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IBA ICC Perspectives



Witnesses before the International Criminal Court

An International Bar Association International Criminal Court
Programme report on the ICC's efforts and challenges to protect,
support and ensure the rights of witnesses

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About the Programme

The International Bar Association's (IBA) Programme (the 'Programme') on the International Criminal Court (ICC or the 'Court') monitors fair trial issues at the ICC and encourages the legal community to engage with the work of the Court. Special focus is placed on monitoring emerging issues of particular relevance to lawyers and collaborating with key partners on specific activities to increase engagement of the legal community on ICC issues.

The IBA's monitoring work includes thematic legal analysis of ICC pre-trial and trial proceedings, and ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the fairness and impartiality of proceedings and the development of international justice.

Research is complemented by consultations with key legal professionals, including: Court officials; academics and legal researchers; non-governmental organisations (NGOs); staff of the ad hoc tribunals; individual defence counsel; and diplomatic representatives. Analysis of the relevant issues and detailed findings are disseminated through monitoring reports published and widely circulated to an extensive Listserv. To ensure the highest quality, reports are vetted by senior-level IBA officials including Dr Mark Ellis, IBA Executive Director; Justice Richard Goldstone, IBA Human Rights Institute Honorary President; and the Co-Chairs of the International Bar Association's Human Rights Institute (IBAHRI).

This report forms part of the Programme's new thematic publication series, IBA ICC Perspectives, presenting the Programme's views on key developments at the ICC which have a particular impact on fair trial standards. The thematic reports will provide in-depth analysis and cross-case comparison of active ICC trials.

This report was researched, written and reviewed by the legal staff of the IBA ICC Programme, Danya Chaikel, IBA Programme Lawyer and Lorraine Smith van Lin, Director, IBA ICC Programme. The Programme is grateful for the extensive research assistance provided by programme interns Juan M Zarama and Nadia Al-Falaki.

The IBA is also grateful to the Court staff and other individuals who graciously participated in consultations for this report (all of whom wish to remain anonymous), including: Office of the Prosecutor; Registry; defence counsel; senior diplomats in The Hague; and independent legal consultants.

The work of the programme is supported by the IBAHRI Trust.

In March 2013, one month before the trial was set to begin, the Prosecutor of the International Criminal Court (ICC or the 'Court') withdrew all charges against Mr Francis Kirimi Muthaura, former head of the Kenyan civil service who had been jointly charged with Kenyan President, Mr Uhuru Kenyatta. The prosecution alleged that, due to critical problems with key eyewitnesses and the loss of potential evidence, it was no longer able to establish the case against Mr Muthaura beyond reasonable doubt.

The developments in the Kenyan case reflect the growing number of witness-related issues currently being addressed by the ICC. In the cases against Thomas Lubanga Dyilo and Mathieu Ngudjolo Chui, the first trials from the Democratic Republic of the Congo (DRC), judges were faced with false testimony by witnesses, witness-credibility concerns arising from the Prosecution's overreliance on, and inadequate supervision of intermediaries, and the jurisdictional conundrum of witnesses seeking asylum in the Host State. Challenges with witness protection and support feature in all cases currently before the Court.

Given the crucial importance of witnesses to the ICC, the IBA ICC Programme conducted comprehensive research and consultations with court officials and other key stakeholders to assess the achievements, challenges and needs of the ICC in this area. This report is the result of that exercise.

Among other general findings, the IBA found that the significant attention paid to witness-related issues at the ICC reflects the Court's extensive reliance on witnesses to provide the bulk of evidence in support or against the accused during the proceedings. Encouragingly, the Court has dedicated significant human and financial resources to prepare, support, manage and protect witnesses as testimony to its respect for, and commitment to, their important role and their rights provided under the Statute.

However, the Court's extensive reliance on witnesses is a double-edged sword which has led to a plethora of difficulties. For example, managing and protecting the Court's witnesses demands a complex web of activities: obtaining state cooperation; supporting witnesses' practical and psychosocial needs; organising logistics; securing their safe passage to The Hague; and protecting persons from potential threats or interference during investigations and trials. The IBA's legal analysis has revealed that while many of these activities are successfully being carried out, poor investigative techniques by the Office of the Prosecutor (OTP), inadequate cooperation from states and insufficient resources, among others, have created gaps which undermine the Court's

efforts to successfully prosecute serious crimes.

The ICC's remarkable efforts during its first decade of operations to protect, assist, prepare and coordinate the persons who testify before it have not gone unnoticed, but in the next ten years the Court and its member states will need to evaluate and review their approach to witnesses in order to bolster its international credibility and ensure fair, efficient and effective trials. This report presents the ICC's accomplishments as well as the outstanding and pressing priority issues the IBA has identified and believes should be addressed, along with specific recommendations to the Assembly of States Parties (ASP), the organs of the Court, and the Host State (the Netherlands).

Key findings and recommendations

- **ICC cases rely extensively on live witness testimony which may be unsustainable.** The IBA's consultations, research and assessment of ICC cases have revealed that the Court relies heavily on direct testimony by witnesses who come in person to The Hague to give evidence in trials. This is primarily due to the legal framework which favours in-person testimony as a rule and also because of the advantages for judges in assessing the witnesses' credibility. However, there are a number of challenges related to this extensive witness reliance including: the Court's inability to enforce witness attendance or testimony; managing witness protection needs; logistical challenges in navigating immigration issues and a possible increase in the number of asylum claims; and also risks of witness interference and bribery. To mitigate the ICC's reliance on live testimony, the IBA encourages all parties and participants to pursue and utilise additional forms of evidence more rigorously, such as forensic materials and electronic evidence including voice and cyber communication. In order to make use of such probative evidence, innovative methods such as remote sensing, satellite imaging, cyber investigations and digital and video analysis are currently being explored by the OTP. This approach will help ensure that sufficient reliable and relevant evidence is produced while alleviating the burden on witnesses who may be unable or unwilling to venture to The Hague.
- **The Court's functional inability to enforce witness testimony should be remedied with an amendment to the Rome Statute.** Under the current legal framework judges can require witnesses to attend proceedings but have no

subpoena or citation power to compel their attendance and testimony. Furthermore, states can only cooperate in facilitating the transfer of witnesses who volunteer or consent to appear before the Court. This could effectively stall ICC proceedings, particularly if the person is a crucial witness. While there could be other challenges in dealing with a witness who is brought by force, this method has been proven at the ad hoc tribunals to be a strong incentive to encourage witnesses to testify. In this regard, the IBA considers that the ICC would benefit from having similar powers to enforce the appearance of witnesses which could be accomplished through an amendment to the Court's legal texts. Specifically, the IBA proposes an amendment to Article 93(1)(e), clearly mandating that States Parties organise the transfer of witnesses to The Hague if ordered by Chambers, and removing the element of voluntariness on the part of the witnesses.

- **The ICC's enforcement regime for breaches by or against witnesses is inadequate and requires timely and effective investigations by the prosecution.** The Court is empowered to impose a sanction of five years' imprisonment or a fine in the event of conviction for witness-related breaches against the administration of justice under Article 70 of the Rome Statute. However, a conviction depends on timely and effective investigations, which can only be carried out by the OTP, the Court's investigative arm. To date there have been no publicly reported results of such investigations. The issue is further complicated when the breach is carried out by persons connected to the OTP, such as intermediaries that the Office relies on. To ensure transparency, and to avoid conflicts of interest, the IBA recommends that the judges appoint *amicus curiae* to assess the need for investigations to be carried out by the prosecution, and whether they should be conducted internally or externally.
- **The Court has made commendable progress in systematising and streamlining its approach to intermediaries, but the potential impact of the Draft Guidelines for Intermediaries is uncertain.** Several issues related to the unregulated reliance on intermediaries have arisen at the ICC. As such the Court promulgated the *Draft Guidelines for Intermediaries* (the 'Draft Guidelines') after extensive consultation with all organs of the Court, civil society and relevant stakeholders. While the document is a positive step in the right direction, it has not been fully implemented or distributed, and is not binding on the Chambers, raising concerns over the Court's ability to enforce the Draft Guidelines. Given the extensive role played by intermediaries in sourcing and liaising with witnesses, the IBA recommends that more

concrete steps are taken to ensure that the Draft Guidelines are legally enforceable.

- **Cooperation between the ICC and States Parties is not fully functioning and is negatively impacting the Court's ability to effectively support and protect witnesses.** States Parties are encouraged to meet their Rome Statute obligations to cooperate with the Court, particularly during investigations and in facilitating the transfer, protection and support of witnesses. In particular, States are encouraged to enter into meaningful framework agreements on witness relocation and to facilitate the temporary movement of witnesses who may be urgently required by the Court. The Court is urged to ensure that cooperation requests are detailed, streamlined and sent in a timely manner to the states concerned.
- **The legal status of ICC witnesses who have already testified is unclear and should be clarified.** While the ICC's legal texts provide for witness protection measures throughout the proceedings, little attention has been given to the question of what should happen to these individuals once their testimonies are complete. The same can be said for acquitted persons, even those who testify as 'witnesses' on their own behalf. The IBA considers that the detention of ICC witnesses for several years after they have finished testifying pending the final resolution of protracted legal arguments to determine their status, is not the model the ICC or the Netherlands should follow in future cases. Likewise the status of acquitted persons (whether they were witnesses or not) who cannot return to their country for security reasons must be clarified. The IBA recommends that the ICC, States Parties and the Host State work together and develop a joint policy on the eventual placement for witnesses and acquitted persons with asylum claims, based on their respective human rights obligations.

To the Registry

While the IBA commends the Registry for their tremendous efforts in facilitating the protection of witnesses, there are several critical areas requiring further attention:

- **The operational structure of the Victims and Witnesses Unit (VWU) needs to be reinforced.** The VWU faces budgetary challenges, human-resource gaps and inadequate leadership. The IBA welcomes the Registry's acknowledgement that the VWU is in need of a major overhaul to improve its function, a process which will commence in 2013. This is a welcome development in light of the importance of this unit for the protection and support of ICC witnesses. We urge the Registry to follow

through with plans to review the management and operational capacity of the VWU and to ensure that the Unit has the human, technical and financial resources necessary to carry out its functions.

- **The Registry is not providing sufficient operational support for: (i) the protection of defence witnesses; and (ii) state cooperation requests on defence matters.** The IBA finds there is an absence of structural support by the Registry, both in terms of communication flow and technical assistance, for defence teams in their efforts to assess the protection needs of their witnesses. Accordingly, we encourage the Registry to hold adequate consultation with defence teams to determine their needs; and to: (i) establish a mechanism, or subsection of the Office of Public Counsel for Defence, similar to the OTP's Operational Support Unit to assist the defence teams with assessing protection needs of witnesses and making necessary referrals to the VWU; and (ii) appoint a focal point to coordinate defence requests for state cooperation on witness matters.
- **The Registry should explore opportunities with non-States Parties to increase capacity for witness relocation.** Many non-States Parties with effective national protection programmes would be keen to cooperate with the ICC on witness relocation matters. The IBA encourages the Registry to continue pursuing ways to engage with these non-States Parties, which could be done through ad hoc agreements as provided in the Rome Statute's cooperation provisions.
- **Witness asylum claims may indicate inadequate security assessments.** The witness asylum cases provide a further example of the Court's reliance on witnesses, and the intrinsic challenges of bringing witnesses to The Hague due to their potential vulnerability, protection needs and right to request asylum. The IBA urges the Registry to scrupulously assess the protection needs and security risks of witnesses and the likelihood of them claiming asylum, and – if necessary – explore suitable alternatives to direct testimony in The Hague, provided that these do not impinge on the defendant's right to examine such witnesses.
- **Video-link testimony is on the rise at the ICC but its limitations should be addressed.** Various challenges of facilitating witness testimony – such as securing the protection of persons who travel to The Hague – have led the Court to explore other less risky options such as testimony by video-link. However, amidst concerns related to the Court's technical capacity to facilitate video-link testimony, the IBA recommends that the Registry assess its capacity (including the adequacy of technology and also the domestic conditions of witnesses during their testimony) to ensure this form of testimony is a viable alternative.

- **Court-ordered procedural protocols on witnesses and other matters should be compiled and published.** Several protocols addressing various procedural issues such as witness familiarisation, proofing and contact with witnesses of the opposing party have been handed down by the judges in different cases. These are appended to particular decisions but are not published anywhere else on the ICC website and are thus not readily accessible to new counsel or to external observers. The IBA therefore recommends that the Registry compile all such ICC protocols in one easily accessible webpage on the ICC website. This would not only be beneficial to the Court, but also to Court observers who are monitoring and assessing the ICC's performance.

To the Office of the Prosecutor (OTP)

The IBA commends the OTP for its consistent efforts to support and protect witnesses as part of its overall investigative strategy given the immense difficulties in conducting investigations, sourcing and accessing potential witnesses in often volatile situation countries. Nevertheless, based on IBA research, consultations and review of the cases at the Court, there are some areas which merit further attention or review:

- **The OTP's investigative practices for assessing witness credibility are falling short.** In the ICC's first two verdicts, the judges found that poor OTP investigations, as well as overreliance on and inadequate supervision of, intermediaries contributed to credibility problems with some witnesses and, ultimately, the rejection of their testimony. The judges in the Kenyan case have also had cause to strongly reprimand the OTP for its approach to investigations, as the majority of witnesses were sourced following the confirmation of charges. The IBA understands that an internal review of the OTP's investigative practises are underway, which we hope will be speedily completed and the results will be shared publicly. Given the importance of quality investigations and credible witnesses to successful prosecutions, we urge the OTP to take positive steps to ensure that investigations are carried out by experienced investigators who can make informed assessments.
- **While there have been several allegations of false testimony and witness interference, no investigations or prosecutions have been publicised.** The IBA condemns all forms of witness misconduct and interference, and stresses the need to ensure the safety and security of all witnesses who take the stand. We are deeply concerned that, despite allegations of false testimony and witness interference, to date there are no publicised OTP investigations before the Court. The IBA strongly urges the

OTP to ensure timely investigations of such allegations, especially those involving threats and intimidation, and that the results of such investigations are published as soon as practicable.

- **The OTP is taking positive steps towards promulgating a Professional Code of Conduct.** ICC prosecution counsel are not governed by a professional code of conduct whereas defence counsel and legal representatives for victims are, provoking serious concern over fairness, as well as accountability, for prosecution counsel. The IBA commends the OTP for recognising the need for a code and urges the Office to follow through with plans to promulgate a prosecutorial code of conduct in 2013.

To the Chambers

The IBA lauds the Chambers' sincere efforts to provide for the protection of witnesses and to balance the rights of witnesses with those of defendants, and encourages consideration of the following matters:

- **Every effort should be made to ensure that the application of in-court measures to protect witnesses do not unduly limit the rights of accused persons.** Concern has been expressed by some counsel appearing before the Court that protective measures appear to be applied at the ICC too routinely. Thus, there are limitations on counsel's ability to freely question particularly vulnerable witnesses which impacts their ability to effectively present their case. The IBA fully supports the Chambers' efforts to avoid re-traumatising witnesses but encourages the Court to permit counsel as much as possible to question witnesses candidly in order to test their credibility. The IBA also recommends that the Court further reduces the number of closed hearings and applies as standard procedure the grouping together of confidential questions by the parties.
- **ICC procedural protocols dealing with witness matters are an important procedural advancement; however, the case by case approach may lead to inconsistencies in their application and enforcement.** The IBA commends the judges for adopting various witness related protocols, dealing with matters such as contact of the opposing party's witnesses and witness preparation. However, we encourage the judges to standardise these procedural protocols to ensure uniform application in all cases and legal certainty, as opposed to the current case-by-case approach. In addition, measures against breaches of these protocols must be strictly enforceable. Even though there are 'safeguards' included in the Witness Preparation Protocol, for example, including a section on 'Prohibited Conduct,'

the five-page document remains silent on who investigates and prosecutes such misconduct and whether sanctions are available. While in the view of Trial Chamber V(B), that Chamber has authority to sanction potential breaches, this only applies to the *Kenyatta* case. Otherwise if potential breaches constitute offences against the administration of justice, investigations may be carried out by the OTP, but as one of the parties this can raise obvious concerns over conflicts of interest and lack of transparency.

To the Assembly of States Parties

Mindful of the complexities involved in the oversight and management of the ICC, the IBA has made the following suggestions to the Assembly of States Parties (ASP) in order to improve state cooperation with the Court, aimed directly at reducing delays and augmenting efficiency:

- **States Parties have made important pledges on witness related matters, but more concrete action is needed.** States Parties have repeatedly pledged and reiterated their unwavering commitment to the Court. Nevertheless, large gaps remain, such as the low numbers of witness relocation agreements and inconsistent cooperation on facilitating witness travel and other logistics. The IBA recommends the ASP identify key areas where concrete action is possible and for the ASP Presidency to call upon states to honour pledges already made and to set a deadline to indicate the steps taken to achieving cooperation goals.
- **The IBA commends the 12 states who have concluded witness relocation agreements but more is required to sustain the growing relocation needs.** To date only 12 states have signed framework agreements on witness relocation with the ICC, along with several other states having facilitated witness relocation on an ad hoc basis with the Court. While these efforts are commendable, more meaningful advancements need to be made in this area. For example, the generic nature of the agreements mean that states may sign but still not accept witnesses, thus undermining the original intent of the agreement. The ASP is urged to continue to encourage states to sign agreements, to actually follow through by accepting witnesses and where there are resource challenges, to take advantage of the Special Relocation Fund which was established to facilitate states in such situations.
- **The ASP recognises the particular cooperation challenges faced by defence witnesses but has yet to follow through on its own recommendations.** The IBA urges the Assembly and States to implement the 66 recommendations identified in the Bureau's report on cooperation and, specifically,

recommendations 12–14 and 24–33 which concern improved defence access to state cooperation. To further address these and other defence related challenges, the IBA encourages the Assembly to consider the re-appointment of a focal point/facilitator on defence issues within The Hague Working Group.

- **There is a need for national focal points to coordinate and streamline state cooperation.** The IBA supports and encourages States Parties to prioritise the appointment of national focal points to receive cooperation requests from the Court for transmission to the relevant domestic authorities. This will facilitate more effective state cooperation which the ICC depends on for many witness related matters.
- **There is an urgent need to protect the necessary privileges and immunities of all prescribed persons working to fulfil the Court’s purposes.** The Agreement on Privileges and Immunities

of the International Criminal Court (APIC) provides ICC officials, staff, counsel, experts, victims and witnesses with certain privileges and immunities necessary for the fulfilment of the Court’s purposes. Regrettably, in spite of APIC, there was the unacceptable detention of ICC staff in Xintan, Libya, in 2011. Moreover, there were deeply concerning reports of defence counsel being arrested and having their privileged documents confiscated while carrying out investigations in the field. This speaks to the immediate need for the universal ratification and implementation of APIC, which both the Court and the Assembly have trumpeted. The IBA echo this call and encourage more states to ratify, in order to entrench the scope of privileges and immunities to all persons working officially with, or on behalf of, the ICC as well as victims and witnesses.

List of Abbreviations

AC	Appeals Chamber
APIC	Agreement on the Privileges and Immunities of the ICC
ASP	Assembly of States Parties
CBF	Committee on Budget and Finance
CICC	Coalition for the International Criminal Court
Court	International Criminal Court
CSS	Counsel Support Section
DRC	Democratic Republic of the Congo
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EoC	Elements of Crimes
FPLC	Forces Patriotiques pour la Libération du Congo
FRPI	Forces de Résistance Patriotique d'Ituri
IAP	International Association of Prosecutors
IBA	International Bar Association
IBAHR	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICCPP	International Criminal Court Protection Programme
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IRA	Individual Risk Assessment
IRS	Initial Response System
JCCD	Jurisdiction, Complementarity and Cooperation Division (OTP)
LRV	Legal representatives for victims
MFA	Ministry of Foreign Affairs
MONUC	United Nations Organization Mission in the DRC
NGO	Non-governmental organisation
OPCD	Office of the public counsel for defence
OPCV	Office of the public counsel for victims
OSU	Operational Support Unit (OTP)
OTP	Office of the Prosecutor
PSU	Protection and Strategy Unit (OTP)
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
Special Fund	Special Fund for Relocations
Statute	Rome Statute
STL	Special Tribunal for Lebanon
STRA	Security Risk and Threat Assessments
TC	Trial Chamber
THWG	The Hague Working Group
TFV	Trust Fund for Victims
UN	United Nations
UPC	Union des Patriotes Congolais
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

“Witnesses are the eyes and the ears of justice”¹

Those who bear witness to Rome Statute crimes – war crimes, crimes against humanity and genocide, the most egregious offences facing humanity – provide vital evidence in the cases before the International Criminal Court (ICC or the ‘Court’). Their sworn testimony significantly assists judges in gaining insight into the crime scene, the cultural nuances of countries they may never have visited and more fundamentally whether a defendant is innocent or guilty of the crimes charged.

While eyewitness accounts are essential to weaving together the context of each ICC case, the multifaceted challenges these persons face, and how they are treated during Court proceedings, is not often the focus of academic writing or media coverage. Even less in the public eye is the defence perspective – specifically, the impact witness protective measures may have on accused persons and the challenges posed by the absence of organisational infrastructure to facilitate defence witness-related support and state-cooperation requests. For the entire Court, supporting and making logistical arrangements for witnesses; ensuring their protection from potential threats or interference during investigations and trials; and obtaining state cooperation, is an extremely daunting and costly endeavour.

Challenges aside, the ICC must be praised for its tremendous accomplishments in managing and protecting the individuals who testify before it. In some respects, the Court has pioneered the development of a more comprehensive witness protection, support and logistics scheme than its predecessor ad hoc tribunals, but in other ways the ICC still has much to learn.

Recent witness-related challenges at the ICC have prompted the International Bar Association (IBA) to examine the issue more closely, and to prepare this report analysing the impact of the ICC’s extensive reliance on witnesses. The report is written from the Court’s perspective rather than that of the witnesses. In fact, no ICC witnesses were consulted. Rather, the aim is to draw attention to crucial witness-related developments at the Court; discuss legal and structural challenges the ICC faces in dealing with witnesses; highlight positive steps taken to address these challenges; and finally

to identify areas where gaps remain. Ultimately, the report concludes that the complex matrix required to facilitate direct in-person witness testimony at the ICC needs to be reviewed and, in some cases, revised.

The report focuses on four overarching themes discussed in six discrete chapters:

1. **Witness attendance and legal status.** The report discusses the absence of a legal mechanism – a citation or subpoena power – to enforce witness appearance before the Court to testify. Given the Court’s reliance on witnesses, the report concludes that this is a weakness in the legal framework which needs to be rectified. In addition, the report considers the viability of other options to direct testimony, such as video-link testimony, which the ICC is currently exploring.
2. **Witness handling and preparation.** The report also closely examines the ICC’s procedure for preparing and handling witnesses during Court proceedings. While case-specific protocols addressing issues such as witness familiarisation and Counsel’s interaction with the opposing party’s witnesses are welcomed, the report criticises the inconsistent approaches to and inadequate enforcement mechanisms for these important witness management tools. The report also critically evaluates the evolving issue of witness proofing which was positively embraced in the Kenyan cases, marking a revolutionary departure from the approach adopted in the first three trials.
3. **Witness behaviour and susceptibility to interference.** Given that eyewitness testimonies are a primary source of evidence at the ICC, the report analyses the complex relationship between the Court and its crime-based witnesses. Much attention is paid to the implications of the Court’s findings of false testimony, witness intimidation and interference in its first two final judgements, and the way in which the ICC investigates and addresses these serious offences. Ultimately the report concludes that the enforcement regime for such breaches lacks teeth and there is an absence of timely, open and public investigations.
4. **Witness security, protection and support.** The vulnerability of ICC witnesses and the complex and costly management of their protection and logistics is a crucial part of the Court’s operations. The report explores

¹ Jeremy Bentham, *A Treatise on Judicial Evidence Extracted from the Manuscripts of Jeremy Bentham, Esq* (1st edn, Baldwin, 1825) 226.

how witness security, protection and support depend not only on the Court but also on state cooperation, which is provided in an inconsistent manner. Defence counsel face particular challenges arranging out-of-court protection for their witnesses, partly due to inadequate Registry infrastructure and some states' reluctance to directly engage with the defence. The report also considers how the provision of in-court 'protective' and 'special' measures to certain witnesses during their testimony impacts the principle of open and public proceedings.

These issues were selected following extensive research which included review of jurisprudential developments and academic discourse; and consultations with senior Court officials from the Office of the Prosecutor (OTP) and the Registry, as well as defence counsel, senior diplomats in The Hague and other international criminal law experts. Following discussion of each theme, a number of priority issues are highlighted for consideration and concrete action by relevant organs of the Court, the Assembly of States Parties (ASP), the Host State (the Netherlands) and other States Parties to the Rome Statute.

Witnesses in war crimes tribunal proceedings are precious commodities²

The ICC relies extensively on direct witness testimony in order to function effectively. This is based on the principle of orality enshrined in the legal texts which requires that witnesses must testify in person unless certain exceptions apply.³ The ICC's permanent location in The Hague, the Netherlands, places it at some distance from the situations currently under investigation – all of which are in African nations.⁴ Witnesses must therefore be physically transported to The Hague which creates legal and logistical challenges.

Of these, one of the greatest impediments is the lack of a citation or subpoena power at the Court's disposal to oblige potential witnesses to come to the Court to share their evidence.⁵ While ICC judges have the power to *require* witnesses to attend and testify in court, they lack the power to force them to appear. Furthermore, without its own enforcement mechanism, the ICC must rely on states to facilitate the *voluntary* appearance of

witnesses before the Court. Access to witnesses is particularly problematic in territories of non-States Parties to the Rome Statute.

The Court's reliance on witnesses, its inability to consistently access witnesses and to compel their attendance in The Hague is potentially a serious impediment to its effective functioning. The question is: are alternatives – such as video-link testimony – viable options, and to what extent is the Court ready to source and utilise other forms of evidence such as forensic materials and electronic evidence including voice and cyber communication?

The ICC's reliance on witnesses

To date, 199 witnesses have testified before the ICC to provide their knowledge and expertise on alleged charges in seven cases (see **Table 1**).⁶ It is projected that the case against former Congolese Vice President Jean-Pierre Bemba Gombo will see the largest number of witnesses called, with 92 persons testifying in total. It is also clear that in all of the trial cases, the defence have called almost as many witnesses as the prosecution.

Given the ICC's extensive reliance on live witness testimony,⁷ the Court's difficulties in compelling the appearance of witnesses could ultimately undermine the Court, deprive it of access to crucial witnesses and affect the fair conduct of proceedings.⁸ This is particularly problematic where the entire case depends on the testimony of high-profile or crime-based witnesses in order to succeed. While it is unlikely that the Court will ever fully be able to complete a case without the testimony of such witnesses, creative consideration should be given to other options – including new sources and forms of evidence⁹ – which the ICC must explore in its investigation, prosecution and defence of cases.

