

## The ICC's witness protective measures through the lens of policy-oriented jurisprudence

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## **DRAFT SUBMISSION**

### **THE ICC'S WITNESS PROTECTIVE MEASURES THROUGH THE LENS OF POLICY-ORIENTED JURISPRUDENCE**

Steven William Kayuni\*

#### **Abstract**

The protection of witnesses from intimidation or harm has become a firmly entrenched *part of modern criminal justice systems*. *The ICC's decision-making* with regard to procedural and non-procedural protective measures has on one hand reinforced the integrity and success of the judicial process, while on the other hand has led to numerous interpretational and applicability challenges of both policy and legal framework. This article aims at designating policy-oriented jurisprudence as a possible theoretical approach and solution *to the ICC's international law* making of witness protective measures. Policy-oriented jurisprudence approaches international law as a decision-making process where decisions are made pursuant to shared community interests and expectations. This is likely to aid an adviser, scholar, or those entrusted with decision-making to pay particular attention to all factors necessary for the security of witnesses.

#### **A. INTRODUCTION**

Protection of witnesses from intimidation or harm in the form of security arrangements is imperative to the integrity and success of any judicial process.<sup>1</sup> The Rome Statute of the International Criminal Court ('Rome Statute'),<sup>2</sup> and the Rules of Procedure and Evidence (RPE)<sup>3</sup> provide for appropriate measures to protect the safety, physical, and psychological well being, dignity and privacy of victims and witnesses.<sup>4</sup> Despite this, the guarantees are muddled with numerous interpretational and applicability challenges on the bases of policy and law.<sup>5</sup> Such challenges range from little, or lack of internal coordination<sup>6</sup> among the different organs of the Court – namely, the Chamber, the

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<sup>1</sup> Chris Mahony, 'The Justice Sector Afterthought: Witness Protection in Africa' (Institute of Security Studies Pretoria 2010), 1.

<sup>2</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, entered into force on 1 July 2002), UN Doc. A/CONF.183/9, 37 ILM 1002.

<sup>3</sup> Rules of Procedure and Evidence (adopted on 09 September 2002, entered into force on 09 September, 2002), ICC-ASP/1/3 and Corr.1, Part II.A.

<sup>4</sup> Article 68(1) of the Rome Statute.

<sup>5</sup> Heidi Hansberry, 'Too Much of a Good Thing in Lubanga and Haradinaj: 'The Danger of Expediency in International Criminal Trials' [2011] 9(3) ACLYIR358.

<sup>6</sup> Markus Eikel, 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice' (2012) 23 CLF 97.

Office of the Prosecutor, and the Witnesses and Victims Unit<sup>7</sup> – to cooperation with states parties, cooperating organizations, and financial issues. This makes it difficult for the International Criminal Court (ICC) to fulfil the intention of its negotiators and the values that the world community envisaged during the Rome negotiations. Witness protection as guaranteed by articles 43 and 68 of the Rome Statute can only be realised if there is a proper understanding, applicability, and implementation of said provisions.

William Reisman, Siegfried Wiessner, and Andrew Willard have argued that in order to attain a clarified world public order and human dignity, the law should at all times serve human beings.<sup>8</sup> Those entrusted with interpretation and application of appropriate protective measures within the legal framework of the Rome Statute are able to fulfil their duties if they focus on the core purpose of the ICC: ending world impunity.<sup>9</sup> This article examines the legal practices surrounding witness protective measures law through the lens of policy-oriented jurisprudence.<sup>10</sup> It is argued that this approach will enable the ICC to surmount the numerous witness protective measures' interpretational and applicability challenges currently dogging the Court, which will aid in attaining the core aims and objectives of the Rome Statute.

The article provides first, an overview of policy-oriented jurisprudence in relation to the current practice of witness protection at the Court. Second, it discusses the main critics of policy-oriented jurisprudence. These critics have mainly been proponents of other theoretical approaches to international law that are likely to be applicable to the interpretation and applicability of witness protective measures.<sup>11</sup> These likely theoretical approaches are positivism, critical legal studies ('CLS'), law and economics ('L & E'), and feminism. Finally and in conclusion, this article calls for the ICC to take urgent actions to overcome the current challenges surrounding witness protective measures, by mirroring a policy-oriented approach in the interpretation and application thereof. It is proposed that this method of international law is optimal in construing and implementing the relevant protective measures.

## B. THE NEW H(E)AVEN

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<sup>7</sup> Rome Statute, Articles 43, 68.

<sup>8</sup> William Michael Reisman *et al.* 'The New Haven School: A Brief Introduction' (2007) 32 YJIL579.

<sup>9</sup> Sarah Nouwen, & Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' [2010] 21(4) EJIL 943.

<sup>10</sup> Positivism, *see* Steven Richard Ratner, 'Schizophrenias of International Criminal Law' (1998) 33 TILJ 237; Feminism, *see* Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 AJIL 379; Law and Economics, *see* Jeffrey L. Dunoff & Joel Trachtman, 'Economic Analysis of International Law' (1999) 24 YJIL 1; Critical Legal Theory, *see* Martti Koskeniemi 'Hierarchy in international law: A sketch' (1997) 8(4) EJIL 566.

<sup>11</sup> There are some other methodologies that have been left out of this critique such as the *Third World Approach to International Law* and *International Relations and International Legal Process*. It is the considered opinion of the author that such methodologies ought to be left out as they are not likely to be appropriate nor applicable to the interpretation of protective measures relating to witnesses before the ICC.

