> *G. Janković*, 1st inst., p. 29 (p. 29 BCS).

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid.* at p. 30 (p. 29 BCS).

<sup>324</sup> *Ibid.* p. 30 (p. 29 BCS).

<sup>325</sup> Relevant paragraphs of Art. 84 CPC BiH read: (3) Immunity shall be granted by the decision of the Chief Prosecutor of BiH.

<sup>326</sup> *G. Janković*, 1st inst., p. 30 (p. 29 BCS).

<sup>327</sup> Relevant paragraphs of Art. 84 CPC BiH read: (1) The witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon

*The panel further held that although the requested immunity may be the practice at the ICTY, the ICTY was an international tribunal whose orders and decisions should be interpreted in relation to national regulations, and there was no national legislation which would represent a parallel to the ICTY rule on such immunities.*

The panel further held that although the requested immunity may be the practice at the ICTY, the ICTY was an international tribunal whose orders and decisions should be interpreted in relation to national regulations, and there was no national legislation which would represent a parallel to the ICTY rule on such immunities.<sup>329</sup> The panel recalled that all rights and obligations for witnesses in proceedings before the Court of BiH were prescribed in Articles 81 through 91 of the BiH

CPC, including the right to refuse answering potentially incriminating questions, but also the possibility of arrest or fine if the witness failed to respond to a court summons or failed to justify his absence.<sup>330</sup> The panel considered that although the BiH CPC prevented the panel from ordering the requested immunity, the panel was obliged to respect and apply the ECHR, which provided the guarantee to the accused that defence witnesses should have the equal treatment as prosecution witnesses.<sup>331</sup>

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himself, (2) The witnesses exercising the right referred to in Paragraph 1 of this Article shall answer the same questions provided that immunity is granted to such witnesses.

<sup>328</sup> *G. Janković*, 1st inst., p. 30 (p. 29 BCS).

<sup>329</sup> In particular the panel referred to Rule 54 of the ICTY RPE, which reads: At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

<sup>330</sup> *G. Janković*, 1st inst., p. 30 (p. 30 BCS).

<sup>331</sup> *Ibid.*

## 14.7.2. VICTIM COMPENSATION, REPARATIONS AND RESTITUTION

*Notes for trainers:*

- This section deals with victim compensation, reparations and restitution before all of the courts of BiH. The code applicable to the Court of BiH, as well as the code applicable before the entity level courts, includes provisions for injured parties to receive compensation, reparations and restitution. In particular, the BiH CPC and entity level criminal procedure codes provide that injured parties may participate in the proceedings as injured parties in order to pursue their claims for compensation.
- The relevant case law, to the extent it is available, in respect of injured parties is highlighted in this section.

## 14.7.2.1. DEFINITION AND RIGHTS OF INJURED PARTIES

The BiH CPC, FBiH CPC, RS CPC and BD CPC define an “injured party” as “a person whose personal or property rights have been threatened or violated by a criminal offence”.<sup>332</sup> The term “injured party” is connected to, for instance the following:<sup>333</sup>

- The injured party’s claims under property law and petitions to satisfy such claim (Articles 193 to 212 of the BiH CPC)<sup>334</sup>;
- Failure of the prosecution to act in accordance with a submitted criminal report, as, in that case, the injured party enjoys the right to file a complaint with the prosecutor’s Office (Article 216 of the BiH CPC);
- Cessation of the investigation by the prosecution, in which case the injured party enjoys the rights as set out in Article 216 (Article 224 of the BiH CPC);
- Plea bargaining, whereby the injured party needs to be given an opportunity before the prosecutor to state its position regarding the claim under property law (Article 231 of the BiH CPC);
- Notification of the injured party regarding the withdrawal of indictment (Article 232 of the BiH CPC);
- The right to attend the examination of a witness out of the court, when during the proceedings a witness is not able to appear before the court; this right also extends to the right to attend a reconstruction of the event (Article 272 of the BiH CPC);

<sup>332</sup> See BiH CPC, Art. 20(f) and the corresponding provision under FBiH CPC, RS CPC and BD CPC.

<sup>333</sup> See, e.g., Komentar Zakona o krivičnom/kaznenom postupku BiH, Savjet/Vijeće Evrope / Evropska komisija, 2005, pp. 91-92 (Commentary of the BiH Criminal Procedure Code, Council of Europe / European Commission, 2005, pp. 91-92); See also corresponding provisions of the FBiH CPC, RS CPC and BD CPC.

<sup>334</sup> Court of BiH, Dragan Damjanović, Case No. X-KR-05/51, 2nd Instance Verdict, 13 June 2007, p. 2 (p. 2 BCS); See also Court of BiH, Damjanović Goran et al., Case No. X-KR/05/107, 1st Instance Verdict., 18 June 2007 p. 2 (p. 2 BCS) (relevant part upheld on appeal); *Lelek*, 2nd inst., ¶ 3.; *Ljubicac*, 1st inst., p. 3 (p. 3 BCS).

- The right to be present at the trial even when the public was excluded (Article 236 of the BiH CPC);
- The right to present the closing arguments (Article 277 of the BiH CPC). However, the closing arguments of the injured party may relate only to analysis of evidence confirming justifiability of the claim under property law;<sup>335</sup> and
- The right to appeal the court's decisions with respect to the costs of the criminal proceedings and the claim under property law (Articles 288, 289 and 293 of the BiH CPC).

#### 14.7.2.2. CLAIMS UNDER PROPERTY LAW

A claim under property law may pertain to reimbursement of damage, recovery of items, or annulment of a particular legal transaction.<sup>336</sup> The petition to satisfy a claim under property law in criminal proceedings may be filed by the person authorised to pursue that claim in a civil action.<sup>337</sup> A petition to pursue a claim under property law in criminal proceedings is to be filed with the prosecutor or the court.<sup>338</sup> The petition may be submitted no later than the end of the main trial or sentencing hearing before the court.<sup>339</sup> If the authorised person has not filed the petition to pursue his claim under property law in criminal proceedings before the indictment is confirmed, he shall be informed that he may file that petition by the end of the main trial or sentencing hearing.<sup>340</sup>

If the authorised person does not file the claim under property law until the end of the main trial or if he requests a transfer to civil action, and the data concerning the criminal proceedings provide reliable grounds for a complete or partial resolution of the claim under property law, in the convicting verdict the court will order the accused to forfeit the property gain.<sup>341</sup>

*The petition to satisfy a claim under property law in criminal proceedings may be filed by the person authorised to pursue that claim in a civil action.*

The prosecutor has a duty to gather evidence regarding claims under property law relevant to the criminal offence.<sup>342</sup> The prosecutor has a duty to establish facts necessary for deciding on claims under property law in accordance with Article 197 of the BiH CPC and on the forfeiture of property gain obtained by the commission of a criminal offence in accordance with Article 392 of the BiH CPC.<sup>343</sup>

The court shall decide on claims under property law.<sup>344</sup> The court may propose mediation to the injured party and the accused or the defence attorney so that they can settle the property claim.<sup>345</sup> A

<sup>335</sup> Commentary of the BiH Criminal Procedure Code, p. 701.

<sup>336</sup> Art. 193(2) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>337</sup> Art. 194(1) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>338</sup> Art. 195(1) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>339</sup> Art. 195(2) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>340</sup> Art. 195(4) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>341</sup> Art. 195(5) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>342</sup> Art. 197(1) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>343</sup> Art. 35(2)(g) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>344</sup> Art. 198(1) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>345</sup> *Ibid.*

proposal for mediation can also be initiated before the completion of the main trial by either the injured party, the accused or the defence attorney.<sup>346</sup>

*In a verdict pronouncing the accused guilty, the court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder.*

In a guilty verdict, the court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder.<sup>347</sup> If the data of criminal proceedings do not provide a reliable basis for either a complete or partial award, the court shall instruct the injured party that he may take civil action to pursue his entire claim under property law.<sup>348</sup> If the court renders a verdict acquitting the accused of the charge or dropping the charges or if it decides to discontinue criminal proceedings, it shall instruct the injured party that he may

pursue his claim under property law in a civil action.<sup>349</sup> The injured party being examined as the witness shall be asked about his wishes for satisfaction of a property claim in the criminal proceedings.<sup>350</sup>

If a claim under property law involves the recovery of articles, and the court finds that the article does belong to the injured party and is in the possession of the accused or one of the participants in the main trial or in the possession of a person to whom those persons gave it for safekeeping, it shall order in the verdict that the article be turned over to the injured party.<sup>351</sup>

If a claim under property law pertains to annulment of a specific legal transaction, and the court finds that the petition is well founded, it shall declare in its verdict complete or partial annulment of that legal transaction with the consequences that derive therefrom, without affecting the rights of third parties.<sup>352</sup>

If the accused is found guilty, the operative part of the verdict must include, *inter alia*, the decision on the claim under property law. If the accused is acquitted of the charge or the charge is rejected, the operative part of the verdict must also include a claim under property law, if such was made.<sup>353</sup>

<sup>346</sup> *Ibid.*

<sup>347</sup> Art. 198(2) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>348</sup> *Ibid.*

<sup>349</sup> Art. 198(3) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>350</sup> Art. 86(10) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>351</sup> Art. 199 of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>352</sup> Art. 200 of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

<sup>353</sup> Art. 290(4) in conjunction with Art. 285(1)(g) of the BiH CPC; *See also* corresponding provisions in FBiH CPC, RS CPC and BD CPC.

### 14.7.2.2.1. RELEVANT CASE LAW

In the *Božić et al.* case, for example, the Court of BiH noted that it had not received any claims under property law and, therefore, the court did not rule on the matter.<sup>354</sup> However, the court held that persons authorised to file claims under property law could file civil suits to pursue those claims.<sup>355</sup>

In many cases before the Court of BiH, the court, pursuant to Article 198(2) of the BiH CPC, instructed the injured party who filed a property claim to initiate a civil action, as the determination of the property claim would be lengthy, mostly due to high number of the injured parties, and would thus delay the proceedings.<sup>356</sup> For the same reasons, in the *Momir Savić* case, the court instructed the injured parties who explicitly submitted claims under property law and the remaining injured parties to take civil action with their claims and potential claims.<sup>357</sup>

*In many cases before the Court of BiH, the court, pursuant to Article 198(2) of the BiH CPC, instructed the injured party who filed a property claim to initiate a civil action, as the determination of the property claim would be lengthy, mostly due to high number of the injured parties, and would thus delay the proceedings.*

In the *Mejakić et al.* case, the court referred the injured parties to take civil action to pursue their property law claims since the information obtained in the course of the criminal proceedings did not provide a reliable basis for decision on property law claims and the criminal proceedings would have been substantially prolonged by the determination of the amount of the claims.<sup>358</sup>

Where the accused has been acquitted of the charges, the court, pursuant to Article 198(3) of the BiH CPC, referred the injured parties to take civil actions with their claims under property law.<sup>359</sup>

In the *Milorad Trbić* case, the court attached to its verdict a table showing the names of persons killed, applicants and aggrieved parties, names of injured parties' attorneys, and the amounts

<sup>354</sup> Court of BiH, Zdravko Božić et al., Case No. X-KR/06/236, 1st inst., 6 Nov. 2008, p. 96 (p. 92 BCS) (the verdict upheld on appeal).

