The Treatment of Victims and Witnesses and the International Criminal Tribunal for the former Yugoslavia (ICTY)[1]

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I. Introduction

The treatment of victims and witnesses has been one of the greatest challenges Victims and Witnesses that has faced the Tribunal in the past 10 years. This is in part due to the nature of the conflict in the former Yugoslavia and perhaps more importantly the sense that victim-witnesses are the responsibility of the world at large and not simply the parties. Moreover, in contrast to many domestic systems, the Tribunal has a broader mandate, as it takes the responsibility for defence witnesses as well as those of the prosecution. The Victims and Witnesses Section is located in the Registry and most decisions on relocation of witnesses are taken by the Registrar whereas the responsibility for imposing protection measure for witnesses rests primarily with the Chambers.

II. Victims

There has clearly been a victims rights revolution over the past twenty years which has resulted in a changed in status of victims both in domestic and international settings. Thus, in common law jurisdictions, the impact of crimes on victims has been recognised in a variety of ways, including victim impact statements and limited participation of victims in proceedings. Civil law jurisdictions have long provided for the participation of victims in criminal proceedings as *partie civile*, which allows a victim to be a party to the proceedings and to make claims for restitution and compensation.

In the international arena, GA's 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, there has been a growing recognition that victims have rights to both participate in criminal proceedings and to compensation and restitution. Extensive work has been done in this area by the UN Commission on Human Rights and definitive statements of such rights have found their way into the 1984 Convention Against Torture and other documents. This has culminated in the extensive rights provided to victims, not simply as witnesses but as victims *per se*, in the Statue of the ICC which provides both victims' participation including the ability to have legal representation in the proceedings and for reparations.

Despite these developments, neither the ICTY Statute nor the Rules of Procedure and Evidence provide for substantive rights to victims to participate in the

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proceedings or obtain reparations (See Rule 105 and 106 which provide, respectively, procedures for restitution of property and compensation but neither provision has been unutilised and at this stage appear to be dead letter). The Tribunal's judges have given consideration to whether it could provide such rights and they determined that such steps would require action by the UN Security Council to amend the Tribunal's Statute. The SC has taken no action, and in view of the Tribunal's completion strategy, any action on these proposals appears to be unlikely in the extreme.

Thus despite frequent referral to victims and "victims and witnesses" in the Tribunal's jurisprudence and literature, the only formal category of victims in the terms of the Tribunal's proceedings is the victim *qua* witness. There have been important developments however with regard to victims as witnesses. Special attention has been paid to their status as victims and they have been accorded protection and assistance. It is in that sense right to described that the Tribunal is part of the second wave of the victims' rights revolution that it has come after the initial recognition that victims are not simply the pawns of the parties in criminal litigation but have special needs and requirements. Thus while the Tribunal does not accord victims the status that the ICC does, it has taken important and innovative steps that are consistent with the movement to ward greater rights for victims.

III. The Victims and Witnesses Section providing assistance and support to witnesses

The act of testifying may be a difficult and intimidating experience for witnesses appearing before the Tribunal. In some, cases, individuals who come to testify may be reviving memories of atrocities, which can lead to severe personal suffering and trauma, even years after the events took place. Furthermore, most witnesses will be confronted with complex trials and legal procedures, which are principally drawn from the adversarial system and are unknown to them as they come from civil law countries, and which have the potential of producing the unexpected at any stage of the proceedings. Many witnesses will arrive in a country where they have never been before and will need support to enable them to cope with the difficulties of unfamiliar surroundings as well as the complexities of a war crimes trial. Moreover, the experience of testifying at a war crimes trial can be a frustrating one, as a war crimes trial may not allow witnesses to fully recount their experiences and "tell the larger story", since it probably will not be the appropriate forum to address such larger moral issues.

Most persons testifying before the Tribunal will therefore need particular attention and personalised care to be given by specialised staff with proper training in order to allow them to cope with the intricacies of testifying at a war crimes trial. This psychological support, assistance and relief is primarily provided by the Tribunal's Victims and Witnesses Section.