The ‘New Haven School’<sup>12</sup> has grown into a worldwide epistemic community of adherents who consider it a revelation, an intellectual liberation and rebirth.<sup>13</sup> It is an approach that considers international law as a process of decision-making. Through the lens of this approach, various actors in the world community clarify and implement their common interests in accordance with their expectations of appropriate process and effectiveness in guiding behaviour.<sup>14</sup> It is an adoption of analytical methods of the social sciences to the prescriptive purposes of law.<sup>15</sup> In turn, these prescriptive purposes demand a focus on the realities of authority and control while eschewing naked power, exercise of legal authority, or power without a corresponding interest in the well being of such an entity.<sup>16</sup> It has been postulated as a focus on more than rules, and an emphasis on how decisions made from those rules affect human beings.<sup>17</sup> As such, policy-oriented jurisprudence pursues a cultivation and development of tools that can bring about changes in public order and promote goals of human dignity.

By describing international law as a comprehensive process of authoritative decisions,<sup>18</sup> this approach brings up an appealing viewpoint that is a realistic perspective of decision-makers’ actions and inferences of the content of international norms applicable in day-to-day situations.<sup>19</sup> From the viewpoint of policy-oriented jurisprudence, authoritative decision means that law and policy are interchangeable.<sup>20</sup> Legal techniques should be applicable in every aspect of policy decision-making.<sup>21</sup> Rules dissipate their effectiveness when they guide a decision-maker to relevant factors and presumptive weightings.<sup>22</sup> Furthermore, this approach accords a lawyer an opportunity to be central to policy-making, identifying policy alternatives in the process.<sup>23</sup> Contrary to the assumption that courts make legal decisions,<sup>24</sup> policy-oriented jurisprudence maintains that decision-making is a dynamic process.<sup>25</sup> Decision-makers need to be looked at from many different institutional positions and

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<sup>12</sup> Siegfried Wiessner, ‘Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman’ (2009) 34 YJIL526. The terms “New Haven School” and policy-oriented jurisprudence are used interchangeably to designate this unique configurative problem and policy-oriented theory about law.

<sup>13</sup> Siegfried Wiessner, ‘Professor Myers Smith McDougal: A Tender Farewell’ (1998-1999) 11 St.TLR 203.

<sup>14</sup> Steven Ratner & Anne-Marie Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers,’ (1999) 93 AJIL 294.

<sup>15</sup> William Michael Reisman *et al.* ‘The New Haven School: A Brief Introduction’ (2007) 32 YJIL576.

<sup>16</sup> A good example in this scenario is the strict adherence to rules by decision-makers at the Court without an actual interest in the well-being, welfare and circumstances of the witnesses; *see* Siegfried Wiessner, ‘Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman’ (2009) 34 YJIL526.

<sup>17</sup> Myres McDougal ‘Jurisprudence For a Free Society,’ (1961) 1 GLR 2.

<sup>18</sup> Myres McDougal ‘A Footnote’ [1963] 57(2) AJIL 383.

<sup>19</sup> D’Amato, Anthony *Jurisprudence: A Descriptive and Normative Analysis of Law*, (Martinus Nijhoff, Leiden, 1984), 189.

<sup>20</sup> Richard Falk, ‘International Legal Order: Alwyn V Freeman vs Myres McDougal’ (1965) 59 AJIL 66.

<sup>21</sup> D’Amato, Anthony *Jurisprudence: A Descriptive and Normative Analysis of Law*, (Martinus Nijhoff, Leiden, 1984), 189.

<sup>22</sup> Myres McDougal, *et. al.*, *Studies in World Public Order* (New Haven, Yale University Press, 1960), 887.

<sup>23</sup> D’Amato, Anthony *Jurisprudence: A Descriptive and Normative Analysis of Law*, (Martinus Nijhoff, Leiden, 1984)190.

<sup>24</sup> Anthony D’Amato, ‘The Neo-Positivist Concept of International Law’ (1965) 59 AJIL 321.

<sup>25</sup> Arthur Jay Silverstein, ‘Emigration: A Policy-Oriented Inquiry’ (1974)2 SJILC 150-151.

contexts.<sup>26</sup> Rules are only one element in the analysis of a decision<sup>27</sup> with judges accustomed to refocusing attention from rules to decisions<sup>28</sup>- which are anchored in diverse social and personal experience.<sup>29</sup>

In clear terms, law is a secular craft or an artifact created by human beings to achieve certain goals that a legal system wishes to attain.<sup>30</sup> As such, the social engineering function or influence of persons dealing with the law cannot be underestimated.<sup>31</sup> Law should be used as an instrument for policy-making;<sup>32</sup> in clarifying jurisprudence and securing shared interests in a community.<sup>33</sup>

According to advocates of policy-oriented jurisprudence, there are eight goals that human beings cherish or regard as values of public order of human dignity.<sup>34</sup> It is suggested that the interpretational scope for such values are open and a choice among the eight values should guide the decision-maker in roughly approximating categories by which data is obtained and processed.<sup>35</sup>

i) Power<sup>36</sup> as a value requires that generous support should be given to an institution or office responsible for decision-making. The decision-maker should not only possess widely held influences, but also be able to receive enough support to exercise said influence without any hindrances. Within the ICC, there is lack of coordination among the decision-makers such as OTP, VWU, Defence and Chambers.<sup>37</sup> Decision-makers cannot exercise their influence over other organs in relation to the implementation of protective measures. Their split responsibilities towards witnesses do not naturally intