

Victim-Witnesses in the International Criminal Court: Justice for Trauma, or the Trauma of Justice?

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1. Introduction

Whilst war has always resulted in harm and suffering, modern armed conflict has been imbued with systematic violence against non-combatants, of whom many are women and children. These atrocities, including rape and mutilation, have been committed, often methodically, for a number of purposes — to intimidate, humiliate, terrorise, manipulate, destroy a group, and even to ‘reward’ soldiers.¹ Indeed, sexual and targeted violence have been viewed during armed conflict as legitimate and justified means of attacking the social fabric of a community and family ‘honour’, and in several recent conflicts as a means of annihilating a racial, ethnic, national or religious group.² As the victims are often the only witnesses to such atrocities, frequently the testimony of these victims, particularly women and children, is necessary to establish or refute evidence before the International Criminal Court (ICC, or Court). The inclusion of victim participation provisions that allow victims to appear before the Court not just as witnesses but also as ‘interested parties’ has resulted in an increased number of vulnerable persons coming before the international judicial body.³

Although witnessing during international judicial processes has been generally viewed as both a source of formal justice and therapy for both the individual and society,⁴ it has been realised that ‘witnessing’ to the original traumatic event often becomes a further source of trauma, especially for children and victims of sexual

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1 For a history of violence against women during armed conflict during the 20th century, see United Nations Division for the Advancement of Women, *Women 2000: Sexual Violence and Armed Conflict: United Nations Response* (1998) <<http://www.un.org/womenwatch/daw/public/cover.htm>> accessed 12 September 2005. For an account of violence against children, see Carolyn Hamilton & Tabitha Abu El-Haj, ‘Armed Conflict: The Protection of Children under International Law’ (1997)

5 *International Journal of Children's Rights* 1.

2 United Nations, *ibid*.

3 International Criminal Court, *Participation of Victims in Proceedings and Reparation* (2004) <<http://www.icc-cpi.int/victimissues/victimsparticipation.html>> accessed 3 September 2005.

4 Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (2000) at 291.

violence.⁵ This increased knowledge about the trauma of testifying, and subsequent pressure from feminist and victims' rights groups, led to the implementation of provisions and adjustments of practices which sought to circumvent or relieve this secondary traumatisation. Indeed, the constitutive and procedural documents of the International Criminal Court incorporated several provisions to address further traumatisation of victim-witnesses, including various procedural and evidentiary rules, the provision of victims' counsel, articles requiring 'integrating gender' into the Courts, a Victim Trust Fund, and the establishment of a Victims and Witnesses Unit (VWU).⁶

Despite few matters being referred to the Court and only a small number of trials having commenced to date, the ability of these provisions to relieve and prevent secondary victimisation has already been questioned. Indeed, deficiencies in the application of new procedural and evidentiary requirements have been identified. One of the primary failures identified has been the inability of these provisions to 'protect' witnesses and to provide real relief from the traumas of witnessing.⁷

This article will seek to explain why these failures have occurred, thus providing insight into how, and if, they can be remedied. Discussion will begin by detailing the trauma of the legal process for victim-witnesses, so as to situate the provisions and explain why they were deemed necessary. Following this, the provisions will be detailed, giving specific focus on how they seek to address the traumas. The effects of these provisions will then be considered, with their ability to date to relieve the traumas detailed in the first section. This discussion will also endeavour to propose amendments and procedures that would aid the objective of ensuring victim-witnesses are not traumatised by the experience of testifying and thereby guarantee that the best evidence is made available to the Court.

2. Secondary Traumatisation: The Victims and the International Criminal Process

The international criminal legal process is intrinsically linked to trauma in that it originates in an event that causes physical or mental harm. In fact, the international legal process most often finds its beginnings when an individual is physically wounded and/or has experienced an event which has affected his or her perceived ability to cope, leaving them feeling emotionally, cognitively, and physically overwhelmed, or in fear of death, assault, interference with bodily integrity, or mental harm.⁸ However, this link to the trauma does not terminate when the crime comes to the attention of the Court. Indeed, the whole trial process becomes an event wherein the trauma is articulated, recorded, valued and judged.

5 Lynda Holmstrom & Ann Burgess, 'Rape: The Victim and The Criminal Justice System' (1975) 3(2) *International Journal of Criminology and Penology* 101; Lynda Holmstrom & Ann Burgess, *The Victim of Rape: Institutional Reactions* (1978) at vii.