The Tribunal's Victims and Witnesses Section[3] is part of the Registry, and, therefore, neutral, in the sense that it is not connected to any of the parties. The

[3] Rule 34 of the Rules of Procedure and Evidence provides: "There shall be set up under the authority of the Registrar a Victims and Witnesses Unit consisting of qualified staff to: (i) recommend protective

Victims and Witnesses Section is tasked with providing impartial assistance to all witnesses, whether testifying for the defence or the prosecution or called by the court. The Victims and Witnesses Section is charged with ensuring that all witnesses can testify in safety and security and that the experience of testifying does not result in further harm, suffering or trauma to them. The Section is also responsible for ensuring that all witnesses, either for the prosecution or the defence, or those called by the Chambers are informed about their rights and entitlements and have equitable access to the services of the Section. It is mandated to provide counselling and support to witnesses, in particular in cases of rape and sexual assault. Furthermore, it is to ensure that witnesses are given proper treatment during their stay and provided with adequate subsistence allowances and compensation.

The Victims and Witnesses Section has approximately forty employees, most of whom are based in The Hague. The Section is divided in three separate units: a Support Unit; an Operations Unit; and a Protection Unit, which also operates a field office in Sarajevo. The Support Unit provides social, psychological support and other assistance to witnesses and is composed of psychologists and social workers who have knowledge of working with victims of violent crime in their home countries as well as staff who speak fluent Bosnian, Serbian, Croatian or Albanian. One of these support staff will accompany witnesses during their entire stay in The Hague, from the moment they arrive at the airport until the time they leave the country and will be on-call 24 hours a day. The Operations Unit is the administrative component of the Section, providing all logistical support enabling witnesses to travel to The Hague and providing appropriate accommodation.[4] The Protection Unit is responsible for the safety and security of witnesses and is composed of staff members who have police backgrounds and witness protection experience in their domestic systems. Protection officers make security arrangements for witnesses and implement protective measures ordered by the court. Their principal responsibility is to independently carry out threat assessments and organise, if needed, the relocation of certain witnesses from the former Yugoslavia to a new destination. Finally, the field office in Sarajevo serves as a focal point for witnesses in the region and facilitates access of Tribunal staff to witnesses. The office is also essential in providing logistical assistance to witnesses travelling to The Hague.

Due to the Tribunal's lack of coercive means, the Victims and Witnesses Section is not in a position to independently offer the services domestic witness units can offer with their more sophisticated witness protection programmes, including change of identity or establishing safe houses. The Tribunal therefore relies on cooperation from States, including the host Dutch authorities, to perform some of these services.

When it was established, the Victims and Witnesses Section was the first of its kind. Without undermining the rights of the parties at trial, it has been in a position to "soften" the impact of trial proceedings on witnesses. The experience at the Tribunal

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measures for victims and witnesses in accordance with Article 22 of the Statute; (ii) provide counseling and support for them, in particular in cases of rape and sexual assault."

[4] There may be important logistical obstacles to organising the discrete movement of witnesses to the Tribunal, which may require the involvement of other authorities, such as collecting witnesses at their homes, accompanying them on flights and providing, where necessary, passports, visas and residence documents.

has shown that a credible witness protection programme will need to include effective measures of counselling and support to witnesses. A Victims and Witnesses Section makes a significant contribution to the well-being of witnesses as they pass through the criminal justice process because witnesses who feel secure are more likely to recall key events accurately and to give their evidence in a lucid and consistent way.

IV. Legal Framework

1. Balancing the protection of victims and witnesses and the right to a fair trial at the ICTY

One of the primary features of the Tribunal is the interaction between two principal legal systems, the common law and the civil law systems. The Tribunal's procedural rules constitute an amalgam of elements derived from the common law and civil law. The Tribunal has drawn on both traditions in an effort to create a system that, whilst respecting the rights of the accused, utilises both effective judicial protective measures and the management of a limited witness protection programme. This "middle way" makes it an interesting case study for international tribunals and courts but also domestic jurisdictions. The right to a fair trial is an integral part of each modern legal system and is central in the Tribunal's criminal procedure. The Tribunal has tried to develop a balanced approach, between the accused's right to a fair trial and the witness's right to protection and safety.

