

***THE INTERNATIONAL CRIMINAL COURT  
THE VICTIMS AND WITNESSES UNIT (ARTICLE 43.6 OF THE  
ROME STATUTE)  
A Discussion Paper***

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under the auspices of the Project on International Courts and Tribunals (PICT)*

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## Foreword

This Paper has been prepared by the Center on International Cooperation under the auspices of the Project on International Courts and Tribunals (PICT) to provide the Preparatory Commission of the International Criminal Court with issues for consideration during the drafting of the Rules of Procedure and Evidence of the Court.

In 1996 the Center on International Cooperation (New York University) and the Foundation for International Environmental Law and Development - FIELD (School of Oriental and Asian Studies, University of London) launched the Project on International Courts and Tribunals (PICT). The context was the growing number of international courts, tribunals and other dispute settlement bodies which have emerged in virtually every area of international activity. PICT's mission is to address the legal, institutional and financial issues arising from the multiplication of international courts and tribunals and other dispute settlement bodies, as well as from the increased willingness of members of the international community to have recourse to them. PICT addresses legal, institutional and financial issues arising out of the proliferation of international courts and dispute settlement bodies and the growing number of cases which these bodies are called upon to address. The overall objective is to promote research, training and public education activities that will contribute to the more effective, equitable and efficient delivery of international justice.

*Effectiveness:* reinforcing the role of international courts and bodies in the administration and development of the international legal system; strengthening their credibility as effective and efficient dispute settlement bodies; ensuring the implementation of their rulings;

*Equity:* reducing financial and structural barriers that limit the ability of disadvantaged actors to have access to international courts and dispute settlement bodies; providing practical know-how and legal skills to their actual and potential users;

*Efficiency:* ensuring the availability of adequate financial means and the use of the best management practices; decreasing costs and length of proceedings by streamlining statutes, rules of procedure and working practices.

To achieve these general objectives PICT promotes and undertakes research on legal, financial, procedural and access issues which affect the delivery of international justice, with the intent of identifying potential solutions.

This discussion paper focuses on a crucial component of the future International Criminal Court: The Victims and Witnesses Unit (VWU). It is intended to provide a background to discussions at the meetings of the Preparatory Commission for the International Criminal Court in 2000.

PICT itself takes no position on the legal questions involved but believes that the views of the Paper's authors can help to both clarify provisions in the Rome Statute and inform decisions on the structure and use of the proposed VWU. Moreover, the views presented in this paper are those of the authors in their personal capacity and do not necessarily represent the institutions with which the authors are associated.

We invite readers to comment on the papers directly to the authors or to PICT staff at <cr28@acf2.nyu.edu>.

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## Introduction

According to article 43.6 of the Rome Statute:

*“The Registrar shall set up a Victims and Witnesses Unit within the Registry. This unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma related to crimes of sexual violence.”*

The Victims and Witnesses Unit (VWU) is of fundamental importance to the work of the International Criminal Court for two reasons. Firstly, the Court does not have the power to compel a witness to appear before the Court. Thus, witnesses’ appearance will depend on their willingness to come to the Hague.<sup>1</sup> The unit’s services will facilitate effective investigation, prosecution and defence by encouraging them to come forward.

Second, the VWU is essential not to make victims and witnesses unnecessarily suffer twice. In many instances they will have to travel to a foreign country, appear before an alien court, participate in unfamiliar proceedings, in a language that is not their own, face the perpetrators, testify about horrendous experiences, encounter cross-examination, possibly put themselves and others at risk, and, at least for some, subject themselves to possible prosecution or arrest. The VWU will prepare them, both materially, physically and psychologically to withstand the trial.

To be sure, the negotiators and experts shaping the VWU will have to walk a thin line. While the unit will provide protection and support in the interest of the victims, witnesses and the parties, those services by themselves should not become an inducement to run to The Hague. Justice would be badly served by hired witnesses.

Although both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been endowed with similar units which can shed some light on the problems the VWU will encounter, the significance of those two precedents is quite modest. First, the witness and victims units of the two tribunals were established with much delay and hesitation by inserting ad hoc provisions in the Rules of Procedure and Evidence. Conversely, the VWU is a statutory organ of the ICC. Because of this, the former units will have structure, relations with other organs, and mandates different from the latter’s.

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<sup>1</sup> According to article 64.6(b) of the Rome Statute, the Court can “require the attendance and testimony of witnesses...by obtaining if necessary, the assistance of States as provided in [the] Statute”. According to article 93.1.e of the Rome Statute, State Parties are obligated to “[facilitate] the *voluntary* appearance of persons as witnesses or experts before the Court” [emphasis added]. National implementing legislation may further strengthen this duty.

Secondly, there is no way of telling what and how many situations the Court may be called to address in the future. The VWU might be faced with different situations at the same time, originating from different offences and locations. The background, circumstances and needs of victims and witnesses can therefore differ significantly. In this respect the VWU is significantly different from its counterparts at the ICTY and ICTR, where the units were able to form and specialize around specific situations.

Not only this quandary makes purposeless any speculation about the VWU budget, capacity and size (although, it is clear that the VWU operations will be only a fraction of the overall Court's budget), but it also creates a tremendous managerial problem. While it is essential that the unit is up and running from the very first day of operations of the Court, it is obviously impossible to factor in the budget and staff situations which are unknown in location and magnitude. Therefore, the VWU will require great flexibility to adjust to different situations and different needs.

Nonetheless, the experience of the ICTY and ICTR units can provide useful insight into the basic elements any efficient and operational unit should be endowed with. This paper intends to present some issues for consideration by the Preparatory Commission of the International Criminal Court, the future Assembly of State Parties and the Court which might have a fundamental bearing on the Unit's future successful operation. It will focus on the main aspects of the VWU's work. It is outside the scope of this paper to address witnesses' rights under the Rome Statute and the procedures that govern the taking and use of their statements and testimonies. To the same extent, this paper will not address victims' rights under the Rome Statute nor the substance and manner of their participation in the proceedings.

## 1 Financing, Staffing and Structure

The VWU must have the necessary financial and human resources to carry out its mission from the Court's very first day of operation. As the experience of the ICTY and ICTR shows, the late launching

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of victim and witness protection programs can seriously hamper the work of the Court in its first years of operation, when it will be most vulnerable to criticism and easily damageable.<sup>2</sup> The Unit's successful accomplishment of its substantive tasks (i.e. to protect and support victims and witnesses in often very difficult circumstances) should not be hindered by financial and personnel-related factors.

### 1.1 Budget and Financing

Because the VWU is an organ of the Registry, and hence of the Court, its budget will be part of the Court's regular budget. The main items in the VWU budget will likely include staffing, travel and security of witnesses and protective measures and assistance.<sup>3</sup> Having said that, it is very difficult to foretell how large the unit's budget will be and what percentage it will be of the overall Court's budget.

If the ICTY is taken as term of comparison, the budget of the VWU will be limited and only a fraction of the Court's overall expected budget. To illustrate, the 1998 expenditure relating to the 407 witnesses appearing before the ICTY that year was \$710,000 (approximately \$1,744 per testifying witness). That is 1% of the total 1998 budget (\$64 million). For the year 2000, \$1,671,200 has been budgeted to cover travel and allowances of victims and witnesses and witness support persons;<sup>4</sup> \$113,700 for dependent children or disabled adults; \$64,500 for claims for loss of earnings for

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<sup>2</sup> The February 1997 report of the United Nations Office of Internal Oversight Services on the ICTR noted that "[t]he slow development of witness related-programmes hampered trial preparation and has the potential to impact negatively on the trials"; see the Report of the Secretary-General on the Activities of the Office of Internal Oversight services; UN Doc. A/51/789 (1997), para. 54. "[T]he inability of the International Tribunal to guarantee the safety of the victim and witness due to the lack of a fully-funded and operational witness protection programme at this moment in time" was one of the main factors that led the ICTY chamber to rule in the Tadic case that witnesses who had been victims of sexual assault could testify anonymously to protect them and their families from retribution; see Prosecutor v. Tadic, Case No. IT-94-1-T, Decision of the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 August 1995, para. 42.

<sup>3</sup> The lack of budget preparation for the functioning of the victims and witnesses unit at the ICTR has been criticized by the Advisory Committee on Administrative and Budgetary Questions. This criticism has both involved the establishment of the victims and witnesses unit and its long term witness protection; see Financing of the International Criminal Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January and 31 December 1994, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/52/697, 21 November 1997, paragraph 23.

<sup>4</sup> It is expected that 600 witnesses and 120 other persons will travel to the tribunal in 2000 for the purposes of hearings and trials.

witnesses; and \$385,000 for relocation costs.<sup>5</sup> This represents only 2% of the ICTY total budget for the year 2000 (\$110,6 million) or approximately \$3,080 per testifying witness.<sup>6</sup> Still, because the ICC will have universal scope and a potentially unlimited number of situations to take on, some of which at the same time, the figures of the ICTY budget are *per se* of little guidance.

In the case of the ICTY and ICTR, voluntary contributions have been essential to the establishment and early functioning of witnesses and victims programs.<sup>7</sup> This is so because, as it was said above, the establishment of a victims and witnesses protection unit in those two tribunals has been an afterthought. In time, the expenditures of those units have been largely incorporated in the tribunals' regular budgets, although voluntary contributions are still present.

According to article 116 of the Rome Statute, the Court may receive, as additional funds, voluntary contributions from governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by Assembly of States Parties. Of course, the ultimate rationale for limiting voluntary contributions from the Court's core functions was to ensure its control lies in the hands of states parties. However, because several of the VWU undertakings will not be of judicial in nature (e.g. victim support), the impact of voluntary contributions on the Court's independence and impartiality will be less significant. Broader criteria on voluntary contribution for non-judicial activities of the VWU should be considered.

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### 1.2 Staffing

As to the number of staff required, once again the precedents of the ICTY and ICTR offer little guidance. In 1999, 23 people were employed at the victims and witnesses unit of the ICTY, and 29 at

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<sup>5</sup> According to article 100 of the Rome Statute the costs associated with the travel and security of witnesses and experts, executed by requested member State, shall be borne by the Court. ICTY witnesses in need of protection and relocation have been admitted to states' refugee programmes at no cost to the tribunal. However, the ICTY is facing relocation cost in two areas: in cases when immediate relocation is necessary prior to permanent relocation arrangements and when relocation takes place within the territories of the former Yugoslavia; see Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Report of the Secretary-General, UN Doc. A/54/518, para. 56(v).

<sup>6</sup> See tables 1 – 3.

<sup>7</sup> The Victims and Witnesses Unit at the ICTR was established from resources available in the tribunal's Voluntary Trust Fund. In 1998, 24 of its staff members were financed from the fund. The unit's support services have also been supported by resources from the tribunal's Voluntary Trust Fund. For instance, in 1998 one safe house and special missions to bring undocumented witnesses from third countries to give testimonies at trial proceedings were financed by voluntary funding. The Witness Assistant Program at the ICTY was financially and professionally supported by the European Union and the Danish Rehabilitation and Research Centre for Torture Victims from 1995 until mid May 1998, when the tribunal assumed financial responsibility for the salaries of the staff participating in the programme. Voluntary funds have also been applied toward payment of a special trauma consultant.

that of the ICTR.<sup>8</sup> However, because the Court might be called to handle more than one situation at time, it is likely that the VWU will need at least the same amount of people, if not a multiple of that figure. The VWU must be provided great flexibility to hire, contract or accept gratis staff suited for each situation.

*As for staffing, forward planning, early recruitment and training cannot be overemphasized*

Nonetheless, finding experienced staff trained in these sensitive tasks might not be easy. The VWU staff will be in daily contact with witnesses and victims belonging to various and often unfamiliar societies and cultures and providing services to vulnerable and traumatized victims. In addition to these humanitarian functions, it will handle confidential information on behalf of all parties and collaborate with States that may have a particular or major interest in the outcome of trials.<sup>9</sup>

Again, much as in the case of voluntary contributions to the Court's financing, article 44.4 of the Rome Statute provides that the Court may only "...in exceptional circumstances, employ the expertise of gratis personnel offered by State Parties, intergovernmental organizations or non-governmental organizations". Although this provision does not exclude gratis or seconded personnel altogether, it does exclude gratis staff from non-parties (although States which are not party to the Rome Statute can offer voluntary contributions). The ICTY and ICTR relied heavily on gratis staff in their early years, many of whom worked with the victims and witnesses units.<sup>10</sup> As in the case of voluntary contributions, concerns for the independence and impartiality of the Court should not hamper the acceptance of gratis personnel for the VWU, at least for the more humanitarian functions. Still, it would not be advisable to fill the unit of personnel offered only by a handful of States. Indeed,

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<sup>8</sup> ICTR 29 regular staff members consist of 6 professionals, 8 field services officers and 15 general services officers. In addition, the unit is provided with security support by the Government of Tanzania, 20 local and armed security officers who are attached to the unit's three safe houses. See also table 4.

<sup>9</sup> The current draft for the Rules of Procedures and Evidence states that "the Victims and Witnesses Unit may include, as appropriate, persons with expertise inter alia, in the following areas: -witness protection and security; -legal and administrative matters, including areas of humanitarian and criminal law; -Logistic administration; -Psychological expertise in criminal proceedings; -Gender and cultural diversity; -Children, in particular traumatized children; -Elderly persons, in particular in connection with war and exile trauma; -Social work and counselling; -Health care; -Interpretation and translation."; see Preparatory Commission for the International Criminal Court, Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999), UN Doc. PCNICC/1999/L.5/Rev.1/Add.1, Annex II, rule C.2. Among the contributions of the Chambers of the ICTY to the ICC Preparatory Commission was a recommendation that in the staffing of the VWU a due consideration be given to the employment of qualified women; see Contribution of the Chambers of the International Criminal Tribunal for the Former Yugoslavia, submitted to the 26 July -13 August 1999 Preparatory Commission on the Proposed Rules of Procedure and Evidence for the International Criminal Court, para. 21.

<sup>10</sup> The victims and witnesses unit at the ICTY benefited from gratis staff for its Witness Assistant Program. On 15 September 1997, the General Assembly adopted resolution 51/243, requesting the Secretary-General to phase out gratis personnel. All then-existing agreements with donating governments and organizations were allowed to lapse in 1998.

employment of gratis staff will need to closely follow the Rome Statute's requirements of equal geographical, gender and legal system representation among the Court's staff (art. 44.2 and art. 36.8).

### 1.3 Sub-Units

The seat of the Court will be at The Hague (The Netherlands), although the Court may sit elsewhere whenever desirable (articles 3.1 and 3.3). It follows that the Registry and the VWU will also be located in the same city. Nonetheless, in light of the nature of the VWU, and the precedents of the ICTY and ICTR, it is likely that the VWU will also need to set up sub-offices in different locations, at or near flash points. Sub-offices might be required to move and relocate witnesses within their home-country and to implement support and protection programs. Sub-offices would also facilitate cooperation between the VWU, local governments and domestic non-governmental organizations. The victims and witnesses unit at the ICTR has a main office located at the Court in Arusha, Tanzania, and a sub-office located in Kigali, Rwanda.

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Under the Rome Statute, the Victims and Witnesses Unit shall be located only under the Registry. At the Rome Conference, proposals to have a special unit for the witnesses for the Prosecution, under the auspices of the Office of the Prosecutor,<sup>11</sup> were rejected because it was widely felt that the purpose of the VWU would have been more to assist and protect victims and witnesses in their own interest rather than merely facilitate investigation.<sup>12</sup> Nonetheless, in the interest of justice, to protect the dignity of the witnesses and victims, and to avoid any misgivings, the VWU services provided to prosecution and defense

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<sup>11</sup> The proposal in the Preparatory Committee's Final Draft was the following: "The Registrar shall set up a Victims and Witnesses Unit within the Registry. This unit shall provide counselling and other assistance to victims, [defence] witnesses, their family members and others at risk on account of testimony given by such witnesses and shall advise the organs of the Court on appropriate measures of protection and other matters affecting the rights and the well being of such persons. The unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence"; see Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1, 1998, art. 44.

<sup>12</sup> The rationale for the establishment of the VWU was that the "Court shall ensure the safety of the accused, victims and witnesses, as well as that of their families, from intimidation and retaliation before, during and after the trial. To this end a special service shall be established to achieve that purpose and State Parties should cooperate with this service in their respective territories", Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, UN Doc. G.A., 51<sup>st</sup> Sess, Supp No. 22, A/51/22, 1996, at 204. At the ICTY the rationale for establishing the victims unit under the Registry rather than the office of the Prosecutor "shifted the emphasis of its work from ensuring effective investigation and prosecution to sensitive cases to the more human concern of providing counseling, psychological help and support services to victims and witnesses"; see Statement by the President of the Tribunal, Antonio Cassese, UN Doc. IT/29 (1994).

witnesses should be kept as separate as possible. This applies to lodging, assistance, translating services, interpretation and all other VWU operational functions.<sup>13</sup> Earlier this month the ICTR reconstructed its victims and witnesses unit into two separate units, one dealing exclusively with prosecution witnesses and the other solely with defence witnesses. One of the main reasons for this separation was to dispel the ever-present possibility of suspicion about breach of confidentiality or conflict of interest in the single unit's operation.

Beside the separation between services given to prosecution and defence witnesses, further distinction is also desirable between victims and witnesses. Most of the witnesses will likely only need basic services like transportation and lodging, while only a small group might also need active protection and comprehensive assistance. At the ICTR, the defence and prosecution victims and witnesses units are further split into Protection Sub-Unit and Support Sub-Unit. All support services provided to victims of sexual crimes by the units are monitored by a special unit: the Gender and Victims Unit.<sup>14</sup> In 1999 the ICTY split its unit into the Witness Protection Unit and the Witness Support Unit.

## 2 VWU Standing and Relationship with the Office of the Prosecutor

The Registrar shall set up the VWU *within the Registry*. In other words, under the Rome Statute the VWU is an organ of the Registry. As such, its status and responsibilities depend in the first place on those of the Registry.

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The Registry is an administrative organ of the Court (art. 43.1), with a limited relationship with the Office of the Prosecutor, since the Prosecutor has full authority over the administration of the office (art. 42.2, 43.1 and 38.3(a)), but a relatively strong relationship with the Chambers since the Registrar is elected by the judges (art. 43.4), and is acting under the authority of the President of the Court (art. 43.2). Again, in this respect the experience of the ICTY and ICTR is of little guidance. The registries of the ICTY and ICTR have different responsibilities and position. Firstly, both tribunals have only one administration, as the Registry is responsible for the administration and servicing of both the Trial Chambers and the Office of the Prosecutor. Secondly, the ICTY and ICTR registrars are appointed by the UN Secretary-General.

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<sup>13</sup> The following rule is proposed in the current draft for the Rules of Procedure and Evidence: "To ensure the efficient and effective performance of its work, the Unit shall: ... (ii) Recognizing the specific interests of the Office of the Prosecutor, the defence and the witness, including, where necessary, by maintaining an appropriate separation of the services between the Prosecution and defence witnesses, and act impartially when cooperating with all parties, and in accordance with the rulings and decisions of the Chambers"; see draft Rules of Procedure and Evidence, *supra* note 9, rule C.3.3(ii).

