



ICC WITNESSES AND THE REVIEW OF THE ROME STATUTE: THE MISSING LINK

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Introduction

The Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court resolved in December 2019 to establish the [Independent Expert Review](#) to identify ways of strengthening the ICC and the Rome Statute system. The ASP mandated the Experts to make “concrete, achievable and actionable” recommendations to improve the entire ICC system. The Experts focused on the following technical issues: governance, judiciary, preliminary examinations, investigations and prosecutions.

Despite having a short turn-around time, the Experts concluded their consultations and submitted their Final Report to the Bureau of the ASP, the ASP, the Court, and other stakeholders on 30 September 2020 in line with the [ASP resolution](#). The Report contains 384 recommendations which require political will to implement. The Experts accordingly recommended the establishment of a standing working group to follow up on the implementation of recommendations. The Experts further considered issues relating to victim participation; tracing and identification of victims with claims for reparation; and legal representation of victims.

Conspicuously missing from the [Experts Report](#) is the issue of witness protection as generally guaranteed under article 68 of the Rome Statute. Nothing in the Experts Report deals with the safe participation of witnesses in ICC proceedings.

The law on the protection of witnesses and a few other issues that can stifle the fight against impunity from the perspective of ICC witnesses are highlighted in this brief.

Protection of Witnesses at the ICC

Category of witnesses testifying at the ICC

There are three categories of witnesses who testify at the ICC. The first category of witnesses is known as detained witnesses. These are persons that are still in detention in the country of origin for committing various domestic offences but whose testimony is crucial for an ongoing ICC case. The second category of witnesses are voluntary witnesses, and the final category is acquitted witnesses. The latter two types are undetained witnesses that usually have the freedom to travel to The Hague to testify and return to their country of origin.

What law governs witnesses testifying at the ICC?

Article 68 of the Rome Statute provides for broad protective measures for witnesses which include exclusion of the public during testimony, use of pseudonyms, image and voice distortion and relocation. Witnesses may relocate to their country of origin or a third country after finalising their testimony. However, as a [general rule](#), relocation is used sparingly and as a last resort.

Detained witnesses travel to The Hague under the provisions of article 93(7) of the Rome Statute which obliges the ICC to confine them at the ICC. Such witnesses can only return to the sending State when

the purpose of their transfer has been fulfilled. An Agreement between the ICC and the host State regulates the handling and management of the detained witnesses while testifying at The Hague.

The obligation of the ICC towards witnesses under the Witness Protection Programme

The ICC must protect witnesses against risks arising from their cooperation with the Court. This duty does not extend to protecting witnesses against risks arising from human rights violations by the authorities of their country of origin.

As also noted by authors [de Boer](#), [van Wijk](#), and [Irving](#), the situation of witnesses under the ICC Witness Protection Programme is complex and challenging as has been demonstrated by the [Katanga](#) and [Lubanga](#) cases concerning detained witnesses.

Application for asylum by detained witnesses at The Hague

The ICC must hand over all detained witness to their country of origin once they finished testifying. The protection of witnesses terminates when all undetained witnesses finished testifying at The Hague. Two critical issues have emerged regarding the termination of witness protection. Firstly, detained witnesses rejected being sent back to their country of origin, opting instead to apply for asylum in the Netherlands. Secondly, some of the undetained witnesses having failed immigration processes were returned to their countries of origin by the ICC.

Regarding detained witnesses, the cases of *Katanga* and *Lubanga*, which both concerned citizens of the Democratic Republic of Congo (DRC) highlight the predicament faced by this group of witnesses at The Hague. The *Katanga case* concerned three detained witnesses who had been in detention in the DRC since 2005 on suspicion of killing US Peacekeepers. The *Lubanga case* involved

Article 68

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

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

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

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

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

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

one witness who was in custody in the DRC since 2010 on suspicion of committing treason. They were all not formally charged by the Government of the DRC.