Witness protection measures almost invariably raise issues regarding the right of parties to a fair and public trial. The Tribunal's witness protection rules and its jurisprudence are clear in the sense that any impact on such rights will need to be justified and should be granted on an exceptional basis only. Whenever the Tribunal's Chamber is confronted with a request to grant protection to a witness, it will apply a balancing test, and will weigh the right of the accused to a fair trial against the witness's need for protection and need for security.

The Tribunal's Statute incorporated internationally recognised standards of fundamental human rights such as the accused's entitlement to a fair and public hearing (Article 21.2), also enshrined in Article 14.1 of the International Covenant on Civil and Political Rights and Article 6.1 of the European Convention on Human Rights. It further includes the right to examine or have examined witnesses (Article 21.4(e)), which is similar to provisions in Article 14.3(e) of the International Covenant on Civil and Political Rights and Article 6.3(d) of the European Convention on Human Rights.

However, these rights are not absolute. Rather, these rights are expressly balanced against the need to protect victims and witnesses. Article 21 of the Statute, providing for the accused to be entitled to a fair and public hearing is subject to Article 22, which obliges the Tribunal to provide for the protection of victims and witnesses in the Rules of Procedure and Evidence. It should be noted that neither Article 14 of the International Covenant on Civil and Political Rights nor Article 6 of the European Convention on Human Rights, which concern the right to a fair trial, expressly list the protection of victims and witnesses as a primary consideration.

The Statute, along with the fundamental rights of the accused, the language in Statute as well as the decisions of the Chambers, makes it clear that protection of witnesses is secondary or subordinate to the rights of the accused. Nevertheless, witnesses have enjoyed a higher degree of protection than in domestic legal systems due to the unique character of the Tribunal and the context in which it operates. This principle was re-affirmed by the Trial Chamber in the *Milosevic* case, which found that "whilst the rights of the accused are elevated above the protection of victims and witnesses, the latter are still given greater protective status than in national systems of criminal law".[5]

2. Procedural witness protection measures decided by the Chambers

The provisions dealing with the protection of witnesses are found in the Statute and in the Rules of Procedure and Evidence. These are judicial or procedural measures which can be granted by a Chamber and are distinct from the non-judicial security measures, such as relocation, which can be provided by the Registrar assisted by the Victims and Witnesses Section.

There was little precedent to guide the drafters of the Statute and the Rules of Procedure and Evidence in elaborating the Tribunal's witness protection rules. The international criminal tribunals in Nuremberg and Tokyo had only rudimentary rules of procedure, guaranteeing certain minimum rights to the accused to ensure fair trial.

Article 22 of the Statute provides that "the Tribunal *shall* in its rules of procedure and evidence provide 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".

The Rules of Procedure and Evidence, which were later drafted and adopted by the Judges, actually develop measures for the protection of victims and witnesses. There is no separate coherent scheme or a comprehensive legal document which sets out the Tribunal's witness protection rules. The provisions with protective measures are scattered throughout the Rules, namely Rule 75 which deals with measures in court, Rule 79 which deals with pre-trial measures and Rule 96 which addresses the specific case of sexual assault victims.

According to recent figures provided by the Victims and Witnesses Section, more than 40% of all witnesses who testified before the Tribunal since 1994 testified with protective measures.[6] This is indeed a significant number and may indicate that

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[5] See *The Prosecutor v. Milosevic*, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, Case No. IT-02-54, 19 February 2002, para. 23.

[6] According to figures provided by the Tribunal's Victims and Witnesses Section, Sixty-one percent of witnesses testified in open session, without protective measures. Nineteen percent of witnesses were granted a pseudonym and testified with face distortion. Eight percent of witnesses testified in closed session and were granted a pseudonym. Seven percent were granted a pseudonym and testified with face and voice distortion. Two percent had face distortion as only protective measure. One percent testified in closed session without any additional protective measure. One percent had a pseudonym. One percent testified with video-link from a remote witness room. The Tribunal's Trial Chamber has in one case gone as far as to grant anonymity to a number of witnesses. In that case, the witness's identity was withheld from the accused. See "1994-2004 a Unique Decade / une décennie unique", published by the ICTY Registry in 2004, pp. 34-42.

protective measures have almost become the rule. Approximately 9% have testified in closed session.

i. *Protective measures during pre-trial stage*

Rule 69 provides that potential witnesses and victims can be granted protective measures in the disclosure and pre-trial phase of the case. Rule 69 permits the prosecution to apply for the non-disclosure of the identity of a victim or witness who is at risk, until such time as the witness can be brought under the protection of the ICTY. This non-disclosure applies to the press and public as well as to the accused.

A prosecutor or defence counsel seeking such measures must show that there are exceptional circumstances and that there is some objective foundation for the fear that the witness may be facing a real risk or danger. Blanket redactions of the names and identifying features of every potential witness until a reasonable period before the commencement of trial are not permitted.[7]

ii. Protective measures during Trial

Before the commencement of the trial, a Judge or a Chamber may, *proprio motu*, or at the request of the parties or the victims or witnesses concerned or of the Victims and Witnesses Section, order appropriate measures protecting witnesses when they testify. The range of confidentiality measures that seek to protect the identity of the witness include those for victims of sexual assault.

a. Confidentiality measures

The general measures at the Trial Chamber's disposal are specified in Rules 75[8] and 79[9] and are aimed primarily at preventing disclosure of the identity of the

[7] The Trial Chamber has set out three criteria which the Prosecutor would need to consider in a new motion: the likelihood that the prosecution witness will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not to the public; the extent to which the power to make protective orders can be used only to protect individual victims or witnesses in the particular trial, as opposed to making it easier for the prosecution to bring cases against other persons in the future; and the length of time before the trial at which the identity of the witness will be disclosed to the accused. See, *The Prosecutor v.Radoslav Brdanin and Momir Talic*, Decision on Motion by Prosecution for Protective Measures, Case No. IT-99-36-PT, 3 July 2000, para. 26. Interestingly, whereas the ICTY and to a certain extent the ICTR have refused to authorise blanket protection measures, the Special Court for Sierra Leone has taken a different approach with regard to the non-disclosure of the identity of a witness. In several cases it has granted witness protection measures globally to a group of people, based on security reports from the region. This difference in approach to witness protection illustrates how international tribunals may need to adjust to realities on the ground since there are indeed differences between the situation in Yugoslavia, Rwanda and Sierra Leone.

[8] Relevant portions of ICTY Rule 75 read as follows:

"(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:

witness and any other identifying information to the public. These measures range from the use of pseudonyms, screening of witnesses from the public gallery, the use of one-way closed circuit television, facial or voice distortion, allowing testimony by way of away video-link and the redaction of information from the broadcast and transcripts to testimony in closed sessions.

The right to a public hearing is central to criminal procedure in order to ensure that a trial is fair and transparent. The granting of protective measures which restrict disclosure of the identity of the witness to the public and media will depend on the particular circumstances and merits of each case. The Prosecutor, when seeking protective measures for a witness, is required to demonstrate that the measures sought are consistent with the rights of the accused, in particular the right to a public hearing, balanced against the particular circumstances faced by each witness. Similarly, when the defence requests protective measures of confidentiality, the Prosecutor's interest in the trial being public should be taken into account.