<sup>14</sup> The Gender and Victims Unit complements the tribunal's victims and witnesses units through a special project, the Support Programme to Witnesses and Potential Witnesses, funded by the tribunal's Voluntary Trust Fund.

Beside placing the VWU within the Registry, the Rome Statute is far from clear about the exact placement of the VWU within the overall Court's architecture. According to article 43.6 of the Rome Statute the VWU shall carry out its mandate "in consultation with the Office of the Prosecutor". What this provision implies is unraveled by paragraphs 1 and 4 of article 68.

*"1) The Court shall take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of the victims and witnesses...The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial or inconsistent with the rights of the accused.*

*4) The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance..."*

Thus, under the first paragraph of article 68, the Court (i.e. the Presidency, the Trial Chambers, the Prosecutor and the Registry (art. 34)) has primary responsibility to adopt measures to protect the well being of victims and witnesses. By paragraph 4 of the same article, the VWU's responsibility appears to be merely that of advising the Court and the Prosecutor on appropriate protective measures, security arrangements, counseling and assistance.

However, the letter of article 68.4 seems to be at variance with the broad mandate given to the VWU by article 43.6, and to the Registrar by article 68.1. The source of the dilemma can be traced back to the Rome Conference, where a compromise had to be reached between those delegates who insisted on placing the VWU within the Registry and those who preferred to have it placed within the Office of the Prosecutor. While the Rome Statute eventually placed the VWU under the auspices of the Registrar, article 68.1 was intended to strongly reaffirm the Prosecutor's fundamental duty to protect witnesses.

Nonetheless, construing the role of the VWU as ancillary to the Court and the Prosecutor, runs counter to the experience of the ICTY and ICTR. In those two tribunals, victims and witnesses units

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have broad powers. They can advise, provide and, most importantly, *motu proprio* request that a Trial Chamber order appropriate measures for the privacy and protection of victims and witnesses.<sup>15</sup>

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<sup>15</sup> Common article 75 of the ICTY and ICTR Rules of Procedure and Evidence.

Chambers, it should be allowed to provide *motu proprio* protective measures, security arrangements and other assistance for victims and witnesses. Furthermore, the Rules of Procedure and Evidence should give the VWU standing to file a motion for Court-ordered protection.<sup>16</sup> In some cases, the interests of victims and witnesses might not necessarily coincide with that of the parties, whose primary interest is typically that of “winning the case”.<sup>17</sup> Both at the ICTY and ICTR the victims and witnesses unit can file motions for protective measures. At the ICTY, motions for Court-ordered protection are usually filed either by the prosecution or the defence, but, in future high profile cases, the unit might be prompted to use its standing. At the ICTR, the victims and witnesses unit has used its standing to file for Court-ordered protection.

*The Rules of Procedure and Evidence should give the VWU standing to file a motion for Court-ordered protection*

As a final consideration on the relationship of the VWU with the Office of Prosecutor, it should be stressed that the Rome Statute implicitly requires the VWU to equally provide protective measures and services to defense witnesses and victims during the investigation, pre-trial, trial and post-trial proceedings. In other words, the VWU is the unit for the protection and assistance of all victims and witnesses, not only, or not preferentially, those of the Prosecutor. Thus, in spite of the wording of article 43.6, the VWU cannot be required to consult with the Office of the Prosecutor on matters relating to defense witnesses. Doing so, would abridge the accused’s right to a fair trial. The VWU should be allowed to act independently of the Office of the Prosecutor when devising security assistance and counseling services to defense witnesses.

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Furthermore, it should be kept in mind that the VWU's duty is only to *consult* with the Prosecutor and is therefore not bound by the Prosecutor's position.

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<sup>16</sup> The current draft of the Rules of Procedure and Evidence does not grant the VWU such standing. According to the draft the Chamber may order protective measures "upon the motion of the Prosecutor or of the defence or upon the request of a witness or a victim or his or her legal representative participating in the proceedings pursuant to rules X to XX or on its own motion, and after having consulted with the Victims and Witnesses Unit"; see draft Rules of Procedure and Evidence, *supra* note 9, rules 6.28 and 6.29.

<sup>17</sup> See comment in Address of the Registrar of the International Criminal Tribunal for the former Yugoslavia, Mrs. Dorothee de Sampayo Garrido-Nijgh to the Preparatory Committee on the Establishment of an International Criminal Court, March/April Session, 6 March – 3 April 1998, 19 March 1998. Contributions of the Chambers of the ICTY to the ICC Preparatory Commission comment that “consideration should be given to the possibility of, when appropriate, appointing counsel for victims and witnesses who testify, *as their best interest are not always represented by either party*”; *supra* note 9, para. 23, [emphasize added].

### 3 Beneficiaries

Under the Rome Statute, the Victims and Witnesses Unit shall provide protective measures and assist:

- 1) Witnesses;
- 2) Others who are at risk on account of testimony given by such witnesses;
- 3) Victims who appear before the Court.

Nonetheless, who these beneficiaries ultimately are is far from clear. Indeed, the Rome Statute does not include a definition of the term *victim* or *witness*.<sup>18</sup>

To ensure the VWU's authority and capacity to carry out its mission, the Rules of Procedure and Evidence must clarify and strengthen the definition of the beneficiaries of the unit's services. For

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instance, it must be clarified whether the unit can provide services to informants and potential witnesses. Similarly, it remains to be decided what organ shall provide services to victims appearing before the Court as non-witnesses. At the same time, it must be recognized that the specific services the VWU will provide to each group of beneficiaries will not necessarily be the same. Similarly, the services provided in each individual

case will be left to the discretion of the VWU and granted on its assessment of the beneficiary's individual needs.

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<sup>18</sup> According to article 21 of the Rome Statute, the application and interpretation of the statute must be consistent with internationally recognized human rights. A footnote made in Rome with article 68.1 comments that "[d]elegations took the view that the protective measures contemplated by this article are intended to be afforded to witnesses, to victims (who are not witnesses) directly connected with an investigation or proceedings before the Court and to other persons who are at risk on account of the testimony given by such witnesses. Some delegations did not agree with this"; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2/Add.8, note 3. Another footnote with article 68 comments that "[I]n the exercise of its powers under this article, the Court shall take into consideration the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power"; *id.* note 5. For the purposes of interpretation of the term victim in article 75 (reparations to victims) the drafters of the Rome Statute referred to the definitions contained in the text of article 44.6 of the Rome Statute, art. 68.1, and its accompanying footnote, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Revised Draft Basic Principles and Guidelines on the Right to Reparation for Victims of gross violations of human rights and humanitarian law; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the whole, Working paper on article 73, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7, note 5. A definition based on the same principles was submitted to the Preparatory Commission for the International Criminal Court in the Report on the international seminar on victim's access to the International Criminal Court, UN Doc. PCNICC/1999/WGRPE/INF/2, Annex I, Rule X.

### 3.1 Witnesses

Article 43.6 of the Rome Statute firmly includes witnesses testifying before the Court in the scope of the VWU's mandate. The prosecution and the defense decide who they are going to call to testify before the Court. This determination should be made known to the VWU and the testifying witnesses and those witnesses should be incorporated into the VWU system as early as possible. In 1999, 257 witnesses testified before the ICTY and 180 for the ICTR. In 2000, it is estimated that 600 witnesses will testify before the ICTY and 180 before the ICTR. On average, 105 witnesses testified in each completed trial before the ICTY and 47 witnesses before the ICTR, or, on average, 44 witnesses testified per each defendant before the ICTY and 37 before the ICTR.<sup>19</sup>

Judging from the experience of the ICTY and ICTR, most witnesses will be also victims. The service of the VWU is particularly important for victims of sexual violence and children, and one of the

*Judging from the experience of the ICTY and ICTR, most witnesses will be also victims. The service of the VWU is particularly important for victims of sexual violence and children*

reasons why the Rome Statute has been provided with a victim and witness unit is exactly to provide protection and assistance to them.<sup>20</sup>

Several articles of the Rome Statute emphasize the need for protective measures and services to such particularly vulnerable victims and witnesses.<sup>21</sup>

Still, witnesses will benefit of the VWU services whether they are victims or not. Judging from the experience of the ICTY and ICTR, the majority of witnesses will also be victims with direct experience of the alleged crimes. Expert witnesses, other witnesses who have not also been victims (e.g., investigators, policemen or peace-keepers), and detainees might also be called to testify before the Court. In 1998, 39 expert witnesses testified before the ICTY and 11 in 1999.

*Witnesses will benefit of the VWU services whether they are victims or not*

<sup>19</sup> See tables 5 –10.

<sup>20</sup> "[I]n particular this service, as well as State Parties, shall take additional measures to protect the integrity, privacy and physical and psychological well-being of victims of sexual assault and of children, who are victims or witnesses"; see Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra note 12, at 204. The original proposal for establishing a Victims and Witnesses Unit called for one that consists of "qualified staff to: ... (ii) provide counselling and support for them, in particular in cases of rape and sexual assault"; id, at 204.

<sup>21</sup> The Victims and Witnesses Unit must include staff with expertise in trauma, including trauma related to crimes of sexual violence (art. 43.6); the VWU must include staff with legal expertise on specific issues, including violence against women and children (art. 44.1, 44.2, 36.8); State Parties must take into account the need to include judges and staff with legal expertise on violence against women and children (art. 36.8(b), art. 44.2); the Prosecutor must appoint advisers with legal expertise on sexual and gender violence and violence against children (art. 42.9); the Court shall take protective measures to protect victims and witnesses and in so doing shall have regard to all relevant factors including the nature of the crime, in particular, but not limited to, where the crimes involves sexual or gender violence or violence against children (art. 68.1); the Prosecutor shall in his or her investigation respect the interests and personal circumstances of victims and witnesses and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children (art. 54.1.b); and in the proceedings before the Court there is a presumption for in camera proceedings or presentation by other special means in cases of victims of sexual violence or when children are victims or witnesses (art. 68.2).

The services of the VWU should apply both to witnesses testifying in person and witnesses who will give their testimony in another form authorized in the Rome Statute or its Rules of Procedure and Evidence.<sup>22</sup> As a general rule, the testimony of a witness at trial shall be given in person. However, articles 64 and 69 of the Rome Statute give the Court the authority to rule on the relevance or admissibility of any evidence. According to article 69.2, the Court "may permit testimony by *viva voce*, recorded testimony by means of video or audio technology as well by introduction of documents or written transcript". In fact, testimony in this form might be chosen exactly to protect testifying witnesses. In addition, as witnesses are not compelled to travel to the Court, State Parties could facilitate witness testimony in their territories.<sup>23</sup>

*The services of the VWU should apply both to witnesses testifying in person and witnesses who will give their testimony in another form*

Witnesses called to testify before the Court should benefit from the VWU services whether their requested testimony will be heard at the trial or not. In light of the experience of the ICTY and ICTR, witnesses may travel to the Court to testify but their appearances might be subsequently cancelled.<sup>24</sup> Still they should benefit of the protection services of the VWU.

*Witnesses called to testify before the Court should benefit from the VWU services whether their requested testimony will be heard at the trial or not*

In the Rome Statute it is not clear whether VWU services will be made available only to witnesses testifying before the Court or also to informants and potential witnesses interviewed by the Prosecutor and the defence. The victims and witnesses units at the ICTY and ICTR have not interpreted their mandate as to provide services to potential witnesses and informants. This responsibility belongs to the Prosecutor, who can take "special measures to provide for the safety of potential witnesses and informants".<sup>25</sup> However, as the term *witness* in various articles of the Rome Statute is used in a broad sense (ranging from the beginning of the Prosecutor's investigation (art. 54, art. 68) to whether the Prosecutor is taking statement or testimony from a witness (art. 19.8(b), art. 56.1(a)) the term in article 43.6 could be

*In the Rome Statute it is not clear whether VWU services will be made available only to witnesses testifying before the Court or also to informants and potential witnesses interviewed by the Prosecutor and the defence*

<sup>22</sup> For this purpose, various provisions in the ICTY Rules of Procedure and Evidence allow witness testimony in other forms than in person. The presentation of evidence includes: the use of deposition evidence in lieu of live testimony (rule 71), the calling of "expert" witnesses who are able to give a representative overview of a larger number of individual testimonies (rule 94 bis), and the use of affidavit evidence to corroborate live testimony (rule 94 ter); see Contributions of the Chambers of the International Criminal Tribunal for the former Yugoslavia, *supra* note 9, para. 37. The current Draft Rules of Procedure and Evidence propose a live testimony by means of audio or video link technology and prior recorded testimony; draft Rules of Procedure and Evidence, *supra* note 9, rules 6.26 and 6.27.

<sup>23</sup> According to art. 93.1(b) of the Rome Statute, the Court can request States Parties, assistance in relation to investigations or prosecutions, namely "the taking of evidence, *including testimony under oath*, and the production of evidence, including expert opinions and reports necessary to the Court", [emphasis added].

<sup>24</sup> In the year 1999 7% of witnesses travelling to the ICTY did not testify. See tables 11 and 12. At the ICTR about 80 per cent of confirmed witnesses are brought before the tribunal.

interpreted correspondingly. Furthermore, various provisions in the Rome Statute extend protective measures explicitly to informants and potential witnesses. With respect to investigations the Prosecutor may ...“take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of *information*, the protection of *any person* or the preservation of evidence”.<sup>26</sup>

According to article 87.4, in relation to any request for assistance presented under Part 9 (International Cooperation and Judicial Assistance), the Court may take measures related to the protection of *information*, as may be necessary to ensure the safety or physical or psychological well-being of *any victims, potential witnesses and their families*. In light of these statutory protections to informants and potential witnesses; the object of the Rome Statute to have victims and witnesses services located only under the Registry; and of the consulting mechanism envisioned in articles 43.6 and 68.4, the Court's Rules of Procedure and Evidence should secure the VWU's ability to provide services to them.

*The Court's Rules of Procedure and Evidence should secure the VWU's ability to provide services to informants and potential witnesses*

### 3.2 Others Who Are at Risk on Account of Testimony Given by Such Witnesses

According to article 43.6, the VWU shall provide protective measures and appropriate assistance to "others who are at risk on account of testimony by such witnesses". Various people can be at risk due to testimony given by witnesses. This often applies to the families and dependents of the witnesses before, during or after the testimony, whether or not they accompany the witness to the Court. For instance these people can be at risk of retaliation because of the testimony, they can experience increased distress because of the witness's participation and testimony, or they can simply be dependent on the witness's presence.<sup>27</sup>

In particular, the Court's Rules of Procedure and Evidence should clarify the term and indicate whether it includes both and physical psychological risk. The Rome Statute's equal concern for victims' and witnesses' physical as well as psychological well-being suggests a broad interpretation, including both circumstances.<sup>28</sup>

*The main trap contained in article 43.6 is created by the ambiguity of the term "risk"*

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<sup>25</sup> Common rule 39 of the ICTY and ICTR Rules of Procedure and Evidence. The defence does not enjoy the benefit of similar protection rules for its potential witnesses and informants.

<sup>26</sup> Rome Statute, art. 54.3.f.

<sup>27</sup> The definition of "victims of crimes" found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also includes as victims of crime "where appropriate, the immediate family or dependents of the direct victim and person who have suffered harm in intervening to assist victims in distress or to prevent victimization"; UN Doc. A/RES/40/34, November 1985, paragraph 2. The Preparatory Committee's Final Draft offered a broader definition than the adopted provisions with regard to family members: "victims, [defence] witnesses, *their family members* and others at risk on account of testimony given by such witnesses"; see supra note 11, art. 44 [emphasis added].

### 3.3 Victims

The letter of article 43.6 restricts VWU services to victims appearing before the Court. In addition to appearing before the Court as witnesses giving testimonies, victims can also appear before the Court as participants in various phases of the case.<sup>29</sup> The Court's Rules of Procedure and Evidence must clarify whether the VWU shall provide services to victims appearing before the Court also for purposes other than giving testimony. As a matter of fact, in an annotation made in Rome to article 68.1 it is noted that "the protective measures contemplated by this article are intended to be afforded to witnesses, to victims (*who are not witnesses*) directly connected with an investigation or proceedings before the Court and to other persons who are at risk on account of the testimony given by such witnesses".<sup>30</sup>

*The letter of article 43.6 restricts VWU services to victims appearing before the Court... The Court's Rules of Procedure and Evidence must clarify whether the VWU shall provide services to victims appearing before the Court also for purposes other than giving testimony*

Effective victims' participation and appearance before the Court requires information.<sup>31</sup> Victims will need information on trials, their right to participate and how to participate. They might need assistance in selecting and financing legal representation.<sup>32</sup> Because the VWU is the Court's focal point on victims' and witnesses' services, assistance in this regard to victims should be located within its framework. Moreover, the unit is likely to have already got in touch for other reasons with victims and witnesses, and other relevant parties in local communities and states. Nonetheless, for efficiency sake, information services should be separated from other services of the VWU.<sup>33</sup>

*Because the VWU is the Court's focal point on victims' and witnesses' services, assistance in this regard to victims should be located within its framework*

<sup>28</sup> art. 68.1, 43.6.

<sup>29</sup> E.g., Rome Statute, art. 15.3, 19.3, 68.3, 75 and 82.4.

<sup>30</sup> Supra note 18, [emphasis added].

<sup>31</sup> See in this regard the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: Informing victims of their role and scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information"; supra note 27, paragraph 6(a).

<sup>32</sup> The current draft Rules of Procedure and Evidence, proposes that the Registry shall, if necessary, assist victims to choose a common legal representative or representatives, and if a victim or victims lack the necessary means to pay for legal representation the Registry shall make available a lawyer and financial assistance from the Registry; see draft Rules of Procedure and Evidence, supra note 9, rule 6.30(B).

<sup>33</sup> The current draft Rules of Procedure and Evidence does not conclude whether this service shall be located within the VWU. The draft proposes that the Registry shall "[a]ssist victims and participate in the different phases of the proceedings" and "[a]ssist victims to organize their legal representation before the Court". The VWU shall "[a]ssist victims to obtain legal advice and assistance for the purposes of protecting their rights during all stages of the proceedings"; see id., rule C.1(v) and (vii) and rule C.3(iii). See also proposed rule on the establishment of an independent office for this purpose in the framework of the VWU, David Donat-Cattin, "Article 68, Protection of victims and witnesses and their participation in the proceeding", in *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer ed., 1999. Including this

## 4 The Victims and Witnesses Unit: Protective and Security Functions

### 4.1 Measures during the Investigation and Pre-Trial Phase.

The need for protection and security arrangements starts as early as the initiation by the Prosecutor of an investigation. Early investigations and information gathering operations are needed to locate and interview potential witnesses. Teams of investigators and lawyers will need to meet with alleged victims and potential witnesses.<sup>34</sup> The Prosecutor's dossier generated from these early investigations usually contains potential witnesses' names, whereabouts and other identifying information as well as leads to further witnesses. Potential witnesses and informants might be at risk even at such early stages of an investigation because they get in contact with the Prosecutor before a suspect has been formally charged, and therefore usually while the suspect is still at large. Of course, security threats and/or counseling needs are often difficult to assess at this early stage, and it can only be done on a case by case basis. Provided the work of the Prosecutor is kept confidential, the majority of potential witnesses will not require specific protective measures before charges have been brought. However, in certain cases, some witnesses or informants might require immediate protection measures, while others might make further collaboration with the investigator dependent upon guarantees of protection and security.

