



Executive summary
of a study on
the protection of
victims and witnesses
in D.R. Congo

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EXECUTIVE SUMMARY OF A STUDY ON THE PROTECTION OF VICTIMS AND WITNESSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO

PREAMBLE

This summary is drawn from a study conducted over several months on the protection of victims and witnesses in the Democratic Republic of the Congo (DRC), with a three-month mission in Kinshasa and the East of the Country, between October 2011 and March 2012.

Protection International (PI) met in the DRC mainly with 15 national NGOs, 2 networks of Human Rights NGOs, 7 international NGOs, 4 UN agencies (United Nations Joint Human Rights Office (UNJHRO), Rule of Law Unit of United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), the United Nations Development Programme (UNDP) and United Nations High Commissioner for Refugees (UNHCR)), 3 embassies and the EU delegation, various international institutions or international programmes (PAG, USAID/Projustice, etc.), 7 lawyers, 9 civilian and military magistrates (prosecutors/auditors and judges), 2 court registrars, 2 officials of the Congolese national police, the Minister for Justice of South Kivu, the Governor of South Kivu, the Joint Committee on Justice, the Supreme Judicial Council and the Standing Committee on the Reform of Congolese Law (the list is not exhaustive).

For the sake of discretion, PI has removed the names of the persons met from this document.

Chapter I. THE NEED TO PROTECT VICTIMS AND WITNESSES IN THE DRC

Section 1. GENERAL CONTEXT AND CRIMINALITY

The Democratic Republic of the Congo has gone through several conflicts in the last two decades during which serious violations of human rights and of international humanitarian law were committed. The Congolese population has suffered many international crimes, summary executions, acts of sexual violence, the conscription of child soldiers, etc.¹ With rare exceptions, the perpetrators of such atrocities, who belong for the most part to groups and armed forces from at least seven different States, including the DRC, have still not been punished. The direct and indirect victims have not been able to find out the truth nor to obtain justice and redress.

The situation of human rights in the DRC remains a major concern to this day. The political context as well as the security and humanitarian situation are still precarious in certain regions, and lead to numerous troubles and multiple violations of human rights. The conflict situation continues mainly in the two provinces of Kivu and in the eastern province (Ituri).² The security situation in the East of the country thus remains particularly alarming; serious violations of human rights and international humanitarian law continue to be committed there by rebel groups, including the Democratic Forces for the Liberation of Rwanda (known by the French initials FDLR)³, the 23 March movement (M23) and the Lord's Resistance Army (LRA),⁴ by other armed groups and by the Congolese police and armed forces. Very recently, North Kivu was struck by a resurgence of insecurity following the attacks of the mutineers of the M23, which would be backed by Rwanda, according to various United Nations sources and NGOs⁵.

¹ As regards crimes committed as of the 1990s in particular, the United Nations published an inventory of the 617 most serious violations of human rights and of international humanitarian law committed between March 1993 and June 2003 on the territory of the Democratic Republic of the Congo, following the discovery of three mass graves in the east of the DRC at the end of 2005. The report concluded that the Congolese justice system was incapable of dealing adequately with these international crimes and cited options for transitional justice mechanisms that could contribute to the fight against impunity in the DRC. These include the creation of a joint judicial mechanism, a new Truth and Reconciliation Commission (TRC) (in spite of the failure of the first), an effective redress mechanism for victims, etc. (Cf. UNITED NATIONS, *Democratic Republic of the Congo, 1993-2003, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, 2010, available on:

http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_FR.pdf (in French).

² UNITED NATIONS HUMAN RIGHTS COUNCIL, Twentieth session, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Ch. HEYNS, "Addendum - Follow-up to country recommendations: Democratic Republic of the Congo", Document A/HRC/20/22/Add.1, 16 April 2012, p. 5, § 11, available on:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.22.ADD1.FRA.pdf> (French version).

³ UNITED NATIONS HUMAN RIGHTS COUNCIL, Fourteenth session, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Ph. ALSTON, "Addendum - Mission to the Democratic Republic of the Congo", Summary, Document A/HRC/14/24/Add.3, 14 June 2010, p. 2, available on:

[http://www.extrajudicialexecutions.org/application/media/14%20HRC%20DRC%20report%20in%20French%20\(A.HRC.14.24.Add.3_fr\).pdf](http://www.extrajudicialexecutions.org/application/media/14%20HRC%20DRC%20report%20in%20French%20(A.HRC.14.24.Add.3_fr).pdf) (French version).

⁴ UNITED NATIONS HUMAN RIGHTS COUNCIL, Fourteenth session, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *op. cit.*, p. 2.

⁵ HUMAN RIGHTS WATCH (HRW), "DR Congo: Rwanda Should Stop Aiding War Crimes Suspect", June 4, 2012, available on: <http://www.hrw.org/news/2012/06/03/dr-congo-rwanda-should-stop-aiding-war-crimes-suspect-0>; RADIO FRANCE INTERNATIONAL (RFI), "DRC: UN report that accuses Rwanda released", July 4, 2012, available on:

<http://www.rfi.fr/afrique/20120704-rdc-rapport-onu-accuse-rwanda-rendu-public-m23-bosco-ntaganda-cpi> (in French).

Women and girls who live in the conflict zones, continue to be subjected to serious sexual violence by the regular army (FADRC), the police (PNC), armed groups and, increasingly, by civilians,⁶ as are women and girls in other regions of the country.⁷ Furthermore, children are not spared by the parties to the conflict. They are victims of murder, mutilation, rape and other serious sexual violence offences, kidnapping, forced conscription, etc. The perpetrators of these acts include in particular armed elements of the *Mai-Mai* militias, the CNDP, the M23, the FDLR, the LRA, as well as members of the Congolese security forces.

Violations of human rights without any direct link with the conflict continue to be perpetrated as well. Even in other parts of the country, members of the Armed Forces of the Democratic Republic of the Congo (known by the French initials FADRC) and the Congolese National Police (PNC) continue to commit serious violations of human rights, including summary executions, rape, torture and cruel, inhuman and degrading treatment. Members of the national intelligence services (both civilian and military) were involved in violations of political human rights, mainly arbitrary arrests, detentions in secret places and acts of torture and extortion.⁸ Human rights activists and journalists are not spared.

Military justice deals with a large part of criminal cases relating to such events, in accordance with the very broad Congolese rules of material and personal competence laid down by criminal law and the rules of military criminal procedure. Furthermore, Congolese military tribunals do not judge exclusively soldiers in the Congolese Armed Forces and similar persons such as the Police, but any persons, including civilians, who commit a violation with a “weapon of war.”⁹ This situation is contrary to international standards.¹⁰

Section 2. IMPUNITY AND ITS CAUSES

Whereas the efforts by several military tribunals which, for some years now, have prosecuted and convicted several perpetrators of massive violations of human rights (some of whom with the rank of colonel) should be commended, the fact remains that impunity for those responsible remains the rule, all the more so when high ranking officers are involved.¹¹ The Special Rapporteur on extrajudicial, summary or arbitrary executions explains that “Alleged war criminals continue to hold senior command positions in the armed forces, massacres are committed without sanction or investigation, and nearly all extrajudicial executions remain unpunished.”¹² The fact that the authorities do not prosecute the perpetrators of violations is one of the main reasons why violations of human rights persist in the Democratic Republic of the Congo.¹³

⁶ UNITED NATIONS HUMAN RIGHTS COUNCIL, *Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country*, A/HRC/10/59, 5 March 2009, p. 8, § 21, available on: http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.59_fr.pdf (French version).

⁷ *Ibidem*, p. 8, § 21.

⁸ UNITED NATIONS HUMAN RIGHTS COUNCIL, *Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country*, *op. cit.*, p. 7, § 18.

⁹ *Confer* Articles 104 to 112 of the Congolese Code of Judicial Procedure.

¹⁰ According to international standards, only civilian courts should be competent to rule on violations of ordinary law and on serious violations of human rights, such as extrajudicial executions and forced disappearances, even if committed by soldiers. *Confer* in particular, “Decaux Principles” adopted by the UN Sub commission on Human Rights, Principle n° 9; Updated Set of principles for the protection and promotion of human rights through action to combat impunity,” (D. ORENTLICHER), Principle n° 29. On this point, *confer* PROTECTION INTERNATIONALE, “partie II: Protection juridique internationale et nationale de certains droits fondamentaux de la personne, et principales normes du procès équitable”, in *Repères pour l’observation des procès en matière pénale*, pp. 96 ff., available on: <http://www.protectionline.org/REPERES-POUR-L-OBSERVATION-DES.html> (French version)

¹¹ UNITED NATIONS HUMAN RIGHTS COUNCIL, Fourteenth session, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Ph. ALSTON, Fourteenth session, *op. cit.*, p. 3.

¹² *Ibidem*, p. 23, § 95.

¹³ UNITED NATIONS HUMAN RIGHTS COUNCIL, Fourteenth session, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Ph. ALSTON, Fourteenth session, *op. cit.*, p. 23, § 95.

The combat against impunity has not yielded any real success up to now, even though efforts have been made. This state of affairs is due not only to a lack of resources and to the structural, financial and institutional problems of the judicial system, but also to corruption which affects all stakeholders in the criminal chain, to political and/or military interference in the course of justice and to the absence of political will on the part of the authorities to investigate, arrest and prosecute members of the armed forces, the law-enforcement forces or intelligence services, all the more so when higher officers are involved.¹⁴ By way of example, the Government ordered that some legal proceedings against suspected war criminals be discontinued.¹⁵ The question of impunity is also related to the disastrous state of the Congolese prison system, perhaps the weakest link in the justice chain, which facilitates escapes of suspects and convicts, because of corruption, “including high profile offenders who sometimes ‘escape’ with the connivance of the authorities.”¹⁶ The criminal justice system therefore is seriously ineffective, if at the end of the process, the persons convicted do not serve their sentence but remain free, and if the victims never get redress. The enforcement of court decisions is the most global issue that arises here.

In view of such dysfunctions, the trust and confidence of the population in the criminal system is severely shaken, and victims and witnesses are therefore reluctant to lodge complaints and to take action. This situation is aggravated by the fact that they are not sure they will be protected against intimidation and violence that suspects, detainees and convicts could exercise against them to dissuade them from cooperating or by way of reprisals. In fact, only very rarely can threatened victims and witnesses rely on any support from the Congolese State.

Section 3. SECURITY INCIDENTS AND THE NEED FOR PROTECTION

Interviews we have conducted and reports from NGOs and international organisations show that threats, pressure and other acts of intimidation as well as reprisals against victims and witnesses are common. Relatives of victims and witnesses are also frequently targeted by such actions. This observation is all the more significant when the perpetrators of criminal acts are men in uniform, rebels, or agents of the State, or in general people who exercise a certain political, military and/or economic influence. This is particularly true when the implication of the State or influential structure could be revealed by statements made by victims and witnesses.

Such security incidents can occur at different stages of the proceedings, during the investigation or the trial, but also after the verdict is handed down, in particular when the convicted person escapes. These incidents tend to occur as a matter of course as soon as the facts are disclosed to a third party, before any complaint or accusation is lodged.

More specifically, the first contact for many victims and witnesses is not the police or the courts, but an “intermediary”¹⁷, whether a human rights activist, a local or international NGO, a UN agency, the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) or

¹⁴ UNITED NATIONS HUMAN RIGHTS COUNCIL, Fourteenth session, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Ph. ALSTON, Fourteenth session, *op. cit.*, p. 25, § 105.

¹⁵ UNITED NATIONS HUMAN RIGHTS COUNCIL, Fourteenth session, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Ph. ALSTON, Fourteenth session, *op. cit.*, p. 25, § 104.

¹⁶ UNITED NATIONS HUMAN RIGHTS COUNCIL, *Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country*, *op. cit.*, p. 18, § 63.

¹⁷ It should be noted that the “intermediaries” are people who investigate, document cases, guide and accompany victims and witnesses, before the trial, during and after the proceedings. They can be individuals, community members or friends of the victim or the witness, or NGOs, generalist or specialist. In all cases, they are Human Rights Defenders (HRD), no matter if intervene from time to time or permanently.

the International Criminal Court. Victims and witnesses can expose themselves to threats and/or reprisals as soon as they reveal the atrocities to which they were subjected or which they disclosed to a third party. The safety of victims and witnesses must also be taken into account during this period outside the criminal procedure *stricto sensu*, which commences as soon as statements are taken or collected by the “intermediaries.” It is moreover worth underscoring that many victims will not lodge a complaint or participate in criminal proceedings, and that their statements will only find their way into reports of organisations on the situation of human rights into the DRC.

Aggravated by the absence of protection, the risks run by the victims and witnesses often dissuade the latter from lodging a complaint, from testifying in court, or from cooperating with the police or the judicial authorities. Many victims are afraid to lodge a complaint, withdraw the proceedings or change their statements during the trial. Many witnesses are afraid to testify, do not respond to summonses, or withdraw or change their statements. The risks of reprisals also force many victims of sexual violence, for instance, to avoid or bypass the criminal justice system by using a mode of informal settlement of disputes, such as an amicable arrangement, which nonetheless only rarely respects their rights.