There are also special rules and criteria for testimony by video-link. Testimony by video-link will only be admitted if certain criteria are met, since the general rule is that a witness should be present at the seat of the Tribunal: the party must first show that the testimony of a witness is sufficiently important to make it unfair to do without it; secondly, that the witness is unable or unwilling to come to the Tribunal.

b. Special measures aimed at protecting victims of sexual assault

Acts of sexual violence have been widespread during the conflicts in Rwanda and the former Yugoslavia. Victims of sexual crimes have special needs as the experience of testifying may result in the re-traumatization of the victim and will therefore require special treatment. In order to prevent the witness from seeing the accused, the Chamber may allow testimony by one-way closed circuit television. The witness will testify from a separate room, which will prevent him or her from

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(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 records;
(b) non-disclosure to the public of any records identifying the victim;
(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.
[…]"

[9] ICTY Rule 79 provides that:
"(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:
(i) public order or morality;
(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
(iii) the protection of the interests of justice.
(B) The Trial Chamber shall make public the reasons for its order."

confronting the accused and the public. Such measures are aimed at preventing the witness from reliving the atrocities and preventing re-traumatization. The Trial Chamber may also allow the placing of screens which prevent the witness from seeing the accused, whereas the accused will see the witness on the courtroom monitors. In addition to the protective measures for witnesses of sexual crimes and rape, ICTY Rule 96 sets out special conditions for the admission of evidence they provide. Rule 96 provides that corroboration of the victim's testimony is not required and consent is not allowed as a defence if the victim has been subject to physical or psychological constraints. Furthermore, the victim's prior sexual conduct is inadmissible as evidence.

c. Anonymous witnesses at the ICTY

The Rules do not address whether witnesses may testify anonymously, i.e., the identity of the witness is not only withheld from the public and media but also from the accused and the defence counsel. The Tribunal was confronted very early in its existence with this question in the *Tadi}* case, when the Prosecutor sought permission from the Trial Chamber for several witnesses to testify anonymously. The Trial Chamber determined that, only in exceptional circumstances, could it restrict the right of the accused to examine or have examined witnesses against him and noted that the situation of armed conflict was an exceptional circumstance *par excellence*. The Chamber then accepted, under certain conditions, testimony of anonymous witnesses, providing very strict safeguards prior to accepting such testimony. Referring to the English Court of Appeal case of *R. v. Taylor*,[10] the Trial set forth the following five criteria:[11]

> -There must be a real fear for the safety of the witness or her or his family;
> -the testimony of the particular witness must be important enough to the Prosecutor's case to make it unfair to require the Prosecutor to proceed without it.
> -there must be no *prima facie* evidence that the witness is untrustworthy or is not impartial. The Chamber will not grant anonymity to persons with an extensive criminal background or of an accomplice. Presumably, this would also apply to co-accused.
> -the ineffectiveness or non-existence of a long-term witness protection programme. Subsequent case law determined that the opinion of the Victims and Witnesses Section must be requested;
> -the measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. There may be no undue justice caused to the accused.

The Trial Chamber then established guidelines to be followed in order to ensure a fair trial and meet the standards of the European Court of Human Rights and domestic law when granting anonymity. While recognising that the standards must be

[10] *R. v. Taylor*, [1995] Crim. L.R. 253.
[11] *The Prosecutor v. Dusko Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, paras. 62-67.

interpreted in the context of the unique object and purpose of the Tribunal, it proposed the following guidelines: first, judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony; secondly, the judges must be aware of the identity of the witness, in order to test the reliability of the witness; thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain incriminating information but still excluding information that would make the true name traceable; finally, the identity of the witness must be released when there are no longer reasons to fear for the security of witnesses.[12]

The use of anonymous testimony highlights the tension between the rights of the accused to a fair trial and the protection of victims and witnesses. No other Trial Chamber has since then allowed anonymous testimony. This may be due to the vigorous criticism levelled against this practice, such as Judge Stephen's strong partial dissent to the decision[13] or the response from the American Bar Association. In view of the difficulties that resulted from the use of an anonymous witness and the fact that no other Chamber has utilised such a procedure, this precedent is considered of limited value.