When they finished testifying at The Hague, they decided to apply for asylum fearing for their safety if they returned to the DRC. The witnesses made applications for asylum in the Netherlands before they could return to the DRC. Their applications for asylum in the Netherlands meant that they opted against remaining on the ICC Witness Protection Programme in favour of asylum protection. During the trial on special protective measures relating to their asylum application, a question arose as to whether the ICC could authorise their return to the DRC despite their asylum application. The Trial Chambers (TC) I and II [held](#) that the ICC should not return the suspects to the DRC until their asylum applications were disposed of by the Netherlands. The Court [held](#) that the ICC has an obligation to the witnesses to guarantee them a real opportunity to make an asylum request before they return to the DRC. The two decisions resulted in the ICC delaying the return of the suspects until the Dutch authorities had considered their applications.

These cases show the inadequacy of the ICC Witness Protection Programme. The scope of protection availed to ICC witnesses is very narrow as compared to what refugee law offers to asylum seekers due to the Rome Statute's legal framework on cooperation. The Rome Statute obliges the ICC to limit witness protection to witnesses testifying at the Court. In the *Katanga* case, the ICC [held](#) that it does not have an obligation to compel a sending or host State to respect, protect, and promote the witnesses' rights before domestic courts.

The above interpretation creates an impression that the ICC distances itself from the consideration of human rights principles in the protection of witnesses despite article 21(3) of the Rome Statute obliging it to consider international human rights law in its interpretation. Irving [argues](#) that a solution to the challenges the Witness Protection Programme currently faces lies in the international customary law right to *non-refoulement*. She presented her views in the following way:

“If the programme were actively applied in a manner consistent with the international customary law right to non-refoulement, many of the issues regarding procedural and substantive rights could be addressed. The availability of legal assistance to witnesses and other procedural rights would be relatively easy to apply (except perhaps on the budgetary level). As to the substantive rights, provision for these could be made in the relocation agreements.”

The current ICC Witness Protection Programme violates several procedural and substantive rights of witnesses. If not closely checked, it has the potential of undermining the fight against international crimes and impunity.

Since the ICC has no police force nor territory of its own, the [effectiveness](#) of its Witness Protection Programme is dependent on States cooperating on several issues including accepting the transfer of witnesses under the provisions of the Statute and accepting the relocation of witnesses and their families. Although State Parties to the Rome Statute have the general obligation to cooperate with the Court, they have no explicit commitment to conclude relocation agreements that guarantee witnesses broader rights like those enjoyed by asylum seekers under refugee law. The conclusion of [relocation agreements](#) *per se* does not “compel a State to accept witnesses on its territory in any given instance”.

The Witness Protection Programme vs Third States

The Witness Protection Programme also raises the issue of allocation of responsibility and jurisdiction between the ICC and host States. The Rome Statute is silent on the responsibility of States (hereinafter referred to as ‘third States’), other than the Netherlands, when faced with an application for asylum by witnesses who are under the ICC Witnesses Protection Programme. Once the ICC decides to remove witnesses from the Witness Protection Programme after finalising their testimony at The Hague, problems arise. The ICC, at times, choose to return some family members to their country of origin while others are relocated to another country. The effect of this decision is that the Witness Protection Programme forcefully compels families to be separated. The inability to find employment, for example, leads to witnesses applying for asylum immediately after they arrive in the host country’s territory.

The Rome Statute did not envisage such scenarios, leaving the witnesses to wonder what legal regime covers their situation since they reject returning to their country of origin. The witnesses are not only in a third State, but their presence in that third country is due to their participation as witnesses at the ICC. The fact that the regime of witness protection established by the ICC is replete with secrecy, inflexibility and incomprehensibility makes matters worse, as witnesses themselves are often not aware of the contents of the Witness Protection Agreements that the ICC concluded with the host State. The secrecy and lack of transparency put participating witnesses at a disadvantage as they toe whatever line their handlers direct. In the absence of transparent and deliberate safeguards, the Witness Protection Programme is prone to abuse and violation of participating witnesses’ rights. Participating witnesses face enormous challenges while residing in the host States’ territory, including difficulties finding legal representation, work, and sometimes education, as compared to asylum seekers who enjoy these rights throughout the process.

Undetained witnesses

Undetained witnesses face similar challenges to the ones faced by detained witnesses. Undetained witnesses have freedom of movement, both within the territory of the Netherlands when they go to testify, and in third States.

Whenever a State enters into a Witness Protection Agreement with the ICC to protect witnesses, its legal relationship must be clearly delineated. The clarification of the legal relationship is vital because a witness cannot belong to two parallel regimes of law - the ICC Witness Protection regime and the refugee law on asylum - while testifying at The Hague. The Court confirmed this in the *Katanga case*:

“...the Chamber reiterates its observation at the status conference that the criteria for considering an application for asylum, in particular those pertaining to the risk of persecution incurred by the applicants, are not identical to the criteria applied by the Court to assess the risks faced by witnesses on account of their testimony before the Court.”

The Court also rejected the request that it should assess risks faced by witnesses in light of the principle of “*non-refoulement*”.

One cannot over-emphasise the importance of clarifying the legal relationship between the ICC and host States. The invocation of refugee law will most likely interfere with a witness’ participation at The Hague as the ICC will have to wait for the host State’s resolution of the asylum application. It will also guarantee sufficient safeguards towards the rights of witnesses as they participate in trials at the Court.

The Interchange between ICC Protected Witnesses and Refugee Law

Non-refoulement

The prohibition of expulsion or return of asylum seekers is a customary international law principle enshrined in article 33 of the [Geneva Convention of 28 July 1951](#), among others. However, the TC II in the *Kantanga case* took an interesting position when it comes to witnesses who testify at the Court [holding](#) that:

“...as an international organisation with a legal personality, the Court cannot disregard the customary rule of non-refoulement. However, since it does not possess any territory, it is unable to implement the principle within its ordinary meaning, and hence is unlikely to maintain long-term jurisdiction over persons who are at risk of persecution or torture if they return to their country of origin. In the Chamber’s view, only a State which possesses territory is actually able to apply the non-refoulment rule. Furthermore, the Court cannot employ the cooperation mechanisms provided for by the Statute in order to compel a State Party to receive onto its territory an individual invoking this rule. Moreover, it cannot prejudice, in lieu of the Host State, obligations placed on the latter under the non-refoulement principle. In this case, it is therefore incumbent upon the Dutch authorities, and them alone, to assess the extent of their obligations under the non-refoulement principle should the need arise.”

The TC II also [held](#) that it has no obligation to protect witnesses who participate in trials at the Hague against risks they face outside The Hague. It is up to States to ensure that rights of witnesses are protected and promoted:

“...the Chamber is of the view that it is not duty-bound to protect witnesses against risks which they might face not only as a result of their testimony but also as a result of human rights violations by the DRC by virtue of its mandate, the Court protects witnesses from risks arising specifically from their cooperation with it, not those arising from human rights violations by the authorities of their country of origin. Article 21(3) of the Statute does not place an obligation on the Court to ensure that States Parties properly apply internationally recognised human rights in their domestic proceedings. It only requires the Chambers to ensure that the Statute and other sources of law set forth at article 21(1) and 21(2) are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights.”

The TC II [held](#) that it has a duty “to assess the risks of persecution faced by witnesses who are applying for asylum”. However, the criteria for assessment are, nevertheless, different between asylum seekers and witnesses under the Witness Protection Agreement. The TC II made the following [observation](#):

“...the criteria for considering an application for asylum, in particular those pertaining to the risk of persecution incurred by the applicants, are not identical to the criteria applied by the Court to assess the risks faced by witnesses on account of their testimony before the Court.”

Independent Expert Review of the ICC and witness protection

The relevance of the above discussion is clear when one looks at the [Report](#) of the Independent Group of Experts established by the Assembly of States Parties (ASP). The Experts Report addressed the issue of victim participation and not the critical issue of witness participation or protection.

The cases of *Katanga and Lubanga* discussed above have shown that the current ICC Witness Protection Programme does not provide enough safeguards to witnesses who testify at The Hague. Not only is the issue crucial for detained witnesses but also for undetained witnesses, particularly those who are beneficiaries of third State Witness Protection Programmes.