2 Patricia M Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', (2002) 5 Yale Hum Rts & Dev LJ 217, 238.

3 Art 69(2), Rome Statute: 'The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.'; 'The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber': *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', (3 May 2011), AC, at para 76, www.icc-cpi.int/iccdocs/doc/doc1066048.pdf, last accessed 19 June 2013 [all URLs last accessed 19 June 2013 unless otherwise specified].

4 The ICC has opened investigations into eight situations in Africa: the Democratic Republic of the Congo; Uganda; the Central African Republic; Darfur, Sudan; the Republic of Kenya; the Libyan Arab Jamahiriya; the Republic of Côte d'Ivoire and Mali. 'Situations and cases', (ICC, 10 May 2013), www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

5 The legal mechanism to compel testimony by a witness or production of evidence is referred to as subpoena throughout the English common law systems while in Civil Law systems this mechanism is normally referred to as a 'citation' or 'witness summons'.

6 Figures provided by the ICC Registry on 6 March 2013: witnesses have testified in the cases of *Prosecutor v Thomas Lubanga Dyilo*; *Prosecutor v Bahar Idriss Abu Garda*; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*; *Prosecutor v Jean-Pierre Bemba Gombo*; *Prosecutor v William Samoei Ruto and Joshua Arab Sang*; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*; and *Prosecutor v Laurent Gbagbo*.

7 Art 69(2), Rome Statute.

8 Göran Sluiter, 'I Beg You, Please Come Testify: The Problematic Absence of Subpoena Powers at the ICC' (2009) 12 New Crim L Rev 590, 605.

9 This includes, inter alia, forensic materials, official government records, physical exhibits, medical reports, satellite imaging, remote sensing, cyber investigations, and digital and video analysis.

TABLE 1

ICC WITNESSES WHO HAVE GIVEN TESTIMONY						
Case	Calling party					Total per case
	Chamber	Office of the Prosecutor	Legal Representatives of Victims	Defence		
LUBANGA ⁱ	4	36	3	24 (+2 at sentencing hearing)		69
ABU GARDA ⁱⁱ	0	3	0	1		4
KATANGA ⁱⁱⁱ NGUDJOLO	2	24	2	KATANGA	NGUDJOLO	58
				17 (+ Mr Katanga)	11 (+ Mr Ngudjolo)	
BEMBA ^{iv}	0	40	2	15 (50) ^v		57 (92)
RUTO SANG ^{vi}	0	0	0	RUTO	SANG	4
				2	2	
MUTHAURA KENYATTA ^{vii}	0	0	0	MUTHAURA	KENYATTA	4
				2	1 (+ Mr Kenyatta)	
GBAGBO ^{viii}	3	0	0	0	0	3
Total:						199

Table prepared by the IBA. Figures provided to the IBA by the ICC Registry on 6 March 2013.

Table 1 notes

- i Trial complete.
- ii Pre-Trial Chamber I refused to confirm charges against Mr Abu Garda.
- iii Mr Ngudjolo acquitted following the severing of case; Mr Katanga's trial at the deliberations stage.
- iv Trial ongoing.
- v Mr Bemba's defence projects to call 50 witnesses total: *The Prosecutor v Jean-Pierre Bemba*, ICC-01/05-01/08, Decision on the order of appearance of witnesses to be called by the defence following Witness D04-56, (15 May 2013), Trial Chamber III, www.icc-cpi.int/iccdocs/doc/doc1592801.pdf.
- vi Trial scheduled to start 28 May 2013.
- vii Trial scheduled to start 9 July 2013; charges against Mr Muthaura were dropped 11 March 2013.
- viii Confirmations of charges hearing complete with Pre-Trial Chamber deliberating on charges.

The ICC's missing subpoena or citation power

All witnesses who appear to testify before the ICC do so voluntarily, even if they are key witnesses and their evidence is central to the case. The Statute provides that in performing its functions the Trial Chamber (TC) may 'require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States' [emphasis added].¹⁰ Since the ICC does not have its own police force, it has very few options other than its reliance

on states. However, states cannot force witnesses to appear and give testimony before the Court. The Statute provides that States Parties shall assist with 'facilitating the *voluntary* appearance of persons as witnesses or experts before the Court' [emphasis added].¹¹ Similarly, a person who is in custody in the requested state may be transferred to the ICC only if that person *freely consents* to the transfer.¹² Therefore the inclusion of voluntariness appears to undermine the requirement to appear.¹³

¹¹ Art 93(1) (e), Rome Statute.

¹² Art 93(7) (a) (i), Rome Statute.

¹³ In accordance with Art 64(6) (b), Rome Statute; Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, (Intersentia 2002), 254–255, 311.

¹⁰ Art 64(6) (b), Rome Statute.

For witnesses residing in non-States Parties, the Court is even more restricted in requiring the appearance of these individuals, making it exceptionally difficult for the Registry to arrange for travel documents or authorisation for their testimony.¹⁴ The case of *Mr Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ('Banda Jerbo'), which arose from the situation in Darfur, Sudan, and was referred to the Court by the United Nations (UN) Security Council, is illustrative. The Court and parties to the proceedings have been largely unable to enter the Sudanese territory to meet potential witnesses to discuss arrangements for testifying due to lack of cooperation from the Sudanese government.¹⁵ In such instances where a state is totally uncooperative, one expert commentator opines that a subpoena could be of assistance to the ICC and 'be enforced by other entities than national law enforcement agencies, such as UN peacekeeping forces,' which 'enables the Court to "get hold" of a witness when he is travelling.'¹⁶

The lack of subpoena/citation power also poses certain challenges to OTP investigations. As a witness cannot be forced to appear before the Court, witnesses have the advantage of deciding whether to testify or not. Indeed, as expert Göran Sluiter proffers, witnesses have little incentive to testify other than the desire to support international criminal justice, and without a subpoena and the corresponding enforcement, there is a possibility that some witnesses will seek some sort of compensation for their efforts.¹⁷ The IBA understands that the voluntariness factor, coupled with meeting the expectations of potential witnesses, is creating an additional resource burden on the OTP in its management of witnesses.

Subpoena power at the UN-backed ad hoc tribunals

The ICC's lack of subpoena power has been described as a 'serious weakness within a system of international criminal justice wherein the Court lacks direct enforcement power, while being built upon the aspiration that the testimony of a witness at trial shall be given in person.'¹⁸

By contrast, at the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Trial Chamber is empowered to issue subpoenas 'when it is necessary for the purpose of an investigation or for the preparation or conduct of the trial.'¹⁹ Accordingly, witnesses can be required to testify through summonses and subpoenas addressed directly to them. For instance, in May 2013, Mr Karadzic was successful in his request to subpoena Mr Zdravko Tolimir who is in ICTY detention in The Hague and was refusing to testify.²⁰ Furthermore, if such a witness fails to comply he or she may be held in contempt for knowingly and wilfully interfering with the tribunal's administration of justice, for which sanctions of imprisonment or fines may be imposed.²¹

Further, the ICTY and ICTR are backed by the UN and enjoy primacy over national courts – and thus may request national authorities to defer to its competence at any stage.²² At the ad hoc tribunals, states must comply with the tribunal's subpoenas for witnesses unlike the Rome Statute system which complements states' investigations and prosecutions of cases,²³ and also limits states' obligations to facilitate the transfer of witnesses willing to testify.

19 Art 19(2), Statute of the International Criminal Tribunal for the former Yugoslavia; Art 18(2) Statute of the International Tribunal for Rwanda: 'Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial;' Rule 54, ICTY Rules of Procedure and Evidence; Rule 54, ICTR Rules of Procedure and Evidence: '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.' See for example ICTY, *Prosecutor v Radovan Karadzic*, IT-95-5/18-T, Decision on Accused's Motion to Subpoena Zdravko Tolimir, (9 May 2013), TC, www.icty.org/x/cases/karadzic/tdec/en/130509.pdf; *Prosecutor v Halilovic*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, (21 June 2004), AC, at para 5, www.icty.org/x/cases/halilovic/acdec/en/040621.htm; *Prosecutor v Krstic*, IT-98-33-A, Decision on Application for Subpoenas, (1 July 2003), AC, at para 10, www.icty.org/x/cases/krstic/acdec/en/030701.htm; see also ICTR, *Prosecutor v Kanyarukiga*, ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, (6 June 2008), TC, www.unict.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions%5C080606.pdf; *Prosecutor v Kanyarukiga*, ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 bis, (30 October 2008), AC, www.unict.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions%5C081030.pdf.

20 *Ibid*, (*Karadzic*).

21 See n 19, above, Rule 77(A) (iii), (ICTY Rules); Rule 77(A) (iii), (ICTR Rules): 'The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who [...] without just excuse fails to comply with an order to attend before or produce documents before a Chamber.' For sanctions see Rule 77 (G), (ICTY Rules); Rule 77 (G), (ICTR Rules).

22 See n 19, above, Art 9(2), (ICTY Statute); Art 8(2), (ICTR Statute).

23 Preamble, Rome Statute.

14 IBA consultation with ICC defence counsel, 15 March 2013, (notes on file with the IBA).

15 *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-274, Defence Request for a Temporary Stay of Proceedings, (6 January 2012), Defence, at paras 4–15 www.icc-cpi.int/iccdocs/doc/doc1296602.pdf.

16 Göran Sluiter, 'The Problematic Absence of Subpoena Powers at the ICC' (2009) 12 *New Crim L Rev* 590, 605.

17 *Ibid*, 606.

18 Claus Kress & Kimberly Prost, 'Article 93', in Otto Triffterer (ed), *Commentary in the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Beck/Hart 2008), 1576.

While subpoenas were not frequently used initially at the ad hoc tribunals, the fact that this power existed may have significantly affected witnesses' decision to testify at trial.²⁴ Indeed ICC expert Göran Sluiter finds that 'the absence of any subpoena power is strikingly peculiar for the ICC' and as far as he is aware there is 'no system where criminal courts lack this power as a general rule.'²⁵

Fair trial concerns

While the Court's inability to require witnesses to testify can be detrimental to both the prosecution and the defence, accused persons have the statutory right 'to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.'²⁶ The full exercise of this right may be hindered by the Court's inability to force potential defence witnesses to appear before the Court and to testify.

A contrary view is that the lack of a subpoena power does not lead to unfairness per se. At least one leading academic expert on the ICC says that, while '[it] may create hardship for the defence, it does not seem that [...] the right to a fair trial is being denied because of the impossibility of obtaining witnesses and requiring their attendance in court.'²⁷ According to this line of argument, what is most important is that the prosecution and defence are being treated equally, for the trial to be considered 'fundamentally fair'.²⁸

This issue was debated in 2009 when Mr Katanga's defence challenged the admissibility of the case. The defence raised, among other issues, the fairness implications of the ICC's lack of a subpoena power for the accused, and relied on ICTR jurisprudence concerning the transfer of a case from the ICTR to Rwanda.²⁹ The Katanga defence team submitted that the ICTR Trial and Appeals Chambers found that Rwanda's inability to subpoena witnesses outside of its territory would render the trial unfair, which was one of the reasons the Tribunal decided not to transfer the case to

Rwanda.³⁰ The ICC TC rejected the admissibility motion without directly addressing the fairness implications of the Court's absent subpoena power.³¹ Nevertheless, the Court's inability to secure the attendance of crucial witnesses may be a factor to be taken into account in determining the overall fairness of proceedings at the ICC.

Compellability and the ICC's sanction regime

For witnesses who physically arrive in The Hague to testify, the Court's Rules of Procedure and Evidence (RPE) provide that those *appearing* before the Court are compellable to give testimony, unless otherwise provided for in the Statute and the Rules, and may be sanctioned if they refuse to testify.³² The sanction which may be imposed is a ban from the proceedings for a certain period or the imposition of a fine.³³ This punishment appears to be curiously self-defeating as banning the witness from the trial effectively excludes the witness' testimony and encourages further non-cooperation. In addition, even if a compellable witness is initially cooperative, once they physically leave the ICC building, they may refuse to return the next day or might simply disappear. In this situation, the Court would need to ask for assistance from the Netherlands, as the Host State, or other relevant national authorities to facilitate their return. In such cases, the witnesses' 'voluntariness' would apply, meaning the witnesses would need to agree to appear even though they are technically compellable.

By contrast, if a compellable witness refuses or fails to answer a question at the ICTY and ICTR, the tribunals may hold the witness in contempt and, if found guilty of knowingly and wilfully interfering with its administration of justice, may be fined or imprisoned.³⁴ This type of sanction has teeth and encourages testimony to be given by compellable witnesses.

24 See n 8 above, 591 (Sluiter).

25 *Ibid*, 603.

26 Art 67, Rome Statute.

27 William Schabas, 'Article 67: Rights of the Accused', in Otto Triffterer (ed), *Commentary in the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Beck/Hart 2008), 1265.

28 *Ibid*.

29 ICTR, *Prosecutor v Kanyarukiga*, ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, (6 June 2008), TC, www.unictr.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions%5C080606.pdf; *Prosecutor v Kanyarukiga*, ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, (30 October 2008), AC, www.unictr.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions%5C081030.pdf.

30 *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Motion Challenging Admissibility of the Case by the Defence of Germaine Katanga, pursuant to Art 19(2) (a) of the Statute, (11 March 2009), at para 24, www.icc-cpi.int/iccdocs/doc/doc642392.pdf.

31 *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Art 19 of the Statute), (16 June 2009), TC II, www.icc-cpi.int/iccdocs/doc/doc711214.pdf.

32 Rule 65(1) and (2), 171, ICC Rules of Procedure and Evidence (RPE).

33 *Ibid*, Rule 171.

34 Rule 77(G), (ICTY Rules); Rule 77(G), (ICTR Rules).

Testimony by video-link

Given the Rome Statute requirement of in-person testimony, the statutory limitations to compel witnesses to testify as well as additional protection-related challenges, the Court has been led to explore more risk-averse options other than direct in-court testimony.³⁵ According to a senior Registry official, the proceedings are changing completely as the Chambers are increasingly authorising video-link testimony.³⁶

As provided in the RPE, the technology must first permit the witness to be examined by the prosecution, defence and the Chamber itself while the witness is testifying; and secondly, the Chamber, together with the Registry, must have ensured that the venue chosen for the video or audio-link is 'conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.'³⁷

On one hand, testimony by video-link offers several practical advantages to the Court and to witnesses who cannot – or do not want to – travel to The Hague, or who have heightened security risks.³⁸ First, the Court and the witness are spared the associated stress and cost of travel to and accommodation in the Netherlands. Secondly, for witnesses in need of protection, utilising video link locally will make their interaction with the ICC far less obvious, unlike having them leave the country for several weeks or more.³⁹ In addition, remote witness testimony will also remove the questions of jurisdiction and the legal status of witnesses in the Host State, the Netherlands, making the issue of possible asylum applications by witnesses moot.

On the other hand, there are a number of challenges. Counsel and ICC officials whom the IBA consulted were wary of video-link testimony and in general felt that questioning a witness in person was the most effective way to gauge the truthfulness of the testimony and credibility of the witness. For example, the OTP noted that, due to the distance between the witness and counsel, video-link testimony makes it difficult to, 'connect with the witness, get the evidence out or challenge the witness.'⁴⁰ According to one defence counsel, the need for video-link is 'an extremely unfortunate side effect of the decision to locate the ICC in The Hague'.⁴¹ In their view, requiring witnesses to sit for days or weeks in a small office in front of a camera, on The Hague's schedule, can even be 'oppressive'

for them.⁴² A more technical issue is that the quality of video link is sometimes poor, making it difficult for counsel to use documents, or build a rapport with the witness.⁴³ In fact, in March 2013 technical problems due to a snow storm interrupted video-link testimony in the *Bemba* case leading to the temporary suspension of the hearing.⁴⁴ The quality of the link can also seriously impact the flow of testimony with repeated interruptions and prolonged pauses affecting counsel's questioning and the witness' response.⁴⁵

In sum, while video-testimony is potentially a cost saving and more secure alternative to in-person testimony, it should be applied with caution. Video-link testimony is ideal for situations where the witness' credibility is not in contention and only factual information is provided.⁴⁶ However, as indicated by the OTP, where there are no security concerns, the first choice should be that the witnesses come to The Hague and testify in-person before the Court.⁴⁷

Alternatives to witness testimony

Ultimately, the parties will need to utilise other forms of reliable evidence to minimise the Court's dependence on testimonial evidence – whether live or via video-link – and ensure that the judges are presented with sufficient relevant evidence. While other forms of physical, documentary or electronic evidence require some human verification, they rely on and demand less from eyewitnesses.

Regrettably, the sourcing of other forms of reliable and probative evidence has also proven difficult, reportedly due to factors such as the time lapse since the alleged crimes, ongoing conflicts and security risks, funding limitations and insufficient state cooperation.⁴⁸ In addition, the Chambers have criticised the prosecution in several cases over a lack of relevant material evidence, the use of indirect evidence such as NGO and media reports, and the need for improved investigative practices so that more probative evidence can be collected (also see **Chapter 6** of this report for a further discussion on investigative practices related to sourcing and assessing witnesses).

35 Art 69(2), Rome Statute.

36 IBA consultation with senior official of the Registry, (13 February 2013), (notes on file with the IBA).

37 Rule 67(1) and (3), (RPE).

38 IBA consultation with the OTP, (21 February 2013), (notes on file with the IBA).

39 IBA consultation with ICC expert, (26 February 2013), (notes on file with the IBA).

40 See n 38, above (IBA consultation with the OTP).

41 See n 14, above (IBA consultation with ICC defence counsel).

42 *Ibid.*

43 *Ibid.*

44 W Wairagala, 'Bad Weather Disrupts Bemba Hearings', (*Bemba Trial*, 14 March 2013), www.bembatrial.org/2013/03/bad-weather-disrupts-bemba-hearings.

45 IBA consultation with confidential source (22 February 2013) (notes on file with the IBA).

46 *Ibid.*

47 See n 38, above (IBA consultation with the OTP).

48 Human Rights Center at the University of California, Berkeley, School of Law, *Beyond Reasonable Doubt, using scientific evidence to advance prosecutions and the International Criminal Court*, workshop report from consultation with the ICC Office of the Prosecutor from 23–25 October 2013, at p 4, www.law.berkeley.edu/files/HRC/HRC_Beyond_Reasonable_Doubt_FINAL.pdf.

Problems with both testimonial and other forms of evidence are well illustrated in the verdict and acquittal of Mathieu Ngudjolo, in which the TC noted that the first prosecution forensic investigation mission to the alleged crime scene in Bogoro was not conducted until March 2009, six years after the alleged crimes took place and five years after the investigations into the DRC were opened. The Chamber ruled that the investigative mission's findings had insufficient probative value, which resulted in an overall lack of forensic evidence submitted into evidence during the trial.⁴⁹ This meant that the prosecution had to rely primarily on witness statements and reports by United Nations Organization Mission in the DRC (MONUC) investigators or representatives of various NGOs.⁵⁰ Unfortunately for the prosecution, the testimonial evidence was largely found unreliable by the judges, paving the way to an acquittal. The prosecution has appealed the verdict and the Chambers' approach to the evidence, which is pending at the time of writing.⁵¹

In the *Lubanga* verdict, TC I disregarded most of the prosecution's documentary evidence intended to prove the presence of child soldiers within the Union des Patriotes Congolais (UPC) and Forces Patriotiques pour la Libération du Congo (FPLC) as it was found to be unreliable.⁵² In the *Abu Garda* case, the PTC unanimously declined to confirm any of the charges due to insufficient evidence.⁵³ Nor did the judges confirm the charges in the *Mbarushimana* case, due to the overuse of indirect evidence such as NGO and UN reports to support the allegations.⁵⁴ Similarly in the case against Laurent Gbagbo, the PTC decided to postpone confirming charges against Mr Gbagbo noting, 'with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against

humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1) (a) of the Statute.'⁵⁵

The OTP is taking positive steps to address these evidentiary challenges, both in terms of its reliance on witnesses and the sourcing of other forms of reliable and relevant evidence. The Office has recognised the need to move beyond witness-based evidence in its recent draft Strategic Plan for 2013–2015, by considering increased use of forensic and documentary evidence as well as voice and cyber communication, in order to minimise the security risks and further traumatising of witnesses.⁵⁶

According to a University of California Berkeley (Human Rights Center) report based on consultations with the OTP, the ICC prosecutors and investigators are also looking into new technologies to access untapped probative evidence, including the use of remote sensing, satellite imaging, cyber investigations, and digital and video analysis.⁵⁷ Utilisation of these technologies also reduces the security risks to witnesses and investigators. The OTP is also considering engaging with NGOs and forensic institutes in evidence collection and analysis.⁵⁸ The reality is that many such NGOs and fact-finding organisations work on the ground and can get to the crime scene faster than the Court.⁵⁹

Indeed, the above judicial findings enunciate the need for the OTP to pursue more reliable forms of evidence whether forensic, documentary or electronic. The current dependency on testimonial evidence in ICC trials may prove unjustified if the prosecution is able to successfully explore these new sources of evidence in support of their cases. This is crucial in light of the immense challenges of facilitating live testimony as a main source of evidence, as described throughout this report.

49 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1515-Corr, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009, (7 October 2009), PTII, at paras 27–36, www.icc-cpi.int/iccdocs/doc/doc758119.pdf; *Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12-3-tENG, Judgment pursuant to Art 74 of the Statute (18 December 2012), TC II, at para 117, www.icc-cpi.int/iccdocs/doc/doc1579080.pdf.

50 *Ibid.* (Ngudjolo, Judgment), at para 117.

51 *Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12-39-Red2, Prosecution's Document in Support of Appeal against the 'Jugement rendu en application de l'article 74 du Statut', (3 April 2013), AC, at para 3, www.icc-cpi.int/iccdocs/doc/doc1575902.pdf.

52 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Art 74 (14 March 2012), TC I, at paras 739–740, 752, 758, www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

53 *Prosecutor v Bahr Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, (8 February 2010), www.icc-cpi.int/iccdocs/doc/doc819602.pdf.

54 *Prosecutor v Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, (16 December 2011), PTC I, at paras 113–239, www.icc-cpi.int/iccdocs/doc/doc1286409.pdf.

55 *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/1, Decision adjourning the hearing on the confirmation of charges pursuant to Art 61 (7) (c) (i) of the Rome Statute (3 June 2013), PTC I, at para 35, www.icc-cpi.int/iccdocs/doc/doc1599831.pdf.

56 Office of the Prosecutor, Draft Strategic Plan for 2013–2015. The document is currently being reviewed internally and consultations are ongoing with key stakeholders thus some issues are subject to change, at p 9.

57 See n 48, (Human Rights Centre at the University of California), 4.

58 *Ibid.*, 4 and 6.

59 *Ibid.*, 6.

Key findings

- The ICC relies heavily on the in-court witness testimonies which may be unsustainable due to a number of challenges.
- ICC judges lack real power to force witnesses to come to The Hague to testify or to compel them to testify after they appear in Court.
- Video-link testimony is a potentially viable option to direct in-person testimony, but it has serious challenges for effective assessment of witnesses' credibility and possibly technical difficulties. Nevertheless, it is a mechanism that the Court should pursue and continuously work to improve.
- Creative steps need to be taken to utilise other forms of evidence to establish or refute charges in the cases. The OTP's decision to do this as part of its strategic objectives over the next three years is welcomed.

Recommendations

1. The IBA recommends that the ASP consider amendments to the Rome Statute and Rules of Procedure and Evidence providing the judges a citation or subpoena power to require testimony by witnesses. The IBA also proposes an amendment to Article 93(1)(e) of the Statute clearly mandating States Parties to transfer witnesses to The Hague if ordered by Chambers. The word 'voluntary' should be removed and the word 'facilitating' should be replaced with 'ensuring'.⁶⁰
2. The IBA calls upon the Registry to assess its video-link technological capacity to ensure such testimony is a viable option in cases where it is found that the transfer of the witness to The Hague raises serious security risks.
3. The IBA encourages the prosecution and defence to source and utilise additional forms of evidence in place of exclusive reliance on witness testimony. These may include forensic materials, official government records, physical exhibits, medical reports, video footage and other forms of electronic evidence.

⁶⁰ See n 8, above, (Sluiter) 607.

“It is neither practical nor reasonable to prohibit pre-testimony meetings between parties and the witnesses they will call to testify at trial”⁶¹

The practice of ‘witness proofing’ or ‘witness preparation’ allows parties to meet with their witnesses to review their evidence shortly prior to giving testimony, which ideally facilitates a more accurate, complete and efficient testimony. While witness proofing is an established practice at the ad hoc tribunals⁶² and in many national criminal justice systems,⁶³ it was prohibited at the ICC in the *Lubanga*, *Katanga Ngudjolo*, and *Bemba* cases. Despite this, in a judicial about-face, TC V authorised witness ‘preparation’ in the two Kenya

cases in January 2013.⁶⁴

Witness proofing has become a contentious issue at the Court, with judges divided on its use. This chapter will discuss the implications of the ICC’s diverse approaches to witness proofing and assess the merits and risks of the practise.

Witness proofing/preparation defined

The terms ‘witness preparation’ and ‘witness proofing’ are often used interchangeably by prosecutors⁶⁵ and defence lawyers to describe the same practice.⁶⁶ At the ICC, TC V has now explicitly clarified that the term ‘witness preparation’ is used to refer to ‘a meeting between a witness and the party calling that witness, taking place shortly before the witness’s testimony, for the purpose of discussing matters relating to the witness’s testimony.’⁶⁷ However, according to the Chambers, witness preparation must be distinguished from the term ‘witness familiarisation’ which describes the support provided to witnesses by the Victims and Witnesses Unit (VWU).⁶⁸

While the judges in the Kenya cases clearly define ‘witness preparation’, oddly they do not

- 61 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-524, Decision on witness preparation, (2 January 2013), TC V, at para 50, www.icc-cpi.int/iccdocs/doc/doc1533650.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-588, Decision on witness preparation, (2 January 2013), TC V, para 52, www.icc-cpi.int/iccdocs/doc/doc1533653.pdf.
- 62 See *Prosecutor v Limaj, Bala and Musliu*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of ‘Proofing’ Witnesses, (10 December 2004), TC II, 2, www.icty.org/x/cases/limaj/tdec/en/041210.pdf; *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, (26 October 2005), TC I, www.sc-sl.org/LinkClick.aspx?fileticket=MX3ZNFtyUo%3d&tabid=155.
- 63 See Australia, New South Wales Barrister’s Rules (June 2008), Rules 43 and 44; Canada (Ontario), Crown Policy Manual – Witness (21 March 2005); Canada, Law Society of Upper Canada, Rules of Professional Conduct (1 November 2000), Rule 4.03; England and Wales, Code of conduct of the Bar of England and Wales, at para 705 and the Written Standards for the Conduct of Professional Work, s 6, (31 October 2004), The Crown Prosecution Service – Pre-Trial Witness interviews. Code of Practice, (February 2008); United States, Restatement of the Law (3d) of The Law Governing Lawyers, s 116 (adopted in 2000); New Zealand: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008: Rules of conduct and client care for lawyers, point (13 October 2008); Japan, Rules of Criminal Procedure (Rules of the Supreme Court No 32 of 1948 Arts 191-3) and Fukuoka High Court Judgement (22 March 1965) (Kouken-Sokuho No 944-9). See n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), footnote 63.