However, as the Tribunal faces an increasing number of complex cases involving high-level accused, requiring the testimony of informants and insiders, it may have to reconsider this question. If so, the strict *Tadi}* criteria could have renewed relevance, particularly in cases where no witnesses would testify in their societies due to pressure from well-organised groups. Obviously, such a measure would be one of last resort, when no other protection measure is available and where no other security measure, such as relocation for the witness and his family, can be put in place. On balance, however, in light of the jurisprudence of the Tribunal and the European Court of Human Rights, the arguments against such an approach are strong. Therefore, the Tribunal's priority should continue to further developing its witness relocation programme, rather than re-visit the use of anonymous witnesses

V. Non-procedural measures: Witness Relocation

Some witnesses face situations in which it is impossible to return to their homes. The numbers of such witnesses are minute in comparison to the total number of witnesses testifying at the Tribunal, but in some cases their testimony is critical for the prosecution or the defence. Thus, in a few cases, long-term (read permanent) physical relocation to another country of a witness and his or her family has been undertaken, with serious social consequences to the relocating family as well as resource implications for both the Tribunal and the receiving country.

Relocation is a non-judicial measure in the sense that the Chambers and the judges are not involved in either the decision to relocate witnesses or in administering relocation programmes, which are left exclusively to the other organs of the Tribunal.

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[12] *The Prosecutor v. Dusko Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, para. 71.

[13] *The Prosecutor v. Dusko Tadic*, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995.

Relocation is a form of state cooperation and assistance provided by United Nations Member States to the Tribunal.

In order to facilitate the relocation of witnesses and their families, the Tribunal has sought to enter into arrangements with States to provide the terms of such relocations. The Tribunal has proposed framework agreements, which establish the procedure to be followed in reaching the determination of whether a particular witness should be relocated and the rights and benefits that the witness would receive in the event that he or she is relocated. Although, ultimately, it is up to the State whether it will agree to relocate a particular witness and his or her family within its borders.

The Registrar must first make an assessment of the vulnerability of a particular witness and, based on this assessment, then request the State to consider that witness for relocation. The State will then make a decision as to whether it is willing to accept the witness. The Tribunal is wholly dependent on States to accept such threatened witnesses for relocation, as it has neither its own territory nor the police power essential to carry out a relocation and no means to coerce States to accept relocation. Thus, in theory, relocation can be denied by all cooperating States, regardless of the severity of the threat.

When a witness is accepted for relocation, the State undertakes to provide him or her with various rights and benefits. Generally, relocation itself is sufficient to provide the necessary protection; however, in other cases the witness will need to go into a full witness protection programme, with a change in identity and new identification documents. Since there are only a handful of countries with full-scale witness protection programmes and not all of these have relocation agreements with the Tribunal, most of the agreements are with States which will simply relocate the witness and his or her family. As the Tribunal's cases have over the years become more focused on leadership cases, the number of witnesses needing a change of identity has expanded. This phenomenon is likely to increase in the final years of the Tribunal's mandate, which is intended to focus on the most serious perpetrators. Hopefully, States with full-scale witness protections will be willing to continue to meet this need.

A related issue that raises difficulties with a number of States is the witness with "blood on his hands" or "dirty hands", discussed above. Some countries have legislation that prevents them from giving sanctuary to individuals who have committed criminal acts and/or acts that can be characterised as war crimes or, alternatively, have laws that require that such individuals be prosecuted. Obviously, such laws prevent these countries, should they enter into relocation agreements with the Tribunal, from relocating witnesses who fall into this category. Given that this category of witness is often in need of relocation because they have "turned on" their former compatriots and cannot return to their homes, this issue will continue to be a challenge for the Tribunal.

If a witness is accepted by a State for relocation, then the critical question is his or her status in that country. Each country has a different regime, but the Tribunal's agreements generally provide for some type of temporary residence permit that is renewable on the basis of the Registrar's certification of a continuing need for relocation and which will generally will lead to a permanent residency status after a

period of time. In addition to the residency status, a key element of any relocation is the benefits and service to which the relocated witnesses and their families are entitled. Relocation causes many difficulties for both the witnesses and their families. They will probably have to learn a new language, they will need welfare benefits and social support until they find employment, and they may need training for employment. Thus, the Tribunal has always striven to obtain a sufficient package of benefits and support for the relocated persons. It has used the benefits provided by the 1951 Refugees Convention as a benchmark and done its best to ensure that the rights and benefits to which the relocated persons will be entitled are in line with this standard.