6 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 (entered into force 1 July 2002); *Rules of Procedure and Evidence*, UN Doc ICC-ASP/1/3 (2002).

7 Vesna Nikolic-Ristanovic, 'Victimization by War Rape: The International Criminal Tribunal for the Former Yugoslavia' (2000) 19 *Canadian Woman Studies* 28.

8 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV* (1994) 467.

This articulation and recording of the trauma is conceived as positive, specifically as a therapeutic approach for the individual in coping and accepting the traumatic events and consequences. Indeed, traditionally the law and the judicial process have been portrayed as forming an integral part of the healing process for the traumatised individual, and for society, which itself is considered as wounded by the violation of the law.⁹ Not only does the trial attempt 'to articulate the trauma so as to control its damage',¹⁰ but, by delivering justice (both in the formal and retributive sense), it also attempts to move the individual and society beyond the traumatic event towards a process of physical and mental healing. In allowing those affected by criminal behaviour to be 'witnesses' to the event, the international criminal trial has been conceived as a forum wherein the international community can not only learn of horrific events and punish offenders, but where victims and witnesses can therapeutically speak of their experiences.

However, in cases where gross violations of human rights have occurred, it has been well recognised that this traditional conception of the legal process is inadequate and in fact flawed, with the legal process actually bringing about further trauma to a victim of violence. Whilst the trial process adopted at the ICC is an amalgam of criminal systems, it maintains a largely common law adversarial approach, which has meant that generally a witness is needed to prove a case, and thus must give evidence in open court and in the presence of the accused. This facing of the perpetrator and in-court 'attacks' by legal counsel, combined with the fear of reprisals, applications of domestic law that punish the victim for testifying, and the possibility of stigmatisation, have all been recognised as leading to the 'overwhelming' of victim-witnesses, who consequently may suffer further mental harm manifesting also in various physical conditions.¹¹

Psychologists identified that when required to testify, individuals 'may be reviving memories of atrocities, which can lead to severe personal suffering and trauma, even years after the events took place'.¹² Additionally, the trial process may lead to stigmatisation, perceived blame, fear and stress, which can act solely or cumulatively to further traumatise the individual who may experience physical or psychological harm in a new and different manner to the original traumatising. Specifically, victim-witnesses have identified feeling victimised again, being stressed by having their story manipulated and cut short, and perceive the Court to be an inappropriate forum to address the individual's personal experience of the crime.¹³ In summary, victims, psychologists and social workers identified several key facets of the international legal process that have had a negative impact upon the mental well-being of victims giving testimony. Indeed, these psychologists have determined that the damage done during the legal process to the victim comprises an additional trauma.¹⁴

9 Osiel, above n4 at 291.

10 Austin Sarat & Thomas Kearns, *History, Memory and Law* (1999) at 36.

11 Holmstrom & Burgess, above n5.

12 Gavin Ruxton, 'The Treatment of Victims and Witnesses and The International Criminal Tribunal for the Former Yugoslavia (ICTY)' (Paper presented at the 10th Annual Conference of the International Association of Prosecutors, Copenhagen, 28 August – 1 September 2005) <<http://www.iapcopenhagen.org/Files/Filer/Papers/Ruxton.pdf>> accessed 27 August 2005.

13 Ibid; Nikolic-Ristanovic, above n7.

3. Victim and Witness Provisions: Attempts at Circumventing Secondary Traumatization

In an attempt to prevent this secondary traumatization, and as a consequence of demands by gender justice and victims' rights groups, several key provisions were incorporated into the *Rome Statute of the International Criminal Court* (the Statute) and the *Rules of Evidence and Procedure* (the Rules).¹⁵ Each of these provisions sought primarily to achieve three goals: (1) the participation of victims, (2) their protection, and (3) to offer 'some form of repatriation for their suffering'.¹⁶ For instance, article 68 of the Statute provides:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so 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 violence or gender violence or violence against children.