*The need for protection and security arrangements starts as early as the initiation by the Prosecutor of an investigation*

Article 54.3.f. of the Rome Statute allows the Prosecutor, with respect to investigations, to "...take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence". At the ICTR, the Prosecutor has established a witness protection sub-unit in Kigali (Rwanda) to assist investigators and lawyers with witness matters, particularly during the early investigation phases. A similar arrangement seems to be precluded in the Rome Statute as the victims and witnesses unit shall only be located under the Registry. However, the Prosecutor's office should be organized in such a way as to enable adequate planning and implementation of protective measures taken under article 54.3.(f).

Because in most cases the Prosecutor will probably be the first organ of the Court to get in direct contact with the witness, the

*Because in most cases the Prosecutor will probably be the first organ of the Court to get in direct contact with the witness, the witness's family or informants, and because of confidentiality concerns, the VWU should come into play in the early investigation phase only at the request of the Prosecutor*

responsibility in the framework of the VWU is also recommended in "The International Criminal Court: Ensuring an effective role for victims", Amnesty International, 1999.

<sup>34</sup> In 1999, ICTY investigators interviewed 1.100 witnesses and took 680 witnesses statements. See tables 13 and 14.

witness's family or informants, and because of confidentiality concerns, the VWU should come into play in the early investigation phase only at the request of the Prosecutor. The Prosecutor might require the help of the VWU during this early stage, for example, when a potential witness is willing to meet with the Prosecutor's investigators only outside the current country of residence. In that case, the VWU might step in to arrange the transportation, transfer, travel documents, and immigration or refugee procedures as required by third countries to assist the investigation. Still, if the VWU is engaged early in the investigation, protective measures or counseling should be offered on a highly confidential basis.

However, there are some notable exceptions to the principle that the VWU should be involved in the early investigative phases only at the request of the Prosecutor. First, article 53.3.b of the Rome

*There are some notable exceptions to the principle that the VWU should be involved in the early investigative phases only at the request of the Prosecutor*

Statute allows a Pre-Trial Chamber to overrule a Prosecutor's decision to close down an investigation. If the Court orders an investigation to be reopened, then pursuant to article 68.1, the Court might exercise its discretion to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of the victims and

witnesses". The Court could thus request the intervention of the VWU in the "new" initial stage of the investigation. Similarly, court-ordered security measures or support might have previously been provided by the VWU, and in some instances the witness might already be under its management. In these instances, the VWU could act on its own initiative and implement protection measures under Article 43.6 for the new investigation or trial. Again, a person might have appeared before the Court as a victim of a crime and thus have come in contact with the VWU. However, the same person might subsequently become a key witness in a different investigation and/or trial. While the VWU's role is not to analyze the legal importance of the person's evidence within the Prosecutor's case, the unit's prior relationship with that person might result in the latter expressing security concerns directly to the VWU, and not to the investigation team. As a consequence, the VWU should be able to implement *proprio motu* further security measures or support services.

All these considerations apply equally to the VWU's work with defense witnesses. The spirit of the Rome Statute dictates that articles 68.1, 68.4 and 43.6 be read so as to mandate the VWU to provide timely protective measures and supportive services for defense witnesses commensurate with those for prosecution witnesses. As a matter of fact, defense witnesses do have real security concerns. Investigation by the defense coincides with pre-trial litigation and the completion of discovery of evidence. The defense must locate

*The spirit of the Rome Statute mandates the VWU to provide timely protective measures and supportive services for defense witnesses commensurate with those for prosecution witnesses*

crucial eyewitnesses to alleged criminal acts, find alibi witnesses, and gather any evidence that rebuts the Prosecutor’s witnesses and documentary evidence. Defense witnesses might need protection from inevitable confrontations with victims groups as well as from pressure exerted by groups aligned with the accused. In some instances, defense witnesses could reasonably fear that they would be arrested for their own crimes if they were to testify at the Court.<sup>35</sup>

To summarize, under the ICC Statute, unlike in the case of the ICTY and ICTR, the VWU may very well play a role in the early investigation and pre-trial phases, although at this stage the unit would be in contact with a relatively small percentage of the overall witnesses and victims involved in the case. Assessment of the risks to which victims and or witnesses are exposed will likely initially be performed by investigators from the prosecution or defense teams. Assessments by either party could lead to consultations with the VWU, as articulated in Article 68.4, and result in the provision of minimal services (e.g., securing safe interview houses) or major measures (e.g., relocation of witnesses and their families to third countries). Witnesses already known by and under the care of the VWU who are involved in subsequent investigations might benefit from measures taken by the VWU *proprio motu*.

#### 4.2 Measures during the Trial.

The advent of the trial must lead to a reassessment of the security measures and services provided during the investigation and pre-trial phases, both to the prosecution and defense witnesses. The

*The advent of the trial must lead to a reassessment of the security measures and services provided during the investigation and pre-trial phases, both to the prosecution and defense witnesses*

reasons are multiple. First, the charging documents, unless subject to a non-disclosure order, could reveal the identity and whereabouts of victims, witnesses or their families. Second, to insure the rights of the accused, and to enable the defense to conduct its investigation, the arrest and initial appearance of an accused is immediately followed by discovery, entailing the transmission of supporting materials to the accused, counsel and agents. Third, barring exceptional circumstances, prosecution witnesses might travel to The Hague to testify, thus heightening the risks to their personal safety. Fourth, being in the physical presence of the accused and testifying in Court could prompt the reliving of traumatic events. Defense witnesses will also require a reassessment of their security situation prior to traveling to the Court to testify. Although the defense commences its investigation only after the arrest of the accused,

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<sup>35</sup> However, according to article 93.2 of the Rome Statute “[t]he Court shall have the authority to provide an assurance to witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restrictions of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested state”.

it probably continues during the pre-trial litigation phase and to some extent during the Prosecutor's presentation of evidence.

These shifts in security situations must be taken into account by the VWU when it contacts witnesses to determine their individual logistical support needs. It is at this stage that the VWU would begin to identify which witnesses are in circumstances that call for intense involvement by the unit. It is likely that logistical support to secure the safe arrival of witnesses to the Court, protection during their presentation before the Court and their safe return home, will be the core of VWU operations. To provide these services, the VWU must also remain in constant contact with the parties to the case and the Trial Chambers.

*These shifts in security situations must be taken into account by the VWU when it contacts witnesses to determine their individual logistical support needs*

Prior to any witness's departure from his or her home community, the VWU will need to obtain the appropriate travel documents, such as passports, identity cards and, where necessary, visas. The VWU must then arrange various modes of transportation to provide door-to-door service, each with its own security risks. Many witnesses are, at the time of travel or soon thereafter, the subject of Court-ordered measures to protect their identities from the public. The VWU is therefore bound to obtain travel documents and use them in a manner that does not inadvertently divulge the witness's identity. In general, security measures must be undertaken to obscure the fact that a witness has officially left his or her country and officially entered The Netherlands.

*Prior to any witness's departure from his or her home community, the VWU will need to obtain the appropriate travel documents, such as passports, identity cards and, where necessary, visas*

Close cooperation between the VWU and the Court's host state and between the VWU and the witness's residential state is essential to ensure effective protection and security measures. According

*Close cooperation between the VWU and the Court's host state and between the VWU and the witness's residential state is essential to ensure effective protection and security measures. The VWU will be able to provide its protective services only if appropriate agreements have been concluded between the Registrar and the governments concerned, including that of the host country*

to the Rome Statute, states parties shall, under procedures of national law, comply with requests by the Court to provide assistance in the protection of victims and witnesses.<sup>36</sup> This particular states' responsibility should be strengthened in the Rules of Procedure and Evidence.

The VWU will be able to provide its protective services only if appropriate agreements have been concluded between the Registrar and the governments concerned, including that of the host country. In the case

<sup>36</sup> Rome Statute, article 93.1.j.

of the ICTY, the Dutch government is responsible for witnesses' safety in The Hague and the tribunal liaises closely with the police regarding security issues during a witness's stay.<sup>37</sup> The ICC should enter into similar agreements with the Dutch government. The ICTR and Tanzania have reached a special agreement whereby immigration procedures are adjusted at entry and departure points to enable protected witnesses to appear before the tribunal anonymously. Unfortunately, a similar agreement has not been reached with the Rwandan authorities. As a result of the existing regulations, the current exit and entry procedures at the Kigali International Airport, as well as the immigration, customs formalities and the civil aviation requirements, do not ensure anonymity and confidentiality of the protected witnesses travelling to and from Rwanda.<sup>38</sup>

Upon arrival at the seat of the Court, the VWU will need to arrange for discrete lodging, local transportation and full-time witness assistants who are fluent in the witness's native language. The

*The practice of the ICTY and ICTR shows that witness security measures under the ICC could be further compounded by family members, especially small children, or unrelated supporting adults*

practice of the ICTY and ICTR shows that witness security measures under the ICC could be further compounded by family members, especially small children, or unrelated supporting adults. Appropriate security measures must be applied to people who accompany witnesses, in order to prevent their additional presence from further contributing to possible risk. Likewise, family members and non-

testifying victims who do not accompany witnesses might be at greater risk during the period that a relative is assumed to be testifying at the Court. The VWU will need to reduce the safety risk of persons who remain at home by making security arrangements with local, national or international authorities or other third party entities to cover the period of the stay of the witness in The Hague.

The VWU will be able to carry out most of its work without authorization from the Trial Chambers. Travel arrangements, security arrangements, accommodations, relocation and support services, for instance do not require an order from a Chamber. In particular instances, the VWU might want to request the Court to order particular protective measures for certain witnesses (e.g., conducting any part of the proceedings in camera or allowing presentation of evidence by

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<sup>37</sup> See Agreement between the United Nations and the Kingdom of the Netherlands concerning the headquarters of the International Tribunal of for the Prosecution of Persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, UN Doc. S/1994/848m art. XXIII and XXVI.

<sup>38</sup> The ICTR victims and witnesses unit and its Registrar have taken up the task of securing from the Government of Rwanda the appointment of a focal point to deal with all witnesses' transit formalities and to allow the tribunal's vehicles transporting protected witnesses, direct access to the tarmac where the tribunal's aircraft is parked for an easy boarding. The exception so far granted to the tribunal in that respect, concerns the movement of the detainee witnesses whose travel from and to Kigali is often the subject of special arrangements afforded by the authorities.

electronic or other special means<sup>39</sup>). At the ICTY and ICTR, either party, victim or witness concerned or the victims and witnesses unit itself may request measures such as *in camera* hearings or one-way closed circuit television.<sup>40</sup> The victims and witnesses units may also request that the Court expunge identifying materials from the record, insure non-disclosure of the records, use image or voice altering devices, or assign pseudonyms to a witness.<sup>41</sup> Witnesses requiring additional protective measures at the ICTY were 103 in 1999 and 143 in 1998, and 83 at the ICTR in 1999 and 32 in 1998.<sup>42</sup>

To summarize, the VWU's most active involvement with witnesses will occur at the trial stage. Most services will concern security aspects connected with routine logistical planning for transportation to and from the Court and lodging in The Hague while waiting to testify. Logistics might be further complicated by the fact that several trials can be ongoing simultaneously and that defense and prosecution witnesses might overlap. Yet, all witnesses must be equally and individually cared for by the unit. In some cases, even witnesses who are testifying on behalf of the same party will not be in a position to have their identities disclosed to each other.

#### 4.3 Measures after the Trial.

The post-trial stage begins when the witness has returned to his or her community. All witnesses who testify will need to be contacted in the post-trial phase by the VWU to determine if their security

*The post-trial stage begins when the witness has returned to his or her community. All witnesses who testify will need to be contacted in the post-trial phase by the VWU to determine if their security situation has changed as a result of having testified at the Court*

situation has changed as a result of having testified at the Court. The VWU must regularly update the Prosecutor and the Defense and alert them to new security risks. The unit might eventually advise on the possibility of Court-ordered measures for former witnesses.

The role of the VWU in the post-trial stage becomes most pronounced when testifying before the Court requires a witness to be relocated. If arrangements for the removal of the witness and his or her family had not been made before the testifying, the VWU might have to arrange the move and set up access to social services, including psychological care, in the new location. Such protection measures should take into account the culture, mentality and, above all, the opinions of the witnesses before they are implemented.

*The role of the VWU in the post-trial stage becomes most pronounced when testifying before the Court requires a witness to be relocated*

<sup>39</sup> Rome Statute, art. 68.1 and 68.2.

<sup>40</sup> See common Rule 75 of the ICTY and ICTR Rules of Procedure and Evidence.

<sup>41</sup> Id. Similar protective measures have been proposed for the Rules of Procedure and Evidence for the ICC; see draft Rules of Procedure and Evidence, *supra* note 9, rules 6.28 and 6.29.

<sup>42</sup> See tables 15-18.

Although relocation might help address urgent safety concerns that witnesses and family members might have, by its own moving is usually cause for deep psychological stress. The witness and family members, already vulnerable, must forsake contact with relatives and friends and agree to remain away from their home country for an undetermined period. When such drastic protective measures are taken, the VWU will undertake a long-term commitment to these people and assure communication through visits, telephone calls to the families and professional exchanges with their local security advisors and social service providers.

As the Court does not have a territory, the relocation of witnesses and victims requires the cooperation of states parties. In some cases the relocation itself will be sufficient, but in others further

*As the Court does not have a territory, the relocation of witnesses and victims requires the cooperation of states parties*

protection might be warranted. Possible admittance of the Court's witnesses and victims into a state's party protection program should be considered and states, now in the process of ICC national implementing process, should be urged to make this possible.<sup>43</sup> The ICTY has entered into agreements with the British government on the relocation of witnesses, and the UK has granted

new identity and refugee status to the tribunal's victims and witnesses.<sup>44</sup> In 1999, the ICTY had estimated 50 relocation requests and the unit expects 20 relocation requests in 2000. Relocation and longer-term solutions are considered by the ICTR through the assistance of states parties who can provide safe havens, new identities and long term support through inclusion of the witnesses in their social security programs.<sup>45</sup> The ICTR, in collaboration with Rwanda, has relocated several witnesses internally, and a few witnesses have been relocated to third-party states. Similarly, the UNHCR has assisted the ICTR with moving and relocating witnesses. Despite this progress, ICTR still needs sufficient offers from states to accept witnesses in need of relocation. In fact, the reluctance and unwillingness shown by states to accept the tribunal's witnesses has raised serious concerns. In 1998, the experience at the ICTR showed that 14 percent of the witnesses coming from Rwanda had

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<sup>43</sup> The ICC bill before the House of Commons of Canada includes provisions which make it possible for witnesses before the ICC to be admitted to the Canadian Protection Programme, see art. 71-75.

<sup>44</sup> In the first years of the ICTY the unit was concerned that a number of governments had failed to give their assurance to provide the requested protective measures, "especially when these measures involve resettlement in a new country, possibly under new identity", see Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, para 124.

<sup>45</sup> See Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN Doc. A/C.5.53/15.

requested assistance in relocation.<sup>46</sup> In 1999 no internal relocations were conducted at the ICTR in Rwanda.<sup>47</sup>

## 5 The Victims and Witnesses Unit: Support Functions

### 5.1 Statutory Provision

The Rome Statute gives the VWU a strong mandate regarding support services to victims and witnesses. According to article 43.6 the unit shall:

*“provide counselling and other appropriate assistance for witnesses, victims and others who are at risk on account of testimony given by such witnesses”*

and according to article 68.1 the Court (and hence the Registry) shall:

*“take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of victims and witnesses”.*

These provisions differ from the those in the statutes of the ICTY and ICTR. They do provide for the protection of witnesses, but are almost silent on support services.<sup>48</sup> The VWU's services should always be available, but rendered on a case-by-case basis according to the unit's assessment of the witness's and victims' needs.

### 5.2 Assistance and Support Services

#### 5.2.1 Administrative Support

The work of the VWU will involve significant administrative support, such as securing travel

*The work of the VWU will involve significant administrative support, such as securing travel documents, travel arrangements and ensuring immigration entry and exit for witnesses and victims*

documents, travel arrangements and ensuring immigration entry and exit for witnesses and victims. Because of the international nature of the Court and the fact that it will be sitting in the Hague and not where cases originate, this will likely be a complex and sensitive undertaking. For example, in the case of the ICTY witnesses have

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<sup>46</sup> id. para 61.d.

<sup>47</sup> Four threat assessments were conducted that year, following witnesses' reports of threats received by them. Ultimately, the threats were discovered to be unfounded and no relocation took place.

<sup>48</sup> See ICTR art. 21 and ICTY art. 22. In rule 34 of the two tribunals' Rules of Procedure and Evidence, which refers to article 21 and article 22, support services are viewed as a form of vaguely defined assistance, a sort of complementary measures to a substantive program of witness protection. Some victims' rights advocates have criticized the support services provided by the tribunals as insufficient. To illustrate, at the ICTR psychological support services for victims were introduced only in September 1999, four years after the tribunal started operating. Prior to this date, psychological services were provided only on an ad hoc basis.

come from 30 countries; in that of the ICTR from 28. In particular, the unit at the ICTR has experienced major problems in its work. Not only do most of the witnesses live in remote areas but also many of them do not possess valid travel documents. Furthermore, many witnesses do not have legal immigration status in their countries of residence and are therefore unable or unwilling to leave the country. This problem has required extensive negotiation by the tribunal with the relevant states. Some states have issued special emergency travel documents, such as safe-conducts, enabling witnesses to travel to the tribunal and back.<sup>49</sup>

According to articles 86 and 87 of the Rome Statute, state parties have a general obligation to cooperate with the Court. Furthermore, according to article 93.1.e, states party shall facilitate the voluntary appearance of persons as witnesses or experts before the Court, and article 93.1.f requires states party to assist in the temporary transfer of persons in its custody. These provisions on state cooperation should be reinforced in the Court's rules of Procedure and Evidence to enable the VWU to carry out its necessary logistical undertakings. It can be expected that victims and witnesses will also travel from states that are not parties to the Rome Statute. Special arrangements will be needed in these situations.<sup>50</sup>

*Provisions on state cooperation should be reinforced in the Court's rules of Procedure and Evidence to enable the VWU to carry out its necessary logistical undertakings*

Even in carrying our administrative and bureaucratic functions, the VWU must exercise the utmost care, giving due consideration both to the psychological and physical well-being of victims and witnesses. For instance, errors in ensuring the confidentiality of documents can have serious consequences on the mental health of witnesses. Again, although most ICTR witnesses who come from Rwanda travel by air, thus ensuring their physical safety and avoiding the risks and hardship related to road transport, they still might

*Even in carrying our administrative and bureaucratic functions, the VWU must exercise the utmost care, giving due consideration both to the psychological and physical well-being of victims and witnesses*

<sup>49</sup> Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, para. 146. Commenting on witnesses visa negotiation, the ICTR reports that "[a]lthough the results to date are encouraging, they have been achieved at the price of indescribable efforts with could usually have been obviated by the issuance of temporary documents by the United Nations. Such documents, which should be guaranteed by the Tribunal and recognized by the States concerned, would undoubtedly facilitate the Tribunal's activities in this key area", see Third annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN Doc. A/53/429, S/1998/857, Annex, para. 147.