The Tribunal is completely reliant on States providing this assistance and must try to accommodate its relocation programmes to the vicissitudes of State law. In this way witness protection is like all other elements of the Tribunal's mandate, as it depends on the assistance and cooperation of States. All aspects of the Tribunal's work are dependent on such assistance and cooperation from arrest all the way through to enforcement of sentences. Thus, it is hardly surprising that witness relocation, which is absolutely essential to the conduct of trials at the Tribunal, is similarly dependent on such assistance.

There have, however, been some encouraging developments that indicate the ICTY's role in witness protection is being taken seriously by European countries and institutions and that consideration is being given to integrating the Tribunal into broader European initiatives. For example, a Council of Europe Committee of Experts on witness protection concluded that common international standards should be developed, in part, to "facilitate and reinforce the activity of international legal institutions".[14] In this regard, the experts found: "the existence of a regional or international instrument for the protection of witnesses and collaborators of justice would, for instance, provide a stronger legal basis for the agreements currently concluded between the ICTY and some States, and facilitate the work of the witness protection service at the International Criminal Court".[15] Similarly, Europol has also shown interest in the ICTY's witness protection work and offered some general support in adopting common European standards which would facilitate relocation agreements between international courts and tribunals and European States.

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[14] Council of Europe, Committee of Experts on the Protection of Witnesses and Pentiti in Relation to Acts of Terrorism, "Draft Conclusions of the Final Report on Protection of Witness and Pentiti in Relation to Acts of Terrorism", 18 September 2003, PC-PW (2003) 18, available at <http:www.coe.int>.

[15] *Ibid*. It should be noted that the EU is also taking initiatives in the field of witness protection. In May 2000, the Council of Europe adopted the EU Strategy for the Beginning of the New Millennium on the Prevention and Control of Organised Crime (The Prevention and control of Organised crime: a European Union Strategy for the Beginning of the New Millennium, 3 May 2000, OJ C 124). In this important policy document, the Council recommended that an instrument be prepared on the position and protection of witnesses and collaborators of justice. It has recommend that a "EU model should be developed taking into account the experiences of Europol and used on a bilateral basis". The ambitious project has not yet been implemented. The General Secretariat of the Council has recently called for the preparation of a framework decision in this area and the preparation of a EU model agreement or guidelines, taking into account the experiences of Member States and Europol. See "Report on the Measures and Steps Taken with Regard to the Implementation of the Recommendations of the European Union Strategy for the Beginning of the New Millennium and Control of Organised Crime", 10925/03, 30 June 2003, pp. 11-12, 14 & 71.

Common legal standards for witness protection, whether international or European, would have certainly made the Tribunal's job negotiating relocation agreements and arrangements much easier and perhaps facilitated a number of additional agreements. Given that the number of agreements is relatively small, these conclusions are most welcome, particularly if such common standards could be developed in the near future. In any event, given that the Tribunal is now nearing the conclusion of its work, the principal beneficiary of such developments will be the International Criminal Court. Since international courts and tribunals do not have the means to conduct witness relocation themselves and must rely on States for assistance, such common standards will be essential if witness protection will be viable in the international arena

VI. Concluding remarks

Effective witness protection is an essential element of international war crimes trials. Without it, most of the trials at the ICTY, as well as the ICTR, the Special Court in Sierra Leone and for the future in the ICC and other international criminal tribunals and courts, would simply collapse. Fortunately, the Tribunal has been able to develop a relatively effective witness protection and assistance programme that has allowed for the Tribunal to conduct its proceedings despite an extremely difficult environment in the region.

Despite these systemic difficulties, the Tribunal has done a credible job on witness protection and support. In addition to a body of rules and law that have been simultaneously innovative and practical, the Tribunal's organs have built a number of cooperative relationships and partnerships both in the region and in the international community. These relationships have allowed the emergence of a credible witness protection and assistance programme. While these innovations have been limited to witness protection and support, rather than victims' representation and compensation, it is clear that in these critical areas the Tribunal has broken important ground and established a solid foundation for the ICC and others to build upon.