The primary mechanism devised to achieve this protection is article 43(6) of the Statute, which creates the Victims and Witnesses Unit (the Unit) within the Court's registry. Under the Rules, the Unit provides protective measures, counselling, security arrangements, and other suitable assistance for those at risk as a result of their testimony.¹⁷ This includes measures to ensure that applications for passports, visas and exit formalities do not identify the reason for travel, guaranteeing that witnesses arrive safely and are safe while in The Hague, and ensuring that the witness is appropriately accommodated while there. The Unit is also responsible for arranging movements and making certain that the witness can access social assistance, health and psychological care. The Statute also explicitly requires that the Unit include staff with expertise in trauma, including staff with experience in trauma relating to sexual violence.¹⁸ Additionally, article 68(4) of the Statute specifies that the VWU may advise the Court and the Prosecutors on additional 'appropriate protective measures, security arrangements, counselling and assistance' as detailed in article 43(6). To ensure that these protections are put in place, the Statute also includes the role of an external body to the registry, the pre-trial chamber, in providing for the protection and privacy of the victims.¹⁹

During the trial stage, a number of provisions provide for adaptations to the Court process to reduce stress and fear. Article 68(2) allows the Court to conduct proceedings *in camera*, to allow evidence by electronic means, or to allow witnesses to present evidence by other 'special means', so as to protect the victim. These 'special means' (such as a one way screen) are permitted so as to allow the accused to hear all evidence against them, but to allow the victim to testify without having to see the

14 Ibid.

15 *Rome Statute*, above n6; *Rules of Procedure and Evidence*, above n6.

16 International Criminal Court, *Victims and Witnesses* (2004) <http://www.icc-cpi.int/victim_issuues.htm> accessed 4 September 2005.

17 *Rules of Procedure and Evidence*, above n6, rules 16–19.

18 *Rome Statute*, above n6, art 43(6).

19 Id at art 57(3)(c).

accused, thus either reducing their fear, or reducing the distraction whilst testifying. Notably, the Statute states this protection *should be* applied in cases of sexual violence.²⁰

To prevent secondary victimisation related to stigmatisation and retaliation due to the giving of testimony, the Rules allow the Court to permit voice and image distortion and/or the giving of *intra voce* (oral) testimony through video conferencing or closed-circuit television,²¹ and allow the Court to direct, where appropriate, the name of a witness to be deleted from public records²² or that the witness be referred to by a pseudonym.²³

The Rules further incorporate mechanisms that aim to shield victims from psychologically harmful attacks on their integrity and sexuality.²⁴ These provisions include articles that restrict or forbid questions about a victim's prior or later sexual conduct ('rape shield' provisions), and articles that eliminate the requirement of corroboration of testimony where sexual violence is alleged.²⁵ Also, the Rules specify that consent cannot be implied where coercive environments or acts were involved (i.e. if someone was in prison or in fear of violence). The inclusion of these provisions was largely an application of existing domestic jurisdiction rape shield provisions.

Furthermore, several gender specific provisions have been included in the Statute, mainly as a consequence of feminist campaigning, with the objective of creating a Court that is better able to work with victims of sexual violence, minimising traumatisation of these victims, whilst also addressing and hopefully quashing the patriarchal nature of international justice.²⁶ Specifically, article 36(8)(a)(iii) of the Statute requires that 'fair representation of female and male judges' be taken into account in the selection process, and article 36(8)(b) requires legal expertise with regard to violence against women or children to be taken into account when appointing judges. Article 42(9) requires the Prosecutor to 'appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children'.

In addition to these protections, the Statute also provides that the Court can make orders directing a convicted person to pay reparations to a victim for damages, loss and/or injury.²⁷ Alternatively, the Statute allows for awards for reparation to be made through the Trust Fund.²⁸ Notably, these provisions allow the victims to obtain compensation from a criminal indictment, saving them the additional trauma of separate civil actions, which they may not even be able to pursue under the domestic laws in the country of origin.

20 Id at art 68(2).

21 Id at rule 87(3)(c).

22 Id at rule 87(3)(a).

23 Id at rule 87(3)(d).

24 Id at rules 70-71.

25 Id at rules 70-71.

26 Indeed, campaigning by groups, such as the Women's Caucus for Gender Justice, sought to include, and have since sought to amend, various provisions regarding the functioning of the ICC, so that they improve the rights and conditions of women victims. See for example, Women's Caucus for Gender Justice, *Women's Caucus for Gender Justice* (2000) <<http://www.iccwomen.org/archive/index.html>> accessed 27 August 2005.