Fears of intimidation and reprisals on the part of victims and witnesses constitute a serious obstacle to access to justice. Moreover, statements by victims and witnesses are often vital for initiating or making progress with investigations, all the more so in a country like the DRC where the means of investigation are very little developed. The absence of testimonies, combined with other dysfunctions which affect the police and judicial apparatuses, block a number of cases, and prevent confronting the perpetrators of atrocities. Criminals are rarely held accountable for their actions. Impunity is perpetuated.

Furthermore, other categories of people are often subjected to intimidation or reprisals because of their intervention in a given case or their support to victims or witnesses. These are usually investigators, magistrates or lawyers, but also “intermediaries” (human rights activists, community associations, local, national and international NGOs, etc.) who assist and/or accompany victims and witnesses.¹⁸

Section 4. RESPONSIBILITY TO PROTECT INCUMBENT UPON THE STATE

The protection of threatened victims and witnesses is an end in itself (protecting the integrity of human beings) but also a condition sine qua non for the proper functioning of the criminal system: more specifically, protecting victims and witnesses conditions their cooperation (reporting of the offences and providing evidence), which is indispensable to investigate, prosecute and convict criminals.

Responsibility for protecting and supporting threatened victims and witnesses lies primarily with the State.

There is no national protection programme for victims and witnesses in the DRC; there is a state mechanism, albeit limited. The national legal system does not even provide expressly the obligation to protect threatened victims and witnesses, except in cases of sexual violence. Nevertheless, Congolese law does comprise certain general provisions that can help protect the security, well-being and privacy of victims and witnesses. These non-specific safeguards for victims and witnesses could however be bolstered and improved, but specific provisions would in any event be more suitable.

¹⁸ UNITED NATIONS HUMAN RIGHTS COUNCIL, *Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country*, op. cit., p. 18, § 61; UNITED NATIONS HUMAN RIGHTS COUNCIL, *Report of the Special Rapporteur on the independence of judges and lawyers - Mission to the Democratic Republic of the Congo*, Document A/HRC/8/4/Add.2, 11 April 2008, §§ 38 and 48; available on: <http://www2.ohchr.org/english/>

Some courts have in point of fact concerned themselves with the security of victims and witnesses at times and have, on occasion, ordered procedural measures, and at times even security measures. But most magistrates are not trained nor made aware of this issue for one, and in any event the courts do not have the appropriate means and resources.

Most of the physical protection and psychological, medical and legal support, where it exists, is nowadays provided by the Congolese civil society, international NGOs and intergovernmental organisations. In the absence of protection from governments, alternative initiatives have been developed in national and international civil society structures and UN organisations. Some of these initiatives are occasional and embryonic, often qualified as “basic” by the civil society itself, while others tend to be more integrated and organised (cf. further).

Section 5. COMPLEXITY OF PROTECTION IN THE CONTEXT OF THE DRC

§ 1. CONTOURS OF PROTECTION

The question of protecting victims and witnesses must be raised not only during the investigation phase (before the criminal proceedings) and during the trial phase (during the criminal proceedings), but also during the sentence enforcement phase (after the criminal proceedings).¹⁹

To be able to define actions to be taken to protect a witness or a victim in danger, it is necessary to assess the threats (particularly the probability that they will be carried out), and also the vulnerabilities of the potential victims, and finally to assess the latter’s protection capacities. The risk is actually defined by applying the following equation: the risk is equal to the threats multiplied by the victim’s or witness’s vulnerabilities, and divided by the latter’s capacities. The risk will be reduced if these three elements can be influenced. If the threats constitute an external element that is more difficult to influence, the potential victim’s vulnerabilities and capacities may be easier to work on. The objective is therefore to reduce the threat by trying to dissuade its perpetrator, to reduce the potential victim’s vulnerability factors and to enhance and develop his protection capacities. These assessments and analyses are carried out in accordance with a specific methodology, and there are tools for conducting them.²⁰ Following a risk analysis, a personalised security plan could be charted with appropriate protection measures, to be assessed and revised regularly.

A full array of measures can be considered. According to Redress, measures and safeguards of a general nature should be considered to reduce fully the risks of intimidation and reprisals (confidentiality, data protection, respect for the privacy and dignity of the individual, etc.).²¹

Furthermore, faced with an identified risk for the victim’s or witness’s security, the protection method must provide an appropriate response (in particular, procedural and non-procedural protection and assistance measures, etc.). The United Nations Office on Drugs and Crime makes the following recommendations.

¹⁹ COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, *Recommendation Rec(2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice, Annexe*, available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2005\)9&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2005)9&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

²⁰ CONFER PROTECTION INTERNATIONAL, *New Protection Manual for Human Rights Defenders*, 3rd edition (2010), available at <http://www.protectionline.org/Nouveau-Manuel-de-protection-pour.html>

²¹ REDRESS - ENDING TORTURE SEEKING JUSTICE FOR SURVIVORS, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: a Call to Action*, London, December 2009, p. 33, available at: http://www.redress.org/downloads/publications/Victim_Protection_Report_Final_10_Dec_09_FRENCH.pdf (in French).

A plan to assist threatened witnesses and victims,²² irrespective of its name or form, must comprise three types of measures, in addition to what are known as “self-protection” measures. It is worth noting that measures should be adapted and particular measures taken depending on the vulnerability of the threatened individual²³.

1. What are **known as police measures** to enhance the witness’s physical security.

The measures taken would be proportional to the threat and of limited duration, to discourage criminals wanting to harm the victim/witness. They could include: security advice, temporary changing of residence to a relative’s house or a nearby town, close protection, regular patrolling around the witness’s house, escort to and from the court and provision of emergency contacts, arrangement with the telephone company to change the witness’s telephone number or assign him or her an unlisted telephone number, monitoring of mail and telephone calls, installation of security devices in the witness’s home, provision of electronic warning devices and mobile telephones with emergency numbers, minimising of public contacts with uniformed police, use of discreet premises to interview and brief the witness, etc.

When such measures do not suffice to protect the victim or the witness, exceptional measures such as change of identity or the international relocation of the victim or witness can be considered. By way of reminder, proportionality between the nature of the protection measures and the seriousness of the intimidation of the witness should be ensured.²⁴ International relocation is “situated at the top end of witness protection services owing not only to the significant costs, resources and impact it entails for the witness and his or her close family members, but also to the complicated nature of international relations.”²⁵

2. Specific **procedural measures** to guarantee the security of the witness during the hearing. Some of these measures may be seriously detrimental to the rights of the defence. The respect of the right to a fair trial consequently requires striking the right balance between the interests at stake, between the need to protect a victim or a witness from intimidation and reprisals, and the rights of the defence. They may include:

- Assigning a pseudonym or number to the victim or the witness throughout the proceedings in official documents,
- Closed session testimony,
- Excluding or restricting the media and/or the public from all or part of the trial,
- Removal of the names, addresses, workplaces, occupations or such information from the public file as may reveal the identity of the victim or the witness,
- Prohibition of the lawyer for the defence, the prosecutor or any other person taking part in the proceedings to reveal the identity of the victim or witness to a third party, or to disclose documents or information of such nature as to reveal said identity,

²² UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime*, Vienna, United Nations, 2009, p. 27,

²³ To assess the protection and support measures that the victims and witnesses need, protection officials should take account of their needs and hence take certain factors into consideration accordingly, such as their age, sex, state of health, disability and nature of the crime.

²⁴ COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, *Recommendation Rec(2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice, Annexe, op. cit.*

²⁵ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime, op. cit.*, p. 82.

- Use of pre-trial (written or recorded audio or audiovisual) statements instead of in-court testimony,²⁶
- Presence of an accompanying person for psychological support,²⁷
- Statements by electronic or other special means, such as closed-circuit television or videoconferencing, with or without voice and face distortion,²⁸ and use of exclusively acoustic means,
- Shielded testimony through the use of a screen, curtain or two-way mirror,²⁹
- Anonymous testimony, partially or fully.

3. **Assistance and support measures** to enable the witness and the victim to cope with the psychological and practical implications of testifying in a court of law and of participating in the proceedings respectively. Assistance to victims and witnesses is closely related to their protection and therefore cannot be overlooked. Certain forms of assistance are an integral part of protection.

According to the United Nations Office on Drugs and Crime and the Council of Europe, assistance is distinguished from protection in that it is aimed not at ensuring the physical security of individuals, but of preventing victims and witnesses from suffering secondary victimisation,³⁰ and making sure that they do not give incomplete or inappropriate testimony.³¹ When it comes to devising victim and witness protection systems, it is therefore necessary to include a (legal and psychological) assistance dimension for the benefit of victims and witnesses. Assistance should therefore be provided before, during and after testifying or the trial.

²⁶ The Committee of Ministers of the Council of Europe recommends that “While taking into account the principle of free assessment of evidence by courts and the respect of the rights of the defence, procedural law should enable the impact of intimidation on testimonies to be taken into consideration and statements made during the preliminary phase of the procedure to be allowed (and/or used) in court (...),” when the appearance of witnesses before the court is not feasible or could entail a serious threat for the witnesses or members of their family. Confer COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, *Recommendation Rec(2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice, Annexe, op. cit.*

²⁷ The court may allow a witness to be accompanied by another person during testimony if the witness is likely to feel anxiety or tension, particularly in the case of vulnerable witnesses (especially victims of sexual crimes or child witnesses). The accompanying person is not party to the case and therefore someone who has only basic information about the witness’s evidence. Typically, an accompanying person is a parent, teacher, police officer or therapist. According to the study, the accompanying person may be in close physical proximity to or in contact with the witness during testimony, inform the court of the witness’s condition, or recommend a interruption, for example, if the witness is too distressed to continue. On the other hand, the accompanying person may not disturb, hinder or unduly influence the cross-examination and testimony, object to particular questions, or offer advice to the witness. Confer UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime, op. cit.*, p. 34. This type of measure may also fall under what are known as “assistance” measures. Cf. *infra*.

²⁸ The scope of this measure is limited when the defendant knows the witness, inasmuch as he could identify the witness on the basis of the latter’s testimony.

²⁹ Such a mechanism is used to disguise witnesses and their identity so that they are not intimidated by the defendant, the public and the media. The study nonetheless specifies that “Screens should not prevent the judge, magistrates, jury and at least one legal representative of each party to the case (prosecution and defence) from seeing the witness and the witness from seeing them.”

³⁰ “Secondary victimisation does not happen as a direct result of the criminal act, but through the response of institutions and individuals to the victim. It involves a lack of understanding of the suffering of victims which can leave them feeling both isolated and insecure, losing faith in the help available from their communities and the professional agencies. The experience of secondary victimisation intensifies the immediate consequences of crime by prolonging or aggravating the victim’s trauma; attitudes, behaviour, acts or omissions can leave victims feeling alienated from society as a whole.” Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, Rapporteur, Mr Jean-Charles Gardetto, Doc. 12440 rev., 12 January 2011, p. 10, §19.

³¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime, op. cit.*, p. 28; COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, Rapporteur, Mr J.-CH. GARDETTO, Doc. 12440 rev., 12 January 2011, p. 10, § 19, available on: <http://assembly.coe.int/Documents/WorkingDocs/Doc10/FDOC12440.pdf> (in French).

The type of assistance needed will always depend on the individual and the vulnerability of the witness.³² Through the investigation process and before trial, assistance entails for instance that the law enforcement officers must question witnesses sensitively.³³ It also entails informing victims and witnesses of their rights, of protection and assistance measures available to them, briefing them on what to expect and the basic aspects of a criminal trial (without preparing in any way their pre-trial testimony) and providing psychological support to minimise the stress from participating in a trial.³⁴ In terms of psychological support, in addition to advice, victims and witnesses should be given therapy where necessary. Furthermore, they should be provided assistance after testifying, a phase that is often neglected, because it is precisely at that point that the risk of secondary victimisation is the most critical.³⁵

4. Self-protection measures:

When, because of the lack of a witness protection programme or any other protection system that includes assistance, police and procedural measures, the United Nations Office on Drugs and Crime explains that “witnesses may be offered support to look after their own protection.”³⁶ To this end, given the often high threshold for admission in witness protection programmes, States have developed financial and other assistance for self-help measures, outside any formal framework.³⁷ Some local or international NGOs actually provide security management training (risk analysis methods, drawing up security plans in advance or following security incidents). Such training courses should be integrated systematically in the protection programmes and given to the beneficiaries. The latter must be made aware so that they can accept and follow security rules and their constraints better, and be able to adapt their security plans accordingly.

Finally, it is important to incriminate and sanction acts of intimidation, reprisals or of any other nature likely to endanger the security of the victim or the witness (incrimination of intimidation, of revealing the victim’s or witness’s protected data, etc.).

§ 2. COMPLEXIFICATION OF PROTECTION IN THE DRC

In the current context of the DRC, the task of protecting and supporting threatened victims and witnesses is made more complex by an entire series of factors, such as the persisting pockets of conflict in the east of the country and the recent deterioration of the situation in North Kivu, the rank of perpetrators of serious violations of human rights (often high ranking officials), generalised impunity, the dysfunctional nature and lack of means and resources of the police and judicial apparatuses, the failings of the prison system, political and/or military interference, corruption of those involved in the criminal chain, and the lack of political will to have certain perpetrators arrested, prosecuted and convicted. The lack of independence of the justice system and the corruption of the stakeholders in the criminal chain, including judicial police officers and magistrates, complicate any protection initiative to the extreme. All these obstacles and dysfunctions generate distrust among persons subject to trial, victims and witnesses towards police and court institutions. All these elements should be taken into account when creating any protection programme or mechanism.

³² COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *op. cit.*, p. 10, § 20.

³³ COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *op. cit.*, p. 10, § 21.

³⁴ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime*, *op. cit.*, p. 28.

³⁵ COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *op. cit.*

³⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime*, *op. cit.*, p. 41.

³⁷ REDRESS - ENDING TORTURE SEEKING JUSTICE FOR SURVIVORS, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: a Call to Action*, *op. cit.*, p. 42.

Chapter II. NORMATIVE LANDSCAPE FOR THE PROTECTION OF VICTIMS AND WITNESSES IN THE DRC

Section 1. INTERNATIONAL COMMITMENTS OF THE DRC

The DRC has ratified most of the main regional and international treaties on human rights, including the African Charter on Human and Peoples' Rights, the International pact for Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the United Nations Convention on the Rights of the Child.³⁸ Whereas the conventions do not refer explicitly to the protection of victims and witnesses, some supervisory bodies of these treaties have developed case law on the protection of victims and witnesses that considers the protection of the latter as a precondition to the attainment of certain fundamental rights³⁹ such as the right to life, the prohibition of torture and inhuman or degrading treatment, the right to justice,⁴⁰ or the right to respect of privacy and family life.⁴¹

The DRC has moreover ratified constraining international conventions that contain provisions which require it to take certain measures to protect victims and witnesses in the particular areas concerned by these conventions.⁴² Nevertheless, the DRC has not yet implemented its international commitments relating specifically to the protection of victims and witnesses.

For example, in ratifying the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the DRC undertook to “ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities,” but to take measures **“to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”** (Article 13, sentences 1 and 2). Thirteen years after the ratification of this convention, on 9 July 2011, the Congolese legislator passed a law “pertaining to the criminalisation of torture,” but which does not harmonise the internal legislation fully with the provisions of the Convention. It introduces no safeguards in the Code of Criminal Procedure to protect victims or witnesses of torture against ill-treatment or intimidation.

The Democratic Republic of the Congo is moreover party to the Rome Statute of the International Criminal Court of 17 July 1998, which entered into force on 1 July 2002, and contains provisions relating to the

³⁸ The Convention was adopted by Resolution 44/25 of 20 November 1989 at the forty-fourth session of the UN General Assembly and entered into force on 2 September 1990. It was ratified by the DRC on 27 September 1990.

The DRC is however not yet party to the African Charter of the Rights and Welfare of the child, the Protocol to the African Charter of Human and Peoples' Rights relating to women's rights in Africa, or to the optional Protocol relating to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³⁹ REDRESS - ENDING TORTURE SEEKING JUSTICE FOR SURVIVORS, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: a Call to Action*, *op. cit.*, p. 8, § 12.

⁴⁰ REDRESS - ENDING TORTURE SEEKING JUSTICE FOR SURVIVORS, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: a Call to Action*, *op. cit.*, p. 25.

⁴¹ COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *op. cit.*, p. 8, § 12. Thus, when the life of physical integrity of a victim or witness is threatened, the State has the positive obligation to take the necessary measures to protect them.

⁴² These include in particular the UN Convention against Transnational Organised Crime (UNTOC), ratified by the DRC on 28 October 2005, the Protocol to the UN Convention against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime, ratified by the DRC on 28 October 2005, the United Nations Convention against Corruption (UNCAC), ratified by the DRC on 23 September 2010, and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), ratified by the DRC on 18 March 1996.

protection of victims and witnesses of international crimes⁴³. The implementing law of the Statute has not been adopted to date. It would nonetheless enable the DRC to comply with its obligation to adopt such legal provisions as necessary to integrate the Rome Statute in its internal legislation so as to combat efficaciously impunity for international crimes and to facilitate the complementarity of the national courts with the International Criminal Court.⁴⁴ This law was intended in particular to deal with questions relating to the protection of victims and witnesses of international crimes and to introduce a coherent protection system for such victims and witnesses in the DRC.⁴⁵ In this sense, a bill on implementing the Rome Statute of the International Criminal Court⁴⁶ was introduced in the National Assembly in March 2008. However, this bill could not be examined before the end of the last legislature (cf. infra). In parallel, a bill creating a Specialised Court,⁴⁷ which was likewise intended to implement the elements of the Rome Statute, was rejected by the Senate in August 2011 (cf. infra).

To “fill the gaps and inaccuracies of a legislator that is dragging his feet in adopting implementing legislation for the Rome Statute,” which was ratified more than ten years ago,⁴⁸ several Congolese courts have applied certain provisions of the Rome Statute directly for a number of years.⁴⁹ Some Congolese judges have consequently accorded direct effect to Article 68 of the Statute, which constitutes the heart of the safeguards that victims and witnesses can enjoy before the International Criminal Court (ICC).⁵⁰ In several cases, the lawyers invoked Article 68 directly to call on the court to take protection measures and, relying on said Statute, the court ordered specific protection measures. Whereas the efforts made by some judges are praiseworthy, the Rome Statute continues to be applied in occasional and isolated instances, and such application should preferably be an initial step to the adoption of implementing legislation for the Rome Statute.

Section 2. NATIONAL LEGISLATION

§ 1. WILL OF POLITICAL AUTHORITIES

As already mentioned, there is no general state mechanism to protect victims and witnesses in the Democratic Republic of the Congo at this time. It would appear that there has not been sufficient political will to make this issue a priority. The creation of a “victim and witness protection programme” was part of the Action Plan to

⁴³ The DRC signed said Statute on 8 September 2008 and ratified it on 11 April 2002, after the President of the Republic had, on 30 March 2002, adopted “Law-Decree no. 003/2002 authorising the ratification of the Rome Statute of the International Criminal Court.”

⁴⁴ Confer PARLIAMENTARIANS FOR GLOBAL ACTION, Conference on Implementing legislation of the Rome Statute of the ICC in African Indian Ocean Countries and in Djibouti, the DRC and Tanzania, (25-26 February 2010), « Statut de la législation mettant en œuvre les provisions du Statut de Rome de la Cour pénale internationale (CPI) dans les pays africains de l’Océan Indien & au Djibouti, en RDC et en Tanzanie, available at: http://www.pgaction.org/pdf/pre/Background%20Doc%20PGA%20ICC%20Conf%20Comoros%202010_FR.pdf

⁴⁵ AVOCATS SANS FRONTIÈRES (Lawyers Without Borders), *Etude de jurisprudence. L’application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo*, March 2009, p. 107, available at: http://www.iccnw.org/documents/ASF_rapportRome_csc_light.pdf

⁴⁶ Bill amending and supplementing the Criminal Code, the Code of Criminal Procedure, the Code for the Organisation and Competence of the Courts, the Military Judicial Code, and the Military Criminal Code to implement the Rome Statute of the International Criminal Court, introduced in March 2008.

⁴⁷ Bill pertaining to the “creation, organisation and functioning of the court specialised in the suppression of genocide crimes, war crimes and crimes against humanity, rejected on 22 August 2011 by the Senate, convened in an extraordinary session, appended to the FIDH, ASADHO, GROUPE LOTUS and LIGUE DES ELECTEURS, *Democratic Republic of the Congo, Recommendations for an independent and effective specialised joint court*, August 2011, available on: <http://www.iccnw.org/documents/notepositionfidh.pdf> (in French).

⁴⁸ AVOCATS SANS FRONTIÈRES, *Etude de jurisprudence. L’application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo*, op. cit., p. 106.

⁴⁹ *Ibidem*.

⁵⁰ Article 68 of the Rome Statute entitled “Protection of the victims and witnesses and their participation in the proceedings”.

Reform the Justice System, adopted in 2007 by the Congolese authorities.”⁵¹ Nevertheless, the implementation of this Plan ran into a number of setbacks since it was adopted and no programme of such nature has seen the light of day yet.

§ 2. THE CONSTITUTION

Unlike the Colombian constitution of 1991, which provides an obligation, incumbent upon the Office of the Public Prosecutor, to protect witnesses, victims and other parties to criminal proceedings, the Congolese Constitution of 2006 provides no express safeguards of protection for threatened victims and witnesses. The Constitution of the Democratic Republic of the Congo nonetheless enshrines a certain number of fundamental rights, such as the right to life and to physical integrity (Article 16, section 2), the prohibition of cruel, inhuman and degrading treatment (Article 15, section 4), and the right to personal freedom (Article 17, section 1), which apply to all and therefore to victims and witnesses. Furthermore, Article 16, section 1 of the Constitution stipulates that human beings are sacred and that the State has an obligation to respect and protect them.⁵²

§ 3. CONGOLESE LAW

Standards under Congolese (ordinary and military) material criminal law and the Congolese (ordinary and military) criminal procedure can contribute more or less directly to protect victims and/or witnesses in the DRC.⁵³

A. INCRIMINATION OF ACTS OF INTIMIDATION

First of all, the Congolese Criminal Code is concerned more with the witness’s obligations than with his rights. It therefore incriminates and sanctions bearing false witness and false statements in court by an “informer,” an interpreter or expert,⁵⁴ and moreover punishes the refusal to appear, take the oath or testify.⁵⁵

Nevertheless, the current Congolese Criminal Code contains a series of incriminations that can be used by the judicial authorities to prosecute and sanction certain types of behaviour intended to intimidate victims and witnesses, particularly provisions that punish homicide or assault and battery,⁵⁶ or attacks on personal freedom.⁵⁷ It also includes the incrimination of a threat to individuals or property.⁵⁸

But the difficulty with intimidation of victims and witnesses lies in the fact that the behaviour, actions or tricks the perpetrator may use do not necessarily fall under the definition of the aforementioned offences. That is why Article 129 of the Criminal Code incriminates influencing a witness.⁵⁹ Whereas the Congolese Ordinary

⁵¹ MINISTRY OF JUSTICE, *Action Plans to Reform the Justice System*, Kinshasa, 2007, pp. 14 to 15 (“Strategic Lines of Action,” Programme 3: Access to justice), available on the Official site of the Ministry of Justice of the Democratic Republic of the Congo: http://www.justice.gov.cd/files/plan_action_justice.html

⁵² Constitution of the Democratic Republic of the Congo, as amended by Act n° 11/002 of 20 January 2011 on the revision of certain articles of the Constitution of the Democratic Republic of the Congo of 18 February 2006, Article 16.

⁵³ The material Criminal Law comprises all the basic (substantial) rules that determine the offences and the sentences applicable thereto. Procedural Criminal Law (or formal criminal law) comprises all the rules that govern the judicial organisation, competence for suppression and rules relating to the conduct of criminal proceedings in the preliminary as well as the trial phase; *confer* H. D. BOSLY, D. VANDERMEERSCH and M.-A. BEERNAERT, *Droit de la procédure pénale*, 6th édition, Bruges, La Chartre, 2010, p. 9.

⁵⁴ Articles 128, 130 and 131 of the Criminal Code.

⁵⁵ Articles 19 and 78 of the Code of Criminal Procedure, Article 201 of the Military Judicial Code, Article 179 of the Military Criminal Code, and Article 41 of Ordinance 78/289 of 3 July 1978 relating to the exercise of the powers of judicial police officers and officials before ordinary law courts.

⁵⁶ Articles 43 ff. of the Criminal Code.

⁵⁷ Articles 67 ff. of the Criminal Code.

⁵⁸ Articles 159 and 160 of the Criminal Code.

⁵⁹ The Ordinary Criminal Code is applied by both civilian and military courts. It is worth noting that Article 136 of the Criminal Code punishes insults and violence against witnesses who testify before the civilian and law enforcement authorities in the exercise or when exercising their remits or carrying out their duties (members of the Political Bureau, the National Assembly, the Government, the

and Military Criminal Codes do not, like other national systems, include a chapter devoted specially to impediment and obstruction of the proper functioning of justice, the fact remains that this provision constitutes a sufficient basis to prosecute and sanction perpetrators of acts of witness intimidation.⁶⁰ Nevertheless, Article 129 could be clarified by drawing inspiration from the provisions of the Rome Statute, the French Criminal Code or other Criminal Codes.⁶¹

Conversely, Congolese criminal law has no specific provision incriminating acts of intimidation carried out against the victims. Such a provision should consequently be included in the Criminal Code, by drawing inspiration from similar provisions that already exist, such as Article 434-5 of the French Criminal Code⁶² for instance. Such amendments were provided in the aforementioned bill for the act implementing the Rome Statute.⁶³

In spite of the possibilities afforded them by criminal law, the police and judges apply few of these provisions. They never investigate acts of intimidation sufficiently and they do not prosecute their perpetrators (cf. the Maheshe⁶⁴ case for instance). Effective investigations, prosecution and convictions of perpetrators of intimidation would however send a strong dissuasive signal and would promote a change in behaviour in the long run.

B. PROTECTION AND CRIMINAL PROCEDURE

From a global point of view, criminal proceedings in the Congo have up to now posed a series of difficulties relating in particular to the fact that the existing procedural rules are disseminated in a plethora of different legal texts, which are at times contradictory, and at others summary and fragmentary, whilst containing certain gaps regarding safeguards of the right to a fair trial. These drawbacks include the question of the protection of victims and witnesses, which is not yet taken fully into account by Congolese criminal proceedings.

Congolese criminal procedure law does not provide expressly any obligation to protect threatened victims and witnesses, except in cases of sexual violence. This exception is worth looking into.

In 2006, under the legislative reform relating to sexual violence, the Congolese legislator actually introduced a new Article 74 *bis* in the Code of Criminal Procedure, drawing inspiration to some extent from Article 68 of the

Constitutional Court, courts and tribunals, office of the public prosecutor, officers from the armed forces and the National Guard, governor, etc.).

⁶⁰ This provision unfortunately does not define the notion of “influencing” and does not go into the forms that intimidation can assume. Nevertheless, following the definition provided on www.Larousse.fr, French criminal law defines *influencing a witness* as “using promises, offers, presents, pressure, threats, assault, manipulation and tricks during proceedings, as plaintiff or defendant, to get others to bear false witness or give a false statement or affidavit, or to abstain from testifying or giving a statement or affidavit” (Article 434-15 of the French Criminal Code). Furthermore, Articles 43-19 and 432-21 of the same Code incriminate influencing the interpreter or expert under the same conditions as Article 434-15.

⁶¹ *Confer* Article 340, §2 of the Angolan Criminal Code, Article 388 of the Burundian Criminal Code, Articles 117 and 121 of the Kenyan Criminal Code, Articles 101, 103 and 107 of the Ugandan Criminal Code, Article 434-15 of the French Criminal Code. We should moreover note that the Congolese Criminal Code refers to influencing a witness without aiming expressly at the “person who makes statements;” it should logically be deduced that influencing the informer is not included. The informant is a person who, called upon to give statements in court, does not have to take oath. Consideration should be given to this point of legislation, inasmuch as recourse to the status of informant rather than witness is very widespread in the DRC.

⁶² These articles imposes three years of imprisonment and a €45,000 fine for any threat or other act of intimidation against anyone, committed in order to get the victim of a crime or misdemeanour not to lodge a complaint or to withdraw it.

⁶³ The amendment of Article 129 of the Criminal Code and the introduction of a specific provision in the same Code incriminating acts of intimidation against victims has been called for by the UNJHRO Monusco Protection Unit, which moreover made concrete proposals in this sense to the Standing Committee on the Reform of Congolese Law (known by the French initials (CPDRC).

⁶⁴ PROTECTION INTERNATIONALE, *Rapport d'observation du procès d'appel «Maheshe» devant la cour militaire du Sud-Kivu (R.D. Congo) et suivi des recours, Et points de repère sur le cadre juridique de l'observation des procès et la protection des défenseurs des droits humains*, pp. 65 ff., available (in French) at: <http://www.protectionline.org/Rapport-d-observation-du-proces-d.html>

Rome Statute. This Article 74 *bis* provides that an official from the Office of the Public Prosecutor or the court to which cases of sexual violence are referred must take such measures as necessary to protect the security, physical and psychological well-being, dignity and respect of the privacy of victims or any other person involved.

Victims of sexual violence, and any other person involved, namely family members of the victim, witnesses and even intermediaries,⁶⁵ may benefit from this article and invoke a right to be protected at each phase of the criminal proceedings, i.e. from the moment that the victim goes to the police until the enforcement of the judgement. All the stakeholders in the criminal chain are concerned, and in particular the judicial authorities and the police services. Article 74 *bis* refers not only to the judge who takes part in the trial phase, but also the officer from the Office of the Public Prosecutor which is responsible for conducting the criminal investigation,⁶⁶ prosecuting, and enforcing the sentences.

On the legislative front, Article 74 *bis* constitutes considerable progress in terms of protection. The implementation of this general obligation is nonetheless running against many obstacles in the field.

First of all, magistrates are very rarely aware of, and trained in, protection. Consequently, many broach the issue from a very restrictive angle. They focus essentially on closed session, the only procedural protection measure mentioned expressly by the legislator,⁶⁷ without being aware of the scope and complexity involved in protecting a person under threat, where measures may have to be taken regarding not only the proceedings but also physical security and psychological support well beyond the hearings themselves. Finally, the legislator has not made matters easier in not seeing to the implementation of this obligation to protect, and has thus not attended to any provisions or organisational arrangements in this respect. Those who try to implement protection measures moreover run up against a lack in the capacities of the judicial apparatus, including the lack of material and financial means and resources.

Furthermore, in view of the dysfunctions of the judicial system, the corruption of the stakeholders in the criminal chain, and political and/or military interference in the course of justice, the confidence that the legislator has placed in the office of the public prosecutor and the courts risks being compromised very seriously. We should moreover note that in 2006, the legislator drew inspiration from Article 68 of the Rome Statute, without however extracting its full scope. For instance, no account of factors such as age, sex or disability is taken in determining the protection measures needed, nor of any equivalent to the independent victim and witness assistance unit created in the registry of the ICC, which nonetheless fulfils an important mission in protecting victims and witnesses in the court system, alongside the chambers and the prosecutor of the ICC. Entrusting the protection to an independent entity of investigation services has nonetheless proved to be of fundamental importance.

Apart from cases of sexual violence where there is the aforementioned obligation to protect victims and witnesses, there is no specific rule in their favour concerning other offences, for which only some general procedural rules can have an impact on their protection. Only two of these rules entail a direct protection aspect: those that enable the judge to opt for a closed session when publicity of the proceedings is prejudicial

⁶⁵ The sexual violence act extends all protection and assistance measures provided for the victims to “any person involved,” which may refer to members of the victim’s family, but also the witness to the violence and intermediaries, i.e. organisations that provide support to victims and witnesses, and human rights activists, who may also be threatened because of the help and assistance that they provide.

⁶⁶ It is actually up to the Office of the Public Prosecutor to supervise and direct the criminal investigation (Articles 1, 3, 28, 29 of the Ordinance of 3 July 1978).

⁶⁷ Article 74 *bis*, section 2, of the Code of Criminal Procedure.

to law and order and good conduct,⁶⁸ and those that enable the whistleblower (including the witness) to request anonymity before the judicial police officer.⁶⁹ Other provisions may also contribute to providing protection to victims and witnesses. These concern the secret of the investigation,⁷⁰ professional secret⁷¹ and, before military courts only, the prohibition in principle of recordings and cameras,⁷² the possibility to prohibit the dissemination of all or part of the minutes of the proceedings,⁷³ and keeping the witnesses apart before the hearing.⁷⁴ Nevertheless, compliance with, and implementing, certain provisions cause a problem.

For example, many rightly underscore that the physical design of hearing rooms and courts limits the protective potential of a closed session. Judges at times preside in make-shift facilities, in ill-suited premises, without doors or windows or under tarpaulin. The secret of investigation is not sufficiently respected. No measure to secure data confidentiality and protection is taken. Moreover, extensive influence is exercised by people implicated in the proceedings or parties concerned, to have the cases communicated, changed or dropped. It so happens that lawyers who want to consult a file are told that it was “lost” or sent to a person who should not have access thereto. Furthermore, because of the infrastructure of police stations and the lack of police staff, a person cannot always be received with full discretion, but on the contrary in the presence of other officers and other persons subject to trial who hear everything. Finally, most judicial police officers disregard completely the provision concerning the anonymity of the informer.

The aforementioned provisions at least exist and could already contribute to improving the situation of victims and witnesses if they were complied with and implemented.⁷⁵ They are nonetheless far from being satisfactory to provide effective protection for threatened victims and witnesses. The Congolese criminal procedure and, more broadly, Congolese law, should develop a global and integrated approach to the protection of victims and witnesses and provide a combination of different types of measures to protect threatened people, as well as a coherent decision-making and implementation mechanism for said measures (determining who is responsible for what, how, with what means and under what conditions).

§ 4. PROTECTION AND EXISTING BILLS

We have just gone over the legislative landscape of protection for victims and witnesses in the Democratic Republic of the Congo. A final addition is nonetheless called for concerning the aforementioned bills: the act implementing the Rome Statute,⁷⁶ and the bill “pertaining to the creation, organisation and functioning of a Court specialised in the prosecution of genocide and war crimes as well as crimes against humanity.” Introduced in parliament during the last legislature, both of these bills aspired to implement the Rome Statute, and contain perspectives of change regarding the protection of victims and witnesses. Though interesting, these could be completed and improved even further from that angle.

⁶⁸ Article 230 of the Military Judicial Code.

⁶⁹ Article 38 of Ordinance 78/289 of 3 July 1978.

⁷⁰ Article 32 of Ordinance 78/289 of 3 July 1978.

⁷¹ Article 73 of the Criminal Code.

⁷² Article 231 of the Military Judicial Code.

⁷³ Article 232 of the Military Judicial Code.

⁷⁴ Article 242, section 5 of the Military Judicial Code. This provision is intended less to protect witnesses than to avoid any contamination between testimonies.

⁷⁵ We should moreover note that the court has a certain latitude at its discretion to protect victims and witnesses, on the strict condition of striking the right balance between the rights of the defence and the right to a fair trial.

⁷⁶ Bill “amending and supplementing the Criminal Code, the Code of Criminal Procedure, the Code for the Organisation and Competence of the Courts, the Military Judicial Code, and the Military Criminal Code to implement the Rome Statute of the International Criminal Court.”

A. BILL FOR THE ACT IMPLEMENTING THE ROME STATUTE

This bill was introduced in the National Assembly in March 2008. It was declared admissible by a majority of MPs only on 4 November 2010. It then had to be sent to the Policy and Administration Committee of the National Assembly for in-depth examination. Even though it was not adopted during the legislature which came to an end with the parliamentary elections of November 2011, it remains topical nonetheless.

Two points are worth underscoring among the innovations provided by this bill: the exclusion of the death penalty (for, if it carries out no longer executions, DRC has still not abolished the death penalty)⁷⁷ and the incompetency of military courts to try international crimes, even when committed by soldiers⁷⁸. The bill designates the civilian (or ordinary) courts of appeal as the only ones competent to try international crimes in first instance, with the "Cour de cassation" designated for referral appeals to the rulings handed down by the courts of appeal.

i. Incrimination of acts of intimidation

This bill provides for including, in the Criminal Code, provisions incriminating acts of intimidation against victims (new Article 128-1 of the Criminal Code), witnesses (new Article 129) as well as acts of intimidation and reprisals perpetrated against a magistrate, judicial personnel, or any other person in court, an arbitrator, an interpreter, expert or lawyer of one of the parties (new Article 128-3).

The advantage of such provisions would be that they would apply to all victims and witnesses and not only those of international crimes.⁷⁹ The same applies to the other stakeholders concerned. It is nonetheless very unfortunate that acts of intimidation against intermediaries, who accompany and support victims and witnesses, are not covered.

The bill moreover provides for inserting a new chapter entitled "Chapter II: Rights of the accused and protection of the victims" in the Code of Criminal Procedure.⁸⁰

ii. Obligation to protect incumbent upon the "court"

Drawing inspiration in part from Article 68 of the Rome Statute, the new Article 11-1 provides for the obligation, for court cases involving international crimes, to take "appropriate measures to protect the security, physical and psychological well-being, the dignity and respect of the privacy of the victims."

This bill for an implementing act is nonetheless marked by pitfalls from the point of view of protection and support. The first, particularly alarming such pitfall has to do with the fact that witnesses are completely overlooked in protection safeguards. The same applies for intermediaries and other persons who incur risks because of their declarations or ties with the victim. Furthermore, the fact that the "court" is responsible for protection and support measures precludes making sure that the protection concerns all the phases of the criminal procedure. Nothing is said about the distribution of tasks, about the respective roles of the court and the Prosecutors. There is no reminder of respect for the rights of the defence and the requirements of a fair and impartial trial are not underscored.

⁷⁷ Confer for more details: « Le droit à la vie en droit congolais », in *Annex of the report on Chebeya-Bazana trial*, , Nov. 2011 http://www.protectionline.org/Rapport-d-observation-du-proces_11301.html

http://www.protectionline.org/IMG/pdf/pi_nov_2011_rapport_proce_s_chebeya_vfin_re_vise_le_11.01.12.pdf

⁷⁸ PROTECTION INTERNATIONAL, « Partie II : Protection juridique internationale et nationale de certains droits fondamentaux de la personne, et principales normes du procès équitable », *op. cit.*

⁷⁹ We should moreover note that the bill provides for including an Article 132 quarter that incriminates acts of intimidation, reprisals and corruption of a member or official of the international criminal court, in Volume II, Title 3, section 5 of the Criminal Code.

⁸⁰ Before Chapter II, which becomes Chapter II bis, Article 11 of which becomes Article 11-2.

The bill does not provide any obligation for this court to take into account all the pertinent factors either, in particular age, sex, state of health, as well as the nature of the crime, when deciding on protection measures to be taken. Furthermore, it does not provide any procedural measure (possibility to testify behind a screen, with full or partial anonymity), not even the possibility contained in Article 68 of the Rome Statute to opt for a closed session or the eventuality, reserved for prosecutors, to delay the disclosure of certain data.