<sup>50</sup> According to article 87.59(a) of the Rome Statute "[t]he Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis".

be exposed to psychological suffering. This is particularly true for female witnesses who have been the victims of sexual violence, when they have to board a United Nations plane in the full view of the local community.

### 5.2.2 Travel Support

Most of witnesses and/or victims might need to travel to The Hague to appear before the Court. It is the task of the VWU to ensure that traveling does not add further stress on them and takes places in the physical and psychological safest conditions.

Victims and witnesses appearing before the Court are forced to renounce their daily routines. The VWU must take every measure to minimize their inconvenience.<sup>51</sup> In some cases, the VWU may need to find a way to secure the victims' and witness' property during absence. The VWU would need to assist with work related issues, such as facilitating leave of absence from work or providing the necessary assistance, as in case of farming. In this respect, the VWU would also need to adopt a policy on loss of earnings. Victims and witnesses should not have to lose wages or other income because of required participation. However, at the same time, this must not create the impression that witnesses are being paid to appear before the Court. The victims and witnesses units at the ICTY and ICTR have adopted policies on compensation for witnesses.<sup>52</sup> For instance, the ICTY policy on compensation for lost wages is to disburse a pre-determined amount to witnesses, based on the minimum wage in the country in which the witness resides. At the ICTY, approximately 50 percent of the witnesses become eligible for reimbursement of lost earnings.

*Victims and witnesses appearing before the Court are forced to renounce their daily routines. The VWU must take every measure to minimize their inconvenience. In this respect, the VWU would also need to adopt a policy on loss of earnings*

In some cases, the witness' dependents will need support while the witness is testifying at The Hague. For instance, dependents may need to stay with other family members during a period which could last for several days or even weeks. The VWU should make necessary travel arrangements for the witness' and victims' dependents. Funds for child-care might also be needed. The victims and witnesses units at the ICTY and ICTR have both adopted policies on dependents and have provided arrangements for them.

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<sup>51</sup> See in this regard the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: ... Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation"; supra note 27, paragraph 6(d).

<sup>52</sup> The UN Advisory Committee on Administrative and Budgetary Questions recommended to the ICTR in 1997 that "[g]uidelines regarding lost income of witnesses should be prepared in line with those developed for the International Tribunal for the Former Yugoslavia", see UN Doc. A/51/7/Add. 8, para. 34.

It can be expected that, because of illiteracy, health problems, victimization or other problematic situations, some victims and witnesses might not be able to travel on their own to The Hague. The

*It can be expected that, because of illiteracy, health problems, victimization or other problematic situations, some victims and witnesses might not be able to travel on their own to The Hague. The VWU should be able to escort vulnerable victims and witnesses to the Court*

VWU should be able to escort vulnerable victims and witnesses to the Court. At the ICTY witnesses who require assistance are escorted from their residence to the tribunal by staff members of the victims and witnesses unit. Other witnesses are met at the airport upon their arrival. The ICTY victims and witnesses unit's staff members have authority to enter the airport facilities and meet witnesses at the arrival gate. Similar arrangements with the Dutch government should be secured for the

VWU.

In addition, the VWU should, on a case by case basis, allow witnesses and victims to be accompanied by a support person, such as a close relative or friend, to the Court. This additional support can further ensure the psychological and physical well-being of victims and witnesses, especially elderly and victims of sexual assaults. The victims and witnesses units at the ICTY and ICTR have both adopted policies in this regard and transportation and accommodation costs for support persons are met by the tribunals.<sup>53</sup> In case children have to accompany witnesses and victims to The Hague, the VWU would have to make necessary preparation, such as the arrangement of child care.

*The VWU should, on a case by case basis, allow witnesses and victims to be accompanied by a support person, such as a close relative or friend, to the Court*

### 5.2.3 Support during the Trial

The VWU will also have the responsibility of carrying out the arrangements associated with

*The VWU will also have the responsibility of carrying out the arrangements associated with witnesses' stay in The Hague. This will include secure safe and appropriate accommodations*

witnesses' stay in The Hague. This will include secure safe and appropriate accommodations. In certain cases the place of accommodation should be changed regularly to avoid unwanted attention. To avoid possible confrontation the VWU should keep witnesses for the prosecution and defence separate. The ICTY unit has had difficulties in managing different ethnic groups at the tribunal at the

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<sup>53</sup> For instance, in 1999, 11 support persons accompanied witnesses and two children to the ICTY. See table 19.

same time.<sup>54</sup> In the case of the ICTY, in 1999 each witness stayed in The Hague on average 7 days, or a total of 1,975 witness/days. At the ICTR, witnesses support days in 1999 were 2,300, or approximately 13 days per witness.<sup>55</sup>

In addition to general accommodation, both the victims and witnesses units at the ICTY and ICTR provide a 24-hour live-in support program at the place of accommodation where “Witness Assistants” are responsible for providing practical and emotional support. Speaking the native language of witnesses, they accompany witnesses during daily activities and act as interpreters for non-court related issues. These satisfactory experiences should encourage the VWU to consider establishing a similar practice.

Daily allowances should be provided to meet the witnesses’ incidental expenses during their stay at the Court.<sup>56</sup> The victims and witnesses units at the ICTY and ICTR have both adopted policies in this regard. At the ICTY the daily allowance is DFL 50 per witness per day, during their stay in the Hague.

Before the trial begins, and in any event before traveling to the Hague is prepared, the VWU should inform victims and witnesses of their rights under the Rome Statute, their role in the proceedings and the Court’s procedures. Most victims and witnesses will be participating in alien proceedings, and proper introduction and preparation is essential to make them feel relatively comfortable. Information should be made available in writing for distribution to victims and witnesses in their home countries and in other forms in case of wide illiteracy. Prior to the hearings, witnesses and victims should also be shown the courtroom, the translation equipment and, if applicable, how protective measures will be carried out during the trial, such as distortion of their voice or concealment of their visual image.

*Before the trial begins, and in any event before traveling to the Hague is prepared, the VWU should inform victims and witnesses of their rights under the Rome Statute, their role in the proceedings and the Court’s procedures*

#### 5.2.4 Medical and Psychological Support

Medical and psychological is part of the mandate of the VWU. Indeed, to be able to testimony and participate in the proceedings, the victims and witnesses must have the physical and psychological

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<sup>54</sup> The Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, supra note 49, para. 190.

<sup>55</sup> See tables 5 and 6.

<sup>56</sup> See Cherif Bassiouni (1988), *Introduction to the UN Resolution and Declaration of Basis Principles of Justice for Victims of Crime and Abuse of power*, Commentary to Article 6., point (d): “(d)2. States should review their laws and practices with regard to the payment of compensation to victims and witnesses for any expenses necessarily incurred in assisting the authorities in the investigation of the case of its prosecution in court”.

ability to do so. It is also a matter of justice and fairness that victims are provided with medical and psychological services at least equal to those given to indigent detainees.

In the case of the ICTR, the victims and witnesses unit has provided medical, gynecological and psychological care to witnesses staying in Arusha by external specialists who are funded through the unit and the tribunal's Voluntary Trust Fund. Follow up medical care

*Medical and psychological is part of the mandate of the VWU. Indeed, to be able to testify and participate in the proceedings, the victims and witnesses must have the physical and psychological ability to do so*

is provided when required. In 1998, 56 witnesses received medical and psychological support at the ICTR.<sup>57</sup>

Medical and psychological support must be provided as early as possible. The need for medical services at earlier stage is graphically illustrated by the case of the ICTR, where investigators have been hindered by problems related to the health of potential witnesses, especially due to their victimization (i.e victims of sexual assaults who have become HIV-positive or infected with AIDS as a result). Medical check-ups might be needed, and preparations must be made to preserve testimonies. In the case of the ICTR, the victims and witnesses unit could not respond to investigators' requests for medical support, because its mandate is not considered to include potential witnesses.<sup>58</sup>

For what concerns psychological support, article 43.6 of the Rome Statute explicitly provides that the VWU shall provide counselling. This mandate is further emphasized by the requirement that the VWU shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. All witnesses who testify have some degree of apprehension or nervousness. Others experience true psychological distress in anticipation of or as a result of testifying about traumatic events. The latter could benefit from timely interventions of VWU psychologists, or from the services of other health professionals, contracted from outside the VWU. Providing counseling services is particularly important for male and female sexual assault victims and witnesses, for children who must testify and for informants who testify and then suffer from a heightened sense of betrayal and risk to their lives. In its counseling work the VWU must act in the best interest of the witness and not of the prosecution or defence. Everything that can be done to contribute to the healing process of

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<sup>57</sup> See table 18.

<sup>58</sup> As a partial solution, a nurse and a counsellor were recruited from January 2000 to provide medical and psychological care to potential witnesses, through the support programme to witnesses and potential witnesses funded by the tribunal's Voluntary Trust Fund. The current draft Rules of Procedure and Evidence proposes that "The Court may, at any time before it has made a determination relating to reparation, order the Trust Fund to provide interim relief to victims, such as medical or psychological attention or other humanitarian assistance". The proposal includes a footnote which among others notes that a consideration needs to be given to a possible conflict between the Trust Fund and the VWU; see draft Rules of Procedure and Evidence, supra note 9, rule 6.31, rule E.

traumatized victims and witnesses should be encouraged, as long as it does not jeopardize the Court's operations and credibility.

The VWU should consider establishing a systematic monitoring programme for the post-trial stage to ensure the continued necessary support for victims and witnesses. The VWU should also facilitate after-care by liaising with relevant national bodies and NGOs that provide

*The VWU should consider establishing a systematic monitoring programme for the post-trial stage to ensure the continued necessary support for victims and witnesses*

such services for victims and witnesses in their countries of residence. In interviews with women who testified before the ICTR Akayesu case, the importance of the establishment of this kind of monitoring programme was strongly emphasized.<sup>59</sup>

Finally, there is no need to stress that all communication between individuals and medical doctors, psychiatrists, psychologists or counsellors of the VWU should be regarded as privileged and not subject to disclosure at trial unless individual consent is given.<sup>60</sup> The Rules of Procedure and Evidence should clearly state it.

*All communication between individuals and medical doctors, psychiatrists, psychologists or counsellors of the VWU should be regarded as privileged and not subject to disclosure at trial unless individual consent is given*

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<sup>59</sup> See Report of the International Criminal Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January and 31 December 1994, UN Doc. A/54/315, para. 82.

<sup>60</sup> See proposal in the Report on the international seminar on victims' access to the International Criminal Court, supra note 18, Annex I, Workshop 3, rule D(4).

## 6 Conclusions

The mandate and structure of the VWU are only sketched in the Rome Statute. This paper intended to flesh out those bare-bone provisions with issues for consideration. Some of them should be taken up by the Preparatory Commission for inclusion into the Rules of Procedure and Evidence. Others are to be read as memoranda for the future Assembly of States Parties, particularly for what concerns cooperative agreements to be entered into between the Court, The Netherlands and other states parties and non-parties. Others again might be considered by the VWU itself upon drafting its own guidelines and internal policies.

The main difficulty of this kind of exercise is that because the Court's jurisdiction is potentially universal, it is impossible to foretell how many and what kind of situations and offences the Court, and therefore the VWU, will be called to wade in. The cases of the ICTY and ICTR can offer only limited guidance. Because of this, the VWU should be structured in such a way to be flexible enough to adjust to any situations. In particular, the Rules of Procedure and Evidence, the Regulations of the Court and the Financial Regulations of the Court should leave the VWU enough leeway to effectively and efficiently handle different situations, originating from diverse offences and locations.

Under the Rome Statute, the exact place of the VWU within the overall institutional architecture of the Court is uncertain. On the one hand, the Rome Statute envisages a unit which is impartial and independent, servicing and cooperating with everyone concerned: the chambers, the parties (i.e. Prosecutor and defence), states parties, victims and witnesses. On the other hand, the scant provisions of the Rome Statute describe a unit which has a strong structural relationship with the Chambers, a mandatory consulting role with the Prosecutor and no relation at all with the defence. The Rules of Procedure and Evidence should strengthen the VWU's position by filling those gaps. To underscore its independence and impartiality, the Rules of Procedure and Evidence should give the unit firm standing to act independently and *motu proprio* provide protective measures, security arrangements, counselling and other assistance to victims and witnesses.

The VWU must be established in a timely and efficient manner. It must be able to provide protective measures and support services from the Court's very first day of operation. The unit's successful establishment and operation depend on the securing of adequate funding from the Court's first regular budget and early recruitment of highly qualified staff. Because several of the activities carried out by the unit are of a non-judicial nature, liberal criteria on voluntary contributions to the VWU, both monetary and in-kind, should be considered.

In the Rome Statute it is far from clear precisely whom the beneficiaries of the unit's services will be. First, it is desirable that the Rules of Procedure and Evidence indicate that besides witnesses actually testifying before the Court, potential witnesses and informants are also to be included. At the ICTY and ICTR, because those tribunals' victims and witnesses' units did not consider potential witnesses within the scope of their activities, ad hoc separate arrangements on behalf of the tribunals had to be made.

Second, in the Rome Statute it is not clear whether the definition, "others who are at risk on account of testimony by such witnesses" includes both "risk" regarding physical safety as well as psychological safety. The Rules of Procedure and Evidence should clarify that both circumstances are included.

Furthermore, the Rules of Procedure and Evidence must clarify whether all victims appearing before the Court can benefit from the VWU's services or only those victims appearing before the Court as witnesses. This clarification is especially important for three reasons. First, unlike the case of the ICTY and ICTR, testifying is not the only purpose for which victims can appear before the Court. Second, under the Statute the Court is bound to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses alike. In addition, the Assembly of States Parties shall establish a Trust Fund for the benefit of victims and their families. To secure coherent and coordinated efforts on behalf of the VWU, the Court and the Trust Fund, it must be clarified who can benefit from the unit. Third, the fact that victims' participation in the proceedings and the Court's responsibility regarding victims are novelties in the international judicial setting warrants clarification to ensure effective implementation of the statutory provisions.

As the VWU will be the Court's sole unit of the kind, servicing both the prosecution and the defence, it must be able to provide services during all phases of a trial (pre-trial, trial and post-trial). As a general rule, during the early investigation and pre-trial phases protective measures should be provided only at the request and in close collaboration with the Prosecutor and the defence.

The VWU's most active involvement regarding protective measures will likely occur at the trial stage. Most services provided will concern security and logistical aspects of transportation to and from the Court and witnesses' stay in The Hague. In some cases, the VWU will also need to extend security, as well as support measures, to a witness's family and dependents. Close cooperation between the VWU and the Dutch government, and between the VWU and the witness's residential state, is essential to ensure effective protection. To minimize the inconvenience of the victims and witnesses appearing before the Court, the unit should adopt policies regarding dependents, support persons, children and loss of earnings. In addition, to provide secure and appropriate accommodation the

VWU should consider establishing a 24-hour live-in support program, similar to those in place at the ICTY and ICTR.

For security reasons, the VWU might need to permanently relocate some witnesses. In all circumstances, relocation should balance between the interests of the parties (i.e. safety and preservation of testimony) and the individual interests of the witness. Relocation requires close collaboration with host states regarding logistical arrangements and access to social services. The Rules of Procedure and Evidence should underscore states parties' duty to provide assistance in the protection of victims and witnesses.

The Rome Statute explicitly provides for counselling to victims as well as measures to protect the physical and psychological well being of victims and witnesses. To secure these services, the Rules of Procedure and Evidence should stipulate that the unit shall provide both medical and psychological services to victims and witnesses during all phases of the case. This is especially important because uncertainty as to the responsibility to carry out this service has caused some complications at the victims and witnesses units of the ICTY and ICTR. Such clarification could also prevent parties from arguing that a witness's benefiting from counseling services jeopardizes the credibility of the testimony. Finally, the Rules of Procedure and Evidence should stipulate that all communication between individuals and medical doctors, psychiatrists, psychologists or counselors of the VWU, or within the framework of VWU services, be regarded as privileged.

The work of the VWU will affect every aspect of the Court's life. The unit's undertakings have a direct bearing on the victims' and witnesses' position under the statute, the work of the prosecution, the defence, the Chambers of the Court, state parties' obligations under the Rome Statute, and the operation of the Trust Fund. Whether the VWU is able to carry out its mission ultimately depends on its successful establishment and endorsement by the ICC Preparatory Commission, the Court, the Assembly of States Parties and the international community as a whole.



## RECOMMENDATIONS

1. The Registry must establish the VWU timely. The VWU must have the necessary financial and human resources to carry out its mission from the Court's very first day of operation.
2. Liberal criteria on voluntary contributions to the VWU, both monetary and in kind, should be considered.
3. The VWU should be allowed to establish temporary sub-offices in different locations. To ensure greater independence and competence the VWU should separate its different services.
4. The agreement between the Court and its host state should include provisions on protective measures during victims and witnesses stay in The Hague.
5. The Rules of Procedure and Evidence should declare the VWU as a principal actor than can *proprio motu* provide protective measures, security arrangements and other assistance to victims and witnesses and that also acts as an advisor to the Prosecutor and Trial Chamber.
6. The Rules of Procedure and Evidence should give the VWU standing to file for a motion for Court-ordered protection.
7. The Rules of Procedure and Evidence should declare that the VWU shall carry out its services equally for the benefit of the prosecution and the defence and also in the interest of victims and witnesses. Strict rules on confidentiality must be adopted.
8. The Rules of Procedure and Evidence should specify that the VWU can provide services to informants and potential witnesses, as well as to witnesses testifying before the Court.
9. The Rules of Procedure and Evidence should emphasize the VWU's duty to provide services to victims of sexual violence and children.
10. The Rules of Procedure and Evidence should specify that the VWU can provide services to victims appearing as non-witnesses before the Court.
11. The Rules of Procedure and Evidence should specify that the VWU can provide services to others who are at risk on account of witness' testimony, whether the risk is to their physical safety or psychological well-being.
12. The VWU shall adopt policies on dependents, support persons, child care, daily allowances and loss of earnings.
13. The VWU should establish a systematic monitoring programme for the post-trial stage to ensure the continued necessary support to victims and witnesses.
14. The Rules of Procedure and Evidence should specify that all communication between individuals and the VWU staff is privileged and not subject to disclosure at trial unless individual consent is given.
15. The Rules of Procedure and Evidence should strengthen states' duty to assist in protecting victims and witnesses.
16. The Rules of Procedure and Evidence should strengthen states' duty to assist in bringing witnesses to the Court.