In summary, the Statute and the Rules of Evidence and Procedure offer victims a number of protections that aim to reduce the trauma of aiding an investigation and providing evidence during trial. These measures seek not only to provide support but often act to provide security and the protection of identity. Nevertheless, it is important to note that these protections are only applicable in so far as they 'not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.²⁹

4. Post-Implementation Analysis: The Critical Review of the Practical Success of the Provisions

Whilst the provisions have only been in practical operation for a short period of time (since the first referral of Situation ICC-01/04 in the Democratic Republic of the Congo), similar protections were offered and implemented at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (together, the Tribunals). In light of these experiences, the limited implementation of the provisions at the ICC and similar provisions implemented at a domestic level, a number of critics and non-government organisations have revisited the provisions to determine whether they are achieving the objective of relieving trauma. Also, a number of non-government organisations have analysed the provisions in order to examine how they stand up to certain other objectives, such as the inclusion of women in the legal process or the success of the Court in repatriating or compensating victims.³⁰

The primary problems identified to date, though, lie not with what the provisions and rules do for the victims and witnesses, but rather with what has failed to be included. Firstly, numerous groups have noted that there is a pervasive failure the various judicial bodies of both the Tribunals and the ICC to properly communicate with the different humanitarian agencies working with victim-witnesses during armed

27 *Rome Statute of the International Criminal Court*, above n6, art 75(2). For further examination see Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 *Leiden Journal of International Law* 667; Gilbert Bitti & Gabriela González Rivas, 'The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court' in the International Bureau of the Permanent Court of Arbitration (ed), *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges* (2006) at 299.

28 *Rome Statute* id at art 79. For further information on the Trust Fund, see Thordis Ingadottir, *The Trust Fund for Victims (Article 79 of the Rome Statute): A Discussion Paper* (2001), Project on International Courts and Tribunals (PICT), ICC Discussion Paper No. 3, <http://www.pict-pecti.org/publications/ICC_paprs/Trust_Fund.pdf> accessed 21 November 2006; Carla Ferstman, 'The International Criminal Court's Trust Fund for Victims: Challenges and Opportunities' (2006) 6 *Yearbook of International Humanitarian Law* 424.

29 *Rome Statute* id at art 68(1).

30 Nikolic-Ristanovic, above n7; Victims Rights Working Group, *Victim Participation at the International Criminal Court: Summary of Issues and Recommendations* (2003) <http://www.redress.org/publications/VRWG_nov2003.pdf> accessed 4 August 2005; Thordis Ingadottir, Francoise Ngendahayo and Patricia Visour Sellers, *The International Criminal Court: The Victims and Witnesses Unit (Article 43.6 of the Rome Statute)* (2000), ICC Discussion Paper No. 1, <<http://icc.now.org/documents/PICTVWUMar2000.pdf>>.

conflict.³¹ Once a victim-witness has been identified to the Prosecutor, the relevant ICC bodies (including the Prosecutor, the VWU and if relevant the Gender and Children's Unit (GCU)) proceed to implement a number of procedures and interview stages leading to the giving of evidence at trial. Consequently, this may mean that victim-witnesses are questioned repeatedly (firstly by the organisations and then by the ICC officials). Evidence suggests that this repetition increases the potential for uncertainty and stress, especially for children and young people,³² which in turn can affect the quality of the evidence presented at trial. As a result, there is a need to ensure that the ICC Prosecutor and VWU coordinate their roles with these various agencies and organisations involved in the conflict zones, so as to prevent such repetitive interviewing from occurring, and perhaps for the Court to allow different modes of evidence, such as video taped evidence, to be used instead.³³

Such alternative modes of evidence may also aid in preventing the stress and fear caused by encountering various different persons during the process. At present, victim-witnesses often encounter workers from agencies and organisations, psychologists from the GCU, support persons from the VWU, the investigator, and their legal counsel,³⁴ and then while in Court, the Prosecutor, defence, accused, judge and various registry staff. Each of these people interacts with the witness (frequently a child or young person) at different times, often sporadically or in a one-off interview, despite the *UN Guidelines on Justice for Child Victims and Witnesses of Crime* suggesting that 'every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process'.³⁵ If allowing other modes of evidence is deemed inappropriate, then transferring people associated with the Court to areas where victim-witnesses are located should be considered as it may better aid continuity and reduce the need for unfamiliar and different people to be brought in to perform different functions and roles. Whilst the Court has pursued the creation of specific field roles, few posts have been filled,

31 Geoffrey Nice, 'Trials of Imperfection' (2001) 14 *Leiden Journal of International Law* 383 at 388–389; Ivana Nizich, 'International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal' (2001) 7 *ILSA Journal of International and Comparative Law* 353 at 366; and Patricia Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-day Dilemmas of an International Court' (2001) 5 *Journal of Law and Policy* 87 at 107.