<sup>355</sup> *Ibid.*

<sup>356</sup> See, e.g., *D.Damjanović*, 1st inst., p. 60 (p. 56 BCS) (the verdict upheld on appeal in relevant part); *G. Janković*, 1st inst., p. 78 (p.75 BCS) (the verdict upheld on appeal in the relevant part); *Lelek*, 1st inst., p. 57 (p. 65 BCS) (verdict upheld on appeal in the relevant part); *Palija*, 1st inst., p. 52 (p.50 BCS) (verdict upheld on appeal); Court of BiH, Dragoje Paunović, Case No. X-KR-05/16, 1st Instance Verdict, 26 May 2006, p. 28 (p. 24 BCS) (verdict upheld on appeal).

<sup>357</sup> *M. Savić*, 1st inst., pp. 119-120 (p.104 BCS) (verdict upheld on appeal in the relevant part); See also *Kovačević*, 1st inst., p. 45 (p. 41 BCS) (verdict upheld on appeal); *Milorad Trbić*, X-KRZ-07/386, 2nd inst., 21 Oct. 2010, ¶332

<sup>358</sup> *Mejakić et al.*, 1st inst., p. 230 (p. 217 BCS) (verdict upheld on appeal in the relevant part).

<sup>359</sup> See, e.g., Court of BiH, *Janković Zoran*, Case No. X-KR-06/234, 1st inst., 19 June 2007, p.22 (p.20 BCS) (verdict upheld on appeal); *Mandić Momčilo*, Case No. X-KR-05/58, 1st inst., 18 July 2007, p.171 (p.164 BCS) (verdict upheld on appeal).

claimed by the injured parties.<sup>360</sup> Noting, however, that the process of establishing the facts in terms of the amounts of the claim would require more time, the court referred the victims to pursue their property law claims by taking civil action.<sup>361</sup>

The injured parties' appealed this decision. The appellate panel, however, upheld the trial panel's finding, concluding that, considering all the circumstances of the case at hand—in particular the length of the proceedings and the fact that the accused was in detention—establishing the facts regarding the amount of the claims under property law would require more time, which would place additional burden on the court in dealing with the primary criminal law issue.<sup>362</sup> In relation to the appellate argument of certain injured parties that their claim under property law was not covered by the impugned verdict, the appellate panel found that such arguments were unfounded, as the trial panel had decided that—in accordance with Article 198(2) and (3)—all of the injured parties that submitted the claims under property law, as well as the injured parties with potential claims under property law, were referred to take civil action.<sup>363</sup> The appellate panel concluded that this decision did not have any negative implications on the possibility of the injured parties to exercise their right, as the injured parties were merely referred to other proceedings in which they could exercise those rights.<sup>364</sup>

The trial panel in this case also decided to relieve the accused's duty to pay the costs of the proceedings due to his poor financial circumstances. The injured parties appealed this decision.<sup>365</sup> The appellate panel stressed that, in accordance with the principle that the appeal was to be related to the injured parties' direct legal interests, the injured parties could appeal this decision only if they had been directly damaged by the decision with regards to the costs of their representation during the criminal proceedings.<sup>366</sup> As the injured parties had not submitted any information on these costs, the appellate panel found that the trial panel's decision was correct pursuant to Article 188(4) of the BiH CPC.<sup>367</sup>

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<sup>360</sup> Court of BiH, *Milorad Trbić*, Case No. X-KR-07/386, 1st inst., 16 Oct. 2009 (published on 29 April 2010), p. 295 *et seq* (p. 296 *et seq* BCS).

<sup>361</sup> *Ibid.* at ¶ 873.

<sup>362</sup> *Trbić*, 2nd inst., at ¶ 330 (¶ 331 BCS) (Note: full translation of this paragraph is missing from the English version of the verdict).

<sup>363</sup> *Ibid.* at ¶ 331 (¶ 332 BCS).

<sup>364</sup> *Ibid.* at ¶ 333 (¶ 334 BCS).

<sup>365</sup> *Ibid.* at ¶ 8.

<sup>366</sup> *Ibid.* at ¶ 332 (¶ 333 BCS) (Note: full translation of this paragraph is missing from the English version of the verdict).

<sup>367</sup> *Ibid.*

## 14.8. CROATIA

### *Notes for trainers:*

- This section discusses the provisions of the laws of Croatia that deal with victim and witness protection, reparations and compensation and victim participation in the proceedings.
- This section is structured to deal with each of these issues in turn, citing the relevant jurisprudence, as far as it is known.
- Participants should be encouraged to assess whether sufficient measures have been taken to protect witnesses for war crimes cases. In addition, participants should discuss whether the provisions that allow for compensation and reparations provide adequate justice to the victims of war crimes. Participants should also be asked to discuss whether the extent of victim participation in the proceedings is adequate to represent their personal interests. They may wish to discuss ways in which victim participation can be extended, without undermining the central role of the prosecution and the rights of the accused.

### 14.8.1. VICTIM AND WITNESS PROTECTION AND SUPPORT

The Witness Protection Act came into force on 1 January 2004, and preliminary measures have been taken to upgrade witness protection services.<sup>368</sup> The main provision of this act, the provisions of the Criminal Procedure Act and the provisions that apply from the ICTY are outlined below.

#### 14.8.1.1. THE WITNESS PROTECTION ACT

The Witness Protection Act regulates the terms and procedures for providing protection and assistance to persons exposed to severe danger to their life, health, corporal inviolability, freedom or to large-scale property damage arising from testifying in certain criminal proceedings.<sup>369</sup>

The Witness Protection Act provides that factual witnesses<sup>370</sup> may be granted protective measures if proving a criminal offence would be disproportionately difficult or impossible without the testimony of the endangered witness, who, due to the possible threat would not freely testify in the criminal proceedings. This applies to proceedings involving:

- Criminal offences against the Republic of Croatia,
- Criminal offences against the values protected under international law;

<sup>368</sup> Witness Protection Act, Croatian Official Gazette „Narodne Novine“ No. 163/03, 18/2011, Arts. 47 - 50.

<sup>369</sup> *Ibid.* at Art. 1.

<sup>370</sup> The Croatian legal system separates factual witnesses from expert witnesses.

- Criminal offences of organised crime; and
- Other criminal offences punishable with five years' imprisonment or a more severe sentence.<sup>371</sup>

The Witness Protection Act also sets forth the procedure of becoming a protected witness. Upon the proposal of the competent state attorney or endangered person, the state attorney general may submit a request to a witness protection committee (established by the Witness Protection Act) to bring the person at risk into the protection scheme, if the testimony of a witness in a criminal proceeding could not be assured in any other way.<sup>372</sup>

After the committee approves the request, the protected witness can be provided with one of the following measures:

- Physical protection;
- Relocation;
- Measures of disguising identity and ownership; or
- Change of identity.<sup>373</sup>

*Physical protection involves the immediate provision of protection in order to prevent the endangerment of the life, health, corporal inviolability, freedom or property of the endangered person.*

Physical protection involves the immediate provision of protection in order to prevent the risk to the life, health, corporal inviolability, freedom or property of the endangered person.<sup>374</sup>

Relocation of the endangered person is a temporary or permanent resettlement from the place of residence or domicile of the endangered person to another location designated by the Protection Unit. Relocation is possible on the territory of the Republic of Croatia or outside the territory of the Republic of Croatia, in accordance with international treaties.<sup>375</sup>

The measures to keep the identity of the witness anonymous include the production and use of personal documents with temporarily changed personal data, as well as the production and use of title deeds of the endangered persons. The measures to disguise identity and ownership do not result in the permanent change of personal data and data about ownership in the appropriate records.<sup>376</sup>

*Measures to disguise the witness' identity comprise the production and use of personal documents with temporarily changed personal data, as well as production and use of title deeds of the endangered persons.*

<sup>371</sup> Witness Protection Act, Croatian Official Gazette „Narodne Novine“ No.163/03, 18/2011, Art. 3.

<sup>372</sup> *Ibid.* at Art. 11.

<sup>373</sup> *Ibid.* at Art. 17.

<sup>374</sup> *Ibid.* at Art. 18.

<sup>375</sup> *Ibid.* at Art. 19.

<sup>376</sup> *Ibid.* at Art. 20.

Change of identity is a change to parts of, or all, personal data of the endangered person. Acquisition of a new identity has no impact on the status and other rights and obligations of the endangered person. After the change of identity, the unit allows for and supervises the transition back to the witness' real identity.<sup>377</sup>

The unit will also provide necessary psychological, social and legal assistance to the protected person. In order to assist the transition of the protected person into the new environment, the unit will assist the protected person with financial and social support until the moment of the witness' independence.<sup>378</sup>

*Change of identity is a change to parts of or all personal data of the endangered person.*

Witnesses are not granted protections under the Witness Protection Act in a criminal proceeding, but they would be granted protection in a special proceeding held before a different judge and under a different case number. Thus, objections to the witness protection proceedings should be made before that judge, not in the criminal proceedings.

Although the Witness Protection Acts provides for such protective measures, in practice it is very rare for a witness to enter the protection scheme in war crimes cases.

In the *Dalj* case, the witness was protected under the Witness Protection Act. The accused Miodrag Kikanović and the accused Radoslav Krstinić objected to this protection and stated that there was no reason for the witness protection. The court rejected the defence's objection since the protection had been granted according to the special procedure of the Witness Protection Act and not during the criminal proceeding in the case. Additionally, the court added that it was likely that by testifying or by answering any individual question, a witness might expose himself or any other person close to him to a serious danger. For these reasons, the court rejected the objection and the witness remained protected.<sup>379</sup>

#### 14.8.1.2. THE CRIMINAL PROCEDURE ACT

There are also measures for witness protection under the Croatian Criminal Procedure Act (CPA). Witnesses provided with protection under the CPA are called "witnesses in danger" and special rules apply to them. Such witnesses are examined in a different manner and are given a pseudonym.

Article 249 (238a of 1998 CPA) of the Criminal Procedure Act stipulates that if it is likely that by testifying or by answering any individual question, a witness might expose himself or any other person close to him to serious danger to their life, health, physical integrity, freedom or property, the witness is entitled to refuse to disclose information referred to in Article 248(2) (238 of 1998 CPA) of the Act (his first name and surname, his father's first name, occupation, place of residence, place of birth, age and his relation to the defendant and the injured person). He can also refuse to

<sup>377</sup> *Ibid.* at Art. 21.

<sup>378</sup> *Ibid.* at Art. 34.

<sup>379</sup> Osijek County Court of the Republic of Croatia, Novak Simić et al. (*Dalj*), Case No. K-42/07, 1st Instance Verdict, 21 April 2008, p. 6.

answer individual questions or to refuse to testify at all until witness protection measures have been provided.<sup>380</sup>

*Witness protection under the CPA also includes a special manner of questioning a witness and of his participation in the proceedings as well as measures for protecting the witness and other persons close to the witness who are not participating in the proceedings.*

Witness protection under the CPA also includes a special manner of questioning a witness and of his participation in the proceedings, as well as measures for protecting the witness and other persons close to the witness who are not participating in the proceedings.<sup>381</sup>

If a witness declares he is in danger during the examination, the investigating judge must interrupt the examination if they believe that the existence of the threat is justified. The investigating judge must immediately notify the state attorney by sending a copy of the record and a request for the state attorney to submit, within three days, a written justifiable suggestion for implementing a special manner of examination and participation of the witness in the proceedings. The judge

must also report on measures for the protection of the witness and, if needed, other persons close to the witness not participating in the proceedings. If the investigating judge finds the refusal to testify to be unjustified, he will proceed with the investigation.