- 64 See n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at para 49; see n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 49.
- 65 ‘It does not matter what you call it, whether it is witness proofing or witness preparation, but rather the issue is what do you do and how far can you go.’ See n 38, above (IBA consultation with the OTP).
- 66 There are a number of expressions, including, inter alia, those of ‘preparation of a witness’, ‘proofing of a witness’, ‘training of a witness’, ‘coaching of a witness’ or ‘tampering with the evidence of a witness’ which are used in different jurisdictions in connection with those practices followed to prepare a witness to give oral testimony before a court. *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing (8 November 2006), PTC I, para 12, www.icc-cpi.int/iccdocs/doc/doc243711.PDF.
- 67 See n 61, above (*Ruto Sang*, Decision on Witness Preparation), at para 4; see n 61, above (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 4.
- 68 The Victims and Witnesses Unit (VWU) provides support to witnesses through the practice of witness familiarisation as specified in the ‘Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony’ which has been referred to as both the ‘Unified Protocol’ and the ‘Familiarisation Protocol’ in different cases. See ‘Victims and Witness Unit’s Unified Protocol’ on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-972 and public Annex, ICC-01/05-01/08-972-Anx (22 October 2010), www.icc-cpi.int/iccdocs/doc/doc957501.pdf; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1016, Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial (18 November 2010), TC III, at para 1, www.icc-cpi.int/iccdocs/doc/doc969083.pdf; see n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at para 4; see n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 4.

explain the term ‘witness proofing’, giving the impression that the two practises are different. However, it appears to be a matter of semantics since the term ‘witness proofing’ was employed and rejected in the *Lubanga*, *Katanga Ngudjolo* and *Bemba* cases, and has been long been coined to refer to a practice common in many national criminal justice systems⁶⁹ and at the ad hoc tribunals where lawyers for either party are permitted to meet and re-interview their witnesses before they take the stand.⁷⁰ While it appears as though a new term is being used to describe a novel procedure, in reality preparation appears to be precisely the same as proofing.

Evolution of witness proofing at the ICC

In the Court’s first case against Mr Thomas Lubanga Dyilo, both the PTC and TC rejected the prosecution request for witness proofing.⁷¹ In place of ‘proofing’, the Chambers permitted the VWU to carry out the process of ‘witness familiarisation’. Through this process, witnesses can read through their statement prior to testimony, meet with the party calling them and the other party in brief courtesy calls, have a psycho-social assessment, and become familiar with the courtroom layout. In *Katanga Ngudjolo*, a similar procedure as in *Lubanga* was employed.⁷² In *Bemba*, it was the defence who applied for witness proofing, and it was rejected once again.⁷³ In that case, the majority of judges found ‘no compelling reasons to depart from the uncontroversial jurisprudence of the Court.’⁷⁴ However, Judge Ozaki dissented on the basis that witness proofing may have a truth finding function by ensuring that witnesses have a fair opportunity to tell their story and give clear, relevant, structured, focused and efficient testimonies in Court.⁷⁵

Change of approach in Kenya cases

In 2012 the prosecution requested (in both Kenya cases) the TC to adopt a regime allowing for more extensive witness preparation than in previous ICC cases.⁷⁶ The prosecution requested that the calling party meet with their witness in The Hague prior to testimony to review topics likely to be covered in cross-examination, review the witnesses’ prior statements and show them potential exhibits. The prosecution, citing the established practice of proofing at the ad hoc tribunals, argued that proofing in the Kenya cases would boost the accuracy of witness testimonies, expedite the proceedings and increase witness confidence. However, the defence for both cases opposed the prosecution’s motion on the basis of lack of legal certainty; that there was a risk of witness coaching; and that the practice would lead to delays and late disclosure in violation of the right of the accused to an expeditious trial.⁷⁷

This application was an important strategic move for the prosecution as Judge Osaki was now presiding in one of the two Kenya cases. Given her very strong dissent in the *Bemba* case, the prosecution’s request was more likely to meet a favourable outcome. The prosecution motion was successful; TC V broke from past ICC jurisprudence and determined that witness preparation should be permitted in both cases.⁷⁸ Defence for Mr Ruto and Mr Sang sought leave to appeal the Witness Preparation decision,⁷⁹ but leave was rejected.⁸⁰ The Chamber found the defence arguments failed to show that the risk of witness coaching could not be prevented or mitigated by appropriate safeguards such as the use of cross-examination.

As the main safeguard, the Chamber adopted the ‘Witness Preparation Protocol’, appended as an

69 According to the partly dissenting opinion of Judge Eboe-Osuji in the Kenya cases, witness preparation is ‘consistent with the practice in some of the major adversarial jurisdictions of the world, such as the United States and Canada.’ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-524, Partly dissenting opinion of Judge Eboe-Osuji on Decision on witness preparation (2 January 2013), TC V, at para 20, www.icc-cpi.int/iccdocs/doc/doc1533650.pdf.

70 Tracey Gurd, ‘When Witnesses Change Their Stories...’, (*Lubanga Trial*, 10 February 2009), <http://tinyurl.com/ab62o6g>.

71 See n 66, above, (*Lubanga*, Decision on Witness Proofing) at paras 28, 33–34, 41–42; *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1049, Decision regarding the Practices used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (30 November 2007), TC I, at paras 35–52, 57, www.icc-cpi.int/iccdocs/doc/doc371733.pdf.

72 *Prosecution v Katanga Ngudjolo*, ICC-01/04-01/07-1134, Decision on a Number of procedural issues raised by the Registry, (14 May 2009), TC II, at para 18, www.icc-cpi.int/iccdocs/doc/doc688948.pdf.

73 See n 68, above, (*Bemba*, Decision on the Unified Protocol), at paras 31, 34 and 35.

74 *Ibid*, at para 34.

75 *Ibid*, at paras 4, 25.

76 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-446, Prosecution Motion Regarding the Scope of Witness Preparation, OTP, (13 August 2012), TC V, www.icc-cpi.int/iccdocs/doc/doc1453613.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-462, Prosecution Motion Regarding the Scope of Witness Preparation, OTP, (13 August 2012), TC V, www.icc-cpi.int/iccdocs/doc/doc1453638.pdf.

77 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-452, Joint Defence Response to Prosecution Motion Regarding Scope of Witness Preparation, (4 September 2012), Defence, www.icc-cpi.int/iccdocs/doc/doc1463053.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-475-Red, Defence Response to ‘Prosecution Motion Regarding the Scope of Witness Preparation’, (3 September 2012), Defence, www.icc-cpi.int/iccdocs/doc/doc1462796.pdf.

78 See n 61, above (*Ruto Sang*, Decision on Witness Preparation).

79 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-539, Joint Defence Request for Leave to Appeal the Decision on Witness Preparation, (9 January 2013), Defence, www.icc-cpi.int/iccdocs/doc/doc1538766.pdf.

80 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-596, Decision on the joint defence request for leave to appeal the decision on witness preparation, (11 February 2013), TC V, www.icc-cpi.int/iccdocs/doc/doc1551021.pdf.

Annex⁸¹ to both decisions.⁸² This Protocol, based upon a proposal put forward by the prosecution, sets out a complete list of permitted and prohibited conduct, along with rules governing logistical matters and disclosure. The Chamber also specified that the Familiarisation Protocol would still be followed in both Kenya cases, except to the extent that it regulates contact between the calling party and its witnesses, in which case it is superseded by the new Witness Preparation Protocol.⁸³ Accordingly, the Chamber modified some of the provisions of the Familiarisation Protocol and substantially changed the familiarisation process followed in all previous ICC cases. Despite this modification, the VWU will continue to provide its assistance through the practical familiarisation of witnesses but the nature of the assistance may be adjusted to complement the preparation process.

As an additional safeguard, following the criteria originally formulated by Judge Ozaki in her dissent in *Bemba* and restated in the defence for both Kenya cases,⁸⁴ TC V also established that witness preparation sessions must be video-recorded at all times. The Chamber determined that these videos will only be disclosed at the discretion of the Chamber, in the event of allegations of coaching of a witness or of any other improper interference.⁸⁵ However, an unanswered question on this safeguard remains: what happens if, during the preparation session, counsel decides not to call the witness, but the Chamber views the video and decides to call the witness themselves?⁸⁶

Merits versus risks of witness preparation

Divergent views remain on whether witness proofing or preparation should be permitted in ICC trials. Arguments against the practice include lack of legal basis in the ICC's legal texts;⁸⁷ delayed disclosure of evidentiary material by the prosecution;⁸⁸ that proofing provides a second opportunity to the prosecution to re-interview witnesses and conduct additional investigations and the possibility of distortion of the truth and diminished spontaneity.⁸⁹

However, in the Kenya cases, TC V considered these to be risks which could be overcome by appropriate safeguards. On the issue of distortion, TC V opined that when properly conducted, witness preparation was not likely to result in substantive alterations to a witness's testimony and spontaneity at trial.⁹⁰ Judge Eboe-Osuji added that 'prepared witnesses often give unexpected answers to questions; presenting competent and alert counsel with spontaneous opportunities to be explored or exploited.'⁹¹ In response to the defence argument that witness proofing gave the prosecution a second opportunity to investigate, TC V found that, 'the purpose and nature of the witness preparation conducted by counsel shortly before the testimony of a witness differs in important respects from those activities that are properly undertaken during an investigation.'⁹²

On the other hand, it could be argued that the prohibition on proofing in the *Lubanga* case assisted the Court in hearing an un-sanitised version of the evidence, information which may not have been known if proofing had been permitted.⁹³ Mr Lubanga's defence team were of the view that the prohibition on proofing resulted in testimony

81 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-524-Anx, Witness preparation protocol, (2 January 2013), TC V, www.icc-cpi.int/iccdocs/doc/doc1533651.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai*, ICC-01/09-02/11-588-Anx, (2 January 2013), TC V, www.icc-cpi.int/iccdocs/doc/doc1533654.pdf.

82 See n 61, above (*Ruto Sang*, Decision on Witness Preparation), at para 46; see n 61, above (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 49.

83 See n 61, above (*Ruto Sang*, Decision on Witness Preparation), at para 52; see n 61, above (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 54.

84 See n 77, above, (*Ruto Sang*, Defence Response to Prosecution Motion on Witness Preparation), at para 32; see n 77, above, (*Muthaura Kenyatta*, Defence Response to Prosecution Motion on Witness Preparation), at para 45.

85 See n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at para 47; see n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 50.

86 IBA consultation with confidential source (22 February 2013), (notes on file with the IBA).

87 See n 66, above, (*Lubanga*, Decision on Witness Proofing), at para 11; see n 71, above, (*Lubanga*, Decision on Witness Testimony at Trial), at para 36; To counter this argument, judges in TC V argued that while the Statute is silent on the issue, ICC judges have a significant degree of discretion concerning the procedures they adopt in managing the proceedings as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims. See n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at para 27; see n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 31.

88 As required by Art 64(3)(c) of the Rome Statute; see n 77, above, (*Ruto Sang*, Defence Response to Prosecution Motion on Witness Preparation), at para 13; see n 77, above, (*Muthaura Kenyatta*, Defence Response to Prosecution Motion on Witness Preparation), at para 24.

89 *Ibid.*, (*Muthaura Kenyatta*, Defence Response to Prosecution Motion on Witness Preparation), at para 12.

90 See n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at para 39; see n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 43.

91 See n 69, above, (*Ruto Sang*, Dissent of Judge Eboe-Osuji), at para 14.

92 See n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at para 41.

93 IBA consultation with Court official from Chambers (17 August 2012), (notes on file with the IBA); IBA consultation with Mr Lubanga's Defence team (18 October 2012), (notes on file with the IBA).

which was more spontaneous, less polished and more genuine.⁹⁴ According to a source from the Court, if ‘proofing’ had been permitted, issues which arose in relation to the first witness in *Lubanga* may not have been brought to the attention of the Chamber and the parties.⁹⁵

Proponents of witness proofing espouse its beneficial impact on the fairness and expeditiousness of proceedings and on the overall confidence of witnesses. TC V was of the view that since ICC trials rely heavily on the examination of live witnesses through questioning by the parties, witness preparation is also likely to enhance the efficiency, fairness and expeditiousness of the trials.⁹⁶ In this sense, the TC agreed with the ICTYTC in the *Limaj* case which held that substantive witness preparation ‘is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.’⁹⁷ Another benefit identified by the Chamber was that proper witness preparation ‘enhances the protection and well-being of witnesses, by helping to reduce their stress and anxiety about testifying.’⁹⁸ The practice can help witnesses understand what to expect while taking the stand and they can communicate any concerns to the calling party.⁹⁹

Undoubtedly, the decisions in the Kenya cases are a revolutionary development in what appeared from the first three cases to be a settled area of ICC law and practise. Ironically, while deviating from the decisions of the first three cases, the decision to allow witness proofing is fully consistent with the approach of the ad hoc tribunals. However, as this is a decision of a first instance trial chamber and has not been tested on appeal, there may yet be a difference of approach by other chambers with implications for legal certainty for witnesses, parties and participants and incremental costs associated with re-litigation of procedural issues.

Ensuring compliance via protocols

As previously noted, the judges in the Kenya cases adopted the ‘Witness Preparation Protocol’ to regulate the practice of witness preparation and to mitigate inappropriate behaviour. Judges appeared to place significant reliance on the deterrent effect of the protocols to ensure compliance by the parties. However, these and other protocols are being developed on a case-by-case basis rather than being standardised across the cases and it is unclear how the Court will ensure compliance.

The Witness Preparation Protocol will only be applied in the Kenya cases, one of several witness-related protocols, such as the witness familiarisation protocol and the protocol to regulate contacts with witnesses of opposing parties, currently implemented at the ICC. Utilising protocols as a tool to manage procedural matters not specifically addressed in the ICC RPE appears initially to be an efficient manner in which to deal with such matters. However, there are several drawbacks to this approach: the legal status of these documents are unclear; there are variations across cases which makes it legally uncertain for parties and participants; and due to the casuistic approach, judges in different cases devote considerable time and resources to adjudicating the same procedural issues. This is especially true for those protocols which are essentially the same but which are modified or supplemented to various degrees for each case.¹⁰⁰

Furthermore, the sanctions provisions for breach of the protocols are not clearly enunciated. Even with the ‘safeguards’ included in the protocol, the documents remain silent on who investigates and prosecutes such misconduct and whether sanctions are available. One option would be for the OTP to carry out investigations if the breaches constitute offences against the administration of justice.¹⁰¹ However, this possibility raises obvious concerns over conflicts of interest and lack of accountability.

Given the pervasiveness of these issues across all cases, it may be necessary to amend the RPE or the Regulations of the Court to specifically address such matters. As this is often a complex exercise, the judges may also wish to consider developing one comprehensive document in a plenary session. All 18 judges could then systematically assess the merits of the proposed procedures.

94 *Ibid*, (IBA consultation with Lubanga Defence Team).

95 See n 93, above, (IBA consultation with official from Chambers).

96 See n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at paras 31, 35; see n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), at paras 35, 39.

97 See n 62, (*Limaj*, Decision on Defence Motion on Prosecution Practice of Witness Proofing), 2.

98 See n 61, above, (*Ruto Sang*, Decision on Witness Preparation), at para 37; see n 61, above, (*Muthaura Kenyatta*, Decision on Witness Preparation), at para 41.

99 Katy Glassborow, ‘Lawyers Divided Over ICC Witness Preparation’, (*Institute for War & Peace Reporting*, 2 March 2009), <http://iwpr.net/report-news/lawyers-divided-over-icc-witness-preparation>.

100 See n 36, above, (IBA consultation with the Registry).

101 Art 70, Rome Statute.

At an operational level, the OTP is in the process of implementing witness proofing guidelines in their Operational Manual in 2013.¹⁰² While the IBA strongly welcomes this initiative, the lack of an effective sanctions regime is still a cause for concern. If the breach is committed by defence or victims' counsel, it is clear that the ICC Code of Professional Conduct for Counsel would apply.¹⁰³ Interestingly, Judge Eboe-Osuji stressed in the Kenya decisions, that in adversarial jurisdictions where witness proofing is authorised, a code of professional conduct provides a framework to sanction inappropriate conduct such as witness coaching.¹⁰⁴

The adoption of the new approach to witness preparation in the Kenya cases, coupled with allegations about inappropriate conduct of the OTP, led TC V(B) to consider the need for establishment of ethical standards applicable to prosecution lawyers.¹⁰⁵ The ICC has lacked such a safeguard in relation to prosecution counsel, a point previously raised by the IBA.¹⁰⁶ The IBA contends that the absence of a prosecutorial professional code of conduct raises fairness concerns since all other ICC counsel are governed by such a code. As submitted by the defence in one case, the absence of such a code could mean 'an absence of guidance to assist prosecution counsel, who may not be members

of a Bar and who may have had no training in deontology or professional ethics, from knowing what behaviour is or is not acceptable.'¹⁰⁷

As such, the IBA welcomes the TC V(B)'s decision in the *Kenyatta* case, which ruled that 'the Code of Professional Conduct for Counsel should, where applicable and to the extent possible, also apply to members of the Prosecution.'¹⁰⁸ Significantly, in the same decision, the TC stressed its 'ability to sanction breaches [...] and similar misconduct occurring outside the courtroom.'¹⁰⁹ TC V(B) specified provisions in the Code of Professional Conduct for Counsel as particularly applicable to the members of the prosecution¹¹⁰ stating that they expect the prosecution to respect such provisions, not only during witness preparation but throughout the conduct of the proceedings.¹¹¹ However, this decision only applies to the *Kenyatta* case,¹¹² underlining the urgency of a comprehensive set of rules applicable to all cases.

In this regard, the IBA commends the OTP for recognising the need for a professional code of conduct to govern ICC prosecutors and their plans to promulgate a code in 2013.¹¹³ A previous draft code,¹¹⁴ prepared by the International Association of Prosecutors (IAP) and the Coalition for the International Criminal Court (CICC) in 2002, is being reviewed for this purpose.¹¹⁵

102 OTP's Draft Strategic Plan for 2013–2015, which is subject to change, 10.

103 According to Art 31 of the Code of Professional Conduct for Counsel, misconduct is committed when counsel: '(a) Violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her; (b) Knowingly assists or induces another person to commit any misconduct, referred to in paragraph (a) of this article, or does so through the acts of another person; or (c) Fails to comply with a disciplinary decision rendered pursuant to this chapter.' Counsel is also liable for misconduct by their assistants or staff, when they have ordered or approved the conduct, or 'Knows or has information suggesting that violations may be committed and takes no reasonable remedial action', under Art 32 of the Code. One or more sanctions can be applied by the Disciplinary Board pursuant to Art 42 of the Code, including admonishment, a public reprimand with an entry into counsel's personal file, a fine of up to €30,000, suspension of the right to practice at the ICC up to two years, and permanent ban on practicing before the ICC. See the ICC's Code of Professional Conduct for Counsel, ICC-ASP/4/Res 1-Anx, www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf.

104 For example, in the USA, '[t]he sanctions of the Code of Professional Responsibility are there for the attorney who goes beyond preparing a witness to testify to that about which the witness has knowledge and instead procures false or perjured testimony.' State V McCormick, supra, 298 N C 788 at p 792 and 259 S E 2d 880 at p 883; cited in: see n 69, above, (Ruto Sang, Dissent of Judge Eboe-Osuji), para; see n 91, above, (*Muthaura, Kenyatta*, Dissent of Judge Eboe-Osuji), at para 44.

105 *Prosecutor v Uhuru Mugai Kenyatta*, ICC-01/09-02/11-747, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers (31 May 2013), TC V(B), www.icc-cpi.int/iccdocs/doc/doc1599174.pdf.

106 IBA, *Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC* (IBAHRI, 2012), 21, www.ibanet.org/Article/Detail.aspx?ArticleUid=e295830c-9014-4007-a91c-b6660d191b99.

107 *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-617-Red, Public Redacted Version of 'Application for Sanctions pursuant to Article 70 of the Statute against an OTP staff Member and request for steps to be taken to ensure the protection of defence witnesses' filed on (1 February 2013, 4 February 2013), Defence, at para 19, www.icc-cpi.int/iccdocs/doc/doc1547770.pdf.

108 See n 105, above, (*Kenyatta*, Decision on Defence Application on Professional Ethics), at para 16.

109 The legal basis identified by the Chamber are arts 64(2) and 64(6) (f), which give the Chamber power to regulate the conduct of the proceedings, as well as Art 71, which provides for the Chamber's power to order sanctions for misconduct.

110 Such provisions with the necessary amendments are set out in an Annex to the Decision (*Prosecutor v Uhuru Mugai Kenyatta*, ICC-01/09-02/11-747-AnxA, Annex A to the Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, (31 May 2013), TC V(B), www.icc-cpi.int/iccdocs/doc/doc1599175.pdf).

111 See n 105, above, (*Kenyatta*, Decision on Defence Application on Professional Ethics), at para 16.

112 *Ibid*, 12, 16.

113 See n 38, above, (IBA consultation with the OTP); see n 102, above, (OTP Strategic Plan), 9.

114 International Association of Prosecutors & Coalition for the International Criminal Court, 'The Code of Professional Conduct for Prosecutors of the International Criminal Court', www.amicc.org/docs/prosecutor.pdf.

115 See n 38, above, (IBA consultation with the OTP).

Key findings

- The evolution in the debate on witness preparation and proofing at the ICC is a positive development. It underscores the importance of the issue and is evidence of the Court's progression since its first trial. However, the inconsistent approach to the practice of proofing by different Chambers is cause for concern given the lack of legal certainty for parties, participants and witnesses.
- The IBA commends the judges for adopting the Witness Preparation Protocol as well as the protocols on witness contacts that contain fundamental safeguards for the protection of witnesses and the trial proceedings as a whole. However, it is regrettable that the judges have applied a case by case approach (even on the same subject matter) leading to differing protocols being ordered (see **Annex A** for a list of the various ICC procedural protocols dealing with witnesses), as this creates more work for the Court and legal uncertainty for the parties.
- The *Kenyatta* decision to apply sections of the ICC Code of Professional Conduct for Counsel to the prosecution is welcome, but this does not apply to the *Ruto Sang* case or any other ICC cases, leaving it unclear how the compliance of prosecution counsel in other cases (and with other protocols) is evaluated, enforced and sanctioned since only defence counsel are governed currently by a code of professional conduct; and
- While the protocols are appended to various decisions of the Chambers, they are found nowhere else on the ICC website. Consolidating all of the protocols in one location would not only benefit the Court¹¹⁶ but also the Court observers monitoring the ICC's procedural developments.

116 See n 36, above, (IBA consultation with the Registry).

Recommendations

1. The IBA encourages the Court to standardise various procedural protocols across all cases. Consideration should be given to amending the RPE or the Regulations of the Court to address these procedural matters related to witnesses. In the alternative, judges may wish to consider determining the content of such protocols in a plenary session.
2. In order to ensure accountability and compliance with the Witness Preparation Protocol, in both Kenya cases and with other court-ordered protocols, there needs to be an enforceable code of professional conduct for *all* ICC counsel. The IBA therefore urges the OTP to follow through with their plans to promulgate a professional code of conduct tailored to prosecution counsel in 2013.
3. The IBA recommends that the Registry compile all ICC protocols which have been authorised in the Court's first ten years in one easily accessible webpage of the ICC website.

*The court relies on witnesses, and in turn they rely on us to ensure that they are not harmed as a result of their interaction with us. We therefore have to ensure that their interaction with the Court is a successful one*¹¹⁷

A key element of witness management before the ICC is ensuring adequate protection, support and assistance to witnesses. Operationally, while the Court has adopted provisions and practices borrowed from the ad hoc international criminal tribunals, it has pioneered the development of a more comprehensive witness protection, support and logistics scheme.¹¹⁸ It is clear that the ICC’s credibility rests on ensuring that persons who testify or who may be at risk because of their connection with those who testify, are safe and secure.

Protection and witness support come at a massive cost to the Court. In the 2013 Programme Budget more than €6m (over five per cent) was allocated to the Victims and Witnesses Unit (VWU), the unit in the Registry responsible for logistical and administrative care of witnesses.¹¹⁹ Despite the rising number of witnesses and victims requiring protection during the past decade due to the growing number of cases before the Court, it

is questionable whether the required resources are being provided to match these protection needs.¹²⁰ The VWU has also had to grapple with its own internal challenges and sometimes tense relations with the other organs of the Court.

Ultimately, the long-term feasibility of the Court’s current approach to witness protection and support will need to be reviewed, especially in light of the growing numbers of cases and witnesses, and the States Parties’ tightening of the Court’s overall budget.

Key achievements and challenges in witness protection and support

The ICC has made significant progress in protecting and supporting witnesses. All organs of the Court and external counsel have taken their responsibility for protecting the safety, physical and psychological well-being, dignity and privacy of all witnesses and their families quite seriously.¹²¹ The Court itself has an enviable infrastructure for ensuring the safety and security of witnesses (see **Chart 1** overleaf). Despite these notable achievements, IBA research and consultations reveal several gaps and areas of concern which must be addressed:

117 Silvana Arbia, ‘The ICC Registrar’s speech at the opening of the seminar on the protection of victims and witnesses’ (ICC, 26 November 2011), www.icc-cpi.int/NR/rdonlyres/56D91DDB-50B7-4E18-8C7B-E1884766B16D/282704/SeminaronprotectionIntroductionofRegistrarBIGPRINT.pdf.

118 S Ngane, ‘Witnesses before the International Criminal Court’ (2009) 8 *Law and Practice of International Courts and Tribunals* 431, 455.

119 In 2013, the ASP approved a €6,015,200 budget for the Victims and Witnesses Unit: Assembly of the States Parties, ICC-ASP/11/10, ‘Proposed Programme Budget for 2013 of the International Criminal Court’, (16 August 2012), 122, www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf.

120 According to Court officials, more than 300 witnesses are currently being handled by the Registry for protection; the VWU’s budget was reduced in 2010 and it appears that it has not been incremented since then to match the Unit’s needs: Assembly of the States Parties, ICC-ASP/4/5, ‘Proposed Programme Budget for 2006 of the International Criminal Court’, (24 August 2005), 91, www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-4-5_English.pdf; ICC-ASP/5/9, ‘Proposed Programme Budget for 2007 of the International Criminal Court’, (22 August 2006), 127, www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-9_English.pdf; ICC-ASP/5/9, ‘Proposed Programme Budget for 2007 of the International Criminal Court’, (22 August 2006), 127, www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-9_English.pdf; Assembly of the States Parties, ICC-ASP/6/8, ‘Proposed Programme Budget for 2008 of the International Criminal Court’, (25 July 2007), 105, www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-8_English.pdf; Assembly of the States Parties, ICC-ASP/7/9, ‘Proposed Programme Budget for 2009 of the International Criminal Court’, (29 July 2008), 107, www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-9%20English.pdf; ICC-ASP/8/10, ‘Proposed Programme Budget for 2010 of the International Criminal Court’, (30 July 2009), 110, www.icc-cpi.int/NR/rdonlyres/F945056A-F020-4F6A-A626-B8015D20D925/0/ICCASP810ENG.pdf; ICC-ASP/9/10, ‘Proposed Programme Budget for 2011 of the International Criminal Court’, (2 August 2010), 116, www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-10-MP-III-ENG.pdf; ICC-ASP/10/10, ‘Proposed Programme Budget for 2012 of the International Criminal Court’, (21 July 2011), 128, www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf; ICC-ASP/11/10, *Ibid.*, (ASP Proposed Budget for 2013).

121 Art 68(1), Rome Statute.

CHART 1

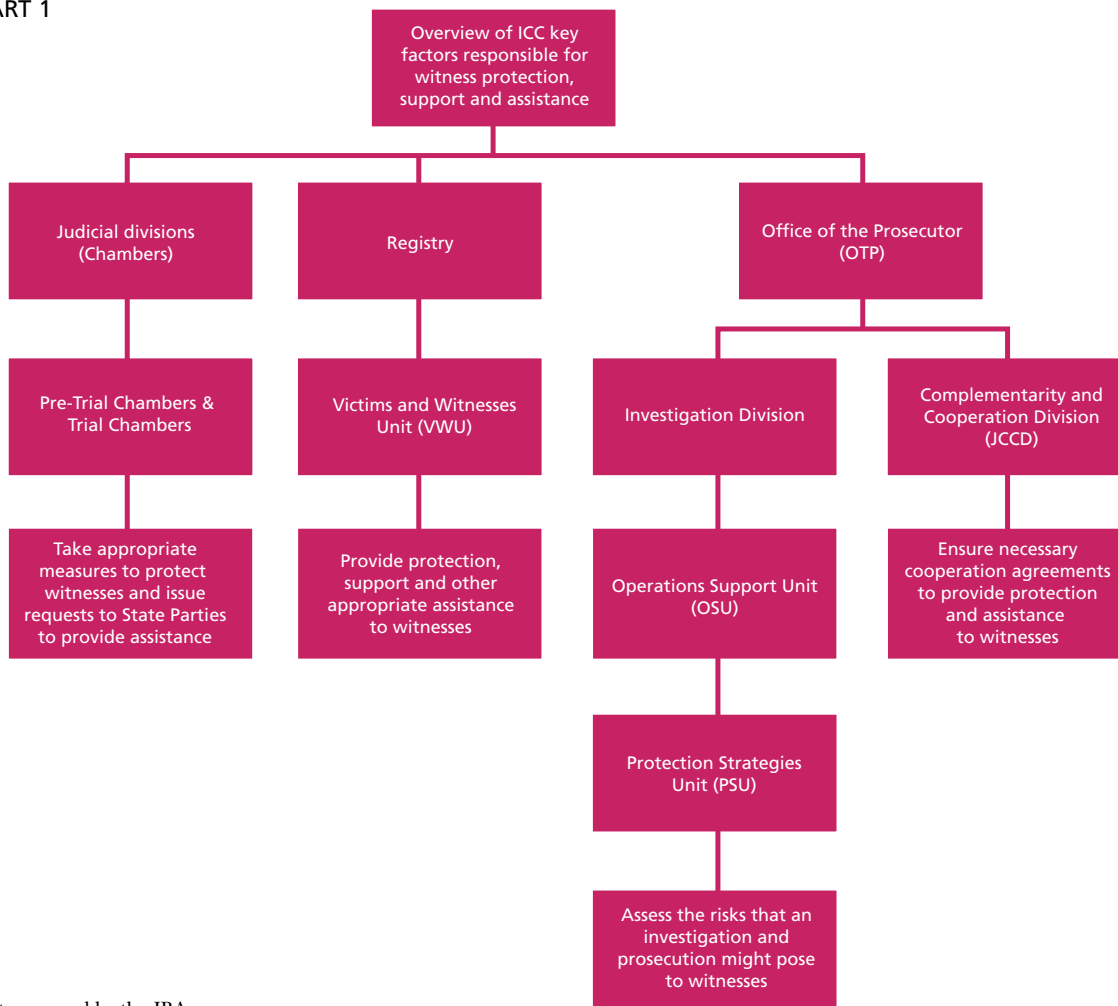


Chart prepared by the IBA.

The operational structure of the VWU needs to be reinforced

Witness protection and support are key aspects of the Registry’s responsibility to provide for the non-judicial aspects of the administration and servicing of the Court. The VWU has a core mandate to provide protection, support and other appropriate assistance to witnesses and victims who appear before the Court as a neutral service provider.¹²² Accordingly, this unit has to adopt adequate protective and security measures and formulate long and short-term plans for witness protection. In terms of support, the VWU’s support team offers assistance during the travel of victims and witnesses to the location of the hearings and provides psycho-social support, crisis intervention, information and debriefings before and after testimony, and access to medical care when needed.¹²³ The VWU is also responsible for logistical arrangements and immigration procedures to ensure the timely and secure appearance of witnesses and

victims in Court.¹²⁴ In addition, the VWU makes formal cooperation requests to States Parties for operational protection of witnesses.¹²⁵ The VWU has both The Hague and field-based staff members who carry out its operations.

Nevertheless, the VWU has had its fair share of challenges. Internal issues saw the VWU losing qualified staff with experience in witness related matters. It also appeared to lack clear leadership at the management level. To further exacerbate the internal challenges, the operational budget has also been subjected to the zero-growth policy that States Parties have imposed on the ICC. During consultations, senior Registry officials have acknowledged that the VWU is in need of a major overhaul to improve its function, a process which will commence in 2013. This is a welcome development in light of the importance of this Unit for the protection and support of ICC witnesses.

122 Art 43(6), Rome Statute.

123 ICC, *Behind the Scenes: The Registry of the International Criminal Court* (ICC, 2010), 13, available at www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf.

124 ‘Victims and Witnesses Unit’ (ICC, 12 April 2013), www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witness%20unit.aspx.

125 Art 93(1) (j), Rome Statute.

Operational protocols are a positive step forward but must be extended to the defence

Early tensions concerning the precise division of responsibilities between the OTP and the VWU became a significant issue in the initial stages of both the *Lubanga* and *Katanga Ngudjolo* cases.¹²⁶ The two were unable to agree on the appropriate risk assessment for the admittance of witnesses into the ICC's Protection Programme (ICPP), which led to litigation over the risk thresholds of witnesses and the need for protection.¹²⁷ The conflicts and litigation eventually led to the establishment of the *Joint Protocol on the Mandate, Standards and Procedure for Protection* in March 2011 (the 'Joint Protocol') which significantly clarified the respective responsibilities and coordination mechanisms of both organs.¹²⁸

A senior Registry official confirmed that the Protocol has improved the relationship between the OTP and VWU.¹²⁹ The OTP shares this view and points to the significance of this Protocol as part of the Court's evolution and how they have 'managed to develop a very coordinated, swift, inter-organ approach to these issues compared to when [they] started.'¹³⁰

The Protocol itself is confidential and is only referred to in other Court documents. It appears to set out the general principles of information sharing and cooperation and the procedures for conducting risk assessments and identifying the appropriate measures to alleviate risk. Importantly, it clarifies the OTP and Registry's respective responsibilities with regard to the different protection tools.¹³¹ The Protocol is drafted in line with the Court's jurisprudence and endorses the fact that the Prosecutor cannot, for example, unilaterally and preventatively relocate witnesses, and must inform the VWU when they wish to change the witnesses' place of residence.¹³²

Notably the Protocol provides for the prosecution to ask the Chamber for revisions of Registry decisions on the protection of witnesses. However, this is rarely done. According to the Registry, the 'OTP is extremely demanding and does not accept easily refusals even when we strongly believe that a request for protection must not be accepted' thus the Registry concedes that it does not 'bother the Chamber with these operational issues which delay the proceedings' and prefers to find a solution between the Registry

and the prosecution'.¹³³ The Registry official noted that the majority of the time it was possible to reach an agreement between the two organs without involving the Chambers.¹³⁴

The Joint Protocol is a positive step towards clarifying overlapping roles. Nevertheless, it is difficult to assess its efficacy since its full contents remain confidential. The Protocol has been in effect for two years and the OTP reportedly plans to review it and the underlying protection principles in order to gauge whether they still meet the current security risks the Court faces. In addition, the OTP and the VWU will begin discussions on drafting a new protocol on provisions of assistance to witnesses.¹³⁵

The Registry informed the IBA that a similar protocol has been extended to the defence.¹³⁶ However, it is unclear after speaking with defence counsel what the content of the protocol is, to what degree counsel were consulted and whether it has yet been adopted.¹³⁷ One pertinent question which arose from IBA consultations was whether defence counsel will be given more resources if the defence will be required to perform additional tasks under the protocol.¹³⁸

Even if a protection protocol between the Registry and the defence is finalised, residual concerns regarding the practical implementation of the protocol will remain given that unlike the OTP which has a specialised internal unit to implement their Joint Protocol, the defence must rely on a single field resource person to carry out witness related tasks.¹³⁹ Essentially, the Registry concedes that in contrast to the defence, the OTP are at a comparative advantage given the size of their teams as they can spend significantly more time and resources than the defence to prepare and present a protection case to the VWU.¹⁴⁰

There is no Registry infrastructure to facilitate risk assessments and support needs of defence witnesses

There is no discrete organisational structure to carry out risk assessments and support needs of defence witnesses. By contrast, the OTP has developed internal expertise to assess the risks that an investigation and prosecution might pose to witnesses, namely its Operational Support Unit (OSU) within which is the specialised Protection Strategies Unit (PSU) with responsibility for

126 Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa* (Institute for Security Studies 2010), 36, www.issafrica.org/uploads/Book2010WitnessProt.pdf.

127 IBA consultation with senior official of the Registry (18 September 2012) (notes on file with the IBA).

128 ICC-ASP/10/7, Report of the Court on the implementation and operation of the governance arrangements (17 June 2011), at para 21, www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-7-ENG.pdf; see n 102, above (OTP Strategic Plan), 9.

129 See n 36, above, (IBA consultation with the Registry).

130 See n 38, above, (IBA consultation with the OTP).

131 See n 128, above, (ASP, Report of the Court).

132 See n 36, above, (IBA consultation with the Registry).

133 *Ibid.*

134 *Ibid.*

135 See n 102, above, (OTP Strategic Plan), 9.

136 See n 36, above, (IBA consultation with the Registry).

137 See n 14, above, (IBA consultation with ICC defence counsel); see n 45, above (IBA consultation with confidential source).

138 *Ibid.* (ICC consultation with confidential source).

139 See n 36, above, (IBA consultation with the Registry).

140 *Ibid.*

witness security related issues.¹⁴¹ The unit is in charge of the development of general security risk and threat assessments (SRTA) in support of ongoing investigations and trials and for the development and implementation of witness protection strategies. The OTP's Jurisdiction, Complementarity and Cooperation Division (JCCD) also has responsibility for ensuring that necessary agreements and arrangements are in place to secure the full cooperation of states and international organisations, and advises the Prosecutor, among other things, on issues related to witnesses that require international cooperation.

In practice, defence counsel carry out their own psycho-social and risk assessments of their witnesses for protection and submit these to the VWU.¹⁴² This is problematic as counsel are legally trained but not necessarily equipped to conduct professional risk assessments, and there is currently no section or staff within the Registry who will assist with such tasks.¹⁴³ For securing witness attendance, according to one defence counsel, under the current system the problems they face are sometimes blamed on the defence who are told that it is their responsibility to ensure their witnesses are 'available' despite having no skills or training in the movement of witnesses.¹⁴⁴ This counsel previously worked on cases at the ad hoc tribunals and had never experienced such systematic failings on the part of the Registry to secure the attendance of defence witnesses.¹⁴⁵

There are currently two ICC Registry offices tasked with defence (and other counsel) matters: the Office of Public Counsel for the Defence (OPCD) which is mandated to protect the rights of the defence, conduct research and provide legal advice at the request of counsel and act as ad hoc counsel if appointed by Chambers;¹⁴⁶ and the Counsel Support Section (CSS) which assists primarily with admission and training to the Court's list of external counsel, administrative and disciplinary matters and legal aid issues. Neither of these offices is mandated to assist counsel with protection issues.¹⁴⁷ Moreover, the IBA is aware that Registry communications with defence counsel is inconsistent. Since defence counsel are not ICC staff and considered 'external', they indicate that they often feel excluded from discussions including those which directly impact their cases and witnesses.

By contrast, the Special Tribunal for Lebanon (STL), established after the ICC, has been fitted with an autonomous defence Office as one of the four organs of the Tribunal, representing the first time in history that an independent defence office has been established at an international criminal tribunal.¹⁴⁸ The Office has its own OSU similar to the ICC's OTP's OSU, which is tasked with providing logistical and operational support to defence counsel, including, for instance, 'assisting counsel with case or document management issues, facilitating defence investigations in Lebanon and elsewhere, recruiting defence team members or finding relevant forensic experts.'¹⁴⁹ The goal of the STL's defence OSU is 'to ensure that counsel, who may be unfamiliar with practical and operational problems that are specific to the STL, are adequately supported so as to enable them to focus on the substantive issues in their case.'¹⁵⁰

ICC defence counsel have expressed to the IBA a significant need for specialised and coordinated services for the defence in the area of witness protection since having Registry staff dedicated to these activities would immensely benefit their ability to investigate.¹⁵¹ Such a mechanism and staff could potentially be linked to the OPCD.¹⁵²

The IBA further stresses that these institutional and logistical deficits not only raise equality of arms issues between the defence and the prosecution, but may ultimately undermine the defence witnesses' right to appropriate protection. If there is no coordinated approach to defence witness issues, this will cost the Court, not just in monetary terms but also in terms of efficiency if the proceedings face delays.

In-court protective measures are routinely applied at the ICC to protect witnesses

In addition to internal structural arrangements to protect witnesses, the Court is mandated to apply in-court 'protective measures' to protect vulnerable witnesses under the Statute and RPE. Such measures have been used to varying degrees in all ICC trials. During the *Lubanga* trial for example, the TC ordered a variety of protective measures including withholding witnesses' identities from the public; use of pseudonyms; and conducting parts of the proceedings in closed session.¹⁵³ Face and voice distortion was in place for all alleged

141 See n 38, above, (IBA consultation with the OTP).

142 See n 86, above, (IBA consultation with confidential source).

143 *Ibid.*

144 See n 14, above, (IBA consultation with ICC defence counsel).

145 *Ibid.*

146 'The Office of Public Counsel for the Defence' (ICC, 12 April 2013), <http://tinyurl.com/cnb2uy8>.

147 See n 39, above, (IBA consultation with ICC Expert).

148 'Defence Office', (STL, 27 March 2013), www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence/defence-office.

149 *Annual Report 2009–2010* (STL, 2010), 52, www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/annual-report-2009-2010.

150 *Ibid.*

151 See n 14, above, (IBA consultation with ICC defence counsel); see n 45, above, (IBA consultation with confidential source).

152 *Ibid.*, (IBA consultation with confidential source).

153 See Rule 87, (RPE).

former child soldiers,¹⁵⁴ and screens were used so that witnesses did not have to see the accused while testifying.¹⁵⁵ Furthermore, testimony via electronic means was permitted,¹⁵⁶ and the Chamber allowed some child witnesses to be accompanied during testimony by a family member, psychologist or legal representative.¹⁵⁷

In the *Katanga Ngudjolo* trial the Court also made use of pseudonyms, and facial and voice distortions.¹⁵⁸ However, there were reportedly fewer closed sessions during that trial in comparison to *Lubanga*¹⁵⁹ (although the TC did permit partially closed sessions on a number of occasions).¹⁶⁰ Given its high numbers of victim-witnesses who allegedly suffered sexual violence, other vulnerable witnesses and high-profile defence witnesses, the *Bemba* trial has perhaps employed the most frequent use of in-court protective measures, mostly in the form of pseudonyms, face and voice distortion during testimony and closed-session hearings.¹⁶¹

Despite the importance of in-court protective measures, questions have been raised about fairness implications and whether or not these measures

are being too routinely applied. The Rome Statute addresses the tension between protecting witnesses and the fair trial rights owed to the accused; the Statute clearly provides that the Court must strike a balance between these two obligations.¹⁶² During the *Lubanga* trial the TC made it clear that protective measures were exceptional and must be based on objective grounds, such as actual threats, rather than simply the personal preferences or subjective fears of individual witnesses.¹⁶³ The TC concluded that ‘it is important that these applications are not routinely made in the expectation that they will be routinely granted.’¹⁶⁴

However, the Registry confirms that there seem to be more closed sessions during ICC trials in comparison to the ICTY, and the rationale behind this is that the ICC offers much more protection than the ad hoc tribunals.¹⁶⁵ For one defence counsel, closed session hearings at the ICC are frequently and inappropriately used for information which has no possibility of revealing witness identities, but rather might be seen as ‘sensitive’ for the witness to talk about, or is otherwise embarrassing for the institution.¹⁶⁶ Counsel contends that this may impact the rights of the accused, and also make it much more difficult for the public in affected communities, who are not privy to the ‘in-camera’ sessions, to come forward to contradict prosecution evidence.¹⁶⁷ For the counsel this ‘greatly hampers defence investigations as [they] are prevented from revealing the source of accusations or revealing the identity of any protected witnesses, and it makes the proceedings seem secretive and gives credence to the prosecution allegations which [they] aren’t able to refute in public’.¹⁶⁸

Special measures may restrict cross-examinations

Judges may also apply ‘special measures’ to protect vulnerable witnesses including by ‘vigilantly controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation’.¹⁶⁹ This is not always positively viewed. Some defence counsel have felt unusually restricted in their questioning of witnesses and feel that certain judges are reluctant to direct hesitant witnesses to answer questions.¹⁷⁰ Counsel fear that if they press the witness to answer, they may appear to be aggressive which could lead to a reprimand from the Chamber and an even more reticent

154 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-227-Red-ENG, Transcript, (14 January 2010), TC I, at p 6, line 22; at p 7, line 2, www.icc-cpi.int/iccdocs/doc/doc1392937.pdf.

155 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-308-Red-ENG, Transcript, (30 June 2010), TC I, at p 1, lines 20–22, www.icc-cpi.int/iccdocs/doc/doc1263315.pdf.

156 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2285-Red, Redacted Decision Give Public on the Defence Request for a Witness to Evidence via Video-Link, (10 February 2010), TC I, at para 19, www.icc-cpi.int/iccdocs/doc/doc820206.pdf.

157 See n 154, above (*Lubanga*, Transcript).

158 See for example *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1516-ENG, Order concerning protection measures applied to transcripts of testimonies of prosecution Witnesses 2, 12, 30 and 157 in the *Thomas Lubanga Dyilo* case, (7 October 2009), TC II, at para 9, www.icc-cpi.int/iccdocs/doc/doc1050415.pdf; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-129-Red-FRA, Transcript, (19 April 2010), TC II, at p 42, lines 18–24, www.icc-cpi.int/iccdocs/doc/doc883245.pdf; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-91-Red-ENG, Transcript, (27 January 2010), TC II, at p 8, lines 13–14, www.icc-cpi.int/iccdocs/doc/doc814122.pdf.

159 Jennifer Easterday, ‘Q&A with Eric MacDonald, Senior Trial Lawyer for the ICC: Part II’, (Katanga Trial, 2 June 2011), www.katangatrial.org/2011/06/qa-with-eric-macdonald-senior-trial-lawyer-for-the-icc-part-ii.

160 See for example *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-102-Red-FRA, Transcript, (15 February 2010), TC II, at p 41, line 4, www.icc-cpi.int/iccdocs/doc/doc869250.pdf; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-105-Red-FRA, Transcript, 22 February 2010, TC II, at p 6, line 2, www.icc-cpi.int/iccdocs/doc/doc882235.pdf; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-113-Red-FRA, Transcript, (8 March 2010), TC II, at p 2, lines 6–7, www.icc-cpi.int/iccdocs/doc/doc868915.pdf.

161 See, for example, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T-32-ENG, Transcript, (22 November 2010), TC III, at p 62, lines 2–3, www.icc-cpi.int/iccdocs/doc/doc1015356.pdf; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T-33-Red-ENG, Transcript, (23 November 2010), TC III, at p 4, lines 7–8, www.icc-cpi.int/iccdocs/doc/doc995293.pdf; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T-39-ENG, Transcript, (30 November 2010), TC III, at p 21, lines 1–2, www.icc-cpi.int/iccdocs/doc/doc974110.pdf.

162 Art 64(2), Rome Statute.

163 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-153-Red2, Transcript, (24 March 2009), TC I, at p 63, lines 19–25, www.icc-cpi.int/iccdocs/doc/doc1327152.pdf.

164 *Ibid*, p 63, lines 19–21.

165 See n 36, above, (IBA consultation with the Registry).

166 See n 14, above, (IBA consultation with ICC defence counsel).

167 *Ibid*.

168 *Ibid*.

169 Rule 88(5), (RPE).

170 See n 86, above, (IBA consultation with confidential source).

witness. In addition, counsel do not feel at liberty to suggest directly to witnesses that they are not being truthful even if it is a part of their case as this is sometimes also viewed as hostile questioning in ICC proceedings.¹⁷¹

Another related concern of defence counsel is that judges might not fully understand the cultural context of the situation countries. For instance, in some countries when a person says ‘I experienced this’ what they actually mean is that someone told them this. Distinguishing between direct evidence and hearsay normally necessitates a vigorous cross-examination.¹⁷²

For the prosecution, while it is a challenge for the lawyer to put himself or herself into the shoes of witnesses in terms of culture, geography and language, it is a matter of experience to become sensible in questioning witnesses in ways which still get to the heart of the issues.¹⁷³ This maintains both the protection of the witness and the fair-trial rights of the accused. The prosecution added that there are also various ways to avoid re-traumatising a witness during cross-examination, such as admitting a witness statement or a portion of the statement in writing without having to examine it in chief.¹⁷⁴

The OTP indicated to the IBA that to avoid the risk of re-traumatising witnesses, some issues are discussed with the defence before testimony, and often the defence is sympathetic and agrees not to cross-examine on a particular issue. For instance, with a rape-victim witness, the parties will discuss whether the defence needs to go into the details of the rape or, if this can be conceded, the defence counsel will only focus on identifying perpetrators or some other evidentiary linkages.¹⁷⁵ If none of these tools work, however, there is no way around asking witnesses unpleasant questions.¹⁷⁶

The IBA recognises the difficulty the Chambers face in balancing the protection of witnesses and an accused’s right to open and transparent proceedings.¹⁷⁷ While mindful of these challenging circumstances, protective measures must be considered necessary, proportionate and consistent with the rights of the accused. Furthermore, public hearings are not only enshrined as a basic tenet of fair trial, they are also the primary means to deliver the Court’s message to the outside world – especially to affected communities. A disproportionate number of closed sessions can affect public perception of the accused’s responsibility and may prevent potential witnesses from viewing the proceedings and coming forward with new and relevant information.

171 *Ibid.*

172 *Ibid.*

173 See n 38, above, (IBA consultation with the OTP).

174 Rule 68, (RPE).

175 See n 38, above, (IBA consultation with the OTP).

176 *Ibid.*

177 See n 126, above, (Mahony), viii.

Key findings

- Despite tremendous successes in witness protection and support, there are gaps in the management and operational capacity of the VWU which impede its ability to function effectively.
- There is an absence of structural support by the Registry for defence teams in their efforts to assess the protection needs of their witnesses, both in terms of communication flow and technical assistance.
- The Joint Protocol between the OTP and the VWU is a positive sign of engagement between the two organs on an issue of crucial importance. The plans to review the protocol are welcomed in light of further jurisprudential developments since it was first signed. A similar protocol should be concluded between the Registry and the defence in relation to their witness protection needs.
- While re-traumatising witnesses must be avoided, the questioning of witnesses to test their evidence and credibility is a cornerstone of criminal law, and the Court should permit counsel as much as possible to candidly question witnesses on the truthfulness of their testimony.
- Protection measures must be balanced with due process rights. More effort must be made to balance important witness security concerns and the need for public, open proceedings.

Recommendations

1. The Registry is urged to take immediate steps to review the management and operational capacity of the VWU and to ensure that the Unit has the human, technical and financial resources necessary to carry out its functions.
2. The Registry is encouraged to establish a mechanism (or subsection of the OPCD), similar to the OTP's OSU and PSU, to assist defence teams with assessing protection needs of witnesses and making referrals to the VWU when appropriate.
3. The Registry is also urged to hold adequate consultation with defence teams to determine their needs, prior to adopting policies or procedures which impact defence witnesses.
4. The IBA urges the Court to further reduce the number of closed sessions, and apply as standard procedure the grouping together of confidential questions by the parties, in order to hold the majority of the proceedings in open session.

“The fact that someone is coming to the ICC to testify cannot be used to bypass national legislation; we also must respect the sovereignty of the state, and that is a major issue for us”¹⁷⁸

The ICC is distinguishable from its predecessor tribunals and courts as it was established by international treaty and not by a Security Council resolution or UN agreement.¹⁷⁹ Given its international character, witness operations do not function without the cooperation of states which facilitate a wide range of logistical and legal measures. The Court relies on national support for essential witness related activities, even to simply enter a country to find and meet individuals.¹⁸⁰

The Rome Statute mandates States Parties to assist the Court with the protection of witnesses,¹⁸¹ and to accord them such treatment as is necessary for the proper functioning of the Court, in accordance with the Agreement on the Privileges and Immunities of the ICC (APIC).¹⁸² However, according to former ICC Registrar Silvana Arbia, the failure of some states to cooperate remains one of the biggest obstacles to the adequate protection of witnesses.¹⁸³ The former Registrar noted that

requests for cooperation cost time and resources and ‘have not always produced the desired and urgently needed result.’¹⁸⁴

This chapter discusses the importance of the state cooperation framework in enabling the ICC to protect and support witnesses. Given its impact on the overall efficiency of ICC proceedings, particular attention is paid to the challenges that the ICC currently faces due to insufficient witness relocation agreements. Additionally, this chapter highlights some of the challenges faced by the defence in securing state cooperation for investigations, an issue acknowledged by the ASP in a comprehensive report on cooperation more than six years ago.¹⁸⁵

Cooperation framework and context

The ICC’s extensive reliance on state cooperation stems from the absence of its own police force to facilitate investigations, locate witnesses and apprehend suspects. States have a multifaceted obligation to cooperate with the ICC by providing judicial cooperation and logistical support to facilitate investigations, and protect and relocate witnesses.¹⁸⁶ States must also ensure the existence of national mechanisms to respond in a timely manner to the Court’s requests for cooperation.¹⁸⁷ On the other hand, the Court has a corresponding obligation to ensure that cooperation requests are transmitted in a timely, consistent manner and are as detailed as possible.¹⁸⁸

In general the ICC receives a good level of cooperation from States Parties to the Rome Statute. Indeed IBA consultations with Court officials indicate that there appear to be a core number of States Parties who are very cooperative with the Court. Consequently, many cooperation requests are transmitted to those states resulting in ‘burnout or overload’. In its most recent report to the UN, the Court reported that, from August 2011 to July 2012, the Registry and the OTP transmitted 783 requests for cooperation, including over 60 to states not party to the Rome Statute as well as to international organisations.¹⁸⁹ In relation to those requests, the Court said that the execution rate at

178 See n 36, above, (IBA consultation with the Registry).

179 See n 126, above, (Mahony) 16.

180 See n 36, above, (IBA consultation with the Registry).

181 Art 93(1)(j), Rome Statute.

182 Art 48(4), Rome Statute; Art 19, Agreement on the Privileges and Immunities of the International Criminal Court, United Nations (APIC) (2002) <http://untreaty.un.org/cod/icc/apic/apic%28e%29.pdf>. APIC came into force in July 2004 and to date 72 countries are party to it, representing approximately 60 per cent of the ICC’s States Parties. Of the current situation countries which are States Parties, the DRC, Uganda, CAR and Mali have adopted APIC but Kenya and Côte d’Ivoire have not.