The Experts Report covered the issue of witnesses under the category of victim participation of the Expert Report since article 68(3), and rule 89 of the Rules of Evidence and Procedure allows victims to present their views and concerns by submitting written applications at various stages of the proceedings. While these issues are indeed important, they are different from the topics discussed in this brief. The Experts Report only dealt with matters of tracing and identification of victims with claims for reparation, legal representation of victims, and the issue of reparations. They omitted witness protective measures as generally guaranteed by article 68 of the Rome Statute. In short, the Report has not responded to the challenges that the cases of *Katanga and Lubanga* highlight, including the incorporation of human rights principles into the regime of witness protection programmes.

South Africa's ICC Witness Protection Programme

The law governing the protection of witnesses in South Africa is the Witness Protection Act No. 112 of 1998. The [Act](#) establishes the Office for Witness Protection which is led by a Director: Office for Witness Protection who is responsible for the protection of witnesses and related persons, including temporary protection, and related services.

Witness protection under the Act is offered to “any person who has reason to believe that his or her safety or the safety of any related person is or may be [threatened](#)”. It is granted to detained or undetained persons either temporarily or permanently. In considering the application for protection, the Director, in terms of section 10(1) of the Act, takes into account several factors.

“10. Consideration of application for protection.

(1) The Director must in respect of an application for protection ... take into account—

- a) the nature and extent of the risk to the safety of the witness or any related person;*
- b) any danger that the interests of the community might be affected if the witness or any related person is not placed under protection;*
- c) the nature of the proceedings in which the witness has given evidence or is or may be required to give evidence, as the case may be;*
- d) the importance, relevance and nature of the evidence given or to be given by the witness in the proceedings concerned;*
- e) the probability that the witness or any related person will be able to adjust to protection, having regard to the personal characteristics, circumstances and family or other relationships of the witness or related person;*
- f) the cost likely to be involved in the protection of the witness or any related person;*
- g) the availability of any other means of protecting the witness or any related person without invoking the provisions of this Act; and*
- h) any other factor that the Director deems relevant.”*

Discharge from the South African Witness Protection Programme

The Director may discharge a witness from the Witness Protection Programme on several grounds:

“13. Discharge from protection

(1) The Director may, ... by written notice discharge any protected person from protection if he or she is of the opinion that—

- a) the safety of the person is no longer threatened;*
- b) satisfactory alternative arrangements have been made for the protection of the person;*
- c) the person has failed to comply with any obligation imposed upon him or her by or under this Act or the protection agreement;*
- d) the witness, in making application for placement under protection, wilfully furnished false or misleading information or particulars or made a statement which is false or misleading in any material respect, or wilfully failed to disclose any information or particulars material to his or her application;*
- e) the person refuses or fails to enter into a protection agreement when he or she is required to do so in terms of section 11 (3);*
- f) the behaviour of the person has endangered or may endanger the safety of any protected person or the integrity of a witness protection programme under this Act;*
or
- g) the person has wilfully caused serious damage to the place of safety where he or she is protected or to any property in or at such place of safety.”*

South Africa appears to have efficiently fulfilled its obligations under the ICC Witness Protection Agreement until the country decided to withdraw from the Rome Statute in 2017. The challenges now faced by witnesses and their families include difficulties in having their immigration documents accepted by local authorities when they want to open bank accounts, enrol their children in schools and when travelling into and outside the country. The authorities also refuse to issue birth certificates for children born in South Africa, despite the Constitutional Court having [confirmed](#) that all children born in South Africa to foreign nationals can apply for citizenship.

Conclusion

The regime of witness protection under the Rome Statute has challenges and needs strengthening. Witnesses placed under the ICC Witness Protection Programme face several problems including inadequate integration measures, uncertain immigration status in host countries, and an uncertain future due to the abrupt termination of the Witness Protection Programme. The ICC needs to consider the challenges faced by witnesses and their families when concluding Witness Protection Agreements with the Member States. The ongoing Review process must specifically deal with the issue of witness protection. The Review did not address the challenges faced by ICC witnesses. Yet witnesses are the backbone of the fight against impunity and international crimes, and the legal framework must adequately protect their rights.