32 Johannes Nijboer, 'Children and Young Persons in the Criminal Justice System: The Council of Europe Recommendations on Witness Protection and Rights of the Defence' (1999) 10 *Criminal Law Forum* 443 at 458.

33 Paula Hill & Samuel Hill, 'Videotaping Children's Testimony: An Empirical View' (1987) 85 *Michigan Law Review* 809; John Myers, 'A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code' (1996) 28 *Pacific Law Journal* 169 at 204–205.

34 The Office of Public Counsel for Victims (OPCV) provides support and assistance to the legal representatives of victims and the victims themselves, when they are participating in proceedings or applying for reparations. Under rule 90(1) victims are free to choose their legal representatives and can apply under rule 90(5) for assistance from the Registry, including financial assistance, where needed. See *Rules of Procedure and Evidence*, above n6.

35 *UN Guidelines on Justice for Child Victims and Witnesses of Crime*, ESC Res 2004/27, UN ESCOR, expert mtg, 15 March 2005, para 30(b) (2004), at <http://www.unodc.org/pdf/crime/expert_mtg_2005-03-15/res_2004-27_e.pdf> accessed 13 November 2006.

largely as a consequence of slow recruitment rates.³⁶ Consequently, there needs to be greater focus placed on ensuring correct recruitment, co-ordinating procedures for the expeditious gathering of evidence, and minimising the number of interviews a witness undertakes. Also, the provision of stability for witnesses needs to be addressed by encouraging the creation of field posts that provide a continuous contact person and the formation of stronger working relationships with non-government organisations.

This leads to another important criticism raised about the nature of the Court — the location of the Court being in The Netherlands. Many organisations and critics have pointed out that because the Court and the Tribunals have been located externally to the State in which the violence took place, several additional traumas are caused to victims that the current provisions do not seek to address. Nikolic-Ristanovic suggests that one of the primary problems with locating the judicial body external to the State or region in which the conflict takes place is that this will often mean Court staff are not aware of or sensitive to certain ‘cultural, gender, educational, and class differences of the women testifying, as well as the specific mentality of victims’,³⁷ and thus, whilst many are trained in trauma management, they may not properly be able to counsel the victim. Additionally, because many of the permanent ICC staff will not be from the countries that the victims originate from — and thus are unlikely to speak the same language or dialect as the victim — much of the communication between the Court and victim will also involve translators, meaning that the victim may either fear being, or actually be, mistranslated, resulting in further confusion and stress.³⁸ Whilst the funding of field posts was increased dramatically in 2006, thus increasing the number of involved people with culturally specific knowledge, as mentioned previously, the filling of such posts has been very slow. As such, there needs to be a re-evaluation of the positions advertised and of the general recruitment process implemented by the Court, so as to ensure people are employed who facilitate inclusivity in proceedings.

Another major issue detailed by Schiestl is that the provisions fail to adequately address refugee matters associated with being a victim of an international crime.³⁹ Indeed, though the Tribunals and the ICC have been able to liaise with refugee organisations, such as the United Nations High Commissioner for Refugees, the relevant provisions stop short of taking a major step forward for victims, which would have involved establishing asylum policies that guaranteed the testifying victim a safe-haven during and after their participation in the judicial process.⁴⁰ In fact, the provisions provide only that ‘[a]greements on relocation and provision of support services on the territory of a State of traumatised or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be

36 Redress Trust, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court* (2006) <<http://www.redress.org/publications/childsoldiers.pdf>> accessed 13 November 2006.

37 Nikolic-Ristanovic, above n7.

38 Ibid.

39 Barbara Schiestl, ‘Why Don’t Women Speak Out? On the Situation of Women in Asylum Countries’ in Elenor Richter-Lyonette (ed), *In the Aftermath of Rape: Women’s Rights, War Crimes and Genocide* (1997) 136.

40 Ibid.

negotiated with the States by the Registrar on behalf of the Court', and in this way does not guarantee such protection is available to all victims-witnesses as an option.⁴¹

In the absence of such protections, critics have rightfully pointed out that in-Court protections are rendered inconsequential, as victims will rightfully fear that after offering their testimony they will be 'officially delivered over to the perpetrators'.⁴² As such, greater focus needs to be placed on ensuring State parties form relationships with the Court that permit such relocation as required.