183 Silvana Arbia, ‘The International Criminal Court: witness and victim protection and support, legal aid and family visits’ (2010) 36 Commonwealth Law Bulletin 519, 520.

184 *Ibid.*

185 Report of the Bureau on cooperation, ICC-ASP/6/21, (19 October 2007), www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-21_English.pdf.

186 Art 93, Rome Statute.

187 Arts 88, 94 and 97, Rome Statute.

188 Art 96, Rome Statute.

189 UN General Assembly, A/67/308, Report of the International Criminal Court, (14 August 2012), at para 99, www.icc-cpi.int/en_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Documents/A67308EN.pdf.

the end of the reporting period stood at 72 per cent.¹⁹⁰ Ultimately, even though States Parties have a statutory obligation to cooperate with the Court¹⁹¹ – and most states duly comply – there is still the prevailing view that non-cooperation persists as one of the ICC’s most critical challenges that the Court as a whole must overcome.

Effective cooperation in certain areas including transport of suspects and witnesses, witness relocation and enforcement of sentences, are greatly facilitated by prior agreements between the Court and specific states.¹⁹² These so-called ‘framework agreements’ clarify in advance the scope of the cooperation obligation between the Court and states, and set broad parameters which can be modified and adapted to specific situations. Essentially, they provide a key foundation for facilitating future cooperation requests.

Given the importance of cooperation generally and framework agreements in particular, it is difficult to comprehend why more advances have not been made in this area, particularly in relation to witness relocation agreements. As one NGO aptly expressed, ‘a central challenge with regard to cooperation and support is converting broad proclamations into policy and practice.’¹⁹³

Court requests for cooperation on witness related matters

The Registry and the OTP¹⁹⁴ routinely send official cooperation requests to ICC States Parties on witness-related matters. The defence, on the other hand, make requests via the Registry, or on their own initiative. The OTP requests generally relate to investigative activities whereas the Registry’s requests concern, inter alia, the provision of information and the protection of witnesses, the issuance of travel documents for staff members and counsel and ‘support to the investigations conducted by the defence’.¹⁹⁵

In order to meet emergency protection needs of witnesses, the Court has two operational protective measures which function outside of the courtroom

190 *Ibid.*

191 Art 86 of the Rome Statute states that: ‘States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’

192 Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years* (Human Rights Watch, 2008), 219, www.hrw.org/sites/default/files/reports/icc0708_1.pdf.

193 *Ibid* at p 213.

194 Through the OTP’s Jurisdiction, Complementarity and Cooperation Division (JCCD).

195 ICC Assembly of States Parties, ICC-ASP/11/21, Report on the activities of the Court, (9 October 2012), at paras 82–83, www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-21-ENG.pdf; ICC Assembly of States Parties, ICC-ASP/10/39, Report on the activities of the Court, (18 November 2011), at paras 82–83, www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-39-ENG.pdf.

and depend on state cooperation for their proper functioning. The first of these is the Initial Response System (IRS), which is a local protective measure in the field and entails a 24/7 emergency response system enabling witnesses who are in a dangerous situation or are threatened to call a third party and be extracted to a safe location.¹⁹⁶ The Court needs to rely on local actors in participating countries and cooperate with the domestic police in others.¹⁹⁷ The second is the entry of a witness into the ICC Protection Programme (ICCPP), which enables the relocation of the witness and his or her close family away from the source of a threat to a different country.¹⁹⁸ There are currently more than 300 witnesses admitted in the ICCPP¹⁹⁹ and there have been reports of extensive relocation in the two Kenyan cases.²⁰⁰

Framework agreements on witness relocation

Considering the number of witnesses currently in the ICCPP, the ICC’s main challenge at present is that there are simply not enough witness relocation agreements in place. To date, only 12 States Parties have signed such agreements and the Court is struggling.²⁰¹ According to Court officials, the prior existence of a relocation agreement can reduce the time required to relocate witnesses who have been admitted into the ICCPP to six months (or slightly longer) from time of first contact with potential

196 See n 183, above, (Arbia), 522; Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, (29 and 30 January 2009), at p 2, www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf.

197 See n 39, above, (IBA consultation with ICC Expert).

198 ‘Witnesses are relocated mostly externally and provided a stipend with a view to them securing their own employment and financial independence. They are monitored closely after testimony and consistently thereafter [...] Witnesses who are admitted and relocated are required to sign a memorandum of understanding. This includes normative requirements such as non-disclosure of the programme and communication with family and friends through VWU staff only.’ See n 126, above, (Mahony), 43, 54–55.

199 As provided to the IBA by the ICC Victims and Witnesses Unit on 1 March 2013.

200 *Prosecutor v William Samoei Ruto and Joshua Arap Sang and Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, where more than 80 witnesses are reported to have been relocated to countries in Europe since 2011. J Smith, ‘80 Kenyan ICC Witnesses in Safe Houses Abroad’, (*Mwakilishi*, 23 January 2013), www.mwakilishi.com/content/articles/2013/01/23/80-kenyan-icc-witnesses-in-safe-houses-abroad.html; ‘Kenya: Ocampo Witnesses Now Sent to Europe’, (*AllAfrica*, 10 March 2011), <http://allafrica.com/stories/201103110195.html>.

201 IBA consultation with official of the Registry, (14 February 2013), (notes on file with the IBA); Assembly of States Parties, Report of the Bureau on cooperation, ICC-ASP/11/28, (23 October 2012), at para 12, www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-28-ENG.pdf; ICC Weekly Update #164, ICC-PIDS-WU-164, (Week of 12 to 15 March 2013), 3, www.icc-cpi.int/iccdocs/PIDS/wu/ED164_ENG.pdf.

receiving state to relocation.²⁰² By contrast, if there is no relocation agreement, and negotiations take place on an ad hoc basis, a decision (negative or positive) can take up to one year.²⁰³ This depends on the state – which may ask for additional information, and of whom some regrettably do not grasp the urgency of the request.

Additionally, much time and resources are saved if there is a relocation agreement as the process then operates at a technical level. In this scenario the Registry's cooperation unit is not involved and communication takes place between the VWU and a technical person in the receiving state, a direct channel of communication that is ultimately more efficient. With ad hoc arrangements, where there is no witness relocation agreement, the cooperation unit is involved and has to deal with multiple departments within a government – immigration, foreign affairs, justice – a significantly time and resource consuming exercise.²⁰⁴

Indeed, the absence of new agreements 'seriously restricts the ability of the VWU to relocate witnesses'²⁰⁵ and constitutes an 'alarming shortfall' in its ability to protect victims and witnesses at risk.²⁰⁶ According to ICC Vice President, Judge Monageng, '[t]he lack of relocation agreements results in the VWU having to find temporary solutions, pending final acceptance by a state,' meaning that 'the Registrar ultimately may have to make very difficult decisions and choices as to who should be protected.'²⁰⁷

With more relocation agreements in place in all continents, a decision to relocate a witness could be better tailored to suit the witness' background and to facilitate his or her integration.²⁰⁸ Specifically, there is a need for relocation agreements with African states,²⁰⁹ as all current ICC cases are in Africa and moving to a neighbouring country poses far less of a burden on witnesses, especially those who may eventually return home. It would be easier for witnesses to integrate into their new surroundings because of language, culture and schooling similarities which would also assist individuals with finding new employment. In addition, 'from a security perspective, the more relocation agreements available to the VWU, the more difficult it will be to identify the places

where witnesses reside.'²¹⁰ This will assist in further protecting witnesses from potential threats.

The OTP has also expressed to the IBA that the limited numbers of relocation agreements could negatively impact the cases in the long run, and even affect their overall strategy. They indicated that, during an investigation phase, choices have to be made as some potential witnesses can only be approached if relocation can be secured for them. Indeed many witnesses will not speak to the OTP unless they know they will be protected. Ultimately this may limit the number of witnesses, potentially having an adverse impact on a case.²¹¹ The OTP explained that due to this limitation, they are trying to find alternative ways to get evidence without relying on so many witnesses.²¹²

Nonetheless the Court concedes that, despite their importance, there are shortcomings to witness relocation agreements. Like all voluntary framework agreements between the ICC and States Parties, the agreements are couched in general terms and must be adapted to each situation. Furthermore they place no binding obligation on the states to accept witnesses. Thus, there are states that have signed agreements but have never accepted witnesses.²¹³ Actual relocation takes place only after the State Party has accepted a proposal by the Court regarding a specific witness. There is a fear that efforts to adopt a more prescriptive approach concerning a minimum number of witnesses which the concerned state must accept will have a deterrent effect on states who are considering signing such agreements.²¹⁴

States may also assist by issuing 'emergency visas' and accept witnesses on a temporary basis, to facilitate immediate extraction (for example if they are needed urgently in Court). These are referred to as 'platform states'.²¹⁵ The OTP considers that this provides a level of flexibility which helps to facilitate the timely and safe interview of witnesses, and other aspects of the investigation and prosecution of cases. However, emergency visas have also proven difficult to arrange for several reasons, one being that states have expressed concern over potential asylum claims.²¹⁶

202 *Ibid.*, (IBA consultation with Registry).

203 *Ibid.*

204 *Ibid.*

205 See n 126, above, (Mahony), 54.

206 See n 201, above, (ASP, Report of the Bureau on Cooperation), at para 12.

207 S Mmasenono Monageng, ICC First Vice President, 'The shortage of relocation agreements: impact on the proceedings', (Side Event – ASP 11, 19 November 2012, The Hague).

208 *Ibid.*

209 'One of the key factors deterring the relocation of witnesses to Africa is that only South Africa has a protection programme that can admit a witness. This means that establishing arrangements – where the Court funds the admission of witnesses into a national programme – can only happen there.' See n 126, above, (Mahony), 55.

210 See n 207, above, (Monageng).

211 See n 38, above, (IBA consultation with the OTP).

212 *Ibid.*

213 See n 36, above, (IBA consultation with the Registry).

214 See n 86, above, (IBA consultation with confidential source).

215 *Ibid.*

216 See n 38, above, (IBA consultation with the OTP).

Agreement on privileges and immunities of the ICC (APIC)

APIC was designed to provide Court officials and staff certain privileges and immunities necessary to perform their duties in an independent and unconditional manner.²¹⁷ Under APIC, counsel, experts and witnesses 'shall be accorded such treatment as is necessary for the proper functioning of the Court.'²¹⁸ This guarantee is critical to allow counsel to conduct comprehensive investigations, identify and meet potential witnesses in all countries without fear of arrest or reprisals.

Nevertheless there have been deeply concerning reports of defence counsel being arrested and having privileged documents confiscated while carrying out investigations in the field – and the very troubling detention of ICC staff in Libya. On this point, judges of PTC I in the case against Mr Saif Gaddafi, issued a decision in March 2013 addressing the applicability of APIC to states that have not ratified it.²¹⁹ The judges took the broad view that the immunities provided for in article 48 of the Rome Statute as well as in APIC were determinative and applied both to defence counsel and ICC staff involved in the proceedings. Thus the Chamber ruled that non-States Parties such as Libya – who are bound by the terms of the UN Security Council Resolution 1970 to cooperate with the ICC – are equally bound by Article 48 of the Statute to respect privileges and immunities.²²⁰

Ratification of APIC has been on the ASP's agenda for some time. At the 11th session of the ASP in November 2012, ICC member states adopted by consensus a cooperation resolution calling all States Parties as well as non-States Parties to become parties to APIC 'as a matter of priority and to incorporate it in their national legislation, as appropriate.'²²¹ Consistent emphasis on the importance of universal ratification of APIC will go a long way in ensuring that Court staff, defence counsel and witnesses can carry out their functions without impediment.

217 See n 182, above, (APIC).

218 Art 48(4), Rome Statute.

219 *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-291, Decision on the 'Urgent Defence Request', (1 March 2013), PTC I, www.icc-cpi.int/iccdocs/doc/doc1561084.pdf.

220 Dapo Akande, 'ICC Decides on Immunities and Privileges of defence counsel and ICC Staff', (EJIL: Talk, 6 March 2013), www.ejiltalk.org/icc-decides-on-immunities-and-privileges-of-defence-counsel-and-icc-staff.

221 ASP, Resolution ICC-ASP/11/Res 5, adopted at the 8th plenary meeting by consensus, (21 November 2012), at para 9, www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res5-ENG.pdf.

State cooperation and the defence

While challenges of enforcing state cooperation are Court-wide, the logistical limitations inherent to cooperation are aggravated for defence teams who have little means or authority to communicate directly with states. This is in contrast to the Registry and OTP who have direct communication channels with states and regularly make official requests from governments. This is especially relevant in cases where the defence requires cooperation from states with inquisitorial-oriented criminal systems, characteristic in most civil law countries,²²² where the national authorities may be totally unaccustomed to assisting defence with their investigation as investigative judges normally undertake these activities.²²³

With no formalised mechanism or focal point for the defence to route their cooperation requests, the Registry confirms that 'for the defence there is nobody.'²²⁴ The Registry only passes the information to the country from which the defence requests a particular witness but according to a senior Registry official, this does not hold the same value as a formal cooperation request from the OTP's JCCD.²²⁵ Indeed when cooperation requests are routed through the Registry, defence counsel have told the IBA that they are normally not copied in so they are not privy to the content of the request, whether it was sent, when it was sent or whether there has been a response.²²⁶ Since the Registry is an impartial organ, nor is it possible for them to lobby or negotiate on behalf of the defence for their witness related cooperation requests.

In this regard, the VWU may be falling behind its predecessors at the ad hoc tribunals. According to a defence counsel who has worked at both the ICC and ad hoc tribunals, defence teams at ICTY and ICTR could provide a list of their witnesses and contact details, and the experienced staff would rely on developed systems and relationships to ensure that cooperation requests were made and defence witnesses arrived, in the correct order, without gaps in the proceedings.²²⁷ At the ICC, however, counsel has noted that the 'VWU and Registry have been unable to secure passports, visas, and authorisations from the relevant authorities in a timely manner,

222 Inquisitorial criminal procedures are characteristic in countries with civil legal systems, as opposed to common law systems, mainly in continental Europe, Latin America, most of Africa and many central European and Asian countries.

223 'In the inquisitorial system, it is the court that investigates the matter, makes a finding as to its viability and then brings itself the matter to adjudication.' Althea Alexis, 'The Convergence of the Common Law and Inquisitorial Systems in International Criminal Law', in Emmanuel Decaux, Adama Dieng & Malick Sow (eds), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laïty Kama*, (Martinus Nijhoff 2007), 468.

224 See n 36, above, (IBA consultation with the Registry).

225 *Ibid.*

226 See n 86, above, (IBA consultation with confidential source).

227 See n 14, above, (IBA consultation with ICC defence counsel).

if at all'.²²⁸ This is an institutional challenge as the countries where the witnesses are located are not necessarily State Parties and may have little interest in cooperating with the Court.

Even when the countries are State Parties, there has been reported unwillingness to facilitate the presentation of defence witnesses.²²⁹ The political reality of the cases is that some governments may have a vested interest in seeing certain ICC defendants convicted.²³⁰ This has impacted a number of defence witnesses who are in the military, and in order to respect state cooperation the Registry must request that states facilitate the transfer of these persons and the state normally makes these individuals available to the Court.²³¹ However, at times these individuals may agree to testify but do not want the Court to make a formal cooperation request,²³² for fear of repercussions if their government discover they are testifying. This exacerbates the challenges of securing the attendance of defence witnesses.²³³

The IBA has also been made aware that some states have prevented passports from being issued and government ministries have failed to authorise travel or testimony. Some defence witnesses have needed to flee from States Parties to seek refuge in non-State Parties, where they have no papers or status. In some of these situations, the ICC Registry has been unable to secure their attendance, which has a major impact on the right of an accused to present his or her case.²³⁴ The imbalance between the parties is concerning; the OTP has its own division to lobby for prosecution witnesses whereas the defence has no representative or mechanism to follow-up on requests.²³⁵

Indeed the challenges of securing state cooperation became increasingly apparent in the *Bemba* case. In a May 2013 submission, the defence alleged that the non-cooperation of three unnamed countries rendered the witnesses increasingly unable to testify.²³⁶ The defence submitted that these states refused to provide witnesses with the required authorisation and/or did not undertake the necessary arrangements for testimony via video-link. Consequently the Chamber authorised the defence to reduce the number of witnesses it intended to call from 63 to 50,²³⁷ but the judges

have not yet made any findings on the alleged non-cooperation of the relevant states.

Cooperation with non-States Parties

The situation is further aggravated (for both prosecution and defence) if the state in question is not a party to the Rome Statute. Referrals by the UN Security Council to the ICC have given the Court jurisdiction over these countries but fail to guarantee in practice the cooperation of these states. A notable example is the *Banda Jerbo* case situated in Darfur, Sudan, which was referred to the ICC by the UN Security Council in 2005.²³⁸ As Sudan is not party to the Rome Statute and does not consider itself obliged to cooperate, the parties have been unable to effectively investigate or access witnesses in Darfur.

In January 2012, defence counsel in that case filed a request to temporarily stay the proceedings, arguing that the circumstances made a fair trial for the accused impossible.²³⁹ The defence cited, inter alia, lack of cooperation from Sudan to conduct investigation, and the inability of the OTP to investigate and/or disclose potentially exculpatory evidence and witness testimony to the accused thus infringing the rights of the accused to disclosure, to obtain the attendance of witnesses on their behalf and collect and present other forms of evidence.²⁴⁰ The TC was confronted with deciding whether a fair trial is possible if the parties are unable, due to a lack of state cooperation, to carry out on-site investigations and contact potential witnesses contrary to the principle of equality of arms.

Indeed in a letter in support of the defence application, Justice Richard Goldstone²⁴¹ stated that: 'to conduct trial proceedings in circumstances where the defence is denied this investigative opportunity – through no fault of its own – is, in my view, a breach of an accused's right to such an extent as to render a fair trial not possible'.²⁴² Nonetheless the judges ultimately rejected the application on technical legal grounds, namely finding that aspects of the defence application were speculative; that there were other forms of communication available including satellite telephones; and that the defence failed to show that any prejudice could

228 *Ibid.*

229 *Ibid.*

230 *Ibid.*

231 See n 36, above, (IBA consultation with the Registry).

232 *Ibid.*

233 See n 14, above, (IBA consultation with ICC defence counsel).

234 *Ibid.*

235 See n 86, above, (IBA consultation with confidential source).

236 *The Prosecutor v Jean-Pierre Bemba*, ICC-01/05-01/08, Defence Submissions on the remaining Defence witnesses, (10 May 2013), Defence, TC III, at paras 9–15, www.icc-cpi.int/iccdocs/doc/doc1590940.pdf.

237 *The Prosecutor v Jean-Pierre Bemba*, ICC-01/05-01/08, Decision on the order of appearance of witnesses to be called by the defence following Witness D04-56, (15 May 2013), TC III, www.icc-cpi.int/iccdocs/doc/doc1592801.pdf.

238 Security Council, Resolution 1593, (31 March 2005), www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf.

239 *Ibid.*, at para 47.

240 *Ibid.*, at para 1.

241 Justice Goldstone is a Justice of the Constitutional Court of South Africa (Retired), former Chief Prosecutor of the ICTY and ICTR, and Honorary President of the International Bar Association's Human Rights Institute.

242 *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-274-AnxO, Annexure O, (6 January 2012), Defence, www.icc-cpi.int/iccdocs/doc/doc1296610.pdf.

not be remedied through the course of the trial.²⁴³

The decision did not however directly address the fact that non-cooperation by non-States Parties, such as Sudan, to allow access to witnesses and conduct investigations could pose a significant impediment to both prosecution and defence, which could have a deleterious impact on cases before the Court. This is an issue which still calls for determination at the diplomatic level.

Addressing the problem

Has the Court done enough to bring this matter to states' attention? The resounding response from Court officials is that it has. According to the Court, several courses of action have been taken over the years, including the transmission of notes verbales to targeted states, discussion of the issue in the context of Hague Working Group meetings (a subsidiary body of the ASP), comment on the issue in annual reports to the UN as well as in reports on the Court's activities or on cooperation.²⁴⁴ The Registrar also records these issues systematically and when appropriate, as do the President and the Prosecutor in bilateral meetings and during seminars in which they participate. The Registry notably also organised a side event on the protection of witnesses during the 11th ASP meeting in 2012 and participated in another event co-hosted by the Permanent missions of Denmark and the US.

Additionally, the Court has sought to creatively address the problem including by establishing a Special Fund for Relocations ('Special Fund') in 2009 in an effort to make such agreements less financially burdensome for some receiving states.²⁴⁵ In March 2013, the ICC hosted a high-level seminar on fostering cooperation in Nuremberg, Germany with 22 national governments represented. These talks led to two new witness-relocation agreements being finalised and signed by African countries under the new Special Fund, enabling cost-neutral witness relocation to these receiving states.²⁴⁶

Despite these efforts and the confidential nature of agreements, most states are still reluctant to conclude agreements. The reasons for this reluctance vary. Some states highlight the need to safeguard good relations between themselves and the originating state, particularly where there are close political ties, with others citing the absence of a national protection programme and the legal

framework to facilitate such arrangements.²⁴⁷ A number of States Parties, particularly those in Europe, are concerned with potential asylum claims.²⁴⁸ There are also problems with polygamous families as the witnesses need to integrate in the society of the receiving state which may prohibit polygamy in its legislation.²⁴⁹

Some states have appointed national focal points, a central official or body which receives cooperation requests from the Court and transmits them to the relevant body within the national authorities. While this could arguably slow down the processing of cooperation requests, it could also ensure that such requests are brought to the attention of the relevant persons and are expedited. As Human Rights Watch has previously indicated, to be meaningful, the focal point should ideally be a senior government official who is not likely to be rotated throughout different ministries.²⁵⁰ The focal point may also be responsible for following ICC developments and providing advice to their government.

Another important consideration is whether there is sufficient judicial pronouncement on non-cooperation in relation to witnesses. Applications by the prosecution or defence to judges requesting findings of non-cooperation in the face of alleged failure by states to cooperate, could provide a tangible and compelling means to persuade states to honour their obligations under the Rome Statute. While this is now commonly done in relation to States Parties who breach their obligation to arrest and surrender ICC indictees, this has not been done in relation to non-cooperation on witness issues. Developments in one of the two cases from Kenya before the Court provide a noteworthy example.

In a dramatic turn of events, and for the first time at the ICC, the ICC Prosecutor decided in March 2013 to drop all charges against Mr Francis Kirimi Muthaura, who was formally jointly charged with Mr Uhuru Kenyatta, Kenyan President, in one of the two cases from Kenya before the Court.²⁵¹ The Prosecutor noted that one of the justifications for the withdrawal was that, despite assurances of its willingness to cooperate with the Court, 'the Government of Kenya failed to provide [her] Office with important evidence, and failed to facilitate our access to critical witnesses who may have shed light

243 *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-410, Decision on the defence request for a temporary stay of proceedings, (26 October 2012), TC IV, www.icc-cpi.int/iccdocs/doc/doc1498141.pdf.

244 See n 201, above, (IBA consultation with Registry).

245 See n 183, above, (Arbia), 523: This arrangement can mean that States Parties who have the resources and expertise, can assist the states who have the will but lack the capacity to enter into such agreements.

246 See n 201, above, (ICC Weekly Update #164).

247 See n 201, above, (IBA consultation with Registry).

248 See n 38, above, (IBA consultation with the OTP).

249 See n 201, above, (IBA consultation with Registry).

250 See n 192, above, (Human Rights Watch Report), 217.

251 *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-687, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, (11 March 2013), TC V, at para 11, www.icc-cpi.int/iccdocs/doc/doc1565549.pdf.

on the *Muthaura* case.²⁵² The Kenyan Government reacted by filing opposing submissions asserting that it has provided full cooperation, support and assistance to the Court²⁵³ and alleged that the OTP failed to file a formal application requesting the Court to issue an order to the Kenyan Government to comply with their cooperation obligations.²⁵⁴ The Legal Representative of the Victims filed submissions refuting Kenya's assertions of full cooperation.²⁵⁵ A ruling by the Chamber on this issue was pending at the time of writing.

The decision will be an important one for the Court as well as Kenya's credibility. The fact is that presenting allegations of non-cooperation on witness matters to the Court for judicial determination could be a powerful incentive to compel recalcitrant States to cooperate.²⁵⁶ Failure to comply could prompt the Court to take appropriate measures,²⁵⁷ such as a finding of non-compliance and referring the matter to the ASP

for further action.²⁵⁸ This is, of course, while being mindful of the fact that the Assembly itself has still not finalised the clear mechanisms for addressing findings of non-cooperation by the Court.

The response of the Assembly of States Parties

Ultimately, while state cooperation with the ICC is a matter for individual states, it will require the collective will of all states spearheaded by the ASP to seriously address the problems. To its credit, these issues have not been ignored by the Assembly. The ASP has dedicated significant attention to cooperation including in its omnibus resolutions and in 2011, through a standalone resolution on cooperation.²⁵⁹ During the 11th ASP in The Hague, the Assembly held the first-ever formal plenary session on cooperation

In its 2007 report on cooperation, which contains more than 66 recommendations to States Parties and the Court, the ASP addressed witness related issues among others warranting concerted and definitive cooperation by States with the Court.²⁶⁰ The report also recognised that the defence is faced with particular challenges in seeking to conduct investigations, access witnesses, requests for judicial assistance, etc, particularly in countries with civil law systems and recommended that the ASP consider monitoring 'developments regarding witness protection and issues related to victims and defence teams, as an increasingly important part of the cooperation dossier.'²⁶¹

Since 2009, the ASP has appointed a facilitator to exclusively address cooperation issues and, in 2012, Norwegian Ambassador Anneke Krutnes was assigned this important role.²⁶² The cooperation facilitator has identified several priority issues to be addressed in advance of the 12th session of the Assembly, one of which is framework agreements on witness relocation. In this regard, a regional seminar was organised in Dakar, Senegal, in June 2013, on witness protection and relocation

252 F Bensouda, 'Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura', (ICC, 11 March 2013), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx; see *ibid*, (*Muthaura Kenyatta*, Withdrawal of Charges by the Prosecution), at para 11. The prosecution further indicated that they expended considerable efforts to obtain cooperation from the Kenyan Government on requests for assistance, and to overcome various tactics employed to stall, delay, or altogether thwart the prosecution's collection of certain evidence in Kenya. *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-683-Red, Public redacted version of the Additional Prosecution observations on the Defence's Art 64 applications, filed in accordance with order number ICC-01/09-02-11-673, (8 March 2013), OTP, at para 24, www.icc-cpi.int/iccdocs/doc/doc1565410.pdf.

253 The Kenyan Government further details the specific ways in which it has cooperated with the OTP by, *inter alia*, granting the former and current Prosecutor and OTP staff members entry into Kenya, providing public and confidential Government documents to the prosecution, and allowing state officials to provide evidence at the confirmation of charges hearing. *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-713, Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, (8 April 2013), Government of the Republic of Kenya, www.icc-cpi.int/iccdocs/doc/doc1577522.pdf.

254 Kenya questioned the Prosecutor's failure to 'file a formal application with the Chamber wherein she itemises which Art 93 with which the Government has failed to cooperate or has failed to give a justifiable explanation for its inability to cooperate... [thus allowing] the Government ...to respond specifically to these allegations before the Chamber. *Ibid* at para 9.

255 *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-731 0, Victims' Response to the Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, (6 May 2013), LRV, www.icc-cpi.int/iccdocs/doc/doc1590033.pdf.

256 In accordance with Art 93(1), Rome Statute.

257 Regulation 29(1), Regulations of the Court: 'In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.'

258 Art 87(7), Rome Statute: 'Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.'

259 See n 221, above, (ASP Resolution).

260 See n 185, above, (Report of the Bureau on cooperation).

261 *Ibid*, at paras 24, 33.

262 In accordance with the THWG's terms of reference, its responsibilities include: a) Budget; b) Complementarity c) Cooperation; d) Independent Oversight Mechanism; e) Reparations; f) Legal Aid; g) Strategic planning; and h) Victims and affected communities and Trust Fund for Victims. Bureau of the Assembly of States Parties, Oral report of the President on the activities of the Bureau, www.icc-cpi.int/iccdocs/asp_docs/ASP11/BureauOralReport.7dec12.1200.pdf.

agreements, which included key policy makers from African State Parties as well as ICC and ASP representatives.

The key question is: has the Assembly done enough? Civil society organisations including the cooperation team of the Coalition for the ICC – a network of NGOs including the IBA working to promote support for the ICC – have called for states to translate their talk into concrete action. The cooperation team contend that states have made numerous statements in the form of resolutions and pledges but there is little tangible evidence of their commitment to cooperate with the Court in key areas.

States Parties have repeatedly pledged and reiterated their unswerving commitment to the Court with little obvious success, as evidenced by the paucity of witness relocation agreements. At the national level, individual states, particularly those who would benefit most from the Special Witness Trust Fund, should be urged to identify the specific challenges they face in complying with the ICC request for cooperation in this area. A state (facilitated by the ICC or the ASP Secretariat) which has concluded an agreement could anonymously share their lessons learnt and best practises in this area with this state. If there are diplomatic or political as opposed to technical concerns, the issues should be addressed at that level, through the facilitation of the ASP President.

Key findings

- The Registry and the OTP are the main channels for cooperation requests to states. However there have been complaints that some cooperation requests lack clarity and specificity; are not sent in a timely manner or are not sent to the appropriate person; or betray a lack of basic awareness of the national law of the country in question.
- States have made several pledges to cooperate with the Court, such as during the 2010 ICC Review Conference, but have failed to follow-through. The ASP Presidency is urged to call upon States to honour their commitments and pledges made during the 2010 ICC Review Conference in Kampala, Uganda and set a deadline for states to indicate what steps have been taken to achieving those goals.
- The IBA highly praises the 12 states who have concluded voluntary framework agreements on witness relocation with the Court, but these will not sustain the growing relocation needs. There may also be non-States Parties to the Rome Statute with functional national protection programmes, who may be keen to cooperate with the ICC on witness relocation matters.
- Some states have positively appointed national focal points, a central official or body which receives cooperation requests from the Court and transmits them to the relevant body within the national authorities and this should be a model for all States Parties.
- The 66 recommendations included in the ASP's 2007 *Report of the Bureau on Cooperation* have not been fully implemented. States must take concrete and definitive action to implement these recommendations to ensure the rights and interests of witnesses and to facilitate cooperation needs for the prosecution and defence; and
- The Court does not have a formal structure in place to provide guidance to the defence to submit cooperation requests to states which hinders witness related cooperation requests.

Recommendations

1. The IBA urges the Court to streamline and systematise cooperation requests to states. The Court is further encouraged to develop a formal mechanism or focal point for defence requests for state cooperation.
2. The IBA encourages States Parties to meet their cooperation obligations related to transfer, protection and support of witnesses in accordance with the Rome Statute.
3. The ASP is urged to continue to encourage states to sign agreements, to actually follow through by accepting witnesses and where there are resource challenges, to take advantage of the Special Relocation Fund which was established to facilitate States in such situations.
4. The IBA supports the appointment of national focal points and encourages the ASP to revisit this issue during its consideration of tangible ways to facilitate effective cooperation with the Court.
5. The IBA encourages more states to ratify APIC which more clearly elucidates the scope of the privileges and immunities afforded to ICC staff, counsel and witnesses; and
6. The IBA encourages the Court to continue to pursue avenues to engage with non-States Parties with functional witness protection programmes that are willing to cooperate with the ICC and receive relocated witnesses. This could be done through *ad hoc* agreements as provided in the Rome Statute's cooperation provisions.

6 – False Testimony, Witness Interference and the ICC's Enforcement Regime

*I solemnly declare that I will speak the truth, the whole truth and nothing but the truth*²⁶³

Throughout this report, the ICC's reliance on witnesses has been reiterated time and again. Unfortunately, for a number of reasons including poverty, trauma or general vulnerability, some witnesses in international criminal trials are coaxed or threatened to fabricate a story and provide false testimony sometimes in exchange for monetary gain.²⁶⁴ In addition, there have been troubling allegations of threats, bribery, witness intimidation and other forms of interference reported in several cases before the Court.²⁶⁵

The ICC framework provides a sanctions regime for offences against the administration of justice including witness interference and the giving of false testimony by witnesses when committed intentionally.²⁶⁶ However, despite serious allegations of witness misconduct or interference and the judges suggesting that the prosecution launch investigations into these issues, to date there have been no publicised investigations or proceedings before the Court. The underlying challenge is that the ICC's enforcement regime depends on such OTP led investigations as sanctions can only be imposed upon conviction, and there is no scope for contempt proceedings to be initiated as they would at the *ad hoc* international tribunals or the Special Tribunal for Lebanon.

The discussion in this chapter will focus on three important issues affecting witnesses at the ICC: false testimony by witnesses which has led to judicial criticism of OTP investigations and

their use of intermediaries; witness interference including threats and intimidation as well as improper contact with witnesses of the opposing party; and finally the efficacy of the enforcement regime to prevent, deter or punish false testimony, witness interference and misconduct.

False testimony by ICC witnesses – investigations under scrutiny

The rejection of several witnesses considered unreliable and lacking credibility by the judges in the *Lubanga* and *Ngudjolo* cases, as well as strong critique of OTP investigations in others such as the Kenya cases, have led to close scrutiny of the OTP's investigative methodology.²⁶⁷ Whilst the OTP undoubtedly struggles with inadequate resources and budgetary restraints, unprecedented challenges in conducting investigations in volatile, politically charged situations, security challenges and difficulties in securing state cooperation,²⁶⁸ there is no doubt that the gaps raised by the judges point to a need for review of several aspects of the OTP's investigative procedures.

In the *Lubanga* case, the TC rejected the testimonies of some witnesses due to inconsistencies and found their evidence to be unreliable.²⁶⁹ The Chamber also found that six individuals who previously held 'dual status' as victim/witnesses had falsified their testimony resulting in rejection of their evidence and also a loss of their victim status.²⁷⁰

In *Ngudjolo*, the TC similarly concluded that the testimonies of the prosecution's three key witnesses were too 'contradictory', 'overly inaccurate' and 'excessively imprecise' and the Chamber was not able to find them credible or rely on their oral

263 Rule 66, (RPE): every witness, with certain exceptions, shall make this solemn undertaking before testifying before the ICC.

264 Mark Findlay and Sylvia Ngane, 'Sham of a Moral Court' (2011) Sydney Law School, Legal Studies Research Paper No 11/10, 2, <http://ssrn.com/abstract=1753319>.

265 See n 52, above, (*Lubanga*, Judgment), at para 483; see n 102, above, (OTP Strategic Plan), 9; see n 252, above, (Statement by ICC Prosecutor); *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1789-Red, Public Redacted Version of the 26 September 2011 Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011, (27 September 2011), TC III, at paras 29–30, www.icc-cpi.int/iccdocs/doc/doc1237130.pdf.

266 Art 70, Rome Statute.

267 War Crimes Research Office, 'Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor', (October 2012), www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf.

268 See n 252, above, (Statement by ICC Prosecutor); see n 102, above, (OTP Strategic Plan), 9; IBA consultation with the OTP, (11 September 2012), (notes on file with the IBA).

269 See n 52, above, (*Lubanga*, Judgment), at para 479.

270 *Ibid* at paras 484, 502; Rule 85, (RPE). Judge Odio Benito dissented on this issue concluding that the 'contradictions and weaknesses' in the witness testimony of the individuals should not affect their right to participate in the proceedings as victims. Others have expressed the view that the majority decision to withdraw the victims' witness status may be a disincentive to victims to participate in future proceedings as witnesses, especially given there is no judicial process to appeal the withdrawal of victim participation status.

evidence.²⁷¹ In its final judgment the TC indicated that, due to numerous factors, including security and time lapse, there was a lack of crucial forensic evidence in the case, and therefore it was necessary to rely primarily on witness statements and reports by MONUC investigators or representatives of various NGOs.²⁷² In light of this reliance on witness testimony the TC would have preferred the prosecution to call more relevant witnesses to the stand, particularly certain commanders who played a key role in the attack.²⁷³

The Chamber further emphasised that the prosecution should have analysed the witnesses' backgrounds more thoroughly, namely their marital status and educational history, noting that it was often the defence teams who provided these details to the Court.²⁷⁴ The TC added that most of the relevant socio-cultural aspects of the witnesses were only revealed after the judges themselves put these questions to the witnesses and in the Chamber's view, this information should have been raised at the start of the prosecution's case to 'prompt a more informed debate from the outset'.²⁷⁵ The OTP has challenged the Chamber's approach to the evidence on appeal arguing, *inter alia*, that the Chamber applied a 'compartmentalized and selective analysis of the evidence, viewing pieces of evidence in isolation, ignored critical corroborative evidence and relevant factual findings made by the Chamber in the judgment'.²⁷⁶ The appeal is pending.

Overall, in both cases, having considered the entirety of the witnesses' accounts as well as other relevant factors,²⁷⁷ the judges concluded that there was a clear indication of unregulated use of intermediaries and a lack of investigative oversight by the prosecution;²⁷⁸ delayed and insufficient investigations;²⁷⁹ a shortage of relevant witnesses;²⁸⁰ a lack of attention to key background details of the witnesses;²⁸¹ and regrettably the OTP did not physically visit all of the localities relevant to the charges which would have helped clarify several witness testimonies.²⁸²

The problematic use of intermediaries as witness liaisons during investigations

A particularly troubling aspect of the falsification of testimony by some witnesses in the *Lubanga* case was the central role played by intermediaries. Since the Court has limited or no local staff when it begins operations in a new situation country, the OTP routinely relies on third parties, commonly referred to as intermediaries, to assist with investigative activities and to contact potential witnesses. Unfortunately, the judges found that several intermediaries were likely to have persuaded, encouraged or assisted individuals to provide false evidence in their testimonies in exchange for money or other promises, in support of the prosecution's case.²⁸³ The judges rebuked the prosecution for being negligent in failing to verify and scrutinise the materials produced by intermediaries resulting in the potential for witness manipulation.²⁸⁴

During the proceedings the OTP maintained that their reliance on intermediaries was due to the number of security risks they faced while conducting investigations in the DRC including travel restrictions to certain areas.²⁸⁵ According to Nicolas Sebire, former OTP Investigator, the prevailing security conditions made it 'absolutely impossible' for the OTP investigators to go to the villages and come into contact with potential witnesses.²⁸⁶

Despite the critical security challenges encountered in the DRC, the TC opined that the prosecution should not have delegated its investigative responsibilities to intermediaries as it led to the aforementioned false testimony and inadmissibility of their evidence.²⁸⁷ In their final verdict, the trial judges were scathing in their criticism of the prosecution's approach to its investigations.²⁸⁸

Regrettably, critique of the OTP's inadequate investigative practices has not been limited to the *Lubanga* and *Ngudjolo* cases. In the case against Mr Kenyatta (and previously of Mr Muthaura), the TC expressed concern that the bulk of the

271 See n 49, above, (*Ngudjolo*, Judgment), at paras 159, 189, 190, 218–219; *Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12, Transcript, (18 December 2012), TC II, at p 7, lines 20–22, www.icc-cpi.int/iccdocs/doc/doc1529751.pdf.

272 *Ibid.*, (*Ngudjolo*, Judgment).

273 *Ibid.*, at para 119.

274 *Ibid.*, at para 121.

275 *Ibid.*

276 See n 51, above, (*Ngudjolo*, Prosecution Appeal), at para 3.

277 The judges considered, *inter alia*: the manner in which he or she gave evidence; the plausibility of the testimony; consistency with itself and other evidence in the case; and whether the witness's oral evidence conflicted with their own prior statements. See n 52, above, (*Lubanga*, Judgment), at para 102; see n 49, above, (*Ngudjolo*, Judgment), at para 53.

278 See n 52, above, (*Lubanga*, Judgment), at paras 482–3.

279 See n 49, above, (*Ngudjolo*, Judgment), at para 123.

280 *Ibid.*, at para 119.

281 *Ibid.*, at para 121.

282 For instance, the localities where the accused lived and where the preparations of the attack on Bogoro allegedly took place. See n 49, above, (*Ngudjolo*, Judgment), at para 118.

283 See n 52, above, (*Lubanga*, Judgment), at para 483.

284 *Ibid.*, at paras 482–3.

285 While conducting investigations in 2004 and 2005, MONUC intelligence reports state that UPC and Forces de Résistance Patriotique d'Ituri (FRPI) were still active in Bunia. Nicolas Sebire, former OTP Investigator, recounted that while on mission in the village of Nyankunde, the investigators had to travel with a MONUC (UN) military convoy and wear helmets and bullet-proof jackets. *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-334-Red2, Transcript, (22 November 2010), TC I, at p 12, lines 2–7, 12–17, www.icc-cpi.int/iccdocs/doc/doc1343148.pdf.

286 *Ibid.* at p 13, line 5–7.

287 See n 52, above, (*Lubanga*, Judgment), at paras 482–3.

288 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2583, Judgment on the appeal of Prosecutor against the oral decision of TC I of 15 July 2010 to release Thomas Lubanga Dyilo, (8 October 2010), AC, at para 27, www.icc-cpi.int/iccdocs/doc/doc947862.pdf.

prosecution's fact-based witnesses (at least 24 of 31) were interviewed for the first time only after the charges were confirmed.²⁸⁹ Judge Christine Van den Wyngaert noted in a separate, concurring decision that, 'there are serious questions as to whether the prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation,' and that 'there can be no excuse for the prosecution's negligent attitude towards verifying the trustworthiness of its evidence.'²⁹⁰ Judge Van den Wyngaert found this to 'reveal grave problems in the prosecution's system of evidence review, as well as a serious lack of proper oversight by senior prosecution staff.'²⁹¹

Internal efforts to address the problems

On a positive note, notwithstanding the pending appeals for both the *Lubanga* and *Ngudjolo* verdicts, the OTP has launched a major review of its internal investigative practises,²⁹² and indicated the need for additional and stronger evidence at earlier stages of the investigations. This is a positive development which the IBA fully endorses. Nothing has yet been made public and as such it is difficult to say what changes, if any, have been implemented. It is also noted that the Prosecutor has now publicly indicated that additional resources are needed for investigations to be effectively carried out. This request must be heeded by the States Parties as it is a waste of precious time and resources for a case that is not properly investigated to be initiated and to proceed to trial.

In addition, in response to the issues arising in *Lubanga* on intermediaries, and the inadequate standards governing their use in Court's legal texts, the ICC launched a Court-wide initiative to establish guidelines,²⁹³ a code of conduct²⁹⁴ and

a contract for intermediaries.²⁹⁵ This is crucial as intermediaries are not bound by the operational instruments of the Court such as the ICC Staff Rules or Code of Professional Conduct for Counsel. The drafting process for the *Draft Guidelines Governing the Relationship between the Court and Intermediaries* (the 'Draft Guidelines')²⁹⁶ concluded in August 2011 after extensive consultations with all organs of the Court and NGOs.²⁹⁷ The Draft Guidelines take into account the findings in *Lubanga* and address the law and policy governing the use of intermediaries including security, payment and closer monitoring of intermediaries for accountability purposes.²⁹⁸ In its 11th session, the ASP took note of the Draft Guidelines in the so-called 'omnibus resolution' and invited the 'Bureau to engage in a more in-depth discussion with the Court on this issue.'²⁹⁹ The ASP's Hague Working Group met to discuss the Draft Guidelines in March 2013 and the Court presented a paper to the ASP's Committee on Budget and Finance, outlining the resource implications of its implementation.

As for oversight and coordination of the *Draft Guidelines*, one proposed measure which the IBA endorses, is for each ICC office using intermediaries to designate a focal point to record the office's interactions with intermediaries.³⁰⁰ The IBA also welcomes the OTP's codification of its interactions with intermediaries, necessary safeguards and training of investigators in its internal Operational Manual.³⁰¹ It is, however, difficult to assess these provisions since the Operational Manual is an internal document which has not been made public, though the Office has previously indicated that a public version would be promulgated.³⁰² Along those lines, while the Draft Guidelines are a step in the right direction in terms of regulating the Court's interaction with intermediaries, their potential impact remains unclear since, firstly, they have still not been published on the ICC website or broadly distributed nearly two years after the conclusion of the drafting process, and, second, their legal status is uncertain as they are not binding on the

289 *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-728, Decision on defence application pursuant to Art 64(4) and related requests, (26 April 2013), TC V, at 122–123, www.icc-cpi.int/iccdocs/doc/doc1585619.pdf.

290 Judge Van den Wyngaert in particular raised concerns over the continued use Witness 4 (the key witness against Mr Muthaura who the Prosecutor says was bribed) even though the prosecution knew of inconsistencies with this witness' account of events before the conformation of charges hearing in 2011. *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-728-Anx2, Decision on defence application pursuant to Art 64(4) and related requests, Concurring Opinion of Judge Christine Van den Wyngaert (26 April 2013) at paras 1 and 4, www.icc-cpi.int/iccdocs/doc/doc1585626.pdf.

291 *Ibid*, at para 4.

292 See n 102, above, (OTP Strategic Plan), 11.

293 'Commentary on the ICC Draft Guidelines on Intermediaries' (Open Society Justice Initiative and International Refugee Rights Initiative, 18 August 2011), www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf and 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (Redress, 15 October 2010), www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf.

294 The Hague Working Group (THWG), *Code of Conduct for Intermediaries* (Draft, April 2012).

295 The Hague Working Group (THWG), *Model Contract for Intermediaries* (Draft, April 2012).

296 Draft Guidelines governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries (ICC, April 2012).

297 See n 293, above, (Open Society, Commentary on Draft Guidelines) and (Redress, Comments on Draft Guidelines).

298 'Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties', (Open Society Justice Initiative, December 2011), at p 1, www.opensocietyfoundations.org/sites/default/files/intermediaries-20111212.pdf.

299 ASP, ICC-ASP/11/Res 8, Strengthening the International Criminal Court and the Assembly of States Parties (21 November 2012), at para 50, www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res8-ENG.pdf.

300 See n 127, above, (IBA consultation with Registry).

301 See n 268, above, (IBA consultation with the OTP).

302 See OTP's Prosecutorial Strategy 2009–2012, footnote 1. In the OTP's draft Prosecutorial Strategy for 2013–2015, there is mention of an Operational Manual for 2013–2015 but there is no indication that it will be made public.

Chambers,³⁰³ which raises further concerns over the Court's ability to enforce them.

Witness interference

While on the one hand there are clear investigative weaknesses on the part of the OTP as already outlined, the Office also reports an increase in the threats and intimidation of ICC witnesses. This, the OTP contends, creates a 'general climate of fear' which negatively impacts the cooperation of prosecution witnesses and the OTP's ability to prosecute.³⁰⁴ Although allegations of witness interference have been reported in a number of ICC cases,³⁰⁵ the OTP says that the Kenya situation is unprecedented³⁰⁶ and probably the most extreme case for these activities.³⁰⁷ Ultimately such allegations led the Prosecutor to withdraw all charges against Mr Muthaura in March 2013. According to the Prosecutor's public statement, intimidation and interference were some of the main obstacles that the OTP faced in the investigation of Mr Muthaura.³⁰⁸ Purportedly, some witnesses were unwilling to testify or provide evidence to the prosecution and more critically, the key witness against Mr Muthaura was dropped after admitting to have accepted bribes.

The apparent lack of effective protection has led to fears for the safety of the witnesses being questioned during the investigations carried out by the prosecution in Kenya.³⁰⁹ The prosecution

has alleged that '[m]any potential witnesses expressed a fear of being harmed or even killed if they cooperate with the prosecution, and several declined to testify on this basis.'³¹⁰ Defence teams in both Kenya cases have dismissed the prosecution's allegations as unsubstantiated and unsupported by sound investigation and material evidence.³¹¹ Ultimately a judicial determination will have to be made concerning these allegations.

The IBA condemns all forms of witness interference, especially threats and intimidation, and stresses the need to guarantee the safety and security of all witnesses who interact with the ICC. The issue again highlights the problematic issue that independent investigations and convictions are required in order for the judges to impose sanctions under Article 70 of the Rome Statute. Given its role as a party to these proceedings and the party alleging the existence of such interference, it is difficult for the prosecution to conduct independent investigations into these allegations.

Regulating contact with the opposing party's witnesses

The judges have also had to address the issue of improper contact by one party with witnesses of the opposing party.³¹² The TCs have adopted case specific protocols in the Kenya cases (*Ruto Sang and Muthaura Kenyatta*³¹³),³¹⁴ the *Gbagbo* case³¹⁵ and the *Banda Jerbo* case³¹⁶ to regulate the procedure to be followed by the parties when they wish to contact

303 'The Guidelines are based first and foremost on the legal structure of the Court, and take into consideration the relevant jurisprudence of the Court. It is recognised that the Guidelines do not in any way bind or limit the Chambers' exercise of their powers': see n 296, above, (ICC Guidelines for Intermediaries), 3.

304 See n 102, above, (OTP Strategic Plan), 9.

305 For instance, in the *Bemba* trial, several cases of threats and witness intimidation have been reported since July 2011. These threats were allegedly made against prosecution witnesses and their families in connection with their testimony at the Court. According to the TC, the allegations of threats and witness intimidation submitted by the prosecution suggested that the testimonies and identities of prosecution witnesses had been revealed for witnesses whom the Chamber had granted protective measures to protect their identities: see n 265 (*Bemba*).

306 'The witness security issues are daunting, the incidents of witness tampering and interference unprecedented.' *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-437-Red2, Public Redacted Version of the Prosecution Response to 'Defence Application for (1) An Order prohibiting the Prosecution from contacting potential Defence witnesses without following the procedural safeguards stipulated in other cases before the ICC and (2) An Order to the Prosecution to disclose information on all contacts between the Prosecution and potential Defence witnesses' (19 June 2012), OTP, at para 45, www.icc-cpi.int/iccdocs/doc/doc1429257.pdf.

307 See n 38, above, (IBA consultation with the OTP).

308 See n 252 (Statement by ICC Prosecutor).

309 'Police identify eight Kenyans interfering with ICC witnesses', (*The Star*, 20 March 2012), www.the-star.co.ke/news/article-25631/police-identify-eight-kenyans-interfering-icc-witnesses; 'ICC team investigates witness tampering', (*The Star*, 17 April 2012), www.the-star.co.ke/news/article-22021/icc-team-investigates-witness-tampering.

310 See n 76, above, (*Ruto Sang*, Prosecution Motion on Witness Preparation), at para 17; see n 76, above, (*Muthaura Kenyatta*, Prosecution Motion on Witness Preparation), at para 17.

311 See n 77, above, (*Ruto Sang*, Defence Response to Prosecution Motion on Witness Preparation), at para 22. See n 77, above, (*Muthaura Kenyatta*, Defence Response to Prosecution Motion on Witness Preparation), at para 31.

312 For instance, in the *Muthaura Kenyatta* case, this issue was prompted after Mr Muthaura's defence counsel denounced the prosecution for using an intermediary to contact a defence witness without following the procedural safeguards stipulated in other ICC cases. *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-T-18, Transcript, (12 June 2012), PTC II, p 67, lines 7-9, 18-21, www.icc-cpi.int/iccdocs/doc/doc1430824.pdf.

313 After the Prosecutor withdrew all charges against Francis Kirimi Muthaura on (11 March 2013), this case was renamed *The Prosecutor v Uhuru Muigai Kenyatta*.

314 *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-449-Anx, (24 August 2012), TC V, www.icc-cpi.int/iccdocs/doc/doc1459152.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-469-Anx, (24 August 2012), TC V, www.icc-cpi.int/iccdocs/doc/doc1459164.pdf.

315 *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-49, Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, (6 March 2012), PTC III, www.icc-cpi.int/iccdocs/doc/doc1348643.pdf.