If the state attorney fails to submit a suggestion for implementing a special manner of examining the witness within the required period, or if the state attorney suggests that the witness be examined in accordance with general rules, the investigating judge must request the panel referred to in Article 20(2) of the CPA to make a decision. The panel is obliged to make a decision within three days.<sup>382</sup>

Rules regarding how the state attorney must submit the suggestion for implementing a special manner of participation in an examination include:

- The suggestion must be submitted in a sealed cover with the note “Witness in Danger – Confidential”;
- The state attorney must specify a special manner of participation in the proceedings and a special manner of examination of a witness;
- The state attorney must specify the reasons for suggesting the special measures; and
- The suggestion must also contain suggested protection measures and information on when such measures would begin for the witness and other persons close to the witness that are not participating in the proceedings but who have been accepted by an authority carrying out the witness protection program.

If the investigating judge accepts the suggestion submitted by the state attorney, they must determine a pseudonym for the witness as well as a special manner of examination and of

<sup>380</sup> Criminal Procedure Code, Croatian Official Gazette „Narodne Novine“ No. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 115/06 (1998 CPA), Art. 238a.

<sup>381</sup> 1998 CPA Art. 238.a.

<sup>382</sup> 1998 CPA Art. 238.b.

participation in the proceedings. After the ruling on the special manner of participating and examining a witness comes into force, the investigating judge must schedule a hearing and deliver a summons to the witness in a way to ensure that the measures of protecting the witness and other persons close to the witness are carried out.<sup>383</sup> The parties and the witness have the right to appeal against a ruling of the investigating judge.

*If the special manner of examining a witness refers only to non-disclosure of information about the first name and surname, his father's first name, occupation, place of residence, place of birth, age and his relation to the defendant and the injured person, the examination shall be carried out under a pseudonym.*

If the special manner of examining a witness refers only to non-disclosure of information about the first name and surname, his father's first name, occupation, place of residence, place of birth, age and his relation to the defendant and the injured person, the examination shall be carried out under a pseudonym. Apart from this, the examination of a witness shall be carried out pursuant to the general provisions of the CPA relating to the examination of witnesses.

*If the special manner of examination and participation of a witness in proceedings involves concealing the witness' appearance, the examination shall be carried out using video and audio taping equipment operated by an expert.*

If the special manner of examination and participation of a witness in proceedings involves concealing the witness' appearance, the examination shall be carried out using video and audio taping equipment operated by an expert. The appearance and the voice of the witness will be altered during the examination. In the course of the examination, the witness will be situated in a room separated from the room in which the investigating judge and other persons attending the examination are situated. After the examination is completed, the witness

signs the record with the pseudonym in the presence of the investigating judge and the court reporter only.<sup>384</sup>

Taking into consideration a witness' age, physical and mental health or other justifiable interests, the witness may be examined by means of technical devices for the transmission of image and sound, so that the parties may examine him without being present in the room where the witness is located.<sup>385</sup>

Witnesses in war crimes cases arising out of the conflict in the former Yugoslavia are often provided with protection according to the Criminal Procedure Act. For example, in one case the witness in danger was provided with the pseudonym "witness in danger number 1" and was examined in a specially prescribed manner.<sup>386</sup> His testimony was considered valid and truthful.<sup>387</sup>

<sup>383</sup> 1998 CPA, Art. 238.c.

<sup>384</sup> 1998 CPA, Art. 238.d.

<sup>385</sup> 1998 CPA, Art. 238.d.

<sup>386</sup> Supreme Court of Croatia, Case No. Kž-594/09, 2nd Instance Verdict, 4 Nov. 2009, p. 8.

<sup>387</sup> *Ibid.*

The Supreme Court of the Republic of Croatia has held that the Zagreb County Court validly granted protective measures to a witness at risk including the use of a pseudonym, the protection of personal information and the appearance of the witness. The Supreme Court rejected the defence's arguments that witness protection was unnecessary because almost all of the parties, and the public, knew the identity of the witness.<sup>388</sup>

In another case, the Sisak County Court decided not to exclude the public when one of the witnesses was examined. The Supreme Court of the Republic of Croatia upheld this decision. The Supreme Court held that excluding the public is not a protective measure included in the CPA for the protection of a witness' personal and family life. The court held that the CPA and the Witness Protection Act provide measures to protect data about a witness' personal or family life and the security of witnesses.<sup>389</sup>

#### 14.8.1.3. ICTY PROTECTIONS IMPLEMENTED UNDER CROATIAN CRIMINAL PROCEDURE

In some cases, witnesses are granted protective measures by the ICTY in cases which began at the ICTY and then transferred to the national courts, including witnesses that were interviewed in the pre-trial phase of the case and then granted protective measures. These protective measures remain in place during proceedings before the Croatian courts as well.

*ICTY protective measures remain in place during proceedings before the Croatian courts.*

That is what happened in the case against Ademi and Norac (the “*Medački džep*” case) when several witnesses were interviewed by the ICTY OTP under pseudonyms.<sup>390</sup> These witnesses were mostly testifying about the crime scene, murders and perpetrators of other crimes.

The parties could not reach an agreement about reading the testimony of some of the protected witnesses during the proceedings. The defence was opposed to reading the statements because it believed that it would violate the accused's right to a fair trial because the statement had not been tested by the defence during the pre-trial phase of the case.<sup>391</sup>

The court rejected the objection of the defence.<sup>392</sup> The court noted that the protected witnesses had testified about the same facts about which other witnesses had been examined directly and through video-conference link.<sup>393</sup> The court further stated that the defence could have examined those *viva voce* witnesses on the circumstances from the protected witness' written statements.<sup>394</sup> In addition, the court reasoned that the evidence of these witnesses did not relate directly to acts and conduct

<sup>388</sup> Supreme Court of Croatia, Case No. Kž-671/08, 2nd Instance Verdict, 23 July 2008, p. 2.

<sup>389</sup> Supreme Court of the Republic of Croatia; Case No. Kž-171/07, 2nd Instance Verdict, 7-March-2007.

<sup>390</sup> Zagreb County Court of the Republic of Croatia, Rahim Ademi and Mirko Norac-Kevo (*Medački džep*), Case No. K-rz-1/06, 1st Instance Verdict, 30 May 2008.

<sup>391</sup> *Ibid.* at pp. 19 – 20.

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ibid.*

of the accused, but possibly to their subordinates. Finally, the court found that the witness could not appear before the court due to their poor health condition and that, as required by Croatia's Application Law,<sup>395</sup> the statements of protected witnesses had been taken by the ICTY according to their Rules of Procedure and Evidence. This was a requirement for reading the statement of witnesses without consent of the parties set forth in the Article 331 of the Criminal Procedure Act.<sup>396</sup> Therefore, reading the testimony of these witnesses was in compliance with the law and did not violate the right to a fair trial.<sup>397</sup>

The court may decide not to examine the witnesses at risk if their testimony relates to facts that could be proved in another way.<sup>398</sup> For this reason, the court rejected the proposal to examine a witness in danger because there were two other witnesses who had testified about the same events as the protected witness.<sup>399</sup> Furthermore, by examining the protected witness there was a risk that his identity could become known given that the content of the testimony of three other witnesses that suggested the identity of the protected witness.

#### 14.8.2. VICTIM COMPENSATION, REPARATION AND RESTITUTION

*The Croatian Criminal Code defines "injured person" as a person whose personal or financial right has been infringed or jeopardised by the criminal offence.*

The Croatian Criminal Code defines "injured person" as a person whose personal or financial right has been infringed or jeopardised by the criminal offence.<sup>400</sup>

Injured persons have rights under Croatian law to claim compensation in criminal proceedings, in civil proceedings, or from the State.

##### 14.8.2.1. COMPENSATION IN CRIMINAL PROCEEDINGS

Injured persons can file a claim for indemnification during trial, whether they are testifying or not. The injured person who is testifying as a witness would be asked by the judge whether they would file a claim for indemnification.

*Injured persons can file a claim for indemnification during trial, whether they are testifying or not.*

<sup>395</sup> Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law, Croatian Official Gazette „Narodne Novine“, No. 175/2003, 55/2011.

<sup>396</sup> Criminal Procedure Act, Croatian Official Gazette „Narodne Novine“ No. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 115/06.

<sup>397</sup> *Medački džep*, 1st inst., pp. 19 – 20.

<sup>398</sup> *Ibid.*

<sup>399</sup> *Medački džep*, 1st inst., p. 48.

<sup>400</sup> 1998 CPA, Art. 170(1)(5). The Croatian Criminal Procedure Act did not make reference to the term "victim". The new Criminal Procedure Act adopted the term for the first time in December 2008. However, that code will not be enforced until 1 September 2011. Criminal Procedure Act, 24 Dec. 2008, Croatian Official Gazette „Narodne Novine“ No. 152/08, 76/09.

A claim for indemnification shall be considered in criminal proceedings upon the motion of authorised persons, provided that this does not considerably delay proceedings. The claim for indemnification may generally consist of a demand for the compensation of damages, recovery of an object or the annulment of a certain legal transaction.<sup>401</sup> In war crimes cases, the claim for indemnification may consist only of a demand for the compensation of damages and the recovery of an object.

*A claim for indemnification shall be considered in criminal proceedings upon the motion of authorised persons, provided that this does not considerably delay proceedings. The claim for indemnification may generally consist of a demand for the compensation of damages, recovery of an object or the annulment of a certain legal transaction.*

A motion to assert a claim for indemnification can be made by a person who is entitled to litigate an issue in a civil action.<sup>402</sup> This motion, if filed during criminal proceedings, shall be submitted to the authority charged with receiving crime reports or to the court conducting the proceedings before the conclusion of the trial before the first instance court. The claim must be specified and supporting evidence need to be submitted.<sup>403</sup>

Persons entitled to assert a claim for indemnification may withdraw their motion in criminal proceedings and submit it as a civil action.<sup>404</sup>

The court may, in a judgement of conviction, satisfy the claim of the injured person fully, or it may satisfy it partially while directing the injured person to assert the rest of the claim in a civil action. If the data established in criminal proceedings provides no reliable basis for either full or partial adjudication, the court shall direct the injured person to assert his claim in its entirety in a civil action.

*The court may, in a judgement of conviction, satisfy the claim of the injured person fully, or it may satisfy it partially while directing the injured person to assert the rest of the claim in a civil action.*

When rendering a judgement of acquittal, a judgement rejecting the charge or a ruling discontinuing criminal proceedings, the court shall direct the injured person to assert his or her claim for indemnification in a civil action.<sup>405</sup>

When the claim for indemnification is a claim to recover an object, in its judgement the court must first establish whether the object belongs to the injured person and if it is in the possession of the

<sup>401</sup> CPA, Art. 133.