Additionally, it has been pointed out that whilst an efficiency provision has been included in the Statute, the waiting periods inherent in judicial proceedings may also further traumatise the victim.⁴³ To date, it has taken up to two years from formal referral until the pre-trial submissions are heard for matters. Moreover, the trial period in current cases looks to be taking years, with the *Prosecutor v Thomas Lubanga Dyilo* already having taken eight months to progress from pre-trial submission through to trial.⁴⁴ In this way, there remains a real risk that victims may feel anxiety and fear for prolonged periods, as they wait for the progress to judgment and potentially sentencing. Also, they may experience stress due to their relocation to The Hague and isolation from loved ones and friends who may not have relocated for safety-related or other reasons. In addition to these stressors, there is also the issue of stress resulting from the length of the evidence-giving process. Victims generally will be giving testimony over several sessions, even several days, consequently putting them under extensive emotional stress and trauma since 'their present fears [will] mix uncontrollably with fears from the past'.⁴⁵ In this way, it is important for the Court to implement policies which ensure that scheduling minimises harm to the victims and ensures that the relevant bodies remain in contact with victim-witnesses throughout the pre-trial period to keep them apprised of developments and timeframes.

Furthermore, there is evidence from the Tribunals and domestic jurisdictions which suggests that the Rules regarding sexual history are not always observed. Several notable violations of the provisions occurred at the Tribunals, which remarkably went without any comment or only limited comment by the defence. Specifically, at the ICTY several women were asked questions about their sexual history, including questions about contraception and previous abortions, which went without any reprimand from the judge.⁴⁶ There was one instance where a victim was questioned extensively about her sexual history, prompting the judge to state post-cross examination that this had raped the victim again.⁴⁷ Consequently, it has been suggested that the protective measures are not always enough, with violations of the Rules only being commented on post-violations and there being insufficient penalties for breaches of the Rules to dissuade violations.⁴⁸ This suggests a need not only to

41 *Rules of Procedure and Evidence*, above n6 rule 16(4).

42 Schiestl, above n39, at 136.

43 Nikolic-Ristanovic, above n7.

44 International Criminal Court, *Updates* (2006) <http://www.iccpi.int/cases/RDC/c0106/c0106_all/c0106_all1.html> accessed 13 November 2006.

45 Maria Zepfer, 'Suada R: Witness for the Prosecution' in Elenor Richter-Lyonette (ed), *In the Aftermath of Rape: Women's Rights, War Crimes and Genocide* (1997) 139.

46 Nikolic-Ristanovic, above n7.

47 *Ibid.*

educate prosecution and defence counsel on the importance of these provisions, but to ensure that where victims are represented, their counsel also ensure that these provisions are observed. Additionally, there is a need to ensure that judges compel observance of these provisions and act accordingly when violations occur.

5. Conclusions

In light of an examination of the Statute and the Rules of Evidence and Procedure, one can conclude that the ICC's constitutive and procedural documents establish a high standard for the protection of victims and witnesses that far exceeds the protections available in many domestic jurisdictions. However, while these provisions are progressive, it is important not to regard these measures as flawless and as fully protecting victims. Indeed, examination herein has demonstrated that the provisions have limited effect and can easily be undermined by the failure to provide other protections or to observe requirements. A number of simple improvements have been suggested that can be implemented through the formation of policy, amendment of existing provisions and proper implementation of the governing rules.

It would be imprudent to suggest that the Court could guarantee protection and ensure that secondary victimisation does not result from participation. Also, it is unwise to suggest, as many presently do, that the trial process will positively aid recovery. However, it is proper to suggest that the procedural mechanisms adopted by the ICC should not hamper the victim's recovery from trauma, nor should they wilfully disregard the suffering encountered by persons providing testimony to the Court.

Ensuring the ongoing participation of victims is essential, and as such, it is crucial that their participation is guaranteed by providing measures and procedures that reduce the stress of testifying to the lowest possible level and that ensure the continued well-being of victims. Victims' participation in ICC proceedings not only acknowledges the importance of their contribution of first-hand accounts of the relevant crimes, but ensures that the Court and the international community are fully apprised of the trauma experienced by the victims.