## ANNEX I

### Article 43

#### *The Registry*

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the

Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

### Article 68

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

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

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

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

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

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

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

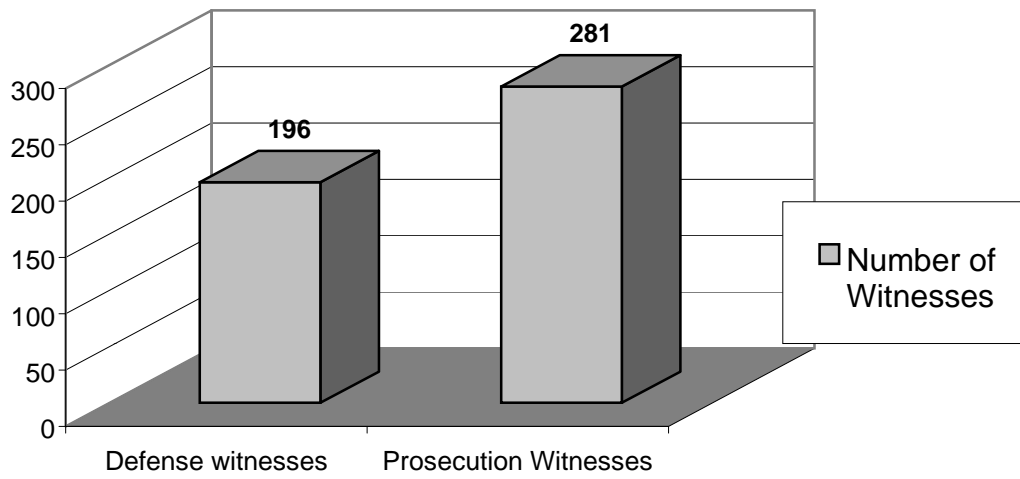
## ANNEX II

### Basic References (in chronological order)

1. Preparatory Commission for the International Criminal Court, *Proceedings of the Preparatory Commission at its First, Second and Third Sessions (16-26 February, 26 July – 13 August and 29 November – 17 December 1999)*, UN Doc. PCNICC/1999/L.5/Rev.1/Add.1, Annex II.
2. *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UN Doc. A/54/634.
3. *Contribution of the Chambers of the International Criminal Tribunal for the former Yugoslavia, submitted to the 26 July – 13 August 1999 Preparatory Commission on the Proposed Rules of Procedure and Evidence for the International Criminal Court.*
4. *Report on the International Seminar on Victim's Access to the International Criminal Court*, UN Doc. PCNICC/1999/WGRPE/INF/2, Annex I.
5. *Rome Statute for the International Criminal Court*, Rome Statute, UN Doc. A/CONF.183/9 (1998), as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999.
6. *ICTR Rules of Procedure and Evidence*, adopted on 5 July 1995; as amended on 12 January 1996, 15 May 1996, 4 July 1996, 5 June 1997, 8 June 1998 and 1 July 1999.
7. *The Statute of the International Tribunal for Rwanda*, U.N. Doc. SC. Res. 955, (1994).
8. *ICTY Rules of Procedure and Evidence*, adopted 11 February 1994; as amended on 5 May 1994, 4 October 1994, 30 January 1995, 3 May 1995, 15 June 1995, 6 October 1995, 18 January 1996, 23 April 1996, 25 June AND 5 July 1996, 3 December 1996, 25 July 1997; as revised on 20 October AND 12 November 1997; as amended on 9 & 10 July 1998, 4 December 1998, 23 February 1999, 2 July 1999, 17 November 1999.
9. The Statute of the International Tribunal for the Former Yugoslavia (U.N. Doc. SC. Res. 827 (1993)).
10. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. G.A. Res. 40/34 (1985).

**Table 1**

### ICTY witnesses in 1998



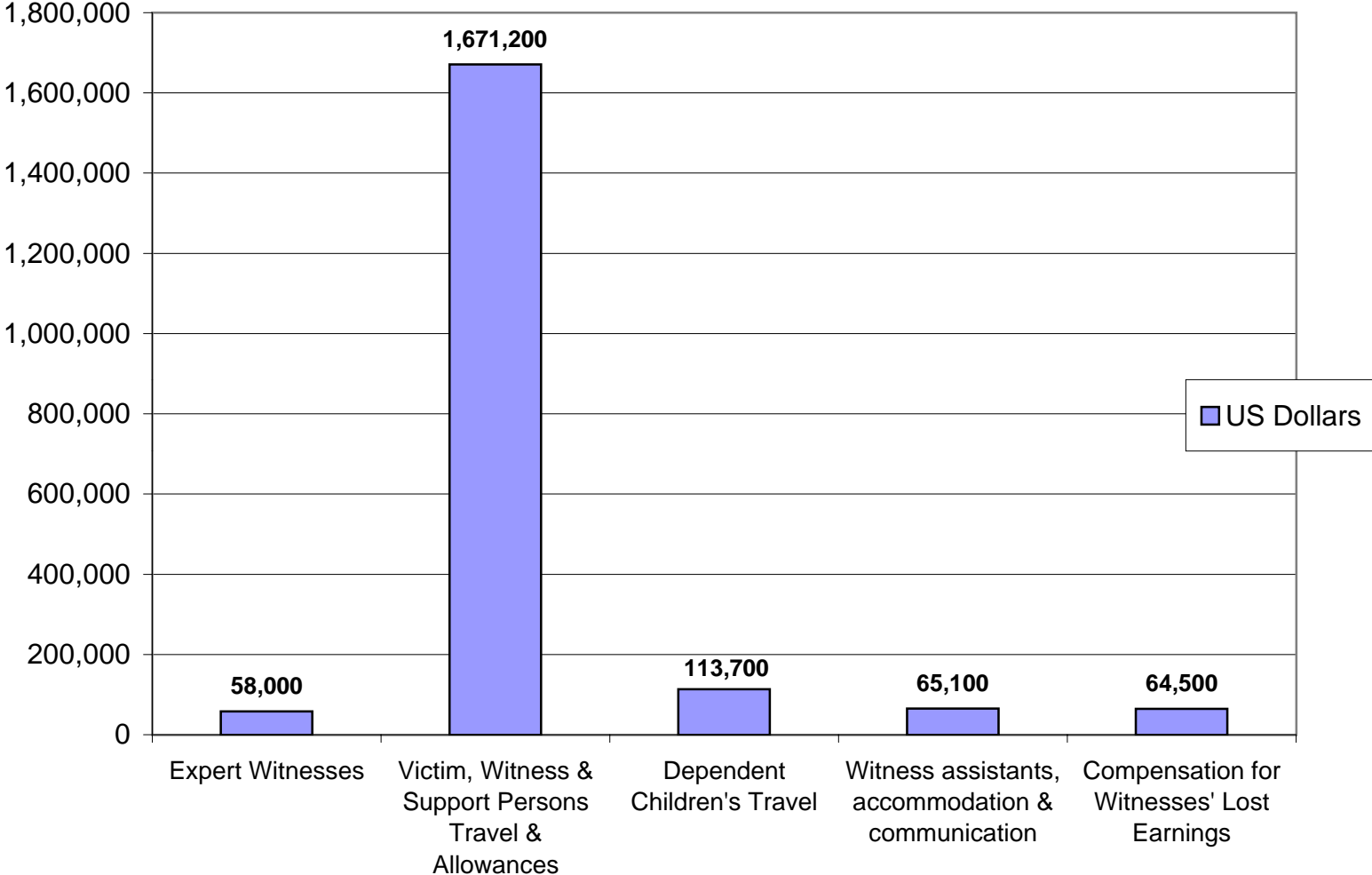
### ICTY witness-related expense for 1998



Source: "The Victim and Witnesses Section Graphics" (ICTY: 1998).

**Table 2**

**Year 2000 budget for witness support costs at the ICTY \***

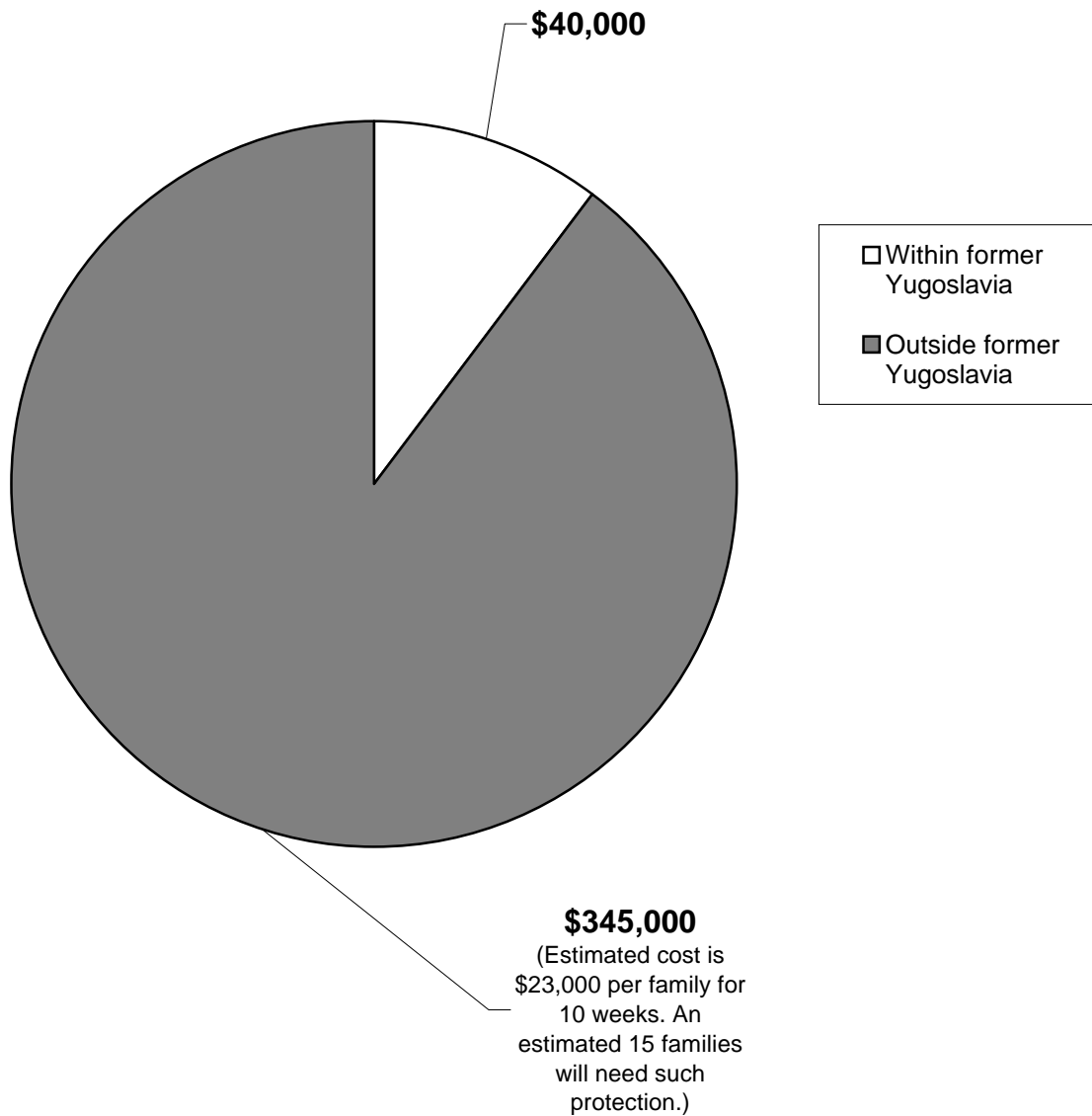


Source: UN Doc A/54 518 (1 November 1999).

\* Figures are estimates.

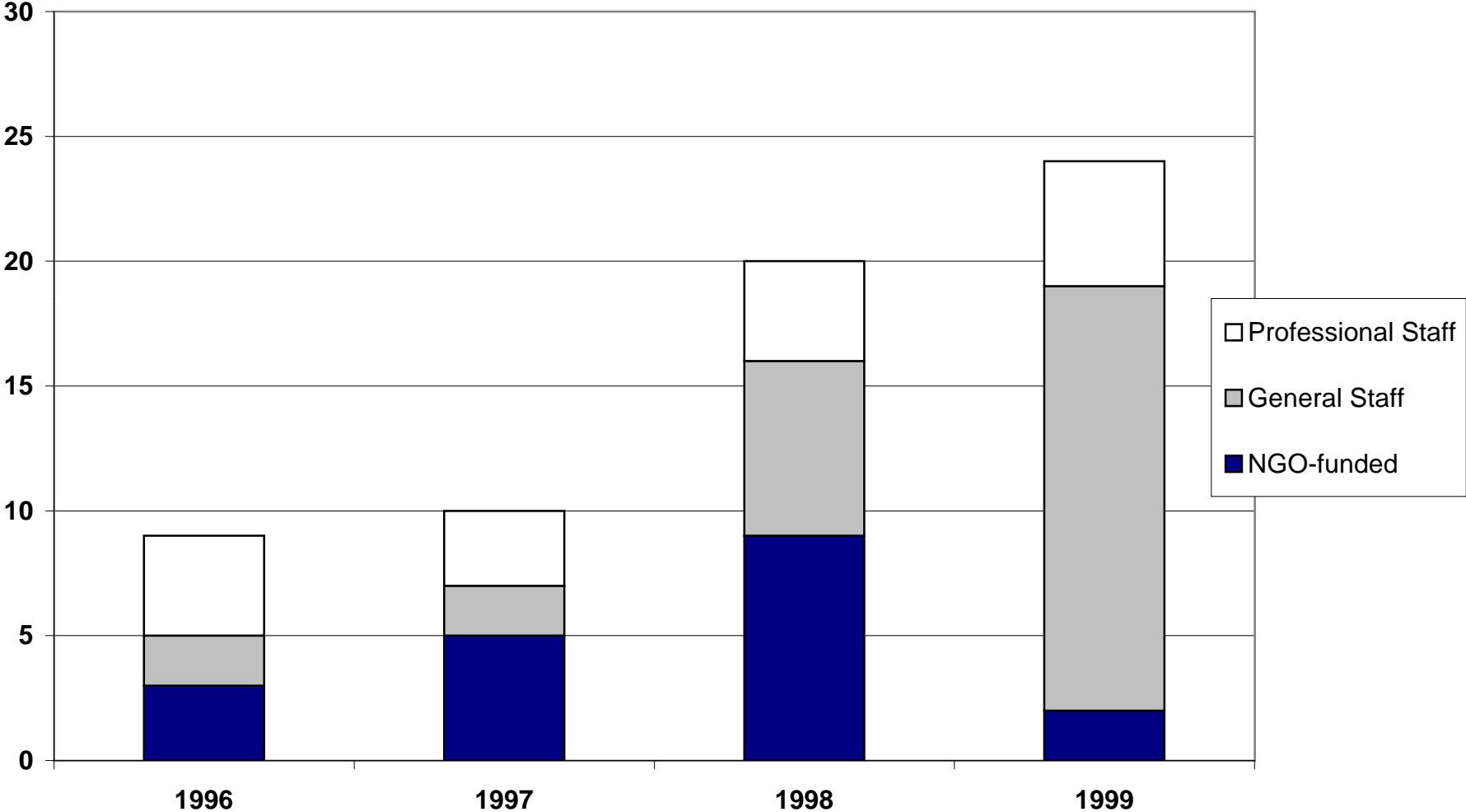
**Table 3**

**Year 2000 estimated relocation costs  
for ICTY witnesses and their families**



**Table 4**

**ICTY staff statistics 1996-1999**  
(Includes part-time staff)

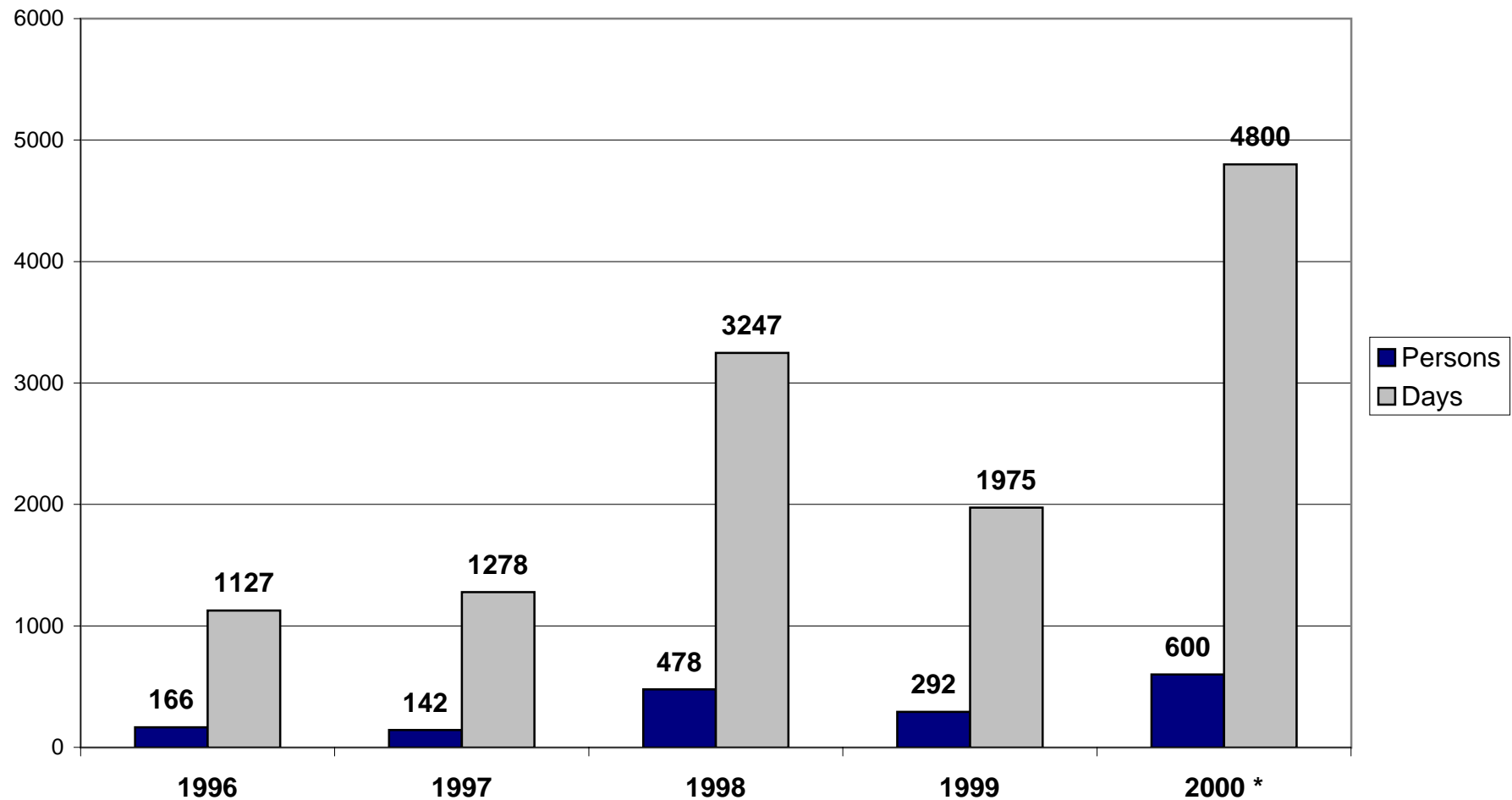


Source: "Victims and Witnesses Section Graphics" (ICTY: 1999).