<sup>402</sup> *Ibid.* at, Art. 134.

<sup>403</sup> *Ibid.* at Art. 135.

<sup>404</sup> *Ibid.* at Art. 128.

<sup>405</sup> *Ibid.* at Art. 138.

defendant, his accomplices or another person. The court must then order the object to be delivered to the injured person.<sup>406</sup>

Although the Croatian legal system provides injured persons in war crimes cases with the possibility to assert a claim for indemnification during criminal proceedings, even in cases less complicated than war crimes cases, the criminal courts refuse to decide on the claim, because the decision would lead to delays in the proceedings. For that reason, the injured person is almost always directed to assert their claim in a civil action.<sup>407</sup>

#### 14.8.2.2. COMPENSATION IN CIVIL PROCEEDINGS

In civil proceedings, the injured person would have to prove that the perpetrator of the crime caused them specific damage. When the perpetrator of the crime is already convicted in a criminal proceeding, it is not necessary to present more evidence to the court that the perpetrator of the crime damaged the injured person, apart from the conviction judgement. However, if the perpetrator of the crime is acquitted, they can still be held responsible for the damages. In these cases, the injured person then needs to prove that the acquitted person caused the damage to the injured person.

*In civil proceedings the injured person would have to prove that the perpetrator of the crime caused them specific damage.*

The Civil Obligations Act stipulates that a person who has caused damage to another person shall compensate for this damage, unless he has proven that the damage was not his fault.<sup>408</sup> Liability to compensate for damage is due as of the time the damage occurs.<sup>409</sup>

The possibility to make a claim of compensation for damages expires three years after the time the injured party became aware of the damage or the person causing the damage, or five years from the moment the damage was caused.<sup>410</sup> Where damage has been caused by a criminal offence and where a longer statute of limitations is provided for criminal prosecution, a claim of compensation for damage against a responsible person will be the same as the statute of limitations for criminal prosecution.<sup>411</sup> There is no statute of limitations for war crimes cases in Croatia.<sup>412</sup>

##### 14.8.2.2.1. COMPENSATION FROM THE STATE

Under Articles 180 and 184 of the old Civil Obligation Act, taken over from the SFRY and amended several times thereafter, persons can claim compensation for damages caused by acts of terror and

<sup>406</sup> *Ibid.* at Art. 139.

<sup>407</sup> Ivo Josipović: Priručnik za praćenje suđenja; Centar za mir, nenasilje i ljudska prava – Osijek, Osijek, 2007.

<sup>408</sup> Art. 1045 of the Civil Obligations Act, Official Gazette of Croatia „Narodne Novine“ No. 35/05, 17 March 2005.

<sup>409</sup> *Ibid.*

<sup>410</sup> Art. 230 of the Civil Obligations Act, Official Gazette of Croatia „Narodne Novine“ No. 35/05, 17 March 2005.

<sup>411</sup> Art. 231 of the Civil Obligations Act, Official Gazette of Croatia „Narodne Novine“ No. 35/05, 17 March 2005.

<sup>412</sup> *See, e.g.*, Module 8.

by members of Croatian armed forces and police, including damage caused during the conflict in former SFRY.<sup>413</sup> However, in 1996, the Croatian Parliament adopted the Amendments to the Civil Obligation, suspending all court proceedings against the state for compensation of damages caused by the act of terror, pending the adoption of new legislation. In 1999, the Parliament again adopted new Amendments to the Civil Obligation Act, suspending all court proceedings against the state for compensation of damages caused by the members of Croatian armed forces and police, pending the adoption of new legislation. Many compensation lawsuits against the state were stayed due to the new legislation.

In 2003, the Croatian Parliament adopted two laws governing the right of injured persons to claim damages from the state resulting from by acts of terror and by Croatian armed forces and the police (*i.e.* the Law on Compensation of Damages Caused by Acts of Terror and Public Demonstrations and the Law on Responsibility of Republic of Croatia for Damages Caused by the Members of Croatian Armed and Police Forces during the Homeland War).<sup>414</sup> Based on the new legislation, the previously stayed lawsuits were resumed and new compensation claims were filed against the state.

However, many plaintiffs failed with their claims, either because the courts found that the claimed damages were “war damages” exempted from compensation under two laws,<sup>415</sup> or that the statute of limitations for filing a claim had already expired.<sup>416</sup> The courts determined that the privileged statute of limitations for damages caused by criminal offences could be applied only if the perpetrator(s) have been convicted for the offence.

However, some plaintiffs were successful and received compensation from the state in cases brought before the European Court of Human Rights (ECtHR). In the case *Skendzic v. Republic of Croatia*, the family of a person taken away by Croatian police in 1991 and missing since then filed a compensation claim against the state. Although the direct perpetrators were not detected and punished, the court found that the state was responsible for the actions of the police and awarded the family compensation.<sup>417</sup> In the case *Knezevic v. Republic of Croatia*, the court awarded damages to the family of a man who had been killed by the Croatian police in prison in 1992.<sup>418</sup> The perpetrators were found and convicted for the crime.

As the above examples show, if the damages are caused by a war crime and the members of Croatian armed forces or police have been found responsible for that crime, the victims could claim compensation of damages from the state. Since there is no statute of limitations in prosecution of war crimes, these claims will not be barred for time if filed within the three or five years after a conviction for war crime becomes final, taking the time when the judgement becomes final as a moment when the injured person has learned about the damages.

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<sup>413</sup> Civil Obligation Act, Official Gazette „Narodne Novine“ No. 53/91, 73/91, 3/94, 7/96, 132/98, 112/99).

<sup>414</sup> Law on Responsibility of Republic of Croatia for Damages Caused by the Members of Croatian Armed and Police Forces during the Homeland War; Croatian Official Gazette „Narodne Novine“ No. 117/2003.

<sup>415</sup> County Court in Sibenik, Vuković v. Republic of Croatia, Case No. Gz – 775/2006.

<sup>416</sup> County Court in Sisak, Jelić v. Republic of Croatia, Case No. Gz-1200/2006; Supreme Court of Republic of Croatia, Case No. Rev 845/07-2.

<sup>417</sup> Municipal Court in Otocac, Skendzic v. Republic of Croatia, Case No. P-82/02-51.

<sup>418</sup> Municipal Court in Split, Knezevic v. Croatia, Case No. P-546/07.

Apart from the domestic case law presented above, it is important to note that “ECtHR” found Croatia responsible for shortcomings in the investigation of two war-time related criminal offences. In the *Skendzic and Krznaric* case, the ECtHR found shortcomings in the inquiry into the disappearance of the applicants’ husband and father, who was taken by the Croatian police from his home in November 1991. The ECtHR found that the investigations were ineffective and lacked independence of the authorities involved. This, the court held, failed to comply with the requirements of Article 2 of the European Convention on Human Rights (“ECHR”). However, although the court found a violation of procedural aspects of Article 2, the court dismissed the applicants’ claim for just satisfaction, finding that the compensation awarded by the national court was sufficient.<sup>419</sup>

In the *Jularić* case, the ECtHR also found Croatia responsible for a violation of procedural aspects of Article 2 of the Convention, regarding the investigation of the murder of the applicant’s husband who had been allegedly killed by members of Serb paramilitary forces in October 1991. On the issue of just satisfaction, the court awarded the applicant 30,000 EUR.<sup>420</sup>

### 14.8.3. VICTIM PARTICIPATION IN CRIMINAL PROCEEDINGS

In Croatia, injured persons have the right to participate in proceedings before the court. Injured persons are not parties to the proceedings, and thus their participation is not as broad as the participation of parties, but is still very significant.

In practice, injured persons are identified either by reporting the crime, by being a witness, or by being named by other witnesses. After the court learns of the injured persons, it sends these persons all of the necessary decisions, documents and invitations to participate in the trial.

It is important to note that injured persons participating in proceedings do not receive any protective measures beyond witness protection measures that may exist if the injured persons are witnesses.

*It is important to note that injured persons participating in proceedings do not receive any protective measures beyond witness protection measures that may exist if the injured persons are witnesses.*

The investigating judge, the single judge and the president of the panel must inform the injured person of their rights, including:<sup>421</sup>

- The right to call attention to all facts the injured person considers relevant and important to the case.
- The right to present evidence important for:
  - the determination of the offence,
  - discovering the perpetrator and
  - adjudicating their claims for indemnification.<sup>422</sup>

<sup>419</sup> *Skendzic and Krznaric v. Croatia*, Application No. 16212/08, 20 Jan. 2011, Final, 20 April 2011, pp. 51, 123.

<sup>420</sup> *Jularić v. Croatia*, Application No. 20106/06, 20 Jan. 2011, Final 20 April 2011, p. 51, 55.

<sup>421</sup> CPA, Art. 54.

- In the course of the investigation, the right to submit motions to the investigating judge to undertake certain investigatory actions.<sup>423</sup>
- The right to attend the taking of a statement and the interrogation of an expert witness.<sup>424</sup>

At the trial, the injured party is entitled to:

- Present evidence;
- Examine the defendant, factual witnesses and expert witnesses;
- Comment on and clarify witness' statements;
- Give other statements;
- Make motions; and
- Inspect files and objects in evidence.

If the injured person is called to stand as a witness during the proceedings, the inspection of the files may be denied to the injured person until he has been examined as a witness.

If the injured person is a minor or a person declared incapable of performing legal acts, his legal guardian shall be authorised to give all statements and perform all actions to which the injured person is entitled. An injured person of sixteen years or more may give statements and undertake procedural actions themselves.<sup>425</sup>

The injured person, as well as their legal guardians, are entitled to exercise their procedural rights through legal representatives.<sup>426</sup>

*If the injured person is a witness in the case, their examination shall be carried out before other witnesses give their testimonies.*

The injured person is entitled to remuneration, as discussed above in section 14.8.2. If they are testifying as a witness, they would be asked whether they intend to assert a claim for indemnification in the criminal proceedings.<sup>427</sup> If the injured person is a witness in the case, their examination shall be carried out before other witnesses give their testimonies.<sup>428</sup>

The injured person or his legal representative may, in their closing argument, make a statement of reasons to support a claim for indemnification and point out the evidence regarding the culpability of the accused.<sup>429</sup> The defence counsel or the accused may then, in their closing argument, comment on the statements made by the injured person. The prosecutor and the injured person are entitled

<sup>422</sup> Art. 54 of the CPA generally stipulates the rights of the injured person but does not specifically define during which phase of the procedure the injured person is entitled to act.

<sup>423</sup> 1998 CPA Art. 197(1).

<sup>424</sup> 1998 CPA Art. 198(2).

<sup>425</sup> 1998 CPA Art. 2.

<sup>426</sup> CPA, Art. 60.

<sup>427</sup> 1998 CPA Art. 239(4).

<sup>428</sup> 1998 CPA Art. 321(3).

<sup>429</sup> 1998 CPA Art. 345.

to respond to the defence. Additionally, the defence counsel and the accused are entitled to comment on these responses.<sup>430</sup>

The injured person is not entitled to file an appeal, except in certain, very limited situations. The injured person may challenge a judgement only regarding the court's decision on the costs of the proceedings.<sup>431</sup>

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<sup>430</sup> 1998 CPA Art. 346(3).

<sup>431</sup> 1998 CPA Art. 363(4).

## 14.9. SERBIA

*Notes for trainers:*

- This section discusses the provisions of the laws of Serbia that deal with victim and witness protection, reparations and compensation and victim participation in the proceedings.
- This section is structured to deal with each of these issues in turn, citing the relevant jurisprudence, as far as it is known.
- Participants should be encouraged to assess whether the existing legal framework for witness protection is sufficient to protect witnesses for war crimes cases. Participants could also be encouraged to find ways to use the existing legal framework most effectively to guarantee the most effective witness protection adjusted to a specific case.
- In addition, participants should discuss whether the provisions that allow for compensation and reparations and whether the procedural mechanisms in place provide adequate justice to the victims of war crimes. Participants can also be asked to discuss whether the extent of victim participation in the proceedings is adequate to represent their personal interests. They may wish to discuss ways in which victim participation can be extended, without undermining the central role of the prosecution and the rights of the accused.

## 14.9.1. VICTIM AND WITNESS PROTECTION AND SUPPORT

The law in Serbia provides for both procedural (in-court) and out of court protection of persons who, due to personal circumstances or their testimony, cannot be treated as all other witness. Such rules have been introduced through several laws and amendments, adopted in 2005 and 2006, to facilitate the testimony of witnesses not only in war crimes cases, but also in organised crime and other criminal proceedings. During the drafting process, relevant international and European standards relating to the position of victims and witness were observed, as well as the practice of the European Court of Human Rights on witness protection and its impact on the rights of the defendant.<sup>432</sup>

The relevant rules concerning in-court protection are included in the following laws:

<sup>432</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Council of Europe Recommendation (97) 13 concerning intimidation of witnesses and the rights of the defence, Council of Europe Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, and Council of Europe Recommendation (06)8 of the Committee of Ministers to member states on assistance to crime victims.

- Criminal Procedure Code of the Republic of Serbia;<sup>433</sup>
- Law on Organization and Jurisdiction of State Authorities in War Crime Proceedings;<sup>434</sup>
- Law on Juvenile Offenders and Criminal Protection of Juveniles;<sup>435</sup> and
- Law on the Protection Program of Participants in Criminal Proceedings.<sup>436</sup>

These laws will be discussed in turn, below.

#### 14.9.1.1. PROCEDURAL (IN-COURT) PROTECTION

##### 14.9.1.1.1. PROTECTION UNDER THE CRIMINAL PROCEDURE CODE

The Criminal Procedure Code (“CPC”) provides various measures to facilitate the testimony of any category of witnesses in court. Article 109 of the CPC provides that the courts are obliged “to protect the witness and injured party from insults, threats and any other attacks”. If “there are circumstances that indicate that the life, physical integrity, health, liberty or any considerable asset of a witness or persons close to him would be threatened as a result of his public testimony, especially in the case of organised crime offences, corruption or other very serious criminal offences, the court may issue a ruling approving special protection measures for such a witness (protected witness)”.<sup>437</sup>

*If “there are circumstances that indicate that the life, physical integrity, health, liberty or any considerable asset of a witness or persons close to him would be threatened as a result of his public testimony, especially in the case of organised crime offences, corruption or other very serious criminal offences, the court may issue a ruling approving special protection measures for such a witness (protected witness)”.*

Protective measures may include changes to the conduct of examination in order to conceal the witness’s identity, including:

- Assigning a pseudonym under which a witness would testify;
- Removing the name and other personal data that disclose the witness’s identity from the file;<sup>438</sup>
- Excluding the public from the hearings; and
- Having the witness testify from a separate room using technical devices for the transmission of images and sound together with voice and image distortion and thereby avoiding the witness’ physical appearance in the courtroom.<sup>439</sup>

<sup>433</sup> Official Gazette of FRY, No. 70/2001 and 68/2002; Official Gazette of the RS, No. 58/2004, 85/2005, 115/2005, 85/2005 – other law, 49/2007, 20/2009 – other law and 72/2009.

<sup>434</sup> Official Gazette of the Republic of Serbia, No. 67/2003, 135/2004, 61/2005, 101/2007 i 104/2009.

<sup>435</sup> Official Gazette of the Republic of Serbia, No. 85/05.

<sup>436</sup> *Ibid.*

<sup>437</sup> CPC, Art. 109a.

<sup>438</sup> *Ibid.* at Art. 109v(3).

<sup>439</sup> *Ibid.* at Art. 109g(3).

A witness may be granted the status of a “protected witness” upon the request of the prosecution or defence, the court’s own motion, or a motion of a given witness.<sup>440</sup> Decisions to that effect are rendered during a hearing closed to the public.<sup>441</sup> A protected witness will be informed prior to giving testimony that:

*A witness may be granted the status of a “protected witness” upon the request of the prosecution or defence, the court’s own motion, or a motion of a given witness.*

- he would be questioned using special protective measures and what these measures are; and
- his identity will not be disclosed to anyone, except to the judges on the case, and to the parties to proceedings only a month before the beginning of trial.<sup>442</sup>

Information about a “protected witness” is classified and is known only to the judges adjudicating the case and to the prosecutor; the defendant and his counsel are informed only a month before the beginning of the trial.<sup>443</sup> Disclosure of such information to the public is subject to criminal prosecution.<sup>444</sup> Data on the identity of the witness and persons close to him and about other circumstances that may lead to the disclosure of his identity are stored in a special file, covered and sealed by the court and handed over to the witness protection unit for safekeeping.<sup>445</sup> Only the second instance court deciding on an appeal will be able to access the special file.<sup>446</sup>

In addition to the above measures available for “protected witnesses”, the court may also grant some specific protective measures to witnesses not granted the “protected witness” status. This includes removing a defendant temporarily from the courtroom if a witness or co-defendant “refuses to testify in his presence or if circumstances indicate that he will not tell the truth in the defendant’s presence”.<sup>447</sup> Upon the defendant’s return to the courtroom, the witness’ or co-defendant’s statement is read to the defendant who is then allowed to question the witness or co-defendant.<sup>448</sup> The court may decide to confront the accused and a witness.<sup>449</sup>

*In addition to the above measures available for “protected witnesses”, the court may also grant some specific protective measures to witnesses not granted the “protected witness” status.*

According to the Criminal Procedure Code, the judgement cannot be based only on the testimony of a protected witness.<sup>450</sup>

<sup>440</sup> *Ibid.* at Art. 109b(1).

<sup>441</sup> *Ibid.* at Art. 109v(1).

<sup>442</sup> CPC, Art. 109g(2).

<sup>443</sup> *Ibid.*

<sup>444</sup> Art 109đ of the CPC in connection with Art. 337(2) (“Violation of the Confidentiality of a Proceeding”) of the Criminal Code of the Republic of Serbia (Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005 - correction., 107/05 - correction, 72/09 and 11/09).

<sup>445</sup> CPC, Art. 109g(4).

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.* at Art. 324.

<sup>448</sup> *Ibid.*

<sup>449</sup> *Ibid.*

*Witnesses who are particularly sensitive due to the nature of the criminal offence committed against them, consequences or other circumstances cannot be confronted by the accused by law.*

Therefore, if a witness enjoys *any* of the protective measures (testimony in closed session, facial or voice distortion, use of pseudonym, etc.), even though the defence knows the identity of the witness, the judgement cannot be based solely in the testimony of such witness. See also Module 12.

The public may also be excluded from the entire or part of a trial for the following reasons:

- the interests of morality;
- the protection of public order;
- the protection of national security;
- the protection of minors;
- the protection of privacy of the participants in the proceedings; or
- the interests of justice.<sup>451</sup>

Another mechanism for the protection of the interests of vulnerable individuals is the provision that minors who are present at trial as witnesses or injured parties will be excused as soon as their presence is no longer needed.<sup>452</sup>

*As a rule, witnesses must be heard by the trial court and therefore written records and audio or video recordings of earlier statements are admissible only in exceptional circumstances.*

As a rule, witnesses must be heard by the trial court. Therefore, written records and audio or video recordings of earlier statements are admissible only in exceptional circumstances.

The panel may decide to read out witnesses' statements if, *inter alia*, a witness developed a mental illness or if it is impossible or very difficult for a witness to appear as a result of their old age, illness or other important reasons.<sup>453</sup>

Moreover, with the agreement of the parties, the panel may decide to read out the record of a witness' earlier examination if the witness is not present, regardless of whether he has been summoned to the trial. Exceptionally, even without the consent of the parties, but after taking their statements, the panel may decide to read out the record of the examination of a witness at an earlier trial, held before the same presiding judge of the panel, if, in view of the other presented evidence, it finds it necessary to learn the content of the record. Once the record has been read out and the parties' objections reviewed, taking into consideration the other presented evidence, the panel decides whether it will directly examine the witness.<sup>454</sup>

Records of earlier examinations of the persons who have been exempted from the duty of testifying

<sup>450</sup> *Ibid.* at Art 109d.

<sup>451</sup> *Ibid.* at Art. 292.

<sup>452</sup> *Ibid.* at Art. 328(6).

<sup>453</sup> *Ibid.* at Art. 337(1)1.

<sup>454</sup> *Ibid.* at Art. 337(2).

must not be read out if they have not been summoned to the trial or said they would not testify before the first examination at the trial. Once the evidentiary procedure has been completed, the panel may exclude these records from the files and keep them separately. A special appeal shall be allowed against the decision to separate the records and information. Once the ruling becomes final, the excluded records and information shall be sealed in a separate envelope and submitted to the investigative judge for safekeeping separately from the other files. They may neither be examined nor used in the proceedings. The records and information must be excluded before the case file is sent to a higher court in connection with an appeal against the judgement.<sup>455</sup>

The reasons for reading the record shall be noted in the trial record, and during the reading it shall be announced whether the witness or expert witness has been sworn in.<sup>456</sup>

In the cases outlined in Articles 321, 332 and 337 of the CPC, the trial panel also has the discretion to play a recording of the interrogation or interview of a witness in addition to reading the record into evidence.<sup>457</sup>

In war crimes proceedings and organised crimes proceedings, however, it is also possible for the trial panel to use statements and information collected by the public prosecutor in the pre-trial criminal proceedings, as long as the final judgement is not based solely only on this evidence.<sup>458</sup>

#### 14.9.1.1.2. PROTECTION UNDER THE LAW ON ORGANIZATION AND JURISDICTION OF STATE AUTHORITIES IN WAR CRIMES PROCEEDINGS

*All protection measures afforded to a witness by the ICTY will remain in force in domestic proceedings.*

The Law on Organization and Jurisdiction of State Authorities in War Crimes Proceedings provides for additional aspects of witness protection in relation to war crimes proceedings. According to this law, all protection measures afforded to a witness by the ICTY will remain in force in domestic proceedings.<sup>459</sup> Termination and modification of any such measure may be ordered by the domestic court only upon approval from the ICTY.<sup>460</sup>

Furthermore, due to a significant cross-border element in these cases, the law also allows witnesses to give their testimony through a video conference link, rather than appear before the court in Serbia. As discussed above, written records of earlier statements are admissible pursuant to the CPC. This law also provides for the possibility of using statements previously given to the ICTY in line with the ICTY Statute and RPE.

<sup>455</sup> *Ibid.* at Art. 337(3).

<sup>456</sup> *Ibid.* at Art. 337(4).

<sup>457</sup> *Ibid.* at Art. 338.

<sup>458</sup> *Ibid.* at Art. 504d(4).

<sup>459</sup> Law on Organization and Jurisdiction of State Authorities in War Crime Proceedings, Art. 14a(5).

<sup>460</sup> *Ibid.*

#### 14.9.1.1.3. IMMUNITY/SAFE-PASSAGE FOR WITNESSES

*People residing abroad may not be arrested, detained, or criminally prosecuted for a crime committed earlier while in the territory of the Republic of Serbia for the purposes of testifying in the capacity of an injured person, witness or expert witness in war crimes.*

The Law on Organization and Jurisdiction of State Authorities in War Crime Proceedings provides that a person residing abroad may not be arrested, detained, or criminally prosecuted for a crime committed earlier while in the territory of the Republic of Serbia for the purposes of testifying in the capacity of an injured person, witness or expert witness in war crimes cases.<sup>461</sup> The law also requires that summons explicitly state that the injured person, witness or expert witness has this immunity.<sup>462</sup>

#### 14.9.1.1.4. PROTECTION UNDER THE LAW ON JUVENILE OFFENDERS AND CRIMINAL PROTECTION OF JUVENILES

This law provides for special consideration when it comes to the position of children and minors as injured parties in criminal proceedings.<sup>463</sup> According to the law, “[s]pecialised members of the police authorities with special skills in the field of the rights of the child and criminal protection of minors shall participate in the investigation of criminal offences prejudicial to minors, when particular activities are delegated to these authorities”.<sup>464</sup> Other special measures must be taken, which are outlined in Article 152 of the law.<sup>465</sup>

Under this law, witnesses who are particularly sensitive due to the nature of the criminal offence committed against them cannot be confronted by the accused.<sup>466</sup> If the identification of an accused is done by injured parties who are children or minors, it must be done with particular care and in such a manner that completely prevents the defendant from seeing the witness.<sup>467</sup> From the first interrogation of the defendant, children and minors who are injured parties must have a legal representative who is from the ranks of defence counsel who possess particular knowledge of rights of the child and criminal protection of juveniles. These counsel will be appointed by the court if the injured party does not engage one privately.<sup>468</sup>

*Due to a significant cross-border element witnesses gave their testimony through a video conference link, rather than having to appear before the court in Serbia.*

<sup>461</sup> *Ibid.* at Art. 14 (6).

<sup>462</sup> *Ibid.*

<sup>463</sup> All persons up to 14 years of age are considered children, and above that they are considered to be minors up until they reach 18.

<sup>464</sup> Law on Juvenile Offenders and Criminal Protection of Juveniles, Art. 151(3).

<sup>465</sup> *Ibid.* at Art. 152.

<sup>466</sup> *Ibid.* at Art. 153.

<sup>467</sup> *Ibid.* at Art. 155.

<sup>468</sup> *Ibid.* at Art. 154.

## 14.9.1.1.5. PROCEDURAL PROTECTION IN PRACTICE

The War Crimes Department of the Belgrade High Court has granted protective measures in multiple cases. For example, in the *Suva Reka* case, the court granted three witnesses “protected witness” status, allowing them to testify under code names, from separate rooms, and in closed session, ordering that any identifying information be removed from the record and banning its publication.<sup>469</sup> These witnesses requested protection due to the risk to their personal safety and security as well as that of their family members. The witnesses were also concerned about the potential condemnation they would face in their community should it become public that they had testified.<sup>470</sup> For eleven witnesses who did not appear at trial, the panel also allowed for the introduction of records of earlier statements given to ICTY investigators.<sup>471</sup> The panel made this decision pursuant to Article 14a of the Law on Organization and Jurisdiction of State Authorities in War Crime Proceedings. The defence’s challenge to using this evidence was rejected by the Court of Appeal. See also Module 12 for more information on using such witness statements.

In the *Zvornik* case, the court, due to the health of a witness from Bosnia and Herzegovina, relied on provision of Article 337 of the CPC allowing the introduction of a record of a prior statement given by this witness to the Prosecutor’s Office in Bjeljina (BiH) and also used by the ICTY in the *Popović et al.* case.<sup>472</sup> Similar to the *Suva Reka* case, a number of witnesses testifying in this trial also sought “protected witness” status due to risks to their personal safety and security and the potential negative impact of public recognition.<sup>473</sup> These witnesses were permitted to testify under a pseudonym, to have their identification data altered or removed from the case file and to be heard in sessions closed to the public. One witness provided testimony through a video-conference link from the Court of Bosnia and Herzegovina in Sarajevo.<sup>474</sup> Earlier statements given to the ICTY were also admitted into evidence pursuant to the Law on Organization and Jurisdiction of State Authorities in War Crime Proceedings.<sup>475</sup>

One of the witnesses granted “protected witness” status in the *Lekaj* case was heard in closed session, because the witness lived in Kosovo, and the information and data she was providing could jeopardise her safety.<sup>476</sup>

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<sup>469</sup> Belgrade District Court, WCC, *Suva Reka*, Case No. K.V. 2/2006, 1st Instance Verdict, 23 April 2009, pp. 75-76.

<sup>470</sup> *Ibid.*

<sup>471</sup> *Ibid.*

<sup>472</sup> Belgrade District Court, WCC, *Zvornik*, Case No. K.Po2. 28/2010, 1st Instance Verdict, 22 Nov. 2010, pp. 55-56.

<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid.*

<sup>475</sup> *Ibid.*

<sup>476</sup> War Crimes Chamber of the Belgrade District Court, *Lekaj*, Case No. K.V.br. 4/05, Judgment of 18 Sept. 2006, p.45 of the original judgment in Serbian (unofficial translation). The Humanitarian Law Centre has been able to facilitate the participation of victims and witnesses from outside Serbia, including from Kosovo, in proceedings before the Serbian courts. The receipt of testimony via video-link has also been arranged where witnesses have been unable to testify in person.

The War Crimes Department of the Appellate Court in Belgrade quashed the judgement in the *Podujevo II (Željko Đukić et al.)* case in relation to one defendant and ordered a re-trial because the evidence that was the basis for the prior conviction against one of the defendants was the testimony of a witness testifying under protective measures. The appellate court held that the judgement can be founded on the testimony of a protected witness, but there must be some other corroborating evidence.<sup>477</sup>

*In cases where the life and physical integrity, safety and security of a witness and his family members may be at risk due to their testimony the court or a public prosecutor may request from the Ministry of Interior that a witness and their family be provided protection.*

*The judgement can be founded on the testimony of a protected witness, but there must be some other corroborating evidence.*

After a re-trial, in which additional evidence establishing the accused's criminal responsibility was admitted, the appellate court upheld the conviction.<sup>478</sup>

#### 14.9.1.2. OUT-OF-COURT PROTECTION

Physical protection of witnesses testifying in criminal proceedings is provided under the Law on the Protection Program of Participants in Criminal Proceedings. Pursuant to the CPC, in cases where the life and physical integrity, safety and security of a witness and his family members may be at risk due to their testimony the court or a public prosecutor may request from the Ministry of Interior that a witness and their family be provided protection.<sup>479</sup> Protection measures under the Law on the Protection Program of Participants in Criminal Proceedings include:<sup>480</sup>

- Physical protection of persons and property;<sup>481</sup>
- Change of place of residence or relocation to another prison institution;<sup>482</sup>
- Concealing the identity and information on ownership of assets and liabilities of the

<sup>477</sup> War Crimes Department of the Belgrade Appellate Court, *Podujevo II*, Case No. Kž1 Po2 3/2010, Appeals, 25 May 2010, ¶ 18 (online format), available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-3-2010.html>.

<sup>478</sup> War Crimes Department of the Belgrade Appellate Court, *Podujevo II*, Case No. Kž1 Po2 2/2011, Appeals, 11 Feb. 2011, available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-2-2011.html>.

<sup>479</sup> CPC, Art. 109(3); Law on the Protection Program of Participants in Criminal Proceedings ("Wit Sec Law"), Art. 1.

<sup>480</sup> WitSec Law, Art. 14(1)&(2).

<sup>481</sup> Physical protection of person and property specified in Article 14 ¶ 1, item 1 hereof constitutes prevention of unlawful endangerment of life, health, physical integrity, freedom or property of the protected person through use of physical/technical means. WitSec Law, Art. 16.

<sup>482</sup> Change of residence referred in Article 14, paragraph 1, item 2 hereof is the temporary or permanent relocation of the protected person from the place of permanent or temporary residence to a location designated by the Protection Unit. Relocation to another prison institution specified in Article 14, paragraph 1, item 2 hereof is the transfer of a protected person serving a prison sentence from the current place of custody to another prison institution determined by the Protection Unit in agreement with the Ministry of Justice. WitSec Law, Art. 17.

- protected person;<sup>483</sup> and
- Change of identity.<sup>484</sup>

These protective measures can be applied to “participants in the criminal proceeding”, including a suspect, defendant, witness, witness collaborator, injured party, expert witness, or expert person.<sup>485</sup> These protective measures can also be applied to their “close person”,<sup>486</sup> which is a person the participant demands to be included in the protection program.<sup>487</sup> These measures can be taken in the territory of the Republic of Serbia or the territory of another State pursuant to international agreements or on the basis of reciprocity.<sup>488</sup> Change of identity is a measure of last resort.<sup>489</sup>

Admission into the witness protection program depends on an assessment and decision of the Witness Protection Commission, which is given following a request of the court or a public prosecutor.<sup>490</sup> In urgent cases, temporary measures may be taken before the commission reaches a decision on admission into the protection program.<sup>491</sup>

A request for admission must contain:

- information about the person for whom protection is requested;
- a description and legal definition of the criminal offence due to which protection is requested;
- an assessment of the existing evidence and the significance of testimony or information for the proceedings; and
- information about the circumstances indicating the risk faced by the person for whom protection is requested.

A questionnaire must be attached to the application for entering the protection program that includes personal information, marital status, information about the circle of close persons and other data, which must be completed by the person for whom protection is requested.<sup>492</sup>

Protection measures afforded under the decision of the Witness Protection Commission are executed by the Witness Protection Unit of the Ministry of Interior.<sup>493</sup> The duration of the protection of a witness or other participant in criminal proceedings is set forth in an agreement signed with the

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<sup>483</sup> Concealing of the identity and ownership information referred to in Article 14, paragraph 1, item 3 hereof comprises issuing and use of personal identity documents or ownership documents of a protected person in which the original data has been temporarily altered. WitSec Law, Art. 18(1).

<sup>484</sup> A change of identity as specified in Article 14, paragraph 1, item 4 hereof constitutes a complete or partial change of personal data of the protected person. This measure may also include the measure of change of physical characteristics of the protected person. WitSec Law, Art. 20(1), 20 - 24 .

<sup>485</sup> WitSec Law, Art. 2 ¶ 1.

<sup>486</sup> *Ibid.* at Art. 2 ¶ 2.