We should moreover note that the bill creates no independent protection entity, such as the victim and witness aid unit of the International Criminal Court, established in a registry that provides important autonomy safeguards. Nothing is provided about the particular services of the registry and its organisation, nor the safeguards it should provide. The bill does not create any specific protection mechanism, nor any independent unit in charge of protection and thus relies on the “court” for the protection of victims of international crimes, without any arrangement or guarantee. In addition to the procedural measures, the question still remains on how and by whom the security and support measures for victims, witnesses and their entourage are adopted and ensured.

B. BILL ON THE SPECIALISED COURT

Stemming from the observation that the Congolese courts were not able to deal efficaciously with the international crimes committed in the DRC since 1990 (recorded in particular in the UN Mapping project referred to above), this bill on the specialised court was introduced in February 2011. It was rejected on 22 August 2011 by the Senate, which sent it back to the Government to be amended, but remains topical nonetheless.

Under the terms of this bill, the Specialised Court will be competent to judge perpetrators of genocide and war crimes as well as crimes against humanity committed as of 1990 on Congolese territory, whether they be Congolese or foreign. It will nonetheless have the option of referring cases which it deems to be less serious, or whose perpetrators are not the main parties responsible, to the *ordinary* competent courts.

The Court will be composed of one or more specialised chambers of first instance and one specialised appellate chamber. These chambers are to comprise a mandatory and minority international component. As to the office of the prosecutor to the Court – composed of an attorney general, one or more counsels for the prosecution, one or more deputies and a Special Investigation and Prosecution Unit (SIPU) –, the bill provides for an optional international presence, except for the SIPU, about which it simply says nothing. The same applies to the Registry of the Court, composed of the Registrar and the victims or witnesses Aid Division or Section, by not mentioning any international presence expressly. Finally, there is no provision as to the composition of the “Cour de cassation” when it will rule on an appeal of a decision handed down by the Specialised Court. An international presence for all the various degrees of courts concerning these crimes would have been more coherent.

i. Protection before the Specialised Court⁸¹

By virtue of Article 58 of the bill, modelled on Article 68 of the Rome Statute, the Court takes appropriate measures to protect the security, physical and psychological well-being, the dignity and the respect of privacy of victims and witnesses, taking account of all the pertinent factors, in particular age, sex and state of health, as well as the nature of the crime in particular, without being limited thereto, when it is accompanied by violence of a sexual or sexist nature or violence against children.

⁸¹ The success of any victim and witness protection mechanism will obviously depend on the way the specialised court functions as a whole and the safeguards it will provide. Thus, broader elements than protection *stricto sensu*, such as the independence and impartiality of national and international magistrates, the financing of the Court and its duration, the scope and the international presence in the court and its duration, will have a non-negligible impact on the efficacy and reliability of a protection system.

Like Article 68 of the Rome Statute, the bill specifies that the prosecutor shall take such measures in particular at the investigation and prosecution stage, without impairing the rights of the defence and the right to a fair and impartial trial. Furthermore, when the disclosure of elements of proof and information in his possession may endanger a victim, a witness or members of their respective families, the prosecutor may, through the entire proceedings before the opening of the trial, refrain from placing such information at the disposal of the defence and present a summary thereof.⁸² We should note that on this point, the Rome Statute goes further by providing for non-disclosure as regards all parties.

In an innovative manner, the bill expressly provides for different protection measures, albeit in non-exhaustive manner: relocation, anonymous participation in the proceedings, taking statements by electronic and other special means, or closed session.

Nevertheless, contrary to Article 68 of the Rome Statute which refers to the victims and witnesses aid division, Article 58 does not provide a role for the victims and witnesses aid division, which was created by the bill nonetheless.⁸³

In addition to the safeguards provided in Article 58, other articles, namely 66, 67 and 68 of the bill provide procedural safeguards concerning the witness's testimony. They provide in particular for the possibility of allowing a witness to testify under full or partial anonymity. We should nonetheless note that confusion between these two notions arises in these three articles. They moreover provide other safeguards, which still lack clarity incidentally, in favour of the "protected" witness, without being able to define this notion in advance.⁸⁴ The need for clarity and precision is all the more important as the measures at issue are themselves likely to undermine the rights of the defence and the right to a fair and impartial trial.

ii. Victims and Witnesses Aid Division or Section

The bill creates a victim and witness aid section in the Court registry (Article 3 *in fine*), which may, following the example of Article 68 of the Rome Statute, advise the prosecutor and the Court about the protection measures to be taken whilst taking account of the realities in the field. One particular feature, however, is that unlike the Rome Statute, which placed this task in the article relating to the Court's general mission to protect, the bill inserts this competence of the division in the very heart of the provisions that list the competences of the Special Investigation and Prosecution Unit (SIPU). This confusion between the SIPU and the division reflects the ambiguity or lack of precision that characterises the distribution of competences of these two bodies regarding protection.

Contrary to the Rome Statute, the bill does not devote a specific provision to the registry (appointment of the registrar, organisation, etc.) nor to the aid division in particular. Nevertheless, it is important for the Court to have a registry which provides all the autonomy safeguards possible, and which assumes all the missions to protect victims and witnesses. We should note that the Rome Statute attaches far more importance to the registrar than to the aid division and entrusts them with broader missions.⁸⁵

⁸² Article 58 moreover specifies that these provisional measures "will cease once questions of security have been debated and resolved." Article 68 of the Rome Statute provides for no such thing. The way the question is settled in the ICC, in particular, consequently deserves closer scrutiny.

⁸³ The bill gives only little substance and responsibility to this entity.

⁸⁴ Article 67 provides that the "President of the hearing may decide to hear the witness in his Chambers without the presence of the parties. He will nonetheless ask the parties to provide beforehand a list of questions they want to have put to the witness. The protected witness's testimony will be read at the hearing, but his physical presence may nonetheless be required if the rights of the defence demand it."

⁸⁵ Confer Article 43 of the Rome Statute in particular.

For its part, the Congolese bill seems to entrust protection tasks to the SIPU, the special unit in charge of criminal investigations.

iii. SIPU and its protection missions

The bill directs the Special Investigation and Prosecution Unit to conduct investigations relating to crimes that fall under the competence of the Court and places it under the direction of the public prosecutor to the Court (Article 8). This unit is composed of investigators specialised in serious violations of international law, sexual violence and violence against children (Article 8, section 2).

In addition to this investigative mission, the SIPU is particularly in charge of flanking witnesses and victims involved in the preliminary investigation, initial inquiry and trial examination procedures, in particular by putting in place a mechanism for psychosocial and health guidance and support for witnesses and victims (Article 10, section 1, (c)) and of introducing and organising a mechanism for the security and protection of all participants in the proceedings, namely magistrates, judicial staff, lawyers, witnesses (for the prosecution and the defence), victims and "presumed perpetrators" (Article 10, section 1, (d)). Intermediaries are unfortunately not addressed.

iv. Creation of a victims and witnesses fund

Article 58 moreover provides that "a victims and witnesses fund" will be created and organised by the Minister responsible for Justice and Human Rights, without however specifying particularly its destination, its conditions of access, term or management method...

* * *

The fact that the SIPU is put in charge concurrently of the investigations and of protection causes problems. This situation is likely to generate conflicts of interest. It would be preferable to have a body of the Court registry (the independence of which would have to be strictly secured) to assume the competences relating to the protection of victims and witnesses, in this case, the aid division. In any event, without a clear distribution of the roles of each and everyone, protection for victims and witnesses risks being less effective.

The system is modelled on the Rome Statute of the ICC. The Rome Statute contains many provisions relating to protection and support, without forgetting the Rules of Procedure and Evidence, for instance. They could be a very important source of inspiration.

Furthermore, a decree of the Minister for Justice providing implementing procedures for protection could also be enacted by the legislator in the bill.

Finally, we should point out that the necessary arrangements must be made to give protected people protection and support safeguards in the medium and long term. Protection is not an area where everything can be discontinued from one day to the next. Only emergency and short term measures are often taken, however. There is therefore a risk of a difference in temporal scale between funding, which tends to be geared to the short/medium term, and the needs of certain protection and support measures required in the medium/long term (aid for reintegration after relocation, for instance).

CONCLUSION

In conclusion, whereas this plan and this bill are laudable efforts, it appears desirable and even indispensable to re-examine and review them with enhanced attention paid to questions of protection, taking due account of the lack of means and resources of the judicial apparatus, the difficulties of independence of magistrates, and the rampant corruption at all stages of the criminal justice chain. We should also point out that safeguards must not only be provided, they must also be secured in a concrete and effective manner. In this respect,

lessons from the protection systems put in place by International and Internationalised Criminal Courts should be drawn, in particular from the concrete experience with protection that the ICC implemented in the DRC in several cases. The idea of a protection fund could moreover prove useful....

Finally, particular attention should be paid to the harmonisation of the two bills we have discussed to avoid incoherence and contradiction, in particular as regards jurisdiction.

Chapter III. ADOPTION AND IMPLEMENTATION OF PROTECTION MEASURES

Section 1. BY THE COURTS

As regards the authorities of the State, specific protection measures are rarely adopted and implemented. Nevertheless, in certain cases of international crimes and sexual violence, magistrates have taken measures to protect threatened victims and witnesses based on Article 74 *bis* of the Code of Criminal Procedure or by direct application of Article 68 of the Rome Statute.

For example, in the Kakado case⁸⁶ concerning the perpetration of international crimes, the lawyer of the civil litigants verbally requested measures to protect victims and witnesses and the decision concerning them was delivered immediately. The lawyer justified his fears about the identification of the victims by the fact that the trial was held in the region where the crimes had been committed and that the person prosecuted enjoyed a certain renown in that region and among the population. A closed session was not granted. Nevertheless, the defence of the accused, the public prosecutor and the court accepted that the victims and witnesses could appear under a pseudonym, with their faces hidden by a hood (and voice distortion for those who managed to do it) and that they all wear the same clothes and shoes.

In other cases, the judges ordered physical protection measures by calling on the police to guard the premises where a threatened witness was accommodated, for instance. Furthermore, when a case requires a visit to the site of the incident, some military prosecutors in the East of the DRC adopt certain measures occasionally. Thus, in cases of sexual violence or international crimes, these judges sometimes go through a member of an international NGO to make the connection with the victims and witnesses that they are going to meet and take some pains to be discrete (they dress in civilian clothes in cases where soldiers are involved, forego the use of any excessively identifiable vehicle, etc.).

Thus, some magistrates try to make do with the meagre means at their disposal. They are moreover often aided and supported in this task by national and international NGOs or intergovernmental organisations. Such attention paid to protection by some magistrates nonetheless remains extremely rare and lacunary.

In addition to the gaps in the law on the matter as well as the dysfunctions of the judicial system, the corruption of the judicial stakeholders and interference from political and/or military authorities which can impede the adoption of effective, reliable and efficient protective measures, several other elements compromise the protection of victims and witnesses:

- It turns out that protection and support for victims and witnesses is a new development for most of the stakeholders in the criminal justice chain. Whereas the police and judicial apparatus already generally have serious shortcomings in terms of (basic and continuing) training of its members, it

⁸⁶ ITURI GARRISON MILITARY Tribunal, Judgement of 09 July 2010 (RP N°071/09, 009/010 and 074/010). From 2000 to 2007, at the time it was arrested by the Congolese army, the armed militia of KAKADO (name of its leader) had become deplorably infamous by the extent of the crimes committed against civilians. The military tribunal found KAKADO guilty, as superior in the line of command, of war crimes through murder, attack against civilian populations, attack against protected property, pillaging, rape, cruel or inhuman treatment and for sexual slavery committed by his militiamen. KAKADO appealed the decision before the Military Court of the Eastern Province. He died in October 2011.

turns out that they are little if at all trained when it comes to protection of victims and witnesses and their obligations on the matter. Neither the criminal investigation department officers nor magistrates are aware of -- or trained in -- this matter.⁸⁷ Most cannot conduct a risk analysis nor chart and update a security plan, just as they do not know their obligations in terms of protection nor the different ways of implementing them, at their level and pursuant to their remit. Whereas some magistrates have shown a certain openness to protection, others have been very reticent. Furthermore, the public prosecution office does not always perform its duty of managing and overseeing judicial police officers, whereas close cooperation between these two stakeholders is necessary when it comes to protection.

- In addition to judicial police officers and magistrates, registrars of the court are not sufficiently aware of -- or trained in -- the role that they play in terms of data protection and respect of secrecy, in particular. The same applies to lawyers, experts and interpreters.
- Whereas some protection measures may not require substantial means, others require sizeable human, material and financial resources. Such resources are lacking at this time, however. By way of example, evacuation then reintegration following relocation inside the country or exfiltration outside the country generates sizeable costs. The simple fact of calling on the services of a police officer to secure one's residence becomes a problem inasmuch as the service has to be paid for.⁸⁸ Furthermore, most of the time, for surveillance to be effective, the victim or the witness, who are often lacking means themselves, must fully cover the needs of the police officer assigned for their protection, as the latter's salary is paid randomly by the State. The courts do not have the means either to place a psychologist or social worker at the disposal of certain vulnerable victims or witnesses (victims of sexual violence, children, elderly or disabled persons, for instance), unless they get outside aid from an NGO or any other entity of the civil society. The police and court system moreover does not have the means or the capacity to acquire new technologies to conduct particular hearing sessions (videoconferencing or image or voice distortion equipment), which prevents drawing on the experience of the ICC.
- The facilities of the police stations and the courts are not adapted to provide protection and support to victims and witnesses.
- The police, whose prime role is to provide protection for the citizenry, has a negative image among the population. In addition to the lack of manpower, training and resources, and interference by the public authorities, corruption among police officers, aggravated by the fact that their salary is paid irregularly by the state, is a real problem and undermines the population's confidence in them.
- Journalists, editorialists and the print, audio and audiovisual press do not approach information with particular attention to protection for victims and witnesses. For instance, journalists frequently film victims and broadcast images on television without taking any precautions to protect their identity, privacy and dignity.

⁸⁷ Training has nonetheless already been provided on occasion by international stakeholders on this issue. More about that later.

⁸⁸ Tax for security by the national police fixed by inter-ministerial decree n° 061/CAB/MININTERDESEC/2006 and n° 097/CAB/MIN/FINANCES /2006 of 13 June 2006 on the fixing of tax and duty rates to be collected at the initiative of the Congolese National Police.

- Assistance for the victim by a lawyer or defence counsel as soon as possible in the proceedings would help improve such protection (information for the victim and guidance to appropriate protection and support structures, protection of certain data and privacy, person of trust, etc.). Nevertheless, the free legal aid system has proved overall deficient and in any event, most lawyers and defence counsels are neither aware of – nor trained in – protection.⁸⁹

Most of the time, NGOs and national human rights associations, as well as UN organisations see to physical protection and provide psychological and medical support to victims and witnesses.

Section 2. BY INTERGOVERNMENTAL ORGANISATIONS, NGOs AND OTHER STRUCTURES OF THE CIVIL SOCIETY

Many NGOs and aid and assistance structures face questions in their daily work that relate to the security and the physical and psychological well-being of victims and witnesses whom they help and support. They adopt protection measures and help threatened victims and witnesses as often “as they can” with “the limited means.”

Organisations and associations report that they provide or obtain funding only to evacuate and relocate temporarily a threatened person inside the country. Whereas there are emergency funds dedicated to human rights and to victims and witnesses in certain NGOs, as their name indicates, they cover only emergency – not longer term – measures. A legal aid clinic based in a rural area explains that in the absence of any funding, and because police and judicial structures are located far away, it can do nothing more than provide advice. A legal aid clinic based in a city in the East of the DRC explains that it puts up in hotels victims that come to the city for proceedings. Others use alternative means of reception, including transit houses. Some NGOs indicate that they take care to be discrete in their contacts with the victim or the witness. Accordingly, several NGOs have already provided “alibis” to certain victims, such as an invitation to a training scheme, to justify moving the victim and in order not to raise suspicions. Others have established specific forms for taking down statements from the victim by mentioning only one initial. A legal expert of one NGO explains in particular that he dresses in a way so as not to be noticed when he goes to meet victims and witnesses and that he prepares a pretext for coming along. Another organisation explains that it provides psychological support for victims and witnesses before and during the hearing. Some NGO officials have stated that when the victim’s case is complicated and the association does not have the means to provide security to the victim, they refer to existing human rights networks or directly to other organisations that they consider more capable of providing protection for the person concerned.

We should also note that some have set up a unit for victims and witnesses within the same structure geared to a holistic approach, comprising medical, psychological, legal and reintegration guidance and support, plus specific attention to protection for the persons concerned.⁹⁰

Fundamental protection measures are frequently adopted and implemented by intermediaries, but are often scattered and not very coordinated. Furthermore, most of these stakeholders are not trained in protection, although they have a key role to play, since they are often the first ones to come into contact with the victim or witness and/or will provide guidance and assistance during the court

⁸⁹ We should also note that Congolese case law precludes that a witness can be assisted by a lawyer.

⁹⁰ This is particularly the case of the PANZI Legal Aid Clinic in BUKAVU.

proceedings.⁹¹ Such training is indispensable to determine the protection measures to be adopted and should in particular enable them to analyse fully, together with the person concerned, the risks entailed by lodging a complaint or testifying, any protection measures and their limits, etc.

Furthermore, a programme for the protection of the victims, witnesses and defenders of human rights was implemented by the United Nations Joint Human Rights Office (UNJHRO). Thanks to national protection officers based in each province, and thanks to a protection network consisting of NGOs, in particular in South Kivu⁹², the Programme provides for the adoption of protection measures in favour of threatened persons (that range from simple security advice and monitoring to temporary or definitive relocation within the country). The NGOs of this network relay information to the UNJHRO and often intervene when it is time to implement the protection measures decided by the protection officer (housing, travel, telephone service, etc.). The action of the Programme is supported by the “Protection Trust Fund” financed by several embassies.⁹³ This programme should be lauded. It is most certainly the most developed protection initiative in the DRC at this time and can provide valuable lessons. Nevertheless, its action to date has been focused chiefly on Human Rights Defenders (HRD). The remit and means of this programme remain limited, so that it can cater for only a tiny part of the people who require protection and support measures. Furthermore, MONUSCO was not intended to remain indefinitely in DRC. Under a specific project, UNJHRO also provides for the implementation of protection measures for victims and witnesses directly involved in several proceedings in which senior officers of the Congolese regular army are involved. Based on this experience, this same project aims to introduce a national protection programme for the victims and to institutionalise protection measures in the DRC.⁹⁴

On the other hand, by application of UN Security Council Resolution 1888, the United Nations Development Programme (UNDP) will see to the implementation of the “Strengthening of military justice” programme which will be geared in particular to the courts of South Kivu. In this connection, the UNDP plans in particular to establish “focal points” on protection within the military courts and the CNP.

Finally, an interesting coordination experiment can be reported. At the beginning of 2011, during the important Fizi-Baraka trial held in a mobile court, which led to the conviction of Lieutenant-Colonel Kibibi Mutware in particular for crimes against humanity, both the UNJHRO and national and international NGOs mobilised and made a real coordination effort to provide protection for victims and witnesses involved in these proceedings.

OTHER ACTIVITIES

Activities are moreover carried out to improve protection. Thus, next to the projects and programme cited above, workshops, conferences and training courses have been organised on occasion by different partners on protection, geared to various stakeholders, such as judicial police officers, magistrates, lawyers and human rights structures and NGOs.

There are two types of training. The first, which is rarer, consists of enabling these stakeholders to analyse risks and to develop a security plan by following a rigorous methodology⁹⁵ and, in so doing, being capable of deciding on appropriate measures. The other type of training consists of giving these stakeholders a list of

⁹¹ More specifically, certain human rights structures and NGOs place lawyers and defence counsels at their disposal.

⁹² VIWINE network

⁹³ The Protection Unit of the UNJHRO sees to the implementation and the NGO Lawyers without Borders manages the funding.

⁹⁴ It is in this connection that the Protection Unit of the UNJHRO made proposals to amend the Criminal Code to the PCDCR concerning in particular incriminations of acts of intimidation against victims and witnesses.

⁹⁵ Confer the security process management training of Protection International, based on a methodology developed in their New Protection Manual for Human Rights Defenders, 3rd edition, (2010), available at <http://www.protectionline.org/Nouveau-Manuel-de-protection-pour.html>

protection and support measures that they could or should adopt, depending on their remit, and training them on how to implement them. These complementary training schemes remain occasional initiatives and are not part of basic or continuing training for police and judicial stakeholders for instance. In any event, they differ substantially in terms of content.⁹⁶

⁹⁶ We should moreover note initiatives such as that of the organisation SEARCH FOR COMMON GROUND which, as part of one of its programmes, contributed to the production of several radio programmes on proceedings before military courts in the East of the DRC in particular and which, in this connection in particular, devoted a programme to the protection of victims and witnesses, and invited representatives from civil society, NGOs, the military courts and the police. Workshops, conferences and training courses have been provided by REJUSCO, in which Protection International took part in an active capacity, bringing together mainly the civil society, the police and civil and military judges on the protection of victims, witnesses and intermediaries.

CONCLUSION

The need to protect victims, witnesses and intermediaries is real and urgent, and should be part of the State's priorities. This question is indeed crucial considering the importance and gravity of violations committed for several decades in the DRC and the quality of their authors. The responsibility to effectively protect the victims, witnesses and intermediaries is a prime duty of the State. One has to note, however, that for the moment, the Congolese State apparatus, marked by major failings, is unable to discharge this duty (absence of legal tools, judicial⁹⁷ and police system malfunctions, etc.). The level of public confidence in the ability of the criminal justice and police system in general to protect victims and witnesses is therefore very low.

It is therefore fundamental that the Congolese State should now embark on incrementally building a protection policy, a real state project for the protection of victims and witnesses. It should meet the needs for both physical and psychological safety of threatened victims and witnesses, from the revelation of the facts to the enforcement of sentences. The Congolese legislative and executive branches should be encouraged to take on their responsibilities of protection and to develop an effective protection mechanism. If protection initiatives have been developed by civil society and some international or inter-State organizations, this should not dodge the State's responsibility to protect. The State cannot discharge this responsibility on individuals, national and international NGOs and inter-State organizations, which are not empowered to replace it. It should also be noted that the programmes to fight impunity, a priority displayed by the President of the Republic and supported by the international community, should fully include the question of the protection of victims and witnesses as an end in itself, as well as a means to achieve the aim pursued.

However, it would not be desirable that the State hastily adopt a "model" protection programme, without careful preparation and assessment. In the immediate future, given the current state of justice and police in the DRC, any State programme which would be implemented hastily without adequate guarantees would very strongly risk not to win the confidence of victims and witnesses on the one hand, and, on the other hand, to be ineffective, or in case of severe failure, to create additional danger for the already endangered persons. The physical and psychological integrity of individuals is at stake, so one should act with great caution. Indeed, creating a *de facto* ineffective confidence framework would aggravate the risks. That would for example be the case in a system of protection where easily corruptible persons or persons whose conduct may be dictated by political or military interference, should supervise, decide, coordinate or implement physical or procedural protective measures (such as complete or even partial anonymity, delay in disclosure, etc.). These people would hold confidential information about the identity of a threatened victim or witness, or about the place (that he/she believes to be secret) where he/she is temporarily relocated. It is therefore appropriate to take into account all these risks of malfunctions and to surround the system with sufficient guarantees, even if this means starting the structural reforms needed before launching any programme. A protection system should not start rashly at the risk of being faulty and dangerous; many prerequisites are needed before its launch: (loyalty and professionalism of the personnel involved, absence of corruption, independence, adequate facilities, etc.) and a strong preparation must be implemented (including training and assessment of personnel).

⁹⁷ In its "2012-2016 Quinquennial Programme" presented in May 2012, the Congolese Government notes, regarding reform of the judicial system, that "despite significant progress in terms of judicial reform, certain major concerns persist in this sector, particularly related to bribery impacting thereby on the quality of distribution of justice. It therefore imposes the need to pursue the "Sanitation" and modernization of the judiciary in order to enhance its independence and effectiveness. The aim will be that of making it an irreplaceable tool at the service of the fight against corruption and at the service of the "cleanup" of business climate" (translation from French version of the Programme).

For the time being, it is clear that alternative protection initiatives developed under the Programme for the protection of the UNJHRO and those developed within civil society are the only effectively existing attempts at physical and psychological protection. Indeed, some of them have very probably helped save the lives of threatened victims and witnesses. All these private initiatives have been developed because of the absence of a State protection mechanism and the lack of implementation of the few protection measures provided by the codes. They are also justified by the fact that many of the cases relate to abuses committed by the Congolese army or police. Victims and witnesses do not therefore want to entrust their protection to military courts or members of the security forces, fearing an "esprit de corps" or some form of interference, common via the chain of command. They prefer to contact unrelated organizations.

In the current state of affairs, and as long as the population will not trust State institutions, the actions of civil society or other non-State actors seem to be the only ones able to offer protection and minimum support pending the establishment of a State mechanism or even, in the meantime, an "ad hoc" mechanism. Meanwhile, these initiatives are here to stay. It is therefore appropriate to support their capacity-building. These actors are also among the only ones able to exert the necessary pressure on the State in order to obtain the establishment of a State policy of protection, and should be supported in this approach.

Generally speaking, a comprehensive strategy coordinated among all actors and articulated in the short, medium and long term, should be considered in order to take into account the multiplicity of actors and the magnitude of the problems which are to be addressed. It seems desirable, at each time level, to clarify both the specificity of each actor's intervention and the complementarity and coordination of their actions.

In the short term and regarding the international actors and civil society, it would be desirable to develop, strengthen and complement their interventions:

- Regarding the UNJHRO, its Protection Programme should be encouraged and reinforced. It should further develop its action of protection for victims and witnesses; the Protection Trust Fund should continue to be financed.
- Regarding civil society, the emphasis should be put on training⁹⁸ in the methodology of risk analysis and security plans development, as well as on training in the different measures to prevent, identify, or reduce the risk of intimidation and reprisals, or to respond to them⁹⁹. Some emphasis should also be placed on improving the actions towards greater coherence, expertise, reliability and coordination, and strengthening their capacities for this purpose. Indeed, the lack of training, combined with the lack of human and material means, the lack of coordination and of a strict collaboration framework both between members of civil society and between them and the judicial and police authorities, as well as with the absence of common rules of confidentiality and data protection, can sometimes generate inappropriate measures.
- More generally, regarding these two types of actors (international actors and civil society), could be envisaged a "strengthened protection Programme" which would take charge, in a complete and integrated manner¹⁰⁰, of both physical and psychological protection for threatened victims and witnesses, going further than existing programmes, for certain types of cases or some specific facts, or for cases with a particular profile (individual criteria for admission (and removal), determined in advance). This programme would use a multiple approach, combining "police measures" of a

⁹⁸ The beneficiaries of the training should be evaluated regularly and benefit from a "coaching" mechanism in order to obtain the necessary advice for the difficulties they encounter.

⁹⁹ Note that psychologists, psycho-social assistants, as well as human rights defenders and journalists should also be trained.

¹⁰⁰ As well as those of their relatives, if necessary, and of the intermediaries, magistrates and investigators.

temporary nature, support measures and, as a last resort, final relocation inside or outside the country. This programme could be initiated by an international organization such as the MONUSCO, which already has expertise in protection, given the implementation of the UNJHRO Protection Programme. The programme would narrowly associate organizations of civil society (national and international), both at the decision-making level and at the level of coordination and implementation of protection measures (operational level). In so doing, the programme would notably enhance confidentiality and the security of all information, would ensure that it would always be financed in an appropriate, stable and sustainable manner, and would provide rigorous procedures regarding personnel selection and control (including partnerships with other structures and selected agencies). Moreover, it would benefit from organization and operation autonomy, meaning, among other things, that it would be distinct from the Prosecutor's Office and operationally "insulated" from the police services. The implementation of certain measures of physical protection, such as escorts, patrols, etc., should be ensured by an (International) police force, autonomous vis-à-vis the ordinary Congolese police, separated from the investigation services and impervious to political and military interference; some other measures could be outsourced to NGOs and other rigorously selected associated structures.¹⁰¹

At the same time, concerning the intervention of the Congolese State and the international actors who are implementing programmes of support to the judicial system or to the reorganization of the police, it would be advisable to enhance actions aimed at furthering training and at raising awareness among the institutional actors of the criminal chain, including magistrates and police officers.

Indeed, the actors of the criminal chain, who all represent an important link of the protection chain, should also be made conscious of and completely trained in the issues relating to protection, in terms of both methodology and measures to be taken within their remit, in order to identify, prevent and respond to the risk of intimidation. As we have seen, the few legal provisions relating to protection are only rarely implemented. Such training should be provided to magistrates (civilian and military, associate judges), Public prosecution officers, military auditors, civil and military judicial police officers, members of the "Agence Nationale de Renseignement" (National Intelligence Agency) - exercising certain powers of investigation - and to the police. Civilian and military Registry staff and Public prosecution secretaries, interpreters and judicial experts, or even the hearings police should also be taken into account. Moreover, lawyers and legal defenders should also be made aware and trained in the protection of victims and witnesses, although they can only assist victims.

Training should have a professionalizing objective and should ideally be integrated into the basic and further training cycles of many professional bodies. It should also be adaptable to developments, including the legislative ones, that might occur. The beneficiaries of the training cycles should be evaluated regularly and benefit from a "coaching" mechanism in order to obtain the necessary advice regarding the difficulties they encounter. An educational material could be developed to support and perpetuate the aforementioned training (Investigation guide, etc.).

Concerning now the specific intervention of the State and more precisely of the governmental authorities in charge of justice and the police, we saw that the scarce legal provisions relating to protection are only rarely implemented. Before considering the development of new texts it would be highly advisable to ensure an effective and correct implementation of the few existing texts in the field of protection. In this respect, an implementation order of the existing but too general provisions (in this case, article 74 *bis* of the code of criminal procedure) could be adopted by the Government. However, given the restrictions to the right to a fair

¹⁰¹ Such a mechanism has a time limit, since the international organization is not bound to remain in the DRC.

trial that certain procedural measures may involve, it would be preferable that the Legislative, and not the Executive Branch, provide for certain procedural measures of implementation (such as partial or complete anonymity, etc.). Thus, as a first step, a series of procedural rules could already be introduced in the Code of Procedure (such as restricting the disclosure of information relating to witnesses and victims, the expurgation from public documents of the elements identifying a witness or a victim, the use of pseudonyms, testimony behind closed doors, under partial or complete anonymity, in the respect of the rights of the defence and the right to a fair trial, use of the assistance of a psycho-social assistant or a trustworthy person to accompany the victim, etc.). The Rome Statute and the Rules of Procedure and Evidence of the ICC may be used as a source of inspiration in this respect, together with a string of *soft-law* instruments developed by several international bodies¹⁰². The criminalization of acts of intimidation could also be introduced in the Criminal Code. The aforesaid amendments can still be largely expanded (rules of data protection, criminalization of protected data disclosure, distancing measures, provisional release conditions, etc.)¹⁰³.

Furthermore, internal directives¹⁰⁴ to the attention of various actors in the criminal chain (magistrates, investigators, court registrar, etc.) could be adopted to encourage and facilitate the adoption of a number of protection measures. These guidelines would provide recommendations as to the application of existing provisions and any other protection measures already applicable, and may be accompanied by an analytical synthesis including the interpretation of existing procedural measures and a wide catalogue of concrete measures resulting (from them) in the judicial practice, inspired by the Rome Statute of the ICC and its Rules of Procedure and Evidence.

About the application of existing texts, one could establish an "ad hoc" Commission or consult the " Standing Committee on the Reform of Congolese Law", for example, in order to develop a document that, through the analysis of all the international conventions binding on the DRC, may establish in a synthetic way the catalogue of all the measures or commitments to be implemented. In the medium term, this catalogue could be translated into specific implementation measures, which might be inserted within the framework of a reform of the Code of Criminal Procedure, along with any other relevant matter.

With regard to medium and long term goals, all along the talks that PI has conducted with the authorities, civil society and international organizations, the interviewees have expressed sometimes very different, even opposing, views on the policy that ought to be adopted in DRC or on its terms and conditions. However, the idea of a national law on the protection of victims and witnesses, which would include the creation of a structure dedicated to protection itself, was raised by many interlocutors. It would take the form of a multidisciplinary cell (in the registry of a court for some, or inside the Ministry of Justice for others). Some would see an early creation, at a stage of "experimentation", provided members of civil society and/or of the international community takes part in it in the early stages, others don't. Some would give this cell some decision-making power outside the procedural steps and a power of coordination on other protection measures, others would only entrust the cell with the execution of decisions made by the judge or the

¹⁰² The "*soft law*", as non-binding, is defined in contrast to the "*hard law*", binding law.

¹⁰³ Note that some tools have been developed by the United Nations, inter alia, to facilitate the effective implementation by States of international instruments to which the Congo is party: the UNODC manual on justice for victims: "Handbook on Justice for Victims: On the use and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power » (<http://www.uncjin.org/Standards/9857854.pdf>), the Manual for professionals and decision-makers and the Model Act on Justice in matters involving child victims and witnesses of crime, the model law against trafficking in human beings (http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP_-_French.pdf), "good practices for the protection of witnesses in criminal proceedings relating to organized crime" (*op. cit.*), the model law on witness protection and the model agreement on international cooperation about resettlement of witnesses at risk, etc.

¹⁰⁴ These guidelines could take the form of a ministerial order for the attention of the magistrates, of the public prosecutor and the CID officers, of an internal directive of the "Conseil Supérieur de la Magistrature" (Supreme Judicial Council) for the attention of the judges and registrars, or of regulations of the National Order Council, or again of a directive of the National Bar for the attention of lawyers, etc.

Prosecutor. The creation of a special police force for the protection of victims and witnesses, or of a special unit to implement certain measures of physical security was also frequently mentioned.

Given these diverging opinions and ideas about a protection programme and its various possible mechanisms, it is essential, first of all, that a cross-reflection is conducted between the Congolese authorities, the criminal chain actors, civil society and international and inter-State organizations acting in the DRC (including UNJHRO), in order to discuss these points and define the most relevant long term strategy for the protection of victims and witnesses. Consulting is necessary to find a common path. It would be highly desirable that the International Criminal Court seize the occasion to share its expertise and practical experience in the DRC, as should also be the case for the Special Court for Sierra Leone. The United Nations Office on Drugs and Crime could also provide some light. The sharing of foreign experience (with its strengths and weaknesses), to be adapted to the particular context of the DRC, could be a source of valuable inspiration (experience of the recent system of witness protection established in Kenya, International Commission against Impunity in Guatemala (CICIG), etc.). This global reflection should allow to clearly highlight all the prerequisites and implications necessary to ensure that the protection system works properly and to consider all the required legislative reforms.¹⁰⁵ At the time when a legislation destined to implement the Rome Statute and a law creating a Joint Specialized Court (or any other joint judicial mechanism) are being prepared, it is important to think the protection as a whole, in all its dimensions.

From this framework of consultation and reflection there should emerge the design of a protection mechanism for victims and witnesses "adapted" to the situation prevailing in DRC (if necessary, with a hybrid [i.e. including an international component at first] support or composition). An "experimental" phase or a pilot project (on a small scale, or only for certain types of facts¹⁰⁶ or for a limited number of cases) could then be considered to test its implementation and its relevance, before being adopted. Regardless of the type of mechanism recommended, it should be noted that this experimental project should be carefully prepared in order to contain all the guarantees of independence, autonomy, confidentiality and reliability and be designed to avoid the risk of leaks, corruption, interference, etc. Moreover, it is important that all the staff involved in the pilot project (from intermediaries to magistrates, including police services, judicial police officers, judicial personnel, lawyers and legal defenders, etc.) should have been trained in the first place, that the impact of this training should have been assessed and the necessary means allocated for the proper functioning of the project. All these guarantees must be thought through considering all the persons, bodies or authorities who will oversee, decide on, or who will coordinate and implement the protective measures. If such were not the case, the launch of any experiment would be dangerous for the people to protect. Then, according to the results of this test experience, the mechanism might be adopted and generalized or, on the contrary, revised.

¹⁰⁵ In this respect, it is important to enter any legislative amendment in the perspective of a comprehensive and coherent reform of criminal procedure and criminal law, as an integral part of a comprehensive reform of the judicial system.

¹⁰⁶ For example, acts of sexual violence for which article 74 *bis* already exists, and/or international crimes.

LINES OF THOUGHT AND ACTIONS

In the light of the foregoing, it would be appropriate:

IN THE SHORT TERM

1. Application of existing texts

A. Implementation of international Conventions

Fully implement the international Conventions duly ratified by the DRC, and in particular those which compel it to take measures to protect and assist victims and witnesses, namely:

- the United Nations Convention against Transnational Organized Crime (UNTOC),
- the additional protocol to the United Nations Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,
- the additional protocol to the United Nations Convention against Transnational Organized Crime against the Smuggling of Migrants by Land, Sea and Air,
- the United Nations Convention Against Corruption (UNCAC),
- the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),
- the United Nations Convention on the Rights of the Child,
- the Rome Statute of the International Criminal Court.

For this purpose, **establish an "ad hoc" Commission or consult the Standing Committee on the Reform of Congolese Law**, for example, in order to develop a document that, through the analysis of all the international conventions binding on the DRC, may establish in a synthetic way the catalogue of all the measures or commitments to be implemented. In the medium term, this catalogue could be translated into specific implementation measures, which might be inserted within the framework of a reform of the Code of Criminal Procedure and of the Criminal Code, along with any other relevant matter (*see above*).

B. Adoption of implementation orders and adoption of circulars/directives of implementation and/or on criminal policy

Adopt a standard of implementation of article 74 bis of the Code of criminal procedure relating to the general obligation to protect victims and witnesses of sexual abuse, and any other "person involved" (for more details, *see above*), building on the procedural rules laid down by the Rome Statute and the Rules of Procedure and Evidence of the ICC.

Adopt internal guidelines and circulars of implementation and/or guidelines on criminal policy, for the attention of the different institutional actors of the criminal chain, in order to facilitate the implementation of

the existing provisions relating to the protection of victims and witnesses, and to give instructions on any other appropriate measure (for more details, *see above*). So, for example,

- The Minister for Justice and the Supreme Judicial Council could, for example, remind the judges and prosecution magistrates :
 - to investigate quickly and effectively all allegations of intimidation and threats against victims and witnesses and pursue and punish the perpetrators of these acts,
 - to be alert, within the limits that the law provides, to the risk of intimidation and reprisals when the time has come to place or maintain a person in preventive detention and to grant provisional freedom (and when adopting necessary measures such as for example the prohibition to travel within a certain perimeter, or be in the vicinity of such and such a place or person).
- The Minister for Justice, the Minister of Internal Affairs and the Supreme Judicial Council could also remind the obligation to comply with other relevant provisions, such as those relating to the investigation secrecy and the professional secrecy and the obligation to ensure, where appropriate, the anonymity of the whistleblower and the use of closed hearings.
- Criminal policy directives could as well concern the adoption of other measures, such as implementing rules of confidentiality, of the protection of data and secure procedure documents, informing the victim or the witness about their rights and the conduct of the procedure (and, especially, about the protection measures he/she can enjoy), questioning the person with tact, respecting his/her privacy and dignity, etc.

C. Monitoring, control and assessment of the penal chain

Establish (through competent bodies) effective control and assessment measures and proceedings about the respect, by the criminal chain institutional actors, of the legal provisions relating to protection and criminal policy circulars and directives mentioned above.

D. Publishing and vulgarization of practical guides and manuals to the attention of all actors involved in protection

See above.

2. Training

To implement a comprehensive, specific, systemic, basic and further, **training Programme** on victims, witnesses and intermediaries protection, **destined to all the actors of the criminal chain mentioned above (and under the conditions mentioned above).**

To implement a comprehensive, specific, systemic, ongoing, **training Programme** on victims, witnesses and protection, **destined to all intermediaries, human rights defenders and journalists (and under the conditions mentioned above).**

3. Maintain and develop the implication of international actors and civil society in the implementation of protection actions

In particular regarding the physical and psychological security of the victims and witnesses under threat, **develop and/or strengthen protective actions by non-State actors, therefore:**

- strengthen the protection Programme of victims, witnesses and human rights defenders led by the protection unit of the UNJHRO - MONUSCO (human and material means to help and support more persons under threat),
- develop and strengthen the actions implemented by civil society for the protection of and assistance to victims and witnesses, to minimize security incidents and allow any threatened victim or witness to benefit from physical and psychological protection and assistance measures.

Elaborate and put in place a comprehensive strategy for protection and assistance, from the moment the statements of the victim or the witness are collected by a third party (even outside police investigation or trial), or he/she is taken care of by the structure, as well as throughout all the phases of the criminal procedure and the post-jurisdictional phase.

Develop comprehensive and specific **training Programmes** about victims and witnesses protection (according to what has been recalled above) destined to intermediaries who help and accompany victims and witnesses, human rights defenders and journalists, and about their own protection. Ensure the monitoring and the assessment of these programmes.

Create, if possible, within the structures for the accompaniment and assistance to victims and witnesses, **multidisciplinary teams** capable of taking measures of both physical and psychological protection and assistance.

Pay particular attention to psychological support and to the providing of psychologists specialized in post-traumatic shocks and other severe traumas.

Ensure that the vulnerability of the person is always taken into consideration in the adoption and implementation of protection and support measures; to this effect, take into consideration factors such as age, sex, disability or the nature of the facts.

Exchange thoughts about the establishment of an alert mechanism and of emergency procedures on the entire territory; about common principles such as use relocation inside or outside the country as a last resort, given the adverse implications it may have on the person; if such measures are to be adopted, ensure that all guarantees of confidentiality, funding and long-term monitoring will be at the disposal of the victim, the witness, and, if necessary, of his/her family. To facilitate exfiltration, provide for agreements and emergency procedures with embassies and relevant international organizations.

Schedule, in the projects relating to victims and witnesses submitted to donors, the lines of **funding necessary to support the physical and psychological security** of victims and witnesses, but also for the security of the staff implementing the project.

4. Advocacy actions

Continue and strengthen the advocacy of legislative proposals, among others, of the implementation of the Rome Statute, of the creation of a specialized Court, of the protection of the Human Rights Defenders, and pay increased cross-the-board attention to the protection of victims and witnesses.

Strengthen the advocacy of a policy and State programme of protection for victims and witnesses

IN THE SHORT AND MEDIUM TERM

1. Concertation, collaboration, transversality

A comprehensive strategy coordinated among all actors and articulated in the short, medium and long term, should be considered in order to take into account the multiplicity of actors and the magnitude of the problems which are to be addressed. It seems desirable, at each time level, to clarify both the specificity of each actor's intervention and the complementarity and coordination of their actions.

To this end, conduct a cross-reflection between the Congolese authorities, the criminal chain actors, civil society and international and inter-State organizations acting in the DRC (including UNJHRO), in order to discuss these points and define the most relevant long term strategy for the protection of victims and witnesses. It would be highly desirable that the International Criminal Court seize the occasion to share its expertise and practical experience in the DRC, as should also be the case for the Special Court for Sierra Leone and the United Nations Office on Drugs and Crime (*see above for more details*).

2. Clarify or determine the relevant mechanisms of concertation and collaboration between all the actors

Establish a strict collaborative framework both among the various structures of civil society and between these structures and judicial and police authorities, including strict rules of confidentiality and data protection. To this end, establish coordination mechanisms to strengthen joint action (signature of conventions or agreements between the different structures and institutions, adoption of a code of conduct or guidelines).

Coordinate the granting of the protection and assistance measures among the various structures of civil society, between those structures and the embassies and inter-State organizations and, when the situation allows it, between those structures and the State institutions.

3. Consider the creation of a "reinforced" victims and witnesses protection mechanism

Regarding the international actors and the civil society, could be envisaged a "strengthened protection programme" which would take charge, in a complete and integrated manner, of both physical and psychological protection for threatened victims and witnesses,¹⁰⁷ going further than existing programmes, for certain types of cases or some specific facts, or for cases with a particular profile (*see above for more details*).

¹⁰⁷ As well as those of their relatives, if necessary, and of the intermediaries, magistrates and investigators.

IN THE MEDIUM TERM

1. Legislative measures

A. Implementation of the Rome Statute and protection

Adopt legislative measures to **implement the Rome Statute of the International Criminal Court**, in the perspective of a comprehensive reform of the judicial system, putting in place a coherent system of protection of victims and witnesses of international crimes in the DRC before, during and after the trial. In particular,

- maintain the achievements in terms of protection and assistance already registered in the proposed Bill filed in March 2008 (including the introduction of new provisions in the Criminal Code that criminalize acts of intimidation against victims, witnesses, judges, court staff, any other person sitting in a court, an arbitrator, an interpreter, an expert and a lawyer); and, in particular,
- Provide for the criminalization of acts of intimidation against intermediaries; provide for the protection of witnesses, relatives of victims and witnesses and intermediaries, among others; think about and introduce a broad range of safeguards, including procedural, physical and psychological safeguards and an effective mechanism for decision, coordination and the implementation of these measures (according to what was said above).

B. Integration of a comprehensive protection strategy in any law establishing a joint judicial mechanism

Integrate a **comprehensive protection strategy in any law establishing a joint judicial mechanism** (recommended by the United Nations Mapping project as a transitional justice mechanism). At the very least, in the proposed Bill on the establishment of a Specialized Court, rejected by the Senate during the past legislature, one should take care to:

- preserve the achievements of the Bill regarding protection (maintain the Rome Statute guarantees already integrated - obligation to protect and support dependent on the Court, on the Prosecutor, taking vulnerability into account -, the creation of a Division or Section to assist victims and witnesses in the registry of this Court, the creation of a fund to help victims and witnesses),
- assign all the protection and assistance tasks to a body within the registry and, in this instance, to the victims and witnesses support Division or Section,
- give to the registry and, in so doing, to this Division or Section all the necessary guarantees of autonomy as well as incorporating an international presence,
- clearly define the distribution of tasks between the Division or Section and the Special Unit for investigation and prosecution in order to avoid any conflict of interest,
- refer more to the provisions relating to protection and assistance contained in the Rome Statute and in the Rules of Procedure and Evidence of the ICC (also expanding and clarifying the catalogue of possible procedural measures),

- clarify the mission of the Fund for assistance to victims and witnesses, its mode of management and its functioning, its access conditions, etc.; provide that it will be financed appropriately, stably and sustainably,
- provide an order of the Minister for Justice establishing the modalities of implementation of the protection and assistance mechanisms.

C. Work on the harmonization of the Bill on the Specialized Court and the Bill for the act of implementation of the Rome Statute

Harmonize and connect the different projects or legislative proposals that would come to be introduced/adopted, in order to fully and consistently consider the protection of victims and witnesses. In particular, harmonize and connect the projects relating to victims and witnesses of international crimes, whether they appear before a possibly Specialized Court or before any national court.

D. Adoption of new procedural measures

Introduce as soon as possible into the legislation a catalogue of procedural measures, such as restricting the disclosure of information relating to witnesses and victims, the expurgation from public documents of the elements identifying a witness or a victim, the use of pseudonyms, testifying behind closed doors, under partial or complete anonymity, in the respect of the rights of the defence and the right to a fair trial.

E. Insertion of new incriminations in the Bill on reform of the Criminal Code

Fully incriminate, as soon as possible, the acts of intimidation against victims, witnesses and their families, but also acts of intimidation against judges, investigators, experts, judicial staff, interpreters, lawyers, intermediaries (see above).

F. Protection of Human Rights Defenders

Adopt a law for the protection of Human Rights Defenders¹⁰⁸.

2. Pilot project conception

From the framework of consultation and the transversal reflection (mentioned above) between all State and non-State actors, enriched by international expertise in the protection of victims and witnesses, **design a protection mechanism** for victims and witnesses "adapted" to the situation prevailing in DRC (if necessary, with a hybrid [i.e. including an international component at first] support or composition).

Conceive an "experimental" phase or a pilot project (on a small scale, or only for certain types of facts¹⁰⁹ or for a limited number of cases) could then be considered to test its implementation and its relevance, before being adopted. Regardless of the type of mechanism recommended, it should be noted that this experimental project should be carefully prepared in order to contain all the guarantees of independence, autonomy, confidentiality and reliability and be designed to avoid the risk of leaks, corruption, interference, etc. Moreover, it is important that all the staff involved in the pilot project has been properly trained (see Conclusion for more details, in particular about the part MONUSCO could play in the mechanism).

¹⁰⁸ In its human rights protection action, and according to its « *Quinquennial Action Programme 2012 – 2016* », the Congolese Government plans to « protéger et renforcer les capacités des ONG nationales de protection des droits de l'homme à travers la finalisation et la mise en œuvre de la loi sur la subsidiarité de ces dernières et la protection de leurs animateurs » (sic). The same Programme foresees to « finaliser la loi relative à la création, l'organisation et/ou fonctionnement de la Commission Nationale des droits de l'homme ».

¹⁰⁹ For example, acts of sexual violence for which article 74 *bis* already exists, and/or international crimes.

3. Adapt police and judicial infrastructures to protection

Integrate, in the construction and renovation of tribunals and police stations programmes, infrastructures and technical equipment for the effective implementation of protection measures and the preservation of confidentiality.

Among others, **adapt the configuration of the courts and tribunals** (possibility to close the premises, separate entrances for the accused and the victims and witnesses, adequate physical separation of the parties in court) and award these courts and tribunals, as much as possible, the technical equipment required for the protection and support of victims and witnesses (availability of screens or boxes, videoconference or distortion of the image or voice equipment, etc.).

IN THE LONG TERM

1. Pilot projects assessment

Conduct a rigorous assessment of the pilot project implemented. According to the results of this test experience, the mechanism might be adopted and generalized or, on the contrary, revised.

2. Elaboration of a comprehensive and reinforced law on victims and witnesses protection

In the light of the results and the assessment of the pilot project, adopt and effectively implement a national law on the protection and assistance to victims and witnesses, which should find its place in a comprehensive reform of criminal procedure and criminal law, the latter being an integral part of a comprehensive reform of the judicial system. This law should in particular:

- provide, if it's not already done, for the use of procedural measures, such as restricting the disclosure of information relating to witnesses and victims, the expurgation from public documents of the elements identifying a witness or a victim, the use of pseudonyms, testimony behind closed doors, under partial or complete anonymity, with all due respect for the rights of the defence and the right to a fair trial,
- create procedures and mechanisms of protection, support and assistance to threatened victims and witnesses, before, during and after the trial, while taking into account the need to provide for measures adapted to the vulnerability of the person (child, elderly person, disabled person, victim of sexual or gender-based violence, etc.),
- extend, if needed, protection and assistance measures to the entourage of the victim or the witness,
- include protection procedures and mechanisms for judges, investigators, lawyers and intermediaries, in particular,
- provide appropriate and sustainable financing to the protection and support programme,
- fully incriminate, if it's not already done, acts of intimidation against victims, witnesses and their families, but also against judges, investigators, experts, judicial staff, interpreters, lawyers, intermediaries.

**TRANSVERSALLY, TO THE ATTENTION OF THE INTERNATIONAL DONORS
(THIRD COUNTRIES, UN AGENCIES, INTERNATIONAL NGOS, ETC.)**

Continue to **fund the Protection Trust Fund** managed by UNJHRO and ASF.

Continue to provide **financial and material resources to programmes and projects of assistance and support to victims and witnesses** by paying special attention to the financing of their physical and psychological protection, as well as that of the “intermediaries”.

Provide the authorities and civil society organizations with **technical expertise** in victims and witnesses protection.

Provide adequate and sustainable help to any protection mechanism put in place within a Specialized Court or within the implementation process of the Rome Statute, and ensure that these mechanisms have all the necessary guarantees of reliability and effectiveness.

Allocate **sufficient, stable and sustainable means** to any victims and witnesses protection programme that would be created and that has all the necessary guarantees of reliability and effectiveness¹¹⁰.

Develop the actions aimed at **strengthening the capabilities of civil society and of State institutions** in this matter, in order to establish a transition when the MONUSCO leaves, and put the MONUSCO expertise at their disposal.

¹¹⁰ According, inter alia, to the good practices highlighted by the United Nations.

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