**Table 5**

**Total number of witnesses, accompanying persons  
and days spent at the ICTY, 1996 - 2000**

Please note that figures do not include Blaskic Defense witnesses

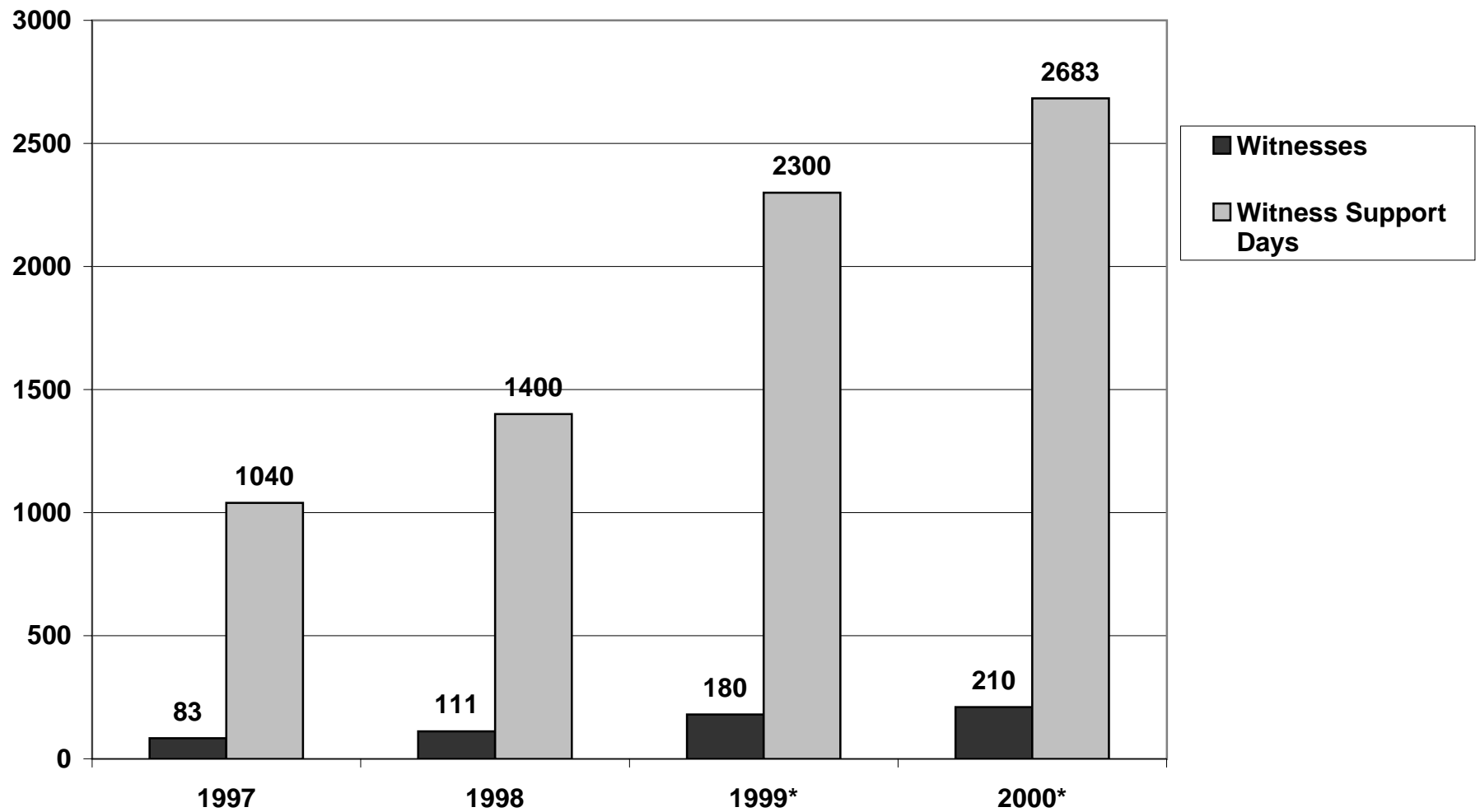


Source: "The Victims and Witnesses Section Graphics" (ICTY: 1999).

\* Figures are estimates.

**Table 6**

**Total number of witnesses and witness support days  
at the ICTR, 1997-2000**

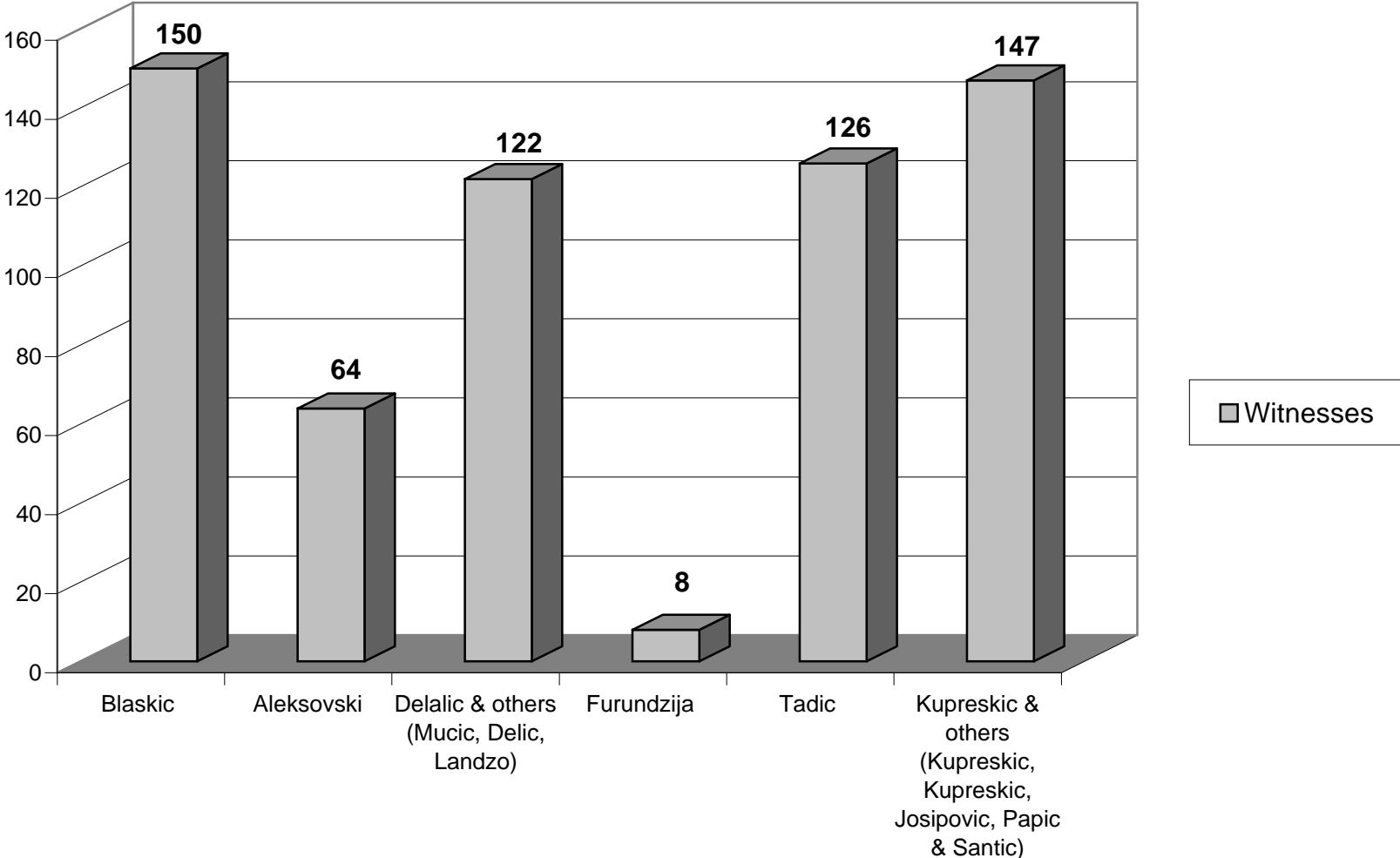


Source: <http://www.ictr.org> (last visited March 10, 2000).

\* Figures are estimates.

**Table 7**

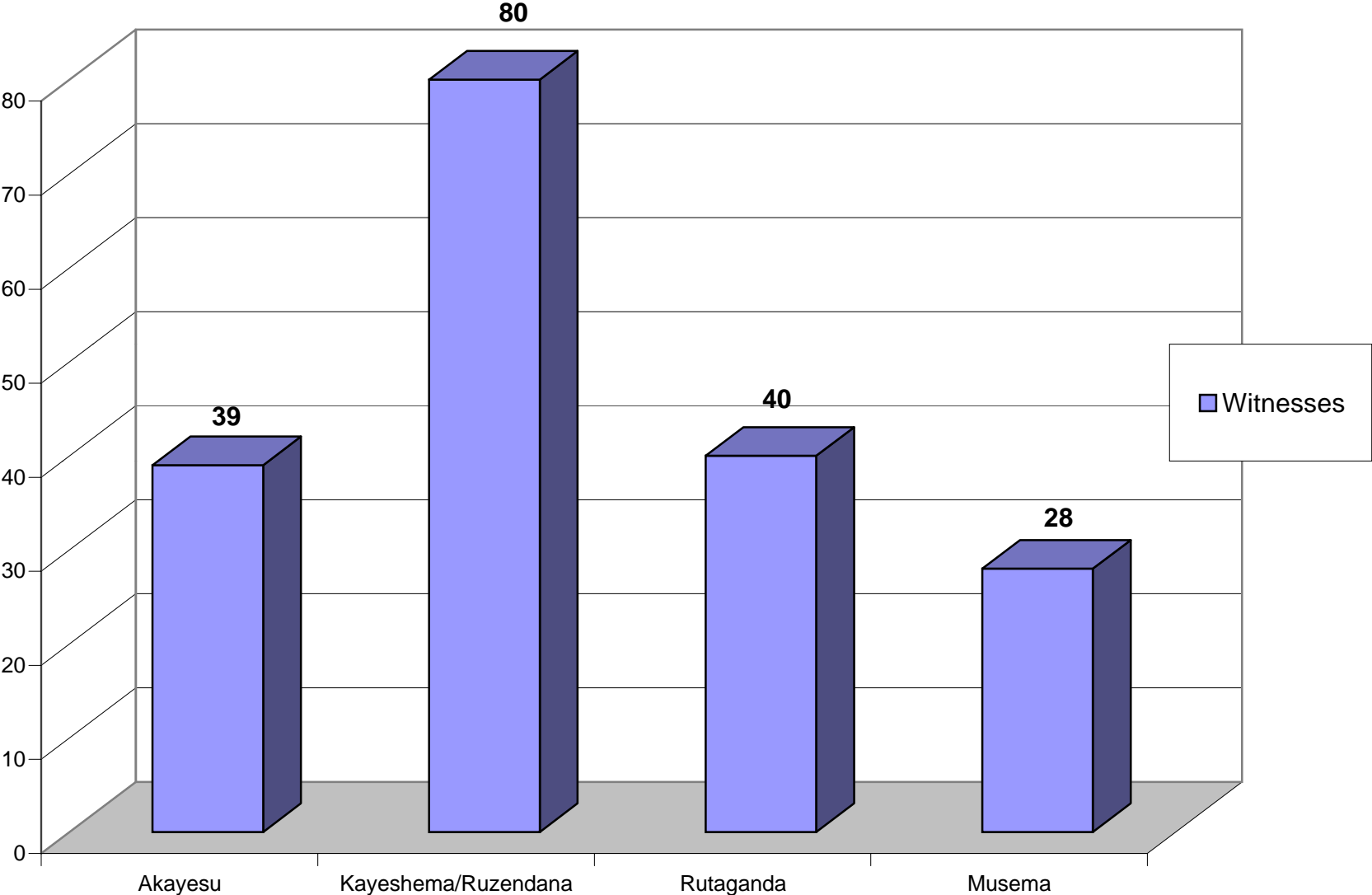
**Witnesses testifying before the ICTY per completed trial**



Source: <http://www.un.org/icty> (last visited March 8, 2000).

**Table 8**

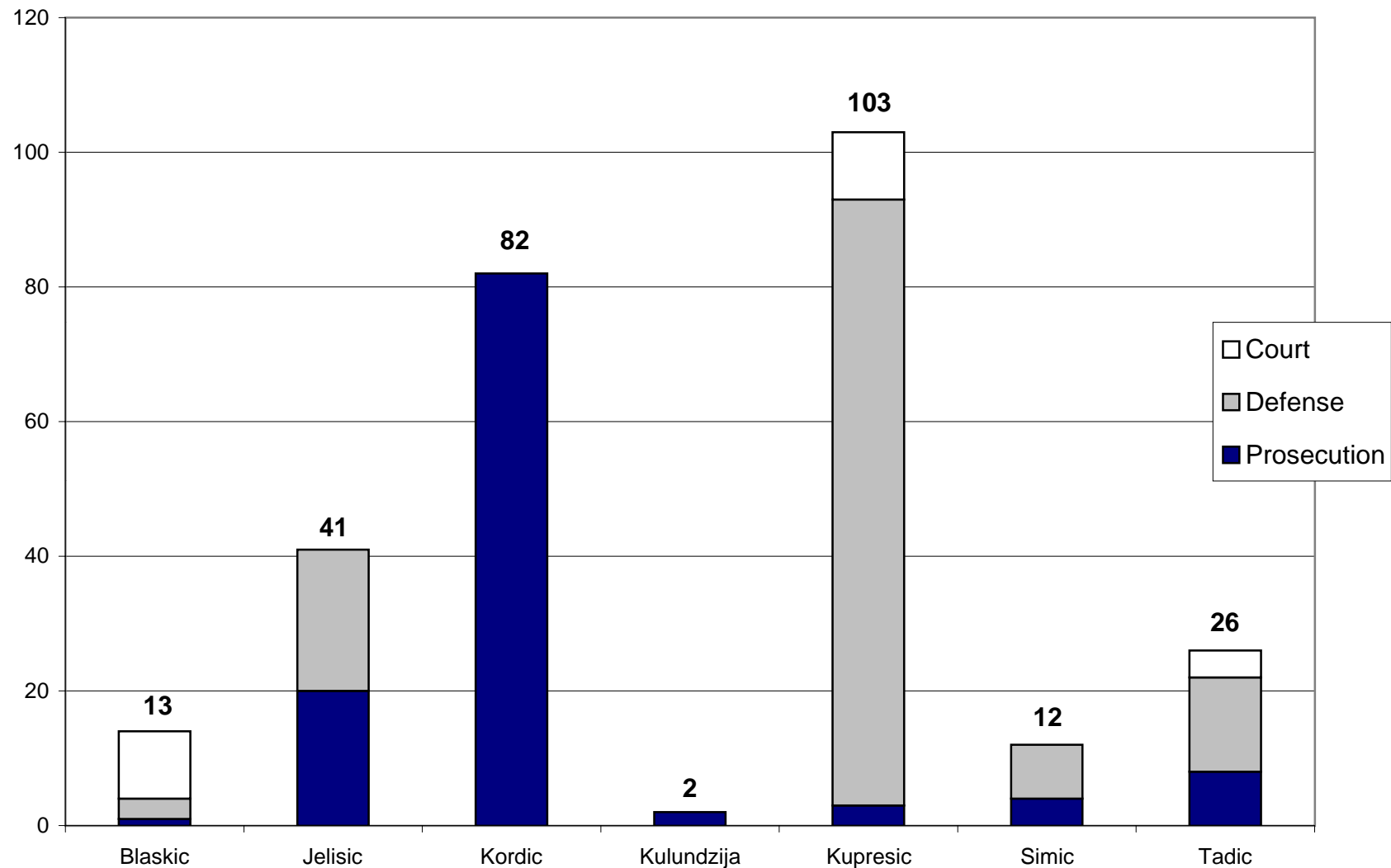
**Witnesses testifying before the ICTR per completed trial**



Source: Note on Witness and Victim Services Section (ICTR: 18 JUNE 1999).

**Table 9**

**Number of witnesses at the ICTY per each trial in 1999\***

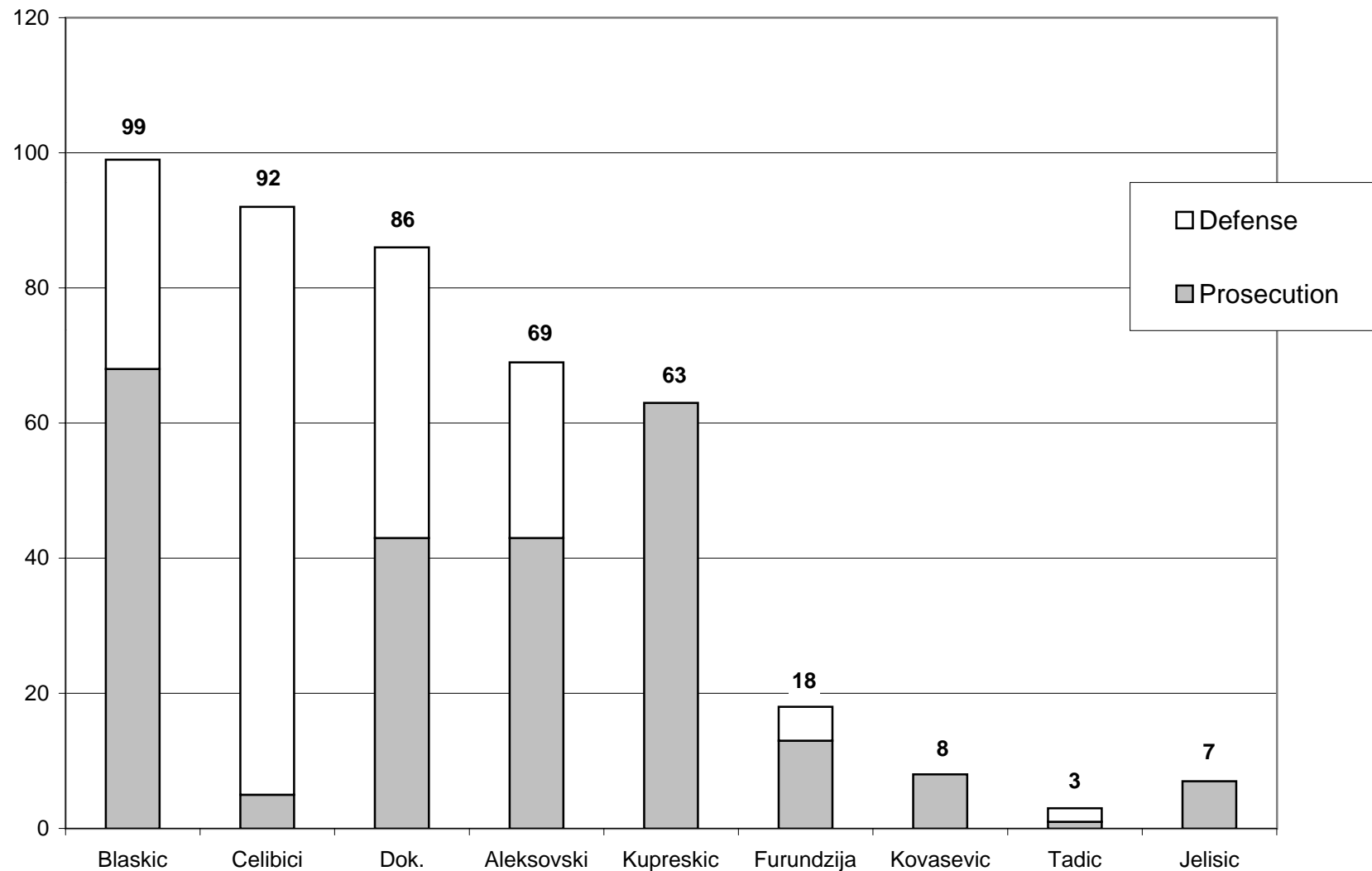


Source: "The Victims and Witnesses Section Graphics" (ICTY: 1999).