<sup>487</sup> *Ibid.* at Art. 6.

<sup>488</sup> *Ibid.* at Art. 14(4).

<sup>489</sup> *Ibid.* at Art. 14(3).

<sup>490</sup> *Ibid.* at Art. 25 – 29.

<sup>491</sup> *Ibid.* at Art. 27.

<sup>492</sup> *Ibid.* at Art. 26(1)&(2).

<sup>493</sup> *Ibid.* at Art. 12.

person entering the program.<sup>494</sup> If need be, protection can be extended beyond that date upon the request of the court or a public prosecutor.<sup>495</sup> The program will usually terminate according to the original agreement or with the protected person's death, or his renunciation of protection.<sup>496</sup>

Protection can be discontinued if:

- The requirement for protection no longer exists;
- Criminal proceedings are instituted against the protected person for a felony that questions the justifiability of application of the protection program;
- The protected person states that the data from the questionnaire is untrue;
- The protected person fails to fulfil his obligations arising from the contract without justification and thus endangers or frustrates the application of the protection program;
- A foreign government on whose territory the protected person is resettled requests discontinuation.<sup>497</sup>

Serbia has concluded an agreement with Bosnia and Herzegovina and Montenegro<sup>498</sup> on witness protection, to facilitate court appearances of protected witnesses. Bulgaria and Macedonia subsequently joined this agreement which, in addition to multilateral and bilateral treaties covering the issue, provides a basis for provision of protection by relevant authorities of host countries where witnesses are coming to testify or are being relocated. Such an agreement or provision of the agreement, when it includes relocation to the territory of a party, is confidential.<sup>499</sup> See more on mutual legal assistance in Module 15.

On many occasions witnesses testifying before the War Crimes Department of the Belgrade High (former District) Court have been granted some type of out-of-court protection, most frequently physical protection. This was widely employed in the case with victims and witnesses coming in from countries in the region or Kosovo who are assigned a constant escort from the moment they enter Serbia (or cross the administrative line).

#### 14.9.1.3. IN-COURT SUPPORT

In 2006, the War Crimes Department of the Belgrade Higher Court established a Unit for Assistance and Support to Victims and Witnesses coming in to testify in war crime proceedings. The unit was envisaged in the Law on Organization and Jurisdiction of State Authorities in War Crimes Proceedings.<sup>500</sup> The unit was modelled after the Victims and Witness Section at the ICTY and is there to assist victims and witnesses with the organization of travel and accommodation arrangements, to

<sup>494</sup> *Ibid.* at Art. Art. 30(1)(6).

<sup>495</sup> *Ibid.* at Art. 31.

<sup>496</sup> *Ibid.* at Art. 36.

<sup>497</sup> *Ibid.* at Art. 33.

<sup>498</sup> Agreement of understanding and cooperation in the field of protection and support of witnesses and other participants in criminal proceedings between Protection Unit of the Serbian Ministry of Interior (Agreement), Bosnian Witness Protection Department of the State Agency for Investigation and Protection, and Witness Protection Unit of the Montenegro Police Directorate, signed 20 July 2006.

<sup>499</sup> Agreement, Art. 3.

<sup>500</sup> Law on Organization and Jurisdiction of State Authorities in War Crime Proceedings, Art . 11.

provide information about the court and the position of victims and witnesses in the proceedings, including their rights in that respect, as well as other information that may be requested.<sup>501</sup> It also coordinates temporary protection for victims and witnesses while on the territory of Serbia with the competent authorities.<sup>502</sup> If situations warrant, psychological support is also provided to those who testify through this unit.

#### 14.9.1.4. STATUS OF INSIDER WITNESSES (“WITNESS COLLABORATORS”)

*Independently of measures available to witnesses in general, insider witnesses, or “witness collaborators” (as termed by the CPC), are eligible to receive a number of additional benefits closely related to their status.*

Independently of measures available to witnesses in general, insider witnesses, or “witness collaborators” (as termed by the CPC), are eligible to receive a number of additional benefits closely related to their status. According to the CPC, witness collaborators can appear in war crimes proceedings due to the gravity of the offences and the likelihood that other evidence might not be sufficient to prove the case.

The CPC prescribes that a witness can only be granted a status of a witness collaborator if:

he has fully confessed the commission of the criminal offense, and [...] the significance of his testimony for the detection, proving or prevention of other criminal offenses [...] outweighs the consequences of the criminal offense he has committed.<sup>503</sup>

The primary obligation of a “witness collaborator” is to testify fully about everything they know about the facts of the case. As of September 2009, both defendants and convicted persons can be granted a status of a “witness collaborator”.<sup>504</sup> Persons suspected of being organisers of criminal groups cannot be afforded this status due to their instrumental role in carrying out the crimes.<sup>505</sup>

*The primary obligation of a “witness collaborator” is to testify fully about everything they know about the facts of the case.*

“Witness collaborator” status is granted by the court upon a motion of the prosecutor.<sup>506</sup> Prior to submitting a proposal to the court, a public prosecutor must ask the potential witness for a full description of everything they know about the facts of the case and other criminal offences, provided in writing, in as much detail as possible, and signed by the potential witness collaborator.<sup>507</sup> The hand-written statement is presented to the court along with the motion for “witness

<sup>501</sup> Republic of Serbia, District Court in Belgrade, 2006, Brochure for victims/witnesses.

<sup>502</sup> *Ibid.*

<sup>503</sup> CPC, Art. 504o(1).

<sup>504</sup> *Ibid.* at Arts. 504o & 504ć.

<sup>505</sup> *Ibid.* at Art. 504o(2).

<sup>506</sup> *Ibid.* at Art. 504o(1) and 504r.

<sup>507</sup> *Ibid.* at Art. 504(p)(2)&(3).

collaborator” status.<sup>508</sup> The court hears all relevant facts related to this motion in a closed session and renders a decision, which is subject to appeal.<sup>509</sup>

*If granted “witness collaborator” status, a defendant will enjoy a number of benefits.*

If granted “witness collaborator” status, a defendant will enjoy a number of benefits. Firstly, their sentence will be decreased or they will be altogether relieved from serving the sentence.<sup>510</sup> As of September 2009, a witness collaborator will serve half of the time that is the statutory minimum prescribed for an offence with which they are charged, but which cannot be less than 30 days.<sup>511</sup>

Exceptionally, taking into account the significance of the cooperating witness’ testimony, the circumstances of the criminal offences with which they are charged, their conduct before the court, their background and other important circumstances, the court may, upon a proposal of a public prosecutor, require less than half of the statutory minimum when issuing a sentence or relieve them from serving an issued sentence.<sup>512</sup>

The current system, in this respect, is stricter than the one in place until 2009, according to which witness collaborators were completely exonerated from criminal liability in exchange for their testimony.<sup>513</sup> However defendants who had been granted “witness collaborator” status prior to the 2009 legislative changes still enjoy this benefit and their status cannot be re-examined.

As a rule, witness collaborators are questioned at hearings closed to the public.<sup>514</sup> The court can decide to hold the session in public only if the person being questioned consents to a prosecutorial motion to that effect.<sup>515</sup> Furthermore, all records and official notes on statements taken from the cooperating witness in the capacity of a suspect or defendant will be excluded from the case file based on a court order and cannot be used as evidence in the criminal proceedings.<sup>516</sup> With the exception of the duty to speak the truth and not to remain silent with regards to anything they may know about the subject matter of the trial, a witness collaborator is entitled to all other rights afforded by the CPC to a defendant.<sup>517</sup>

*As a rule, witness collaborators are questioned at hearings closed to the public.*

A defendant or a convicted person will lose witness collaborator status and associated benefits if they do not fulfil their obligation of testifying or if they commit another serious offence set forth in Art. 504a(3) prior to the conclusion of the criminal proceedings.<sup>518</sup> In such a case, the prosecutor will commence or continue a criminal procedure against that person and the court will abolish its prior

<sup>508</sup> *Ibid.* at Art. 504p(3).

<sup>509</sup> *Ibid.* at Art. 504r(2).

<sup>510</sup> *Ibid.* at Art. 504t(1)&(2).

<sup>511</sup> *Ibid.* at Art. 504t(1).

<sup>512</sup> *Ibid.* at Art. 504t(2).

<sup>513</sup> See old Criminal Procedure Code, Official Gazette of SRY, No. 70/2001 and 68/2002.

<sup>514</sup> CPC, Art 504s(1).

<sup>515</sup> *Ibid.*

<sup>516</sup> *Ibid.* at Art. 504r(4).

<sup>517</sup> *Ibid.* at Art. 504t(5).

<sup>518</sup> *Ibid.* at Art. 504t(3).

decision granting the status of witness collaborator.<sup>519</sup> If, on the other hand, the prior commission of serious offences are discovered during the course of proceedings, a public prosecutor may act pursuant to provisions allowing for “witness collaborator” status, as opposed to being automatically obliged to retract the status and resume criminal prosecution.<sup>520</sup>

As other participants in criminal proceedings, witness collaborators can also be admitted into a witness protection program under conditions prescribed by the Law on the Protection Program of Participants in Criminal Proceedings discussed above.

Amendments to the Law on the Organisation and Jurisdiction of State Authorities in War Crimes

*As other participants in criminal proceedings, witness collaborators can also be admitted into a witness protection program.*

Proceedings, adopted in 2009, introduced an exception to the CPC provision that requires that the witness collaborator be a member of an organised crime group. The exception, applicable only in war crimes trials, indicates that the war crimes prosecutor may propose to the court that the member of an armed formation, state organ or political organization is examined as a witness collaborator. This is provided that he completely admitted to committing the crime and that the importance of his statement for the initiation or proving the involvement of others in the war crime is of more importance than the

consequence of the criminal offence he has committed.<sup>521</sup> The status of the witness collaborator, however, cannot be granted to someone who is suspected as the first ranking in the hierarchical structure for having ordered, planned, instigated or in another way committed a war crime or a person who had the leading role in the commission of the crime.<sup>522</sup>

In the practice of the War Crimes Chamber, the status of witness collaborator was granted to the two defendants in the *Ovčara*<sup>523</sup> and *Damir Sireta*<sup>524</sup> cases, and to one defendant in the *Gnjilane Group*<sup>525</sup> case. This was done under the terms of the CPC before the 2009 amendments, and the witness collaborators were completely exonerated from criminal liability.

#### 14.9.2. VICTIM COMPENSATION, REPARATIONS AND RESTITUTION

Victims in war crimes proceedings have the right to make a claim for indemnification during the criminal proceedings.<sup>526</sup> The criminal procedure code provides that indemnification claims arising

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid.* at Art. 504t(4).

<sup>521</sup> War Crimes Law, Art. 13a(1).

<sup>522</sup> *Ibid.* at, Art. 13a(2).

<sup>523</sup> Belgrade District Court, WCC, Vujovic et. al, (*Ovčara case*), Case No. K.V.1/2003, 1st Instance Verdict, 12 Dec. 2005.

<sup>524</sup> War Crimes Chamber of the Belgrade District Court, *Damir Sireta*, Case No. K.V. 9/2008, 1st Instance Verdict, 23 June 2009.