316 *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-451-Anx, Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party, (19 February 2013), TC IV, www.icc-cpi.int/iccdocs/doc/doc1554601.pdf.

a witness of the opposing party. The key provisions under these protocols require the opposing party to give notice of their intended contact with the witness of the other party and stress the need to obtain the witnesses' consent and protection of their identity.³¹⁷

The IBA recognises that contact between a party and a witness of the opposing party may be beneficial for the efficient management of the proceedings, and welcomes the Court's efforts to regulate this practice. However, there are two drawbacks to the Court's current reliance on protocols: first, there are various procedural protocols across all ICC cases and the current case by case approach has led to different protocols being drafted in each case. The entire process needs to be standardised and streamlined to ensure consistency; second, there is a lack of effective sanctions for these protocols. This issue was raised in Mr Muthaura's application for sanctions against the prosecution based on alleged improper contacts by prosecuting counsel with defence witnesses, but unfortunately was never adjudicated as Mr Muthaura's charges were dropped shortly thereafter.³¹⁸

While such matters are normally addressed as offences against the administration of justice, the matter may also be addressed as a disciplinary infraction under a code of professional conduct. As indicated in Chapter 3 of this report, the current Code applies only to defence and victims' counsel; however, the OTP has indicated its intention to promulgate a code of professional conduct for prosecution counsel which is a welcome development.

ICC enforcement regime for false testimony and witness interference

An important thread running through the issues discussed in this chapter is the Court's ability to sanction breaches committed by or against witnesses.³¹⁹ Convictions for these offences against the administration of justice attract a sentence of imprisonment of up to five years and/or a fine.³²⁰ The challenge is that the Prosecutor is responsible

for initiating and conducting such investigations and prosecutions.³²¹ This is problematic when there are potential conflicts of interest where the witnesses or intermediaries in question were relied on by the prosecution itself. It is unclear whether any Article 70 investigations into false testimony or witness interference allegations have in fact been commenced by the prosecution.³²² The OTP has indicated that it will 'investigate obstructions of justice' as part of its draft Strategic Plan for 2013–2015, but when the question of specific investigations was put to the OTP during consultations, the OTP declined to answer on the basis of confidentiality and indicated that nothing had as yet been made public.³²³ It is therefore uncertain what the OTP's approach is to these investigations; the standards governing them; the range of persons who will be included in the investigations; and whether there will be different approaches to investigations involving defence and prosecution witnesses.

However, the prospect of these investigations is a live issue. In the *Lubanga* verdict, the TC raised the possibility of the Prosecutor initiating investigations into Article 70 violations by intermediaries who likely caused witnesses to provide false testimonies. The Chamber noted that 'the Prosecutor should ensure that the risk of conflict is avoided for the purposes of any investigation.'³²⁴ To date, there is no public indication of the status of this investigation or if it has in fact commenced.

The enforcement regimes at other international tribunals differ from those at the ICC, providing more possibilities for investigations. At the ad hoc tribunals a Chamber, or a Contempt Judge at the Special Tribunal for Lebanon,³²⁵ may direct the Prosecutor to investigate allegations of witness interference or false testimony. However, where there is a conflict of interest, they may appoint independent *amicus curiae* to investigate the matter and report to the Chamber or the judge whether there are sufficient grounds for

317 See n 314, above, (*Ruto Sang*, Annex), at para 4–5; see n 314, above, (*Muthaura Kenyatta*, Annex), at para 4–5; See n 316, above, (*Banda Jerbo*, Annex), at paras 22–31; *The Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-49-Anx, Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations (6 March 2012), PTC III, www.icc-cpi.int/iccdocs/doc/doc1348647.pdf.

318 'The absence of a code of conduct governing the behaviour of persons acting as Prosecution counsel in the ICC is troublesome and may, prima facie, leave complaints such as the one contained in this application without the remedy it deserves.' See n 107, above, (*Muthaura Kenyatta*, Defence Application for Sanctions), at para 19.

319 Art 70, Rome Statute.

320 Art 70(3), Rome Statute.

321 Rules 163 and 165, (RPE); *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-350-Red2-ENG CT3 WT 1404-2011 1-67 PVT, Transcript, (14 April 2011), TC I, at p 17, lines 12–19, www.icc-cpi.int/iccdocs/doc/doc1391720.pdf. Indeed, during the *Lubanga* case the judges assessed the appropriate procedures for an Art 70 investigation and found that the Rome Statute framework clearly designates the Prosecutor as solely responsible for initiating and conducting investigations for offences against the administration of justice.

322 *Prosecutor v Katanga Ngudjolo*, ICC-01/04-01/07-2731, Decision on the Prosecution's renunciation of the testimony of witness P-159, (24 February 2011), TC II, at para 18, www.icc-cpi.int/iccdocs/doc/doc1027401.pdf.

323 See n 102, above, (OTP Strategic Plan), 9; see n 38, above, (IBA consultation with the OTP).

324 See n 52, above, (*Lubanga*, Judgment), at para 483.

325 At the Special Tribunal of Lebanon (STL), the President designates a Contempt Judge to hear cases of contempt and interference with its administration of justice. Rule 60 bis(C), STL Rules of Procedure and Evidence.

initiating investigations;³²⁶ or the judge may initiate proceedings themselves.³²⁷ When compared with the ICC's enforcement framework, these provisions give judges far more authority and flexibility to address such misconduct.³²⁸ In similar situations at the ICC when there are strong allegations of false testimony or witness interference but no apparent

investigations, and/or there is a real risk of a conflict of interests, the IBA encourages the Court to consider replicating the appointment of *amicus curiae* to make recommendations on whether investigations should be launched, and whether they should be conducted internally or externally.

326 See *Prosecutor v Vojislav Sešelj's*, 12/48018BIS, Redacted Version of the 'Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Sešelj's Motion for Contempt Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon', (29 June 2010), TC III, www.icty.org/x/cases/seselj/tdec/en/100629_1.pdf; STL, *Prosecutor v Salim Jamil Ayyash Mustafa Amine Badreddine Hussein Hassan Oneissi Assad Has San Sabra*, Decision on allegations of contempt, (29 April 2013), Contempt Judge, www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/other/f0021__r60bis.

327 Rules 77(C), 91(C) (ii), (ICTY and ICTR Rules); Rule 60 bis(E), (STL Rules).

328 It is worth noting that while the ad hoc tribunals' and the STL's enforcement regimes for witness interference and false testimony appear stronger than the ICC system, they may not offer a definitive solution and have been criticised. See n 264, above, (Findlay & Ngane), 30. Professor Sluiter argues that the sporadic and generally unsuccessful proceedings (one conviction out of three prosecutions) simply demonstrates that the Tribunal's 'law of contempt' has no teeth', Göran Sluiter, 'The ICTY and Offences against the Administration of Justice' (2004), 2 *Journal of International Criminal Justice* 631, 640.

Key findings

- While the IBA strongly commends the Court and the ASP for its ground-breaking efforts to address the issue of intermediaries as well as the open consultation with NGOs during this process, the legal status of the guidelines remains unclear and follow-through is required to ensure clarity of the role of intermediaries and to formalise the relationship between intermediaries and different organs of the Court.
- There is an urgent need for investigations and prosecutions into allegations of witness interference. The IBA considers that definitive action and public information will have a positive impact in raising awareness of the seriousness and criminal nature of offences against the administration of justice including the possibility of serious sanctions and imprisonment.
- The IBA is concerned with the statutory framework which gives the OTP unilateral authority to investigate offences against the administration of justice, as there is no scope for oversight or accountability for such investigations and prosecutions, even when there are apparent conflicts of interest.
- The IBA recognises that contact between a party and a witness of the opposing party may be beneficial for the efficient management of the proceedings, and welcomes the Court's ordering of protocols regulating this practice. However, the casuistic approach to the protocols has led to inconsistent approaches and the Chambers' ability to enforce breaches of the protocols is unclear.

Recommendations

1. The IBA fully supports the internal review of the OTP's investigative practices and urges the OTP to make the findings public. In general, the OTP is encouraged to directly assess the credibility of its witnesses (through its own staff and not intermediaries) as early in the investigations as possible.
2. The IBA urges the Court and the OTP to ensure timely investigations of all allegations of false testimony and witness interference, especially those involving threats and intimidation. Furthermore, results of such investigations should be published as quickly as possible.
3. In lieu of amending the Statute or Rules, the IBA recommends that the ICC judges consider appointing *amicus curiae* to make recommendations on whether investigations should be launched (and whether they should be conducted internally or externally) when there are strong allegations of false testimony or witness interference but no apparent investigations, regardless of who the alleged offender is.³²⁹
4. The IBA encourages the prompt and formal Court-wide implementation of the *Draft Guidelines on Intermediaries* and for each ICC office using intermediaries to designate a focal point to record the office's interactions with intermediaries; and
5. The IBA encourages the Court to standardise various procedural protocols across all cases, as opposed to the current case by case approach.

³²⁹ At the ICC, a TC may appoint an *amicus curiae* at any stage of the proceedings under the RPE, if it considers it desirable for the proper determination of the case. This can be done by inviting or granting leave to 'a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.' The parties to the proceedings are always given the opportunity to respond to the observations submitted by the amicus. Rule 103(1), (RPE).

7 – Legal Status of ICC Witnesses Following Testimony: The Asylum Seekers

Drafters of the law applicable to international criminal tribunals have paid significant attention to the question of how to obtain the presence of suspects and witnesses at trial. However, what should happen to individuals once their presence at the seat of the Court is no longer required?³³⁰

In 2011 four ICC witnesses who were in custody in the DRC were transferred to The Hague to testify on behalf of the defence in the *Lubanga* and *Katanga Ngudjolo* cases. Based on the cooperation arrangements between the Court and the Netherlands, the witnesses should have been returned to the DRC following their testimony. However, all four applied for asylum in the Netherlands, raising difficult questions about the legal status of witnesses who testify before the ICC and the respective obligations of the Court and the

Host State.³³¹

Under the agreement between the ICC and the Netherlands (the ‘Headquarters agreement’), witnesses who arrive on the territory of the Host State solely for the purpose of appearing before the Court, do not have the status of a visitor or immigrant, and are considered to fall under the ICC’s jurisdiction.³³² However, as a signatory to the Refugee Convention, the Torture Convention and the European Convention on Human Rights, in line with the principle of non-refoulement, the Netherlands is barred from returning persons to their country of origin if there is a well-founded risk that they will be tortured or persecuted.³³³ Thus, while not technically under the jurisdiction of the Netherlands, the presence of these witnesses in the country places some obligation on the Netherlands as Host State.

Furthermore, legal questions arise when the witness in question is also an accused before the Court, as evinced by an application made on behalf of Mr Mathieu Ngudjolo Chui, the first person acquitted by the ICC. Mr Ngudjolo has sought asylum in the Netherlands on the basis of a fear of persecution if returned to his native DRC. Interestingly, having testified in his own defence, he has also claimed the statutory protection to which an ICC witness is entitled. Both applications are currently pending, the former before the Dutch courts and the latter before the ICC.

These claims have proven to be a litigious conundrum in terms of the overlapping jurisdictions of domestic, regional and international courts, and raise questions about who owes human rights obligations to these witnesses and the scope of these obligations. This chapter will explore the legal, jurisdictional and financial implications of asylum applications on the ICC and the Netherlands as Host State, and the challenges of witness asylum claims.

331 The witness in the *Lubanga* case sought asylum on 1 June 2011 and the three witnesses in the *Katanga Ngudjolo* case applied for asylum on (12 May 2011). See *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2766-RED, Redacted Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application, (5 August 2011), TC I, at para 11, www.icc-cpi.int/iccdocs/doc/doc1189724.pdf; *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3128, Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, (24 August 2011), TC II, at para 2, <http://icc-cpi.int/iccdocs/doc/doc1209549.pdf>.

332 Art 26, Headquarters Agreement between the International Criminal Court and the Host State.

333 Art 33, Convention on the Status of Refugees; Art 3, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Art 3, European Convention on Human Rights.

330 Göran Sluiter, ‘Shared Responsibility in International Criminal Justice the ICC and Asylum’ (2012) 10 *Journal of International Criminal Justice* 661, 663.

TABLE 2 – JUDICIAL TREATMENT OF ICC WITNESS ASYLUM APPLICATIONS

	International Criminal Court (ICC)	Democratic Republic of the Congo (DRC)	Host State (The Netherlands)						European Court of Human Rights (ECtHR)
			Ministry of Foreign Affairs	Immigration and Naturalisation Service (IND)	District Court	Court of Appeal	Council of State (Immigration Chamber)	Supreme Court	
REQUESTS	TC requested to implement protective measures, including cancellation of transfer back to the DRC, and to facilitate asylum procedure in the Netherlands.	Consulted by the ICC on whether witnesses should remain in detention and, if so, in whose custody.	Requested by the ICC to answer whether the Netherlands would take control of the witnesses until the final outcome of the asylum procedure was determined.	Decided upon the witnesses' asylum applications.	Lubanga Immigration chamber requested to judge the lawfulness of Mr Longa's detention. Katanga Ngudjolo Civil chamber requested to order the Netherlands to take over custody of the witnesses.	The Netherlands requesting the Civil Court find that witnesses were lawfully detained based on Art 93(7) Rome Statute and that the Netherlands does not have jurisdiction over them.	Council requested to find that the District Court erroneously concluded it couldn't apply Dutch law to adjudicate in the matter of the lawfulness of Mr Longa's detention.	N/A	Mr Longa's position was that his detention at the ICC detention centre was unlawful and that the Netherlands should exercise jurisdiction in relation to his detention.
LUBANGA CASE	Court has a duty under Art 21(3) to ensure witness has opportunity to make asylum request. After this the Netherlands should take over custody to process the application.	Custody to ICC transferred temporarily and in good faith. Having completed their testimony, the witness should thus be returned to DRC custody.	Transfer of witness to ICC custody was based on agreement between ICC and DRC, to which the Netherlands is not party. There is no obligation to accept witness into its territory.	Concluded that, since Mr Longa was not within the jurisdiction of the Netherlands, it was not possible for him to request asylum. Mr Longa later withdrew his asylum request.	Dutch law not applicable to Mr Longa as per Art 88 of Uitvoeringswet (Dutch Implementation Act).	N/A	Dutch law not applicable to Mr Longa, under Art 88 of Uitvoeringswet.	N/A	The Netherlands does not have jurisdiction in the sense of Art 1 of the ECHR and Dutch law is not applicable to Mr Longa. Host State Agreement between ICC and Dutch still applies and ICC is responsible for witnesses.
KATANGA NGUDJOLO CASE	Asylum proceedings make return of witnesses impossible due to the ICC's human rights obligations under Art 21(3) of Rome Statute.	Requested immediate return of witnesses, pursuant to agreement adopted by the DRC and ICC governing their transfer to The Hague.	Witnesses should remain in ICC custody pending asylum applications, because the Netherlands is not obligated to receive them.	Rejected asylum requests under Art 1F of Refugee Convention and decided that return of witnesses to DRC would not entail a risk of treatment contrary to Art 3 ECHR.	The Netherlands has full jurisdiction over asylum applications and should accept the transfer of the witnesses to its custody.	The Netherlands does not have jurisdiction (following decision of the ECtHR and overturning decision of District Court).	N/A	Pending decision on appeal against Court of Appeals' ruling on Dutch jurisdiction and responsibility for witnesses.	N/A

The asylum applications

Under the Headquarters Agreement between the ICC and the Host State (Headquarters agreement) witnesses 'shall enjoy[...] privileges, immunities and facilities to the extent necessary for their appearance before the Court for purposes of giving evidence'. These include immunity from personal arrest or detention in respect of acts or convictions prior to their entry into the host state and exemption from immigration restrictions or alien registration when they travel for the purposes of their testimony. These privileges and immunities cease to apply within 15 days after the witnesses' presence is no longer required at the Court provided that they had an opportunity to leave the Netherlands. To facilitate these privileges, the Court must provide the witness with a document certifying that their appearance is required and specifying the time during which appearance is necessary. This obligation appears to be fairly standard but does not directly address the complex issues which may arise with detained witnesses or witnesses who have completed testimony and cannot be repatriated to their home country due to security concerns. In such instances, the witnesses can make asylum applications to remain in the Netherlands, which is precisely what four witnesses in the *Katanga Ngudjolo* and *Lubanga* cases decided to do.

The asylum applications by the four DRC witnesses represent the first-ever judicial determination of the ICC's reverse cooperation obligations under Article 93 of the Rome Statute, the obligations to protect detained witnesses no longer required by the Court and the scope of the Host State's obligation. What appeared in principle to be a straightforward arrangement with DRC authorities under Article 93(7) of the Statute to transfer four prisoners to the ICC to facilitate their testimony became a legal and logistical dilemma for all concerned.³³⁴ The TCs, the DRC government, various Dutch courts, the Dutch government and the European Court of Human Rights (ECtHR) have all been involved in the thorny jurisdictional questions which have arisen from these cases.

In their applications, the witnesses contended that having testified at the ICC and casting DRC officials in a negative light, they would be tortured or killed if they were to return to the DRC. They

argued that both the ICC and the Dutch authorities had an obligation to ensure their protection; the former in keeping with its obligation to ensure the safety, security and dignity of witnesses and its obligations under international human rights law, and the latter due to its obligations under international treaties including the Refugee and Torture Conventions.

Different rulings by two trial chambers

The *Lubanga* TC ruled that the detained witness should be returned to the DRC, pursuant to the Court's agreement with the DRC authorities.³³⁵ The judges were satisfied that sufficient protective measures were in place in the DRC upon the witness' return and thus the ICC had met its protection obligations.³³⁶ The Chamber noted that it did have a duty under article 21(3) of the Statute to ensure that the witness was given a real opportunity to make his asylum request.³³⁷ Once this duty was fulfilled, the Chamber stressed that since it did not have the authority to consider the asylum application it would be unable to detain the witnesses only for that purpose, and the Host State would need to take over custody of the witness while the asylum application was processed.³³⁸ Ultimately, the Dutch refused to accept jurisdiction over the witness, thus he remained in ICC custody until his asylum request was withdrawn and his application before the ECtHR was finalised, after which the IBA understands he was returned to the DRC.

By contrast, while the judges in the *Katanga Ngudjolo* case concurred with aspects of the *Lubanga* decision concerning the availability of protective measures and the need to ensure the witnesses' right to apply for asylum,³³⁹ they reasoned that the pending asylum request made the return of the witnesses legally impossible.³⁴⁰ The TC considered it necessary to consult the Netherlands and the DRC to determine whether the witnesses should stay in detention, and if so in whose custody.³⁴¹ Contrary to TC I in the *Lubanga* case, it did not immediately assume that the Netherlands would take over custody in light of the asylum proceedings.

³³⁴ Art 93 (7), Rome Statute states:

'(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.'

³³⁵ See n 331, above, (*Lubanga*, Decision on Special Protection Measures), at para 86; Art 93(7), Rome Statute.

³³⁶ *Ibid*, (*Lubanga*, Decision on Special Protection Measures), at para 86.

³³⁷ *Ibid*.

³³⁸ *Ibid*, at paras 87–88.

³³⁹ See n 331, above, (*Katanga Ngudjolo*, Decision on Security Situation of Witnesses), at paras 6–13.

³⁴⁰ *Ibid* at para 15.

³⁴¹ *Ibid* at para 16; *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3003-tENG, Decision on an Amicus Curiae application and on the 'Requête tendant à obtenir présentations des témoins DRC D02 P 0350, DRC D02 P 0236, DRC D02 P 0228 aux autorités néerlandaises aux fins d'asile' (Arts 68 and 93(7) of the Statute), (9 June 2011), TC II, at para 85, www.icc-cpi.int/iccdocs/doc/doc1093334.pdf.

At the time of writing, the consultations have not offered a solution to the three witnesses' custody situation, since the Netherlands remains adamant that the witnesses should remain in ICC custody³⁴² while the Court still views sending the witnesses back to the DRC as a violation of their human rights.³⁴³ The TC did stress that 'the Court cannot contemplate holding these witnesses in custody indefinitely.'³⁴⁴ However, without the cooperation of the Netherlands in accepting the transfer of custody, it seems that the Court considers its hands tied so that it has no other choice but to keep the witnesses at its detention centre, at least for the time being.

Proceedings in the Dutch courts

Ultimately the applicability of Dutch asylum law needed to be considered. The District Court of The Hague (immigration chamber) came to different conclusions in the two cases. For Mr Longa (witness in the *Lubanga* case), the immigration District Court found that Dutch law was not applicable and he was to remain in ICC custody.³⁴⁵ However, for the three witnesses in the *Katanga Ngudjolo* case, the immigration District Court found that the Netherlands had full jurisdiction over the asylum applications submitted by the witnesses and obliged the Dutch authorities to apply the ordinary asylum procedure.³⁴⁶

This difference seems, inter alia, to stem from the judges' inconsistent interpretation of Article 88 of the *Uitvoeringswet Internationaal Strafhof*, which is a Dutch law regulating the implementation of the Rome Statute.³⁴⁷ While the immigration District Court dealing with Mr Longa's case ultimately used this as the basis for the non-applicability of Dutch law,³⁴⁸ the immigration District Court dealing with the *Katanga Ngudjolo* witnesses found that the provision was restricted to issues of *habeas corpus* and did not stand in the way of asylum procedures.³⁴⁹

However the three *Katanga Ngudjolo* witnesses still faced the unwillingness of the Netherlands to accept custody over them,³⁵⁰ and therefore separately began civil proceedings, requesting the civil District Court of The Hague to rule that the Netherlands should take over custody of them pending the asylum procedure.³⁵¹ In September 2012, the civil District Court granted their request and ordered the Dutch State to make arrangements with the ICC for the witnesses' transfer within a period of four weeks.³⁵² However, this decision was subsequently reversed on appeal by the Dutch Court of Appeal, and at the time of writing the witnesses are appealing this judgment before the Dutch Supreme Court.

European Court of Human Rights judicial treatment

Meanwhile Mr Longa (*Lubanga* witness), disagreeing with the immigration District Court's ruling, went on to petition the European Court of Human Rights (ECtHR), arguing that his rights under the European Convention of Human Rights

342 Stated in a note verbale sent to the Court by the Dutch Ministry of foreign affairs. See *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3254, Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, (1 March 2012), TC II, at para 9, www.icc-cpi.int/iccdocs/doc/doc1344709.pdf; *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3291, Requests concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, (14 May 2012), TC II, at para 5, <http://icc-cpi.int/iccdocs/doc/doc1410948.pdf>.

343 *Ibid.* (*Katanga Ngudjolo*, Decision on the Urgent Request for Status Conference), at para 11. Additionally TC II noted that the return of the witnesses would lead the Netherlands to violate the witnesses' right to invoke the non refoulement principle. See n 341, above, (*Katanga Ngudjolo*), at para 73.

344 *Ibid.* (*Katanga Ngudjolo*), at para 85.

345 This ruling was upheld by the immigration chamber of the Council of State, which is the highest court of appeal with regard to immigration law. See Raad van State, LJN: BW0617, Judgment, (22 March 2012), at para 2.1.7, <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW0617>.

346 *Rechtbank's-Gravenhage*, LJN: BU9492, Judgment, (28 December 2011), at paras 9.5, 9.9–9.10, <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BU9492>. Prior to this decision, the Dutch Immigration and Naturalisation Service (IND) had refused to accept the asylum applications, based on the Headquarters Agreement between the ICC and the Netherlands, which specifies that persons summoned by the ICC are not subject to Dutch law. See A Habteslasie, 'Asylum Applications of Katanga Witnesses May Complicate ICC's Future Work', (*ilawyerblog.com*, 1 October 2012), <http://ilawyerblog.com/asylum-applications-of-katanga-witnesses-may-complicate-iccs-future-work>.

347 *Uitvoeringswet Internationaal Strafhof* (20 June 2002, Stb. 2002, 314): under Article 88 Dutch law is not applicable to detention undergone by order of the Court in spaces in the Netherlands made available to the ICC.

348 See n 345, above, (Raad van State, Judgment), at para 2.1.7.

349 See n 346, above, (*Rechtbank's-Gravenhage*, Judgment), at para 9.5.

350 See n 342, above, (*Katanga Ngudjolo*, Request for the Detention of Witnesses), at para 5.

351 The State of the Netherlands was summoned before the Provisional Measures Judge of the civil division of the District Court, based on the plaintiffs' claim that the state had committed a wrongful act against them by not ending their unlawful detention at the ICC detention centre. The witnesses claimed that the Netherlands, as host state to the Court and through the pending asylum procedures, has the obligation to offer effective remedy to the witnesses' detention situation. It is within a Dutch civil court's jurisdiction to adjudicate claims of an individual against the state, as long as the dispute is of a civil nature.

352 See n 346, above, (*Rechtbank 's-Gravenhage*, Judgment), at para 3.4, 3.6, 3.8 and 4. The Dutch Court concluded that the witnesses were in a desperate detention situation and that their detention by the ICC has been illegal since August 2011. The Dutch Court further held that since the ICC framework could not provide the witnesses with procedural rights during their detention, the fact that the Netherlands is the Court's Host State may well provide it with jurisdiction over these witnesses, especially considering that the witnesses' continued detention by the ICC is a consequence of the Dutch asylum claims.

(ECHR)³⁵³ were violated because of his continued detention by the ICC in Dutch territory.³⁵⁴ The ECtHR held that Mr Longa's detention by the ICC was still governed by the agreement between the ICC and the DRC³⁵⁵ and thus there was no legal vacuum to speak of with jurisdiction resting squarely with the ICC. The ECtHR also found that the Netherlands did not have jurisdiction over the witness as Dutch law was not applicable to him, underlining that the 'fact that the applicant is deprived of his liberty on Netherlands' soil does not of itself suffice to bring questions touching on the lawfulness of his detention within the 'jurisdiction' of the Netherlands.³⁵⁶ Furthermore, the Netherlands did not have an obligation to allow the witness to remain on its territory to await immigration and asylum proceedings.³⁵⁷

This decision later had significant implications for the three *Katanga Ngudjolo* witnesses, because the Dutch Court of Appeal in the civil proceedings followed the ECtHR judgment, concluding that Article 93(7) of the Rome Statute still formed the legal basis for their detention at the ICC and thus the Netherlands did not have jurisdiction.³⁵⁸ That decision ultimately overturned the previous decision of the civil District Court of The Hague.³⁵⁹ While the decision by the ECtHR appears to have resolved the disparate domestic treatment, the Dutch Court of Appeal's decision in the civil proceedings removing Dutch jurisdiction over the witnesses is currently being appealed by the three *Katanga Ngudjolo* witnesses before the Supreme Court, the highest court in the Netherlands.³⁶⁰

In sum, the latest Dutch decisions indicate that the Netherlands has no obligation to take custody of the witnesses. For the three *Katanga Ngudjolo* witnesses, this means that they remain in ICC custody until the final outcome of their asylum proceedings, which may not be finalised before the

end of 2013 and could be extended to the summer of 2014.³⁶¹ With regard to the civil procedure before the Dutch Supreme Court, the witnesses' asylum counsel also warned that these separate appeals could continue until the autumn of 2014.³⁶² If the final outcomes are negative, the ICC Registry has made it clear that there will be nothing preventing the return of the witnesses to the [DRC].³⁶³ Indeed the TCs have underlined that they have a limited responsibility³⁶⁴ and therefore the Court cannot keep custody of the witnesses indefinitely.³⁶⁵

Acquitted persons before the ICC – legal status as 'witnesses'

A more nuanced but related issue is the legal status of accused persons who have been acquitted by the ICC and who also testified in their own case and thus may be considered witnesses. This issue arose in December 2012, following the acquittal of Congolese defendant Mr Mathieu Ngudjolo Chui.³⁶⁶ Fearing repatriation to his native DRC based on likely persecution, Mr Ngudjolo filed an application for asylum in the Netherlands and for protection under the ICC's witness protection regime. He argued that having testified on his own behalf, he is a witness within the meaning of the Rome Statute and thus entitled to protection.³⁶⁷ Both decisions were still pending at the time of writing. Of course it is arguable whether this protection application would even have been

353 In accordance with Art 5(1)(c), ECHR.

354 *Bède Djokaba Lambi Longa v Netherlands*, Application no 33917/12, Admissibility Decision, (9 October 2012), ECtHR, at paras 51–54, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114056>. Despite Mr Longa's subsequent withdrawal of his asylum request in September 2012, the ECtHR decided to address the merits of the case to determine issues on policy grounds.