\*Please note that if a witness was required to travel to the Hague twice, s/he shows in the figures two times. Blaskic Defense witnesses are not included.

**Table 10**

**Number of witnesses at the ICTY per each trial in 1998\***

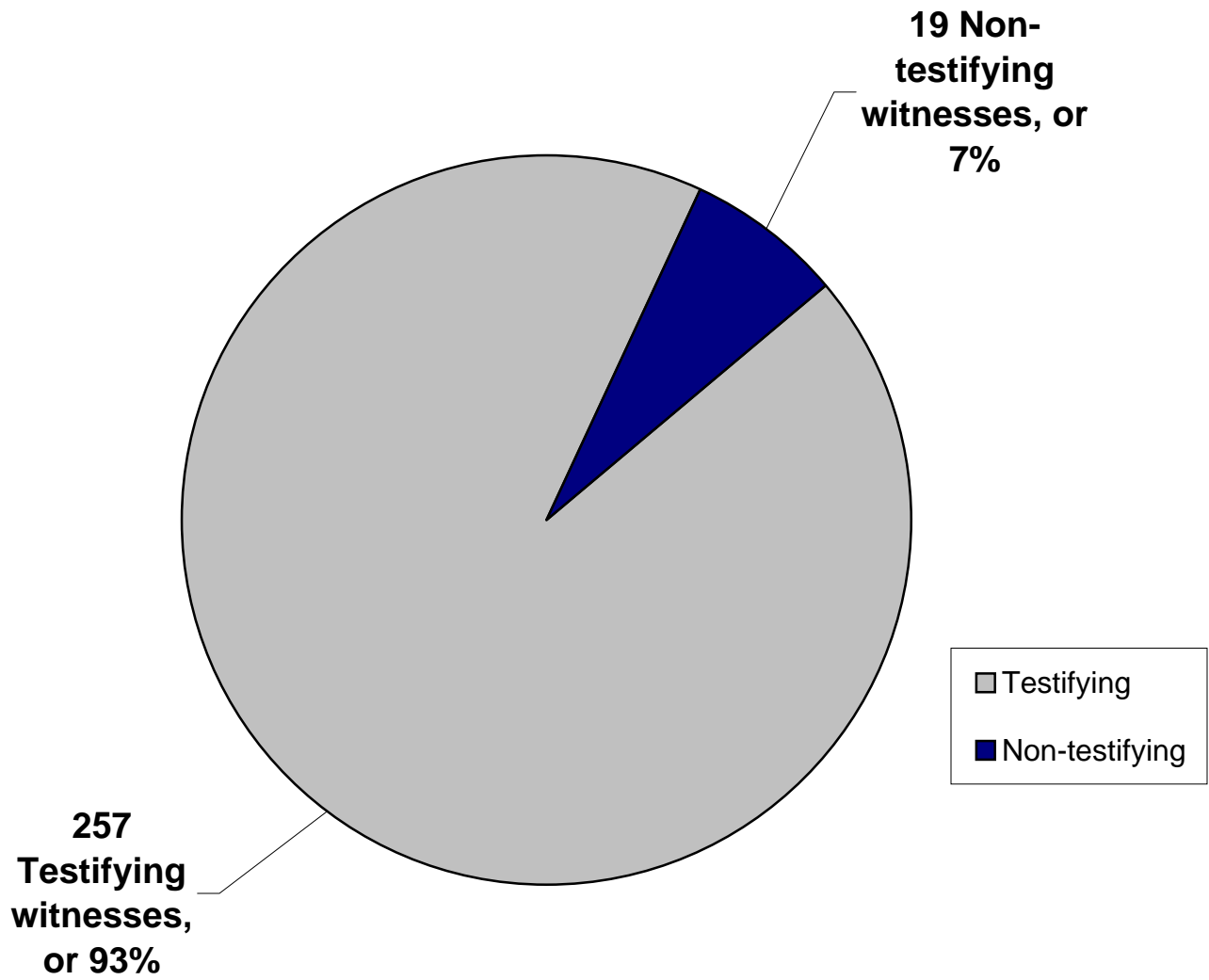


Source: "The Victims and Witnesses Section Graphics" (ICTY: 1998).

\*Please note that if a witness was required to travel to the Hague twice, s/he shows in the figures two times.

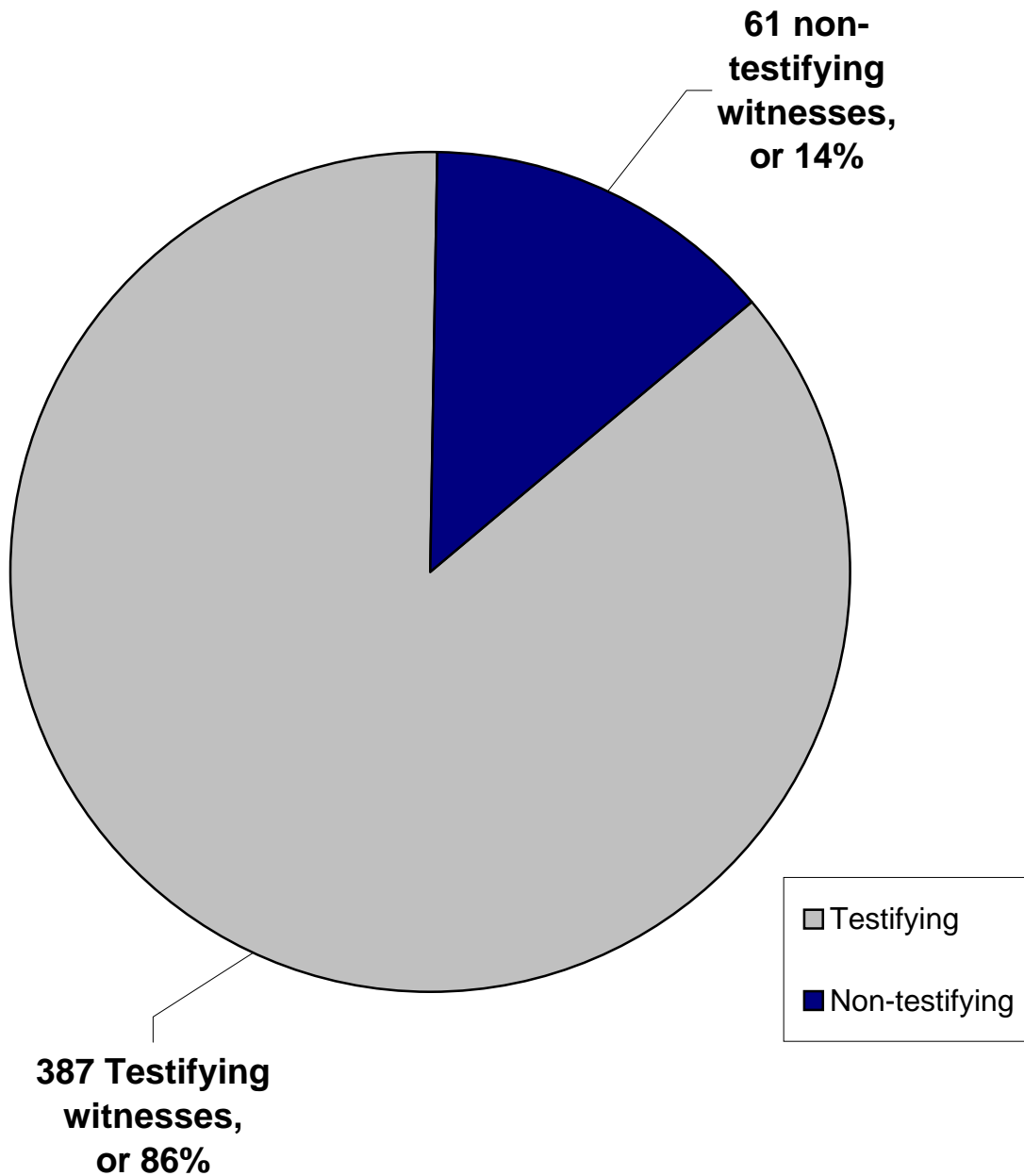
**Table 11**

**Number of testifying and non-testifying witnesses at the ICTY in 1999**



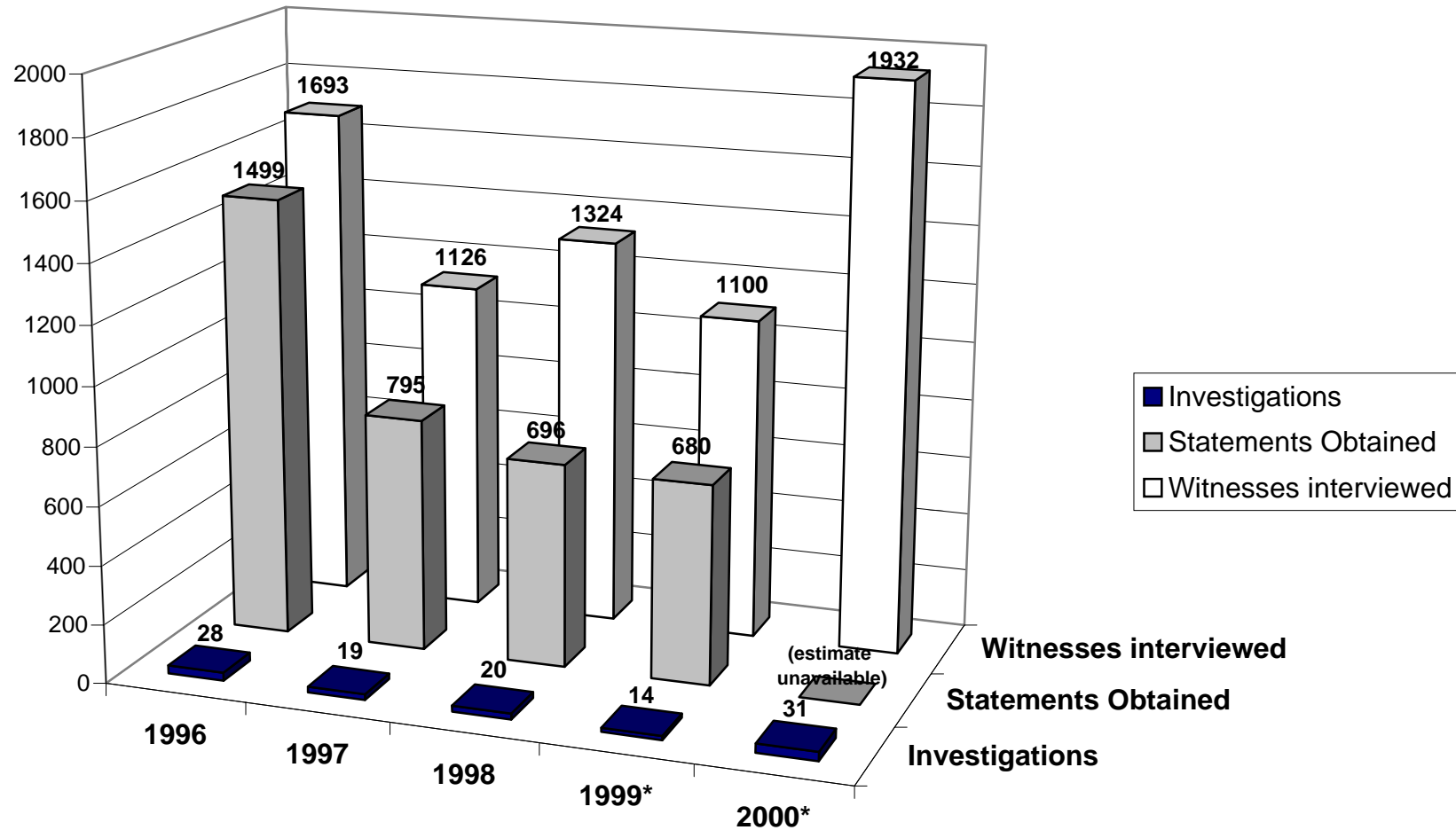
**Table 12**

**Number of testifying and non-testifying witnesses  
at the ICTY in 1998**



**Table 13**

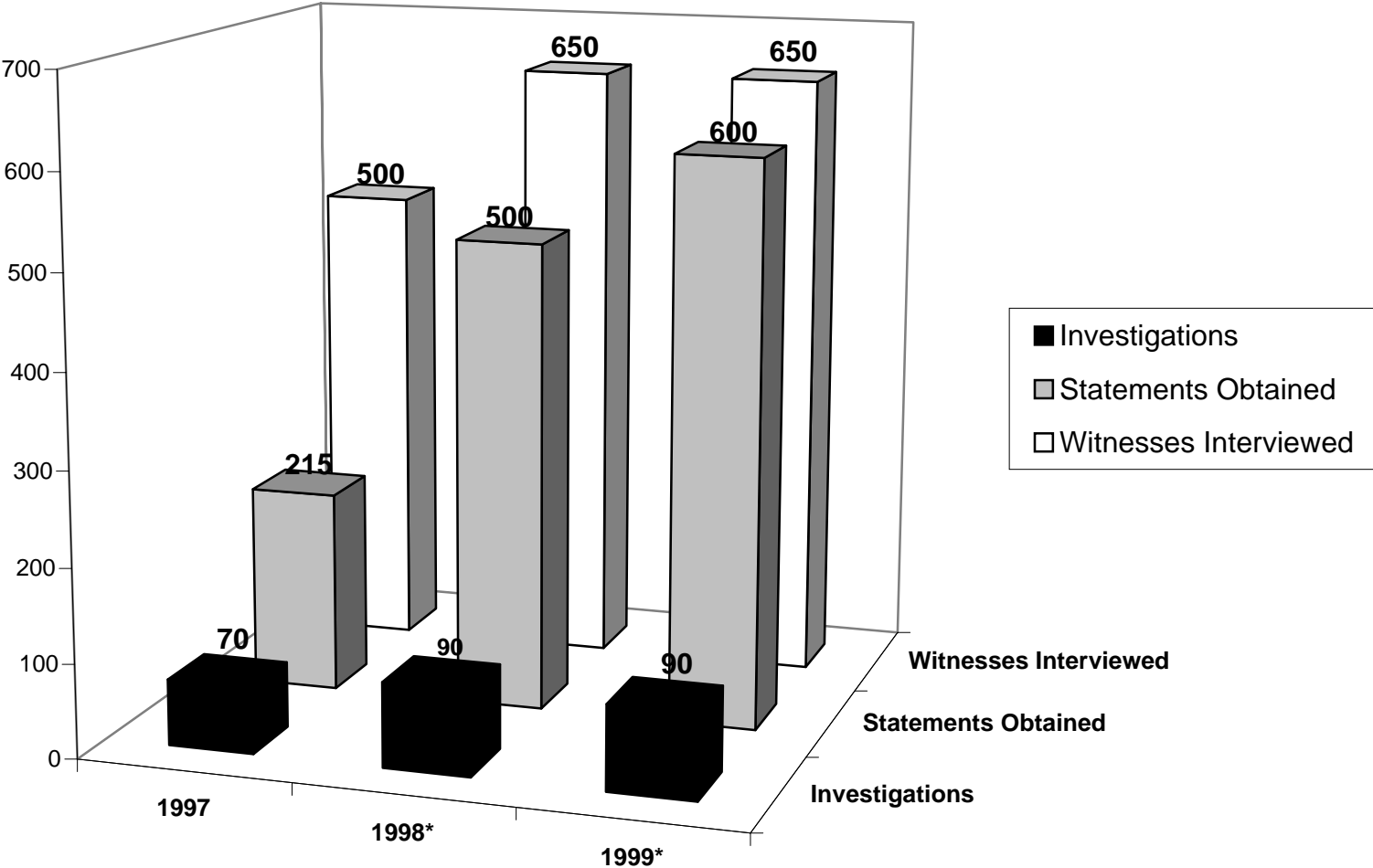
**Witness participation with the ICTY Office of the Prosecutor  
Investigation Division, 1996-2000**



Source: UN Doc A/C.5/52/4 (21 October 1997); UN Doc A/C.5/53/13 (7 October 1998); UN Doc A/54/518 (1 November 1999).  
\*Figures are estimates.