<sup>525</sup> Belgrade High Court, WCD, Agus et al., (*Gnjilane Goup case*), Case No. K-Po2 33/2010, 1st Instance Verdict, 21 Jan. 2011.

<sup>526</sup> CPC, Arts. 54, 104.

*Victims in war crimes proceedings have the right to make a claim for indemnification during the criminal proceedings.*

out of the commission of a criminal offence must be considered in criminal proceedings on a motion of authorised persons, unless it would unduly prolong the proceedings.<sup>527</sup>

However, as with general criminal proceedings, when the damage is difficult to determine, the War Crimes Chambers do not directly afford reparations to victims, but rather refer victims to claim the reparations in civil law litigation. This is regulated in Article 206 of the Criminal Procedure Code, which provides:

In a Judgment convicting the accused person, the court may satisfy the authorized person's property claim in full, or in part, and refer the authorized person to civil litigation for the remainder. Where the data of criminal proceedings provide no reliable basis for full or partial adjudication, the court shall direct the authorized person to assert his indemnification claim in full in civil litigation.<sup>528</sup>

*However, as with general criminal proceedings, when the damage is difficult to determine, the War Crimes Chambers do not directly afford reparations to victims, but rather refer victims to claim the reparations in civil law litigation.*

The War Crimes Chamber usually refers victims to civil litigation without providing any particular explanation. Sometimes, as in the *Nenad Malić (Stari Majdan)* case, the court explains that “determination of the amount of property claim would take extensive time, also taking into account that the victim did not specify the grounds for and the amount of such claim”.<sup>529</sup>

#### 14.9.2.1. VICTIM COMPENSATION FOR DAMAGE INFLICTED BY THE STATE

The 2006 Constitution of Serbia sets forth that “everyone shall have the right to compensation of material or non-material damage inflicted on him by unlawful or irregular work of a state body, entities exercising public powers, bodies of the autonomous province or local self-government”.<sup>530</sup>

The principle that the state is responsible for acts of individuals acting on its behalf also flows from the rule

*The victims of war crimes and their families can claim compensation from the state through civil litigation, before municipal courts.*

of the Law on Obligations that a legal entity is responsible for damage inflicted by its own organ to a third person while carrying out or in connection with carrying out his official duties.<sup>531</sup>

Injured parties (direct victims and, in case of their death or serious disability, spouses, children, parents, and,

<sup>527</sup> *Ibid.* at Art. 201.

<sup>528</sup> *Ibid.* at Art. 206.

<sup>529</sup> War Crimes Chamber of the Belgrade District Court, *Nenad Malić (Stari Majdan)*, Case No. KV 3/2009, 7 Dec. 2009, 1st Instance Verdict, p. 38.

<sup>530</sup> Serbian Constitution, Art. 35, ¶ 2.

<sup>531</sup> Law on Obligations, SFRY Official Gazette, No. 29/78, 39/85, 57/89 and 31/93, Art. 172, ¶ 1.

under certain conditions, siblings) can claim compensation for material as well as non material damage.<sup>532</sup>

The victims of war crimes and their families can claim compensation from the state through civil litigation, before municipal courts. The litigants in these proceedings are often represented by the national NGO Humanitarian Law Center.

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### 14.9.3. VICTIM PARTICIPATION IN THE PROCEEDINGS

For some offences, aggrieved parties as private prosecutors are considered to be the only authorised prosecutors in criminal proceedings.<sup>533</sup> In addition, in certain cases where the public prosecutor finds that there are no grounds for initiating or continuing criminal proceedings, an aggrieved party may assume the role as a subsidiary prosecutor, under conditions regulated by Criminal Procedure Code.<sup>534</sup>

The aggrieved party has many procedural rights that can be used in different phases of the criminal proceedings. The 2002 Criminal Procedure Code provides victims with the following rights:

- (1) Aggrieved parties and private prosecutors are entitled to point to all facts during the investigation and to propose evidence they deem are of significance for the criminal matter and their indemnification claims.
- (2) Aggrieved parties and private prosecutors shall be entitled during the trial to offer evidence, question the defendant, witnesses and expert witnesses, make objections and explanations in connection with their statements, and to make other statements and proposals.
- (3) Aggrieved parties, aggrieved parties acting as prosecutors and private prosecutors are entitled to examine documentation and objects collected as evidence. Aggrieved parties may be barred from examining documentation until they are heard as witnesses.
- (4) Investigating judges and trial chamber presidents shall inform aggrieved parties and private prosecutors about the rights specified in paragraphs 1 to 3 of this Article.<sup>535</sup>

When the public prosecutor finds that that there are no grounds for prosecuting criminal offences prosecutable *ex officio*, or that there is no case against any of the known accomplices, they are

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<sup>532</sup> Law on Obligations, Art. 200 and 201.

<sup>533</sup> CPC, Art. 19(2).

<sup>534</sup> *Ibid.* at Art. 19(3).

<sup>535</sup> *Ibid.* at Art. 60

required to notify aggrieved parties of their decision within eight days and advise aggrieved parties of their right to assume private prosecution.<sup>536</sup>

The 2002 Criminal Procedure Code also envisages that the aggrieved party, as well as their legal representatives, may exercise all their procedural rights via a proxy.<sup>537</sup> As opposed to defence council, a proxy is not required by the CPC to be a lawyer.<sup>538</sup> This is relevant in war crimes trials because of the large numbers of victims and because different non-governmental organizations have appeared as proxies for aggrieved parties. In practice, the courts have allowed the proxies of aggrieved parties to appear and exercise all of the aggrieved parties' rights on their behalf, even if they are not lawyers.

*The 2002 Criminal Procedure Code also envisages that the aggrieved party, as well as their legal representatives, may exercise all their procedural rights via a proxy.<sup>1</sup> As opposed to defence council, a proxy is not required by the CPC to be a lawyer.*

For example, the director of the Humanitarian Law Centre (an NGO based in Belgrade) participated in several proceedings before the court as a proxy.<sup>539</sup> In some trials, victims made statements that they would join the criminal proceedings and made claims for indemnification through their proxy.<sup>540</sup> In other proceedings, the proxy gave closing arguments and analysed documents and evidence.<sup>541</sup>

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<sup>536</sup> *Ibid.* at Art. 61.

<sup>537</sup> *Ibid.* at Art. 66.

<sup>538</sup> *Ibid.*

<sup>539</sup> Belgrade District Court, Škorpioni, Case No. K.V. 6/2005, 1st Instance Verdict, 10 April 2007, p. 1; *see also* Belgrade District Court, Ovčara, Case No. K.V. 4/2006, 1st Instance Verdict, 12 March 2009, pp. 2, 18.

<sup>540</sup> *See Ovčara*, 1st inst., p. 18.

<sup>541</sup> *Škorpioni*, 1st inst., p. 6.

## 14.10. FURTHER READING

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**14.11. ANNEX A****ICTY Rules of Procedure and Evidence****Rule 75 Measures for the Protection of Victims and Witnesses**

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:

(a) expunging names and identifying information from the Tribunal's public;

(b) non-disclosure to the public of any records identifying the victim or witness;

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

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).

(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

(E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal or another jurisdiction.

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

(i) shall continue to have effect mutatis mutandis in any other proceedings before the Tribunal ("second proceedings") or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seized of the first proceedings; or

(ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

(H) A Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application (Amended 28 February 2008):

(i) to any Chamber, however constituted, remaining seized of the first proceedings;

(ii) if no Chamber remains seized of the first proceedings, to a Chamber seized of second proceedings; or

(iii) if no Chamber remains seized, to a newly constituted Chamber.

(I) Before determining an application under paragraph (G)(ii), (H)(ii), or (H)(iii) above, the Chamber shall endeavour to obtain all relevant information from the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

(J) The Chamber determining an application under paragraphs (G) and (H) above shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent.

(K) An application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to “a Chamber” shall include a reference to “a Judge of that Chamber”.

**Rule 105: Restitution of Property**

(A) After a judgement of conviction containing a specific finding as provided in Rule 98 ter (B), the Trial Chamber shall, at the request of the Prosecutor, or may, proprio motu, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

(C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.

(D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

(E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

(F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

(G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to paragraphs (C), (D), (E) and (F).

**Rule 106: Compensation to Victims**

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

**ICC Rules of Procedure and Evidence****Rule 85: Definition of victims**

For the purposes of the Statute and the Rules of Procedure and Evidence: (a) Victims means natural persons who have suffered harm as a result of

the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained

direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

#### **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.

#### **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.

**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 traumatised 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.

**Rule 89: Application for participation of victims in the proceedings**

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.
2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.
3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.
4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

**Rule 90: Legal representatives of victims**

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.
3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.
4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.
5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.

6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.

**Rule 91: Participation of legal representatives in the proceedings**

1. A Chamber may modify a previous ruling under rule 89. 2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

3. (a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

4. For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

**Rule 92: Notification to victims and their legal representatives**

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2.

2. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.

3. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the case in question.

4. When a notification for participation as provided for in sub-rules 2 and 3 has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.

5. In a manner consistent with the ruling made under rules 89 to 91, victims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of:

(a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;

(b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.

6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the Registrar shall notify them as soon as possible of the decisions of the Court in those proceedings.

7. Notifications as referred to in sub-rules 5 and 6 shall be in writing or, where written notification is not possible, in any other form as appropriate. The Registry shall keep a record of all notifications. Where necessary, the Registrar may seek the cooperation of States Parties in accordance with article 93, paragraph 1 (d) and (l).

8. For notification as referred to in sub-rule 3 and otherwise at the request of a Chamber, the Registrar shall take necessary measures to give adequate publicity to the proceedings. In doing so, the Registrar may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

#### **Rule 93: Views of victims or their legal representatives**

A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

**Rule 94: Procedure upon request**

1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:

(a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;

(d) Where restitution of assets, property or other tangible items is sought, a description of them;

(e) Claims for compensation;

(f) Claims for rehabilitation and other forms of remedy;

(g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses. 2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

**Rule 95: Procedure on the motion of the Court**

1. In cases where the Court intends to proceed on its own motion pursuant to article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

2. If, as a result of notification under sub-rule 1: (a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94; (b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.

**Rule 96: Publication of reparation proceedings**

1. Without prejudice to any other rules on notification of proceedings, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States.

2. In taking the measures described in sub-rule 1, the Court may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations in

order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court.

**Rule 97: Assessment of reparations**

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both.
2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
3. In all cases, the Court shall respect the rights of victims and the convicted person.

**Rule 98: Trust Fund**

1. Individual awards for reparations shall be made directly against a convicted person.
2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.
4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.
5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.

**Rule 99: Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e), and 75, paragraph 4**

1. The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.

2. Notice is not required unless the Court determines, in the particular circumstances of the case, that notification could not jeopardise the effectiveness of the measures requested. In the latter case, the Registrar shall provide notification of the proceedings to the person against whom a request is made and so far as is possible to any interested persons or interested States.

3. If an order is made without prior notification, the relevant Chamber shall request the Registrar, as soon as is consistent with the effectiveness of the measures requested, to notify those against whom a request is made and, to the extent possible, to any interested persons or any interested States and invite them to make observations as to whether the order should be revoked or otherwise modified.

4. The Court may make orders as to the timing and conduct of any proceedings necessary to determine these issues.