355 Based on Art 93(7) of the Rome Statute.

356 See n 354, above, (*Lambi Longa*, ECtHR Admissibility Decision), at para 73.

357 *Ibid.*, at para 81.

358 *Gerechthof 's-Gravenhage*, Judgment, (18 December 2012), LJN: BY6075, 200.114.941/01, at para 2.5, http://zoek.n.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BY6075&vrije_tekst=internationaal+strafhof.

359 The Court of Appeal also held that the ICC detention of the witnesses is based on their previous detention in the DRC, and neither a Dutch judge nor the ICC has the authority to rule on the legitimacy of their detention, and any legal remedy against their detention should therefore be addressed in the DRC. *Ibid.* at para 2.2.

360 *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3352, Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, (8 February 2013), TC II, at para 16, <http://icc-cpi.int/iccdocs/doc/doc1550464.pdf>.

361 *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3354, Request for leave to submit Amicus Curiae Observations by Mr Schuller and Mr Sluiter, Counsel in Dutch asylum proceedings of witnesses DRCD02-P-0230 DRC-D02-P-0228 and DRC-D02-P-0350, (15 February 2013), Mr Schuller and Mr Sluiter, at para 11 (d), www.icc-cpi.int/iccdocs/doc/doc1553510.pdf; Furthermore, in the event that the Dutch Immigration and Naturalisation Service (IND) is ordered to make a new decision on the asylum requests, this could take an additional six months. According to counsel, the potential new decision by the IND would then (again) be subject to judicial review, starting a new cycle of proceedings. See *Prosecutor v Germaine Katanga*, ICC-01/04-01/07-3358, Amicus Curiae Observations by Mr Schüller and Mr Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (14 March 2013), TC II, at para 13, <http://icc-cpi.int/iccdocs/doc/doc1567525.pdf>.

362 *Ibid.*, at para 17.

363 See n 36, above, (*IBA consultation with the Registry*).

364 See n 341, above, (*Katanga Ngudjolo*), at para 62.

365 According to one of the witness' Dutch counsel, three reasons help explain this limited responsibility: (i) as a criminal court, the ICC is not equipped to make a broad evaluation of risks to witnesses, a task which is generally handled by an asylum judge; (ii) the Court does not have a physical territory to host the witnesses in order to apply the non-refoulement principle, nor does it have the authority to oblige states to grant asylum; and (iii) since asylum requests have been submitted to the Dutch authorities these claims will be processed in any event. See n 330, above, (Sluiter), 670.

366 See n 49, above, (*Ngudjolo*, Judgment).

367 *The Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12-T1-ENG, Transcript, (18 December 2012), TC II, at p 17, lines 20–22, <http://icc-cpi.int/iccdocs/doc/doc1529751.pdf>.

necessary had there been framework agreements on acquittals in place to facilitate the acquitted person's safe transfer to a receiving country. This gap further highlights the inherent weaknesses of the Court's cooperation regime which has been extensively discussed in Chapter 5 this report.

Implications of asylum applications for the ICC

What do these applications ultimately imply for the ICC? On a positive note, the ICC decisions clarify the scope of the Court's obligations in relation to the protection of witnesses. Both in the *Lubanga* and *Katanga Ngudjolo* cases, the judges unanimously found that the Court's obligation to protect witnesses trumped their obligation to honour cooperation obligations under Article 93(7) of the Statute. While this may result in greater reluctance by states to cooperate in facilitating the attendance of detained witnesses in particular, it nevertheless underscores the importance of the ICC's respect for the protection of witnesses and compliance with international human rights standards.

On the other hand, the protracted legal battles have not only raised human rights issues but according to Court officials, also placed a significant financial burden on the Court, purportedly €25,000 monthly for housing the witnesses in its detention centre. Furthermore, questions have been raised

regarding the housing of witnesses and defendants together in the small detention facility. However the Registry has indicated that the International Committee of the Red Cross, which is responsible for monitoring detention conditions, has not raised any concerns in this regard.³⁶⁸

Moreover, the developments in relation to these four witnesses underscore the risks inherent in bringing witnesses to The Hague to testify given the likelihood that they may make asylum claims.³⁶⁹ The burden on human and financial resources for the Court and the Host State as well as the risk that the ICC could be perceived as not likely to honour its cooperation obligation to return witnesses in such contexts are issues which the Court will not easily resolve.

It is clear that while the ICC's legal texts pay special attention to the ways in which witnesses testify at trial and their protection throughout the proceedings, little attention has been given to the question of what should happen to these witnesses once their testimonies are complete.³⁷⁰ As one academic has surmised, 'perhaps the drafters of the Rome Statute did not anticipate that persons involved in the trials would claim they could not return to their country of origin'.³⁷¹ The differing approaches by the ICC and the Dutch courts presents serious challenges to the human rights of such witnesses, and underscores the ambiguities over the post-testimony legal status of ICC witnesses in The Hague.

368 See n 36, above, (IBA consultation with the Registry).

369 *Ibid.*

370 See n 330, above, (Sluiter), 663.

371 *Ibid.*

Key findings

- The developments concerning the legal status of the detained ICC witnesses in the first two cases reveal a gap in the legal and procedural framework which is still not fully resolved. A protracted legal process to determine the status of such witnesses is potentially detrimental to the witness and should not be a model for future cases.
- Asylum claims further underscore the challenges of the ICC's reliance on witnesses and challenges in bringing witnesses to The Hague due to their potential vulnerability, protection needs and right to request asylum.
- The asylum claims may indicate inadequate security assessments by the relevant authorities of the court.
- The status of acquitted persons (whether they were witnesses or not) who cannot return to their country for security reasons must be clarified.

Recommendations

1. The IBA recommends that the ICC, States Parties and the Host State work together and develop a joint policy on the eventual placement for witnesses and acquitted persons with asylum claims, based on their respective human rights obligations.
2. The IBA urges the Court to scrupulously assess the security risks of witnesses and their likelihood to claim asylum, and if necessary explore suitable alternatives to direct testimony in The Hague.
3. The IBA urges the Court to address the protection needs of those acquitted (whether witnesses on their own behalf or not), in accordance with international human rights standards. The IBA specifically calls on the Registry to develop a framework agreement for the relocation of acquitted persons so they are not dependent on seeking protection as witnesses if acquitted.

Conclusion

This report highlights the ICC's remarkable efforts to protect, prepare and coordinate the safe appearance of witnesses in proceedings before the Court, the most significant of which is the development of a comprehensive witness protection, support and logistics scheme – a collaborative effort between the Court, the ASP and the Host State (the Netherlands).

The IBA's consultations and research have returned mixed findings concerning the Court's discharge of its witness related responsibilities:

Firstly, the Court relies extensively on witness testimony which provides significant advantages for assessing witness credibility but creates other major challenges for the Court, including logistical and protection concerns; increased possibility of asylum applications and challenges with witness interference and bribery. The Court must continue to evaluate the way cases are built and reassess the feasibility of relying so narrowly on witness testimony as the main source of evidence. If the wholesale reliance on *viva voce* evidence is unworkable, the parties will need to explore new sources and forms of reliable evidence.

For example, the innovative and increased use of video-link testimony helps to ensure that evidence is available even when there are serious protection issues or when a witness cannot travel to The Hague. Nevertheless, video-link testimony is not the definitive remedy to overcome the obstacles related to bringing witnesses to the seat of the Court given credibility challenges and technical issues. The OTP should in addition evaluate its investigative practices in terms of sourcing and scrutinising potential witnesses while simultaneously exploring the use of forensic, medical, electronic and other forms of evidence.

Second, the ICC's protection framework is impressive. The measures are comprehensive and largely successful as there have been no reported deaths of witnesses and few allegations of injuries. Even with a limited budget and staff, the ICC is working tirelessly to ensure witnesses are secure and safe, both physically and psychologically. In addition, there has been vastly improved collaboration between the Registry and the OTP due to the implementation of their joint protocol on protection.

However, there are real leadership and capacity gaps in the VWU, the Unit tasked with neutrally administering the Court's protection scheme. In addition, the VWU's budget and staffing levels have not increased proportionally to the growing witness-protection needs. The IBA is also concerned at the lack of institutional support for defence teams in assessing the protection needs of their witnesses and in making official requests for state

cooperation, and urges the Court to address this operational deficit. Finally in-court protection and special measures have at times weighed in favour of witnesses at the expense of the fair-trial rights of the accused.

Third, the Court and the ASP have made sustained efforts to bridge the gap between the ICC and its member states and to ensure cooperation on investigations and prosecutions. Witness relocation agreements are among the important framework agreements between the Court and States which assists the Court to effectively secure witnesses. However only 12 States Parties have signed to date and of that number, not all have actually accepted witnesses into their territory. A Special Relocation Fund has also been implemented as an incentive to states willing to accept witnesses but who are hampered by resource constraints. Despite this, there have only been two states willing to enter into such agreements since 2010. Both the ICC's Seminar for Fostering Cooperation held in Nuremberg, Germany in March 2013, and the specialised workshop organised by The Hague Working Group's Cooperation facilitator, in Dakar, Senegal, on protection issues in June 2013, are welcome initiatives and evidence of the priority this issue is given on the Court and ASP's agenda.

In general, the IBA has found that while States Parties have consistently made pledges and passed resolutions on cooperation for witness related matters including the 66 cooperation recommendations in the Report of the Bureau on Cooperation, there is a lack of concrete action and follow-through by many states. While non-cooperation is problematic for the Court as a whole, the defence is placed at a particular disadvantage, since unlike the Registry and the OTP it does not have a direct communications channel in order to request cooperation from governments.

Finally, the IBA has noted gaps in the enforcement framework for some witness-related breaches. The Court has no subpoena/citation power to compel witnesses to physically attend and testify in The Hague. While judges may legally 'require' witnesses to attend, states must facilitate the process, the witnesses must volunteer or consent to appear, and the Court has no means to act if they refuse.

For the first time at the Court, judges in the Kenya cases have authorised the proofing/preparation of witnesses. The judges in the Kenya, *Gbagbo* and *Bemba* cases have also implemented procedures to regulate the contact of the opposing party with witnesses of the other party. These new procedural developments have all been documented in protocols which are annexed to the respective decisions. While the regulation of these

matters is a positive development, the case by case approach to the protocols is inconsistent and it remains unclear how breaches of the protocols will be investigated, prosecuted and sanctioned.

The ICC must be commended for the court-wide efforts to address troubling developments with intermediaries with the promulgation of the *Draft Guidelines on Intermediaries*. Given the challenges this presented in the Court's first cases, the Guidelines are to be welcomed. However, the legal status of the Guidelines is currently unclear and there are also concerns regarding the mechanism for enforcing breaches of the guidelines.

One of the most notable gaps identified in the report relates to investigations and prosecutions of violations of the administration of justice – particularly false testimony and witness interference. As investigations into such matters are solely for the Prosecution, there is no clear framework for

ensuring that investigations are commenced, to guarantee transparency and follow-through and to address situations where there are potential conflicts of interest (for example if the Prosecutor is a party to the proceedings.) Ultimately, the IBA urges the ICC to examine the model of the ICTY or the STL where *amicus curiae* is appointed to make recommendations to the judges concerning whether and in what circumstances an investigation should be initiated.

The ICC's remarkable efforts during its first decade of operations to protect, assist, prepare and coordinate the persons who testify before it have not gone unnoticed, but in the next ten years the Court and its member states will need to evaluate and review its approach to witnesses in order to bolster its international credibility and ensure fair, efficient and effective trials.

Summary of key findings and recommendations

ACCESS TO WITNESSES AND RELIANCE ON THEIR TESTIMONY

Key findings

- The ICC relies heavily on the in-court witness testimonies which may be unsustainable due to a number of challenges.
- ICC judges lack real power to force witnesses to come to The Hague to testify or to compel them to testify after they appear in Court.
- Video-link testimony is a potentially viable option to direct in-person testimony, but it has serious challenges for effective assessment of witnesses' credibility and possibly technical difficulties. Nevertheless, it is a mechanism that the Court should pursue and continuously work to improve.
- Creative steps need to be taken to utilise other forms of evidence to establish or refute charges in the cases. The OTP's decision to do this as part of its strategic objectives over the next three years is welcomed.

Recommendations

1. The IBA recommends that the ASP consider amendments to the Rome Statute and Rules of Procedure and Evidence providing the judges a citation or subpoena power to require testimony by witnesses. The IBA also proposes an amendment to Article 93(1)(e) of the Statute clearly mandating States Parties to transfer witnesses to The Hague if ordered by Chambers. The word 'voluntary' should be removed and the word 'facilitating' should be replaced with 'ensuring'.³⁷²
2. The IBA calls upon the Registry to assess its video-link technological capacity to ensure such testimony is a viable option in cases where it is found that the transfer of the witness to The Hague raises serious security risks.
3. The IBA encourages the prosecution and defence to source and utilise additional forms of evidence in place of exclusive reliance on witness testimony. These may include forensic materials, official government records, physical exhibits, medical reports, video footage and other forms of electronic evidence.

³⁷² See n 8, above, (Sluiter) 607.

Key findings

- The evolution in the debate on witness preparation and proofing at the ICC is a positive development. It underscores the importance of the issue and is evidence of the Court's progression since its first trial. However, the inconsistent approach to the practice of proofing by different Chambers is cause for concern given the lack of legal certainty for parties, participants and witnesses.
- The IBA commends the judges for adopting the Witness Preparation Protocol as well as the protocols on witness contacts that contain fundamental safeguards for the protection of witnesses and the trial proceedings as a whole. However, it is regrettable that the judges have applied a case by case approach (even on the same subject matter) leading to differing protocols being ordered (see Annex A for a list of the various ICC procedural protocols dealing with witnesses), as this creates more work for the Court and legal uncertainty for the parties.
- The *Kenyatta* decision to apply sections of the ICC Code of Professional Conduct for Counsel to the prosecution is welcome, but this does not apply to the *Ruto Sang* case or any other ICC cases, leaving it unclear how the compliance of prosecution counsel in other cases (and with other protocols) is evaluated, enforced and sanctioned since only defence counsel are governed currently by a code of professional conduct; and
- While the protocols are appended to various decisions of the Chambers, they are found nowhere else on the ICC website. Consolidating all of the protocols in one location would not only benefit the Court³⁷³ but also the Court observers monitoring the ICC's procedural developments.

Recommendations

1. The IBA encourages the Court to standardise various procedural protocols across all cases. Consideration should be given to amending the RPE or the Regulations of the Court to address these procedural matters related to witnesses. In the alternative, judges may wish to consider determining the content of such protocols in a plenary session.
2. In order to ensure accountability and compliance with the Witness Preparation Protocol, in both Kenya cases and with other court-ordered protocols, there needs to be an enforceable code of professional conduct for *all* ICC counsel. The IBA therefore urges the OTP to follow through with their plans to promulgate a professional code of conduct tailored to prosecution counsel in 2013.
3. The IBA recommends that the Registry compile all ICC protocols which have been authorised in the Court's first ten years in one easily accessible webpage of the ICC website.

³⁷³ See n 36, above, (IBA consultation with the Registry).

Key findings

- Despite tremendous successes in witness protection and support, there are gaps in the management and operational capacity of the VWU which impedes its ability to effectively function.
- There is an absence of structural support by the Registry for defence teams in their efforts to assess the protection needs of their witnesses, both in terms of communication flow and technical assistance.
- The Joint Protocol between the OTP and the VWU is a positive sign of engagement between the two organs on an issue of crucial importance. The plans to review the protocol are welcomed in light of further jurisprudential developments since it was first signed. A similar protocol should be concluded between the Registry and the defence in relation to their witness protection needs.
- While re-traumatising witnesses must be avoided, the questioning of witnesses to test their evidence and credibility is a cornerstone of criminal law, and the Court should permit counsel as much as possible to candidly question witnesses on the truthfulness of their testimony.
- Protection measures must be balanced with due process rights. More effort must be made to balance important witness security concerns and the need for public, open proceedings.

Recommendations

1. The Registry is urged to take immediate steps to review the management and operational capacity of the VWU and to ensure that the Unit has the human, technical and financial resources necessary to carry out its functions.
2. The Registry is encouraged to establish a mechanism (or subsection of the OPCD), similar to the OTP's OSU and PSU, to assist defence teams with assessing protection needs of witnesses and making referrals to the VWU when appropriate.
3. The Registry is also urged to hold adequate consultation with defence teams to determine their needs, prior to adopting policies or procedures which impact defence witnesses.
4. The IBA urges the Court to further reduce the number of closed sessions, and apply as standard procedure the grouping together of confidential questions by the parties, in order to hold the majority of the proceedings in open session.

Key findings

- The Registry and the OTP are the main channels for cooperation requests to states. However there have been complaints that some cooperation requests lack clarity and specificity; are not sent in a timely manner or are not sent to the appropriate person; or betray a lack of basic awareness of the national law of the country in question.
- States have made several pledges to cooperate with the Court, such as during the 2010 ICC Review Conference, but have failed to follow-through. The ASP Presidency is urged to call upon States to honour their commitments and pledges made during the 2010 ICC Review Conference in Kampala, Uganda and set a deadline for states to indicate what steps have been taken to achieving those goals.
- The IBA highly praises the 12 states who have concluded voluntary framework agreements on witness relocation with the Court, but these will not sustain the growing relocation needs. There may also be non-States Parties to the Rome Statute with functional national protection programmes, who may be keen to cooperate with the ICC on witness relocation matters.
- Some states have positively appointed national focal points, a central official or body which receives cooperation requests from the Court and transmits them to the relevant body within the national authorities and this should be a model for all States Parties.
- The 66 recommendations included in the ASP's 2007 *Report of the Bureau on Cooperation* have not been fully implemented. States must take concrete and definitive action to implement these recommendations to ensure the rights and interests of witnesses and to facilitate cooperation needs for the prosecution and defence; and
- The Court does not have a formal structure in place to provide guidance to the defence to submit cooperation requests to states which hinders witness related cooperation requests.

Recommendations

1. The IBA urges the Court to streamline and systematise cooperation requests to states. The Court is further encouraged to develop a formal mechanism or focal point for defence requests for state cooperation.
2. The IBA encourages States Parties to meet their cooperation obligations related to transfer, protection and support of witnesses in accordance with the Rome Statute.
3. The ASP is urged to continue to encourage states to sign agreements, to actually follow through by accepting witnesses and where there are resource challenges, to take advantage of the Special Relocation Fund which was established to facilitate States in such situations.
4. The IBA supports the appointment of national focal points and encourages the ASP to revisit this issue during its consideration of tangible ways to facilitate effective cooperation with the Court.
5. The IBA encourages more states to ratify APIC which more clearly elucidates the scope of the privileges and immunities afforded to ICC staff, counsel and witnesses; and
6. The IBA encourages the Court to continue to pursue avenues to engage with non-States Parties with functional witness protection programmes that are willing to cooperate with the ICC and receive relocated witnesses. This could be done through *ad hoc* agreements as provided in the Rome Statute's cooperation provisions.

Key findings

- While the IBA strongly commends the Court and the ASP for its ground-breaking efforts to address the issue of intermediaries as well as the open consultation with NGOs during this process, the legal status of the guidelines remains unclear and follow through is required to ensure clarity of the role of intermediaries and to formalise the relationship between intermediaries and different organs of the Court.
- There is an urgent need for investigations and prosecutions into allegations of witness interference. The IBA considers that definitive action and public information will have a positive impact in raising awareness of the seriousness and criminal nature of offences against the administration of justice including the possibility of serious sanctions and imprisonment.
- The IBA is concerned with the statutory framework which gives the OTP unilateral authority to investigate offences against the administration of justice, as there is no scope for oversight or accountability for such investigations and prosecutions, even when there are apparent conflicts of interest.
- The IBA recognises that contact between a party and a witness of the opposing party may be beneficial for the efficient management of the proceedings, and welcomes the Court's ordering of protocols regulating this practice. However, the casuistic approach to the protocols has led to inconsistent approaches and the Chambers' ability to enforce breaches of the protocols is unclear.

Recommendations

1. The IBA fully supports the internal review of the OTP's investigative practices and urges the OTP to make the findings public. In general, the OTP is encouraged to directly assess the credibility of its witnesses (through its own staff and not intermediaries) as early in the investigations as possible.
2. The IBA urges the Court and the OTP to ensure timely investigations of all allegations of false testimony and witness interference, especially those involving threats and intimidation. Furthermore, results of such investigations should be published as quickly as possible.
3. In lieu of amending the Statute or Rules, the IBA recommends that the ICC judges consider appointing *amicus curiae* to make recommendations on whether investigations should be launched (and whether they should be conducted internally or externally) when there are strong allegations of false testimony or witness interference but no apparent investigations, regardless of who the alleged offender is.³⁷⁴
4. The IBA encourages the prompt and formal Court-wide implementation of the *Draft Guidelines on Intermediaries* and for each ICC office using intermediaries to designate a focal point to record the office's interactions with intermediaries; and
5. The IBA encourages the Court to standardise various procedural protocols across all cases, as opposed to the current case by case approach.

³⁷⁴ At the ICC, a TC may appoint an *amicus curiae* at any stage of the proceedings under the RPE, if it considers it desirable for the proper determination of the case. This can be done by inviting or granting leave to 'a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.' The parties to the proceedings are always given the opportunity to respond to the observations submitted by the amicus. Rule 103(1), (RPE).

Key findings

- The developments concerning the legal status of the detained ICC witnesses in the first two cases reveal a gap in the legal and procedural framework which is still not fully resolved. A protracted legal process to determine the status of such witnesses is potentially detrimental to the witness and should not be a model for future cases.
- Asylum claims further underscore the challenges of the ICC's reliance on witnesses and challenges in bringing witnesses to The Hague due to their potential vulnerability, protection needs and right to request asylum.
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- The status of acquitted persons (whether they were witnesses or not) who cannot return to their country for security reasons must be clarified.

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Annex A: Procedural Protocols on ICC Witnesses

The ICC Pre-Trial and Trial Chambers have developed many protocols dealing with various procedural issues on a case by case basis. Since the protocols are usually appended to decisions of the Chambers or filed by the Registry, they can only be found with the respective case but nowhere else on

the ICC website. However two remain confidential. The following Appendix lists the protocols that have been adopted by the Chambers to regulate the procedure to be followed when dealing with witness's rights before the Court:

PROTOCOLS ON THE PRACTICES USED TO PREPARE AND FAMILIARISE WITNESSES FOR GIVING TESTIMONY AT TRIAL

Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial: *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1150-Conf, 1 February 2008, Referred in *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1351, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, TC I, www.icc-cpi.int/iccdocs/doc/doc494990.pdf [remains confidential and not publically available].

Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-842-Conf-Anx, Referred in *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, TC II, www.icc-cpi.int/iccdocs/doc/doc831030.pdf [remains confidential and not publically available].

Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial: *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-972-Anx, 25 October 2010, www.icc-cpi.int/iccdocs/doc/doc957501.pdf.

Victims and Witnesses Unit's Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony: *Prosecutor v William Samoei Ruto*, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-259-Anx, 12 August 2011, Registrar, www.icc-cpi.int/iccdocs/doc/doc1202135.pdf.

Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony: *Prosecutor v Francis Kiriimi Muthaura and Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-260-Anx2, 22 August 2011, Registrar, www.icc-cpi.int/iccdocs/doc/doc1208303.pdf.

Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony: *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-93-Anx1, 16 April 2012, Registrar, www.icc-cpi.int/iccdocs/doc/doc1389132.pdf.

WITNESS PREPARATION PROTOCOL

Witness preparation protocol: *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai*, ICC-01/09-02/11-588, 2 January 2013, TC V, www.icc-cpi.int/iccdocs/doc/doc1533654.pdf.

Witness preparation protocol: *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-524, 2 January 2013, TC V, www.icc-cpi.int/iccdocs/doc/doc1533651.pdf.

PROTOCOL CONCERNING THE HANDLING OF CONFIDENTIAL INFORMATION AND CONTACTS WITH THE WITNESSES OF OPPOSING PARTIES

Protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call: *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-449-Anx, 24 August 2012, TC V, www.icc-cpi.int/iccdocs/doc/doc1459152.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-469-Anx, TC V, www.icc-cpi.int/iccdocs/doc/doc1459164.pdf.

Decision on the supplementary protocol concerning the handling of confidential information concerning victims and contacts of a party with victims: *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-472, 9 November 2012, TC V, www.icc-cpi.int/iccdocs/doc/doc1505579.pdf; *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-524, 9 November 2012, TC V, www.icc-cpi.int/iccdocs/doc/doc1505586.pdf.

Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations: *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-49-Anx, 6 March 2012, PTC III, www.icc-cpi.int/iccdocs/doc/doc1348647.pdf.

Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party: *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, CC-02/05-03/09-451-Anx, 19 February 2013, TC IV, www.icc-cpi.int/iccdocs/doc/doc1554601.pdf.

PROTOCOL ON INVESTIGATIONS IN RELATION TO WITNESSES BENEFITING FROM PROTECTIVE MEASURES

Protocol on investigations in relation to witnesses benefiting from protective measures: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2007-Anx1, 26 March 2010, Registry, www.icc-cpi.int/iccdocs/doc/doc851489.pdf.

PROTOCOL ON THE VULNERABILITY ASSESSMENT AND SUPPORT PROCEDURE
USED TO FACILITATE THE TESTIMONY OF VULNERABLE WITNESSES

Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses: *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-974-Anx2, 25 October 2010, Registrar, www.icc-cpi.int/iccdocs/doc/doc957719.pdf.

Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses: *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11-93-Anx2, 16 April 2012, Registrar, www.icc-cpi.int/iccdocs/doc/doc1389133.pdf.



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