**Table 14**

**Witness participation with the ICTR Office of the Prosecutor  
Investigation Unit, 1997 - 1999**



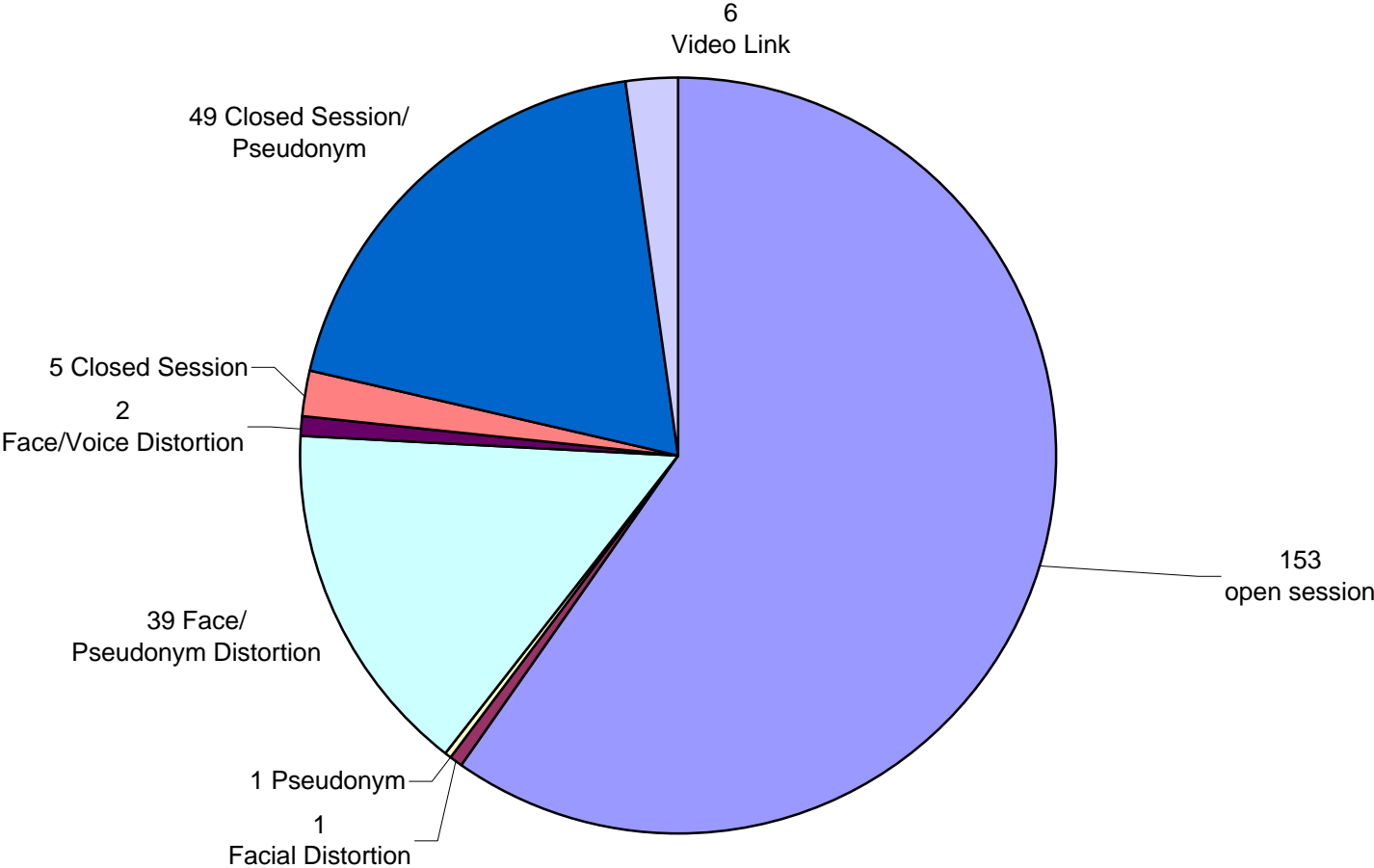
Source: UN Doc A/C.5/52/13 (4 November 1997); UN Doc A/C.5.53/15 (12 October 1998).

\*Figures are estimates.

**Table 15**

**Protective measures at the ICTY in 1999**

(Figures do not include Blaskic Defense witnesses and Celibici sentencing witnesses)

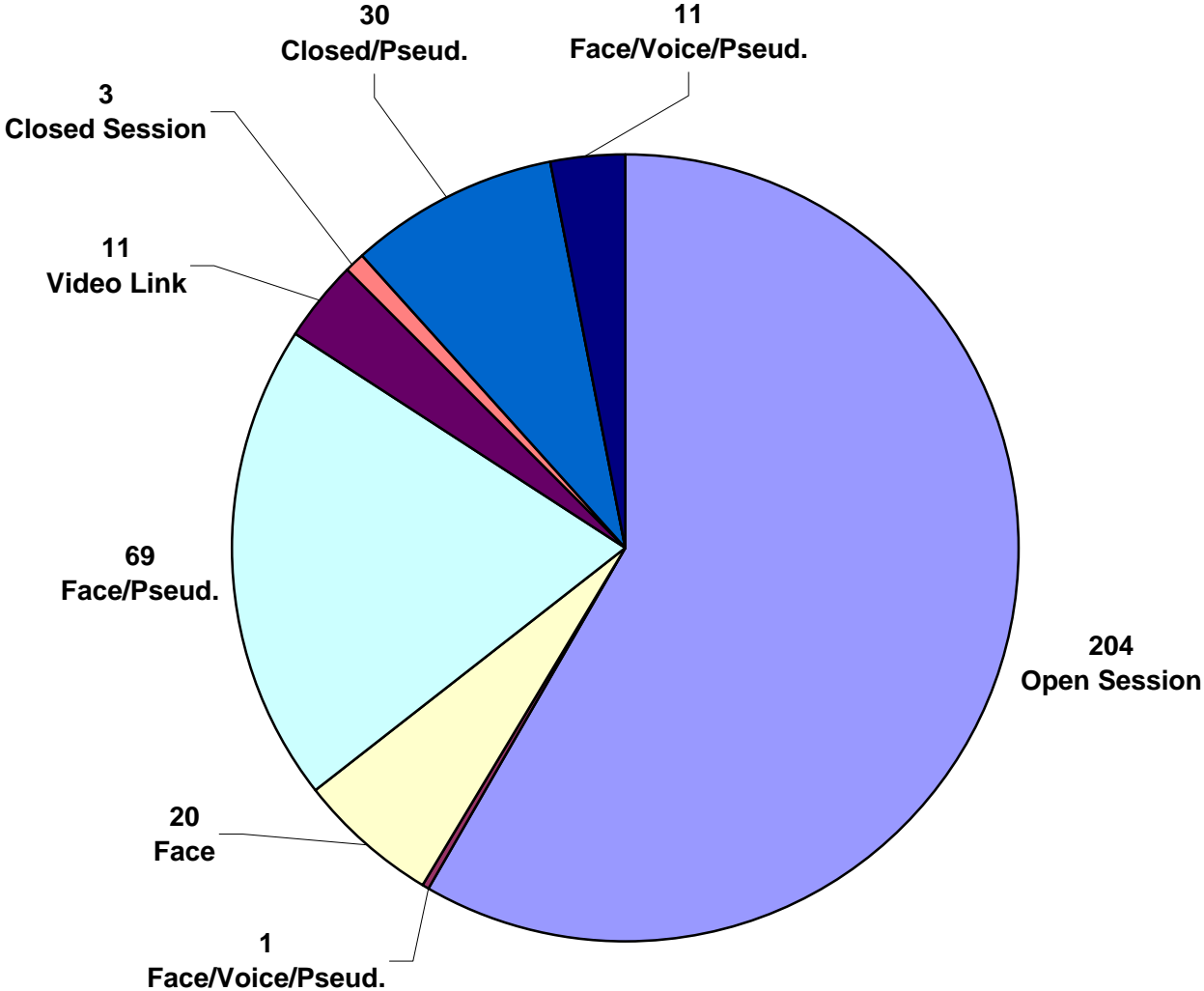


Source: "The Victims and Witnesses Section Graphics" (ICTY: 1999).

**Table 16**

**Protective measures at the ICTY in 1998**

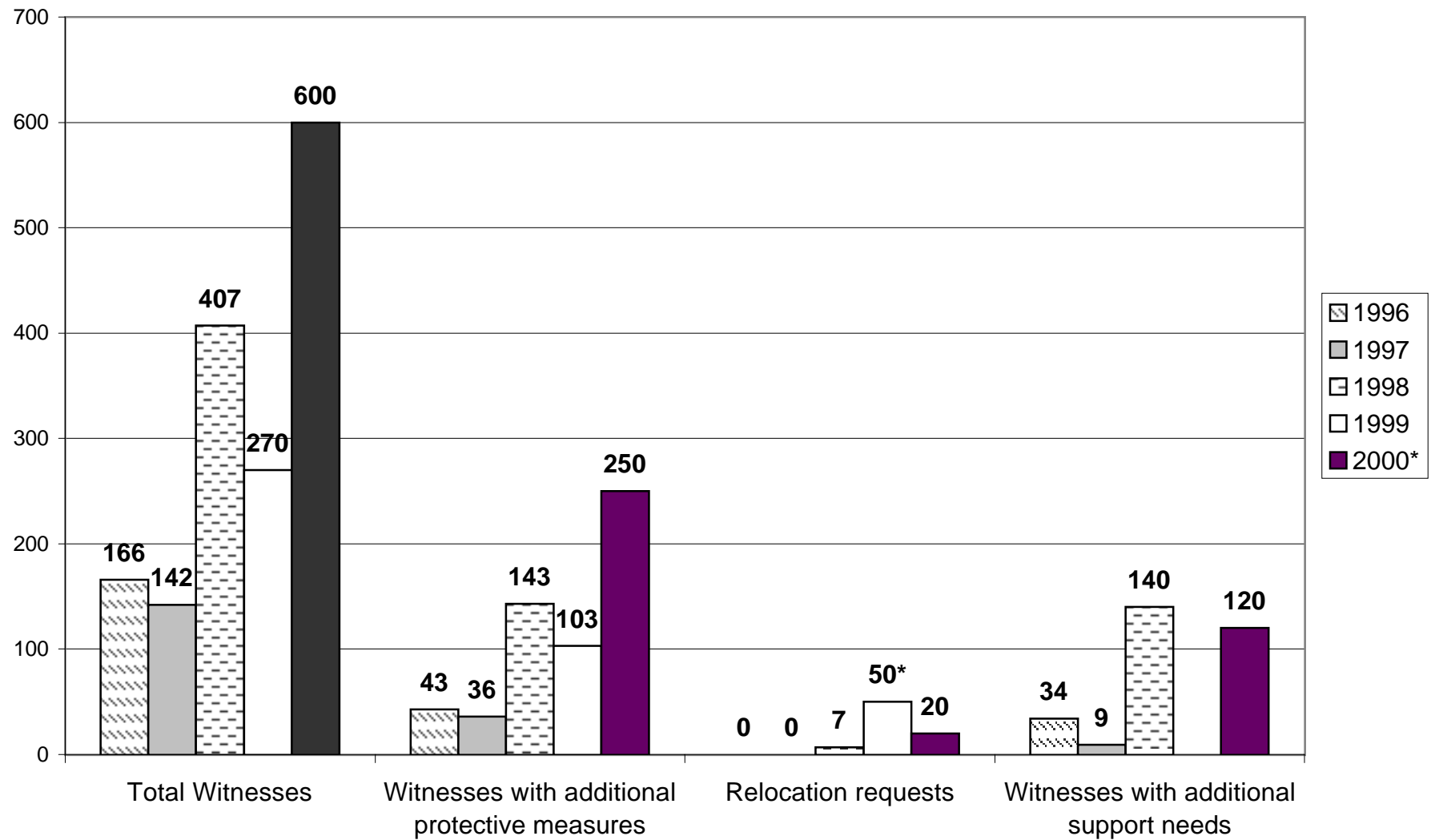
(Figures do not include Blaskic Defense witnesses and Celibici sentencing witnesses)



Source: "The Victims and Witnesses Section Graphics" (ICTY: 1998).

**Table 17**

**ICTY witness protection measures and support, 1996-2000**

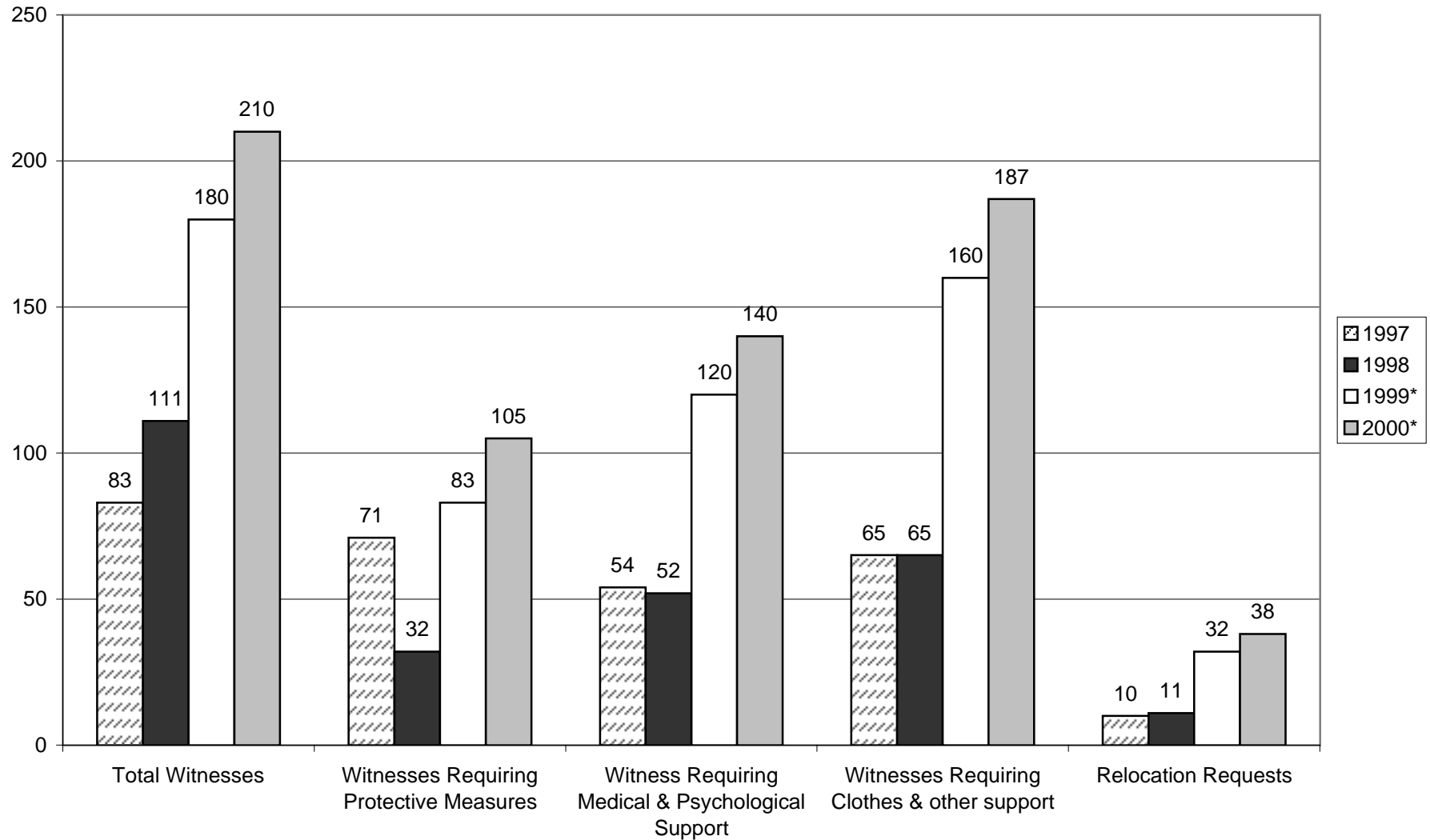


Source: UN Doc A/C.5/52/4 (21 October 1997); UN DDoc A/54/518; "The Victims and Witnesses Section Graphics" (ICTY: 1998, 1999).

\*Figures are estimates.

**Table 18**

**ICTR witness protective measures and support, 1997 - 2000**

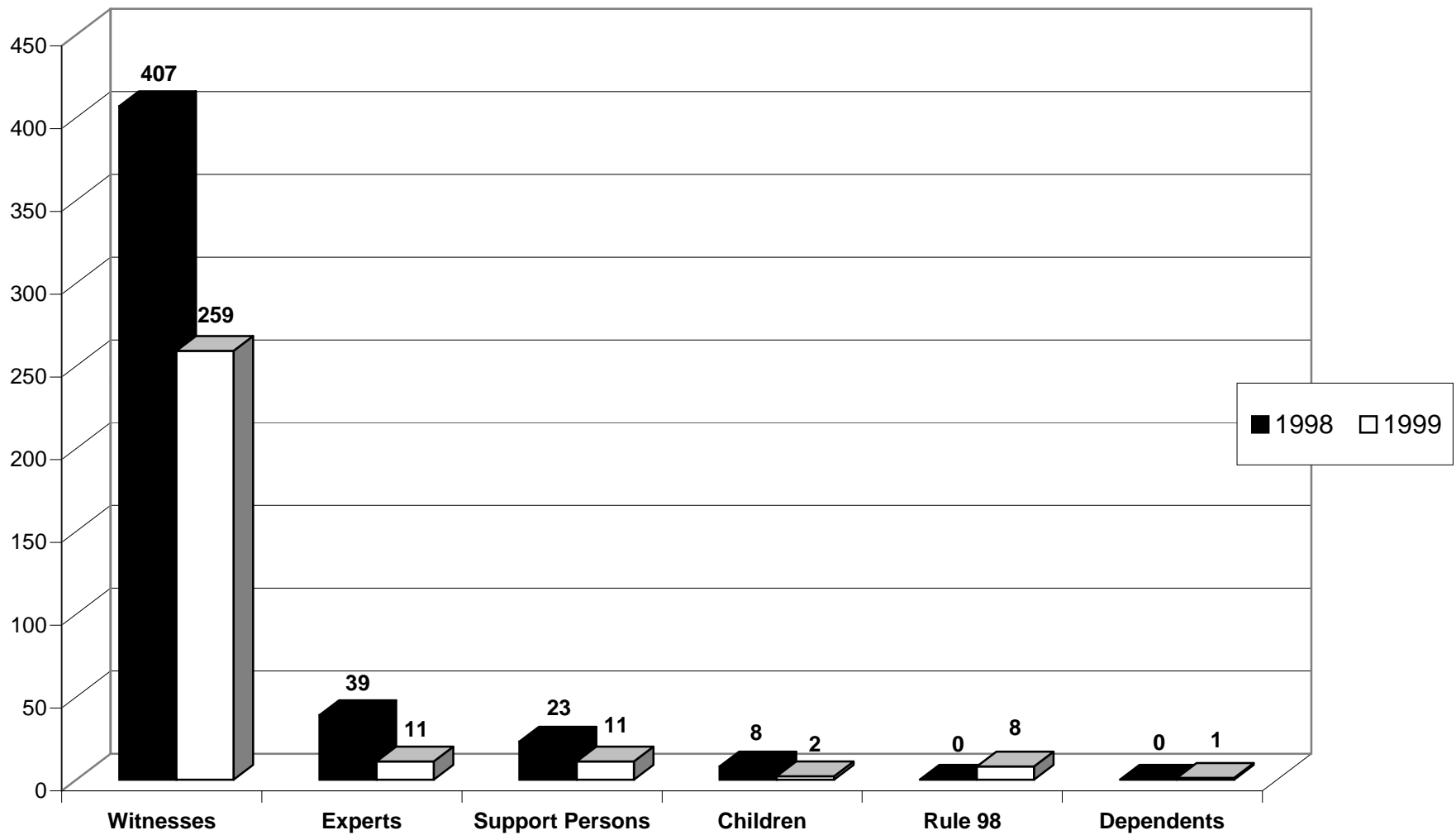


Source: <http://www.ictr.org> (last visited March 10, 2000).

\*Figures are estimates.

**Table 19**

**Witnesses, expert witnesses, support persons, children, dependents  
and Rule 98 witnesses at the ICTY, 1998-1999**



Source: "The Victims and Witnesses Section Graphics" (ICTY: 1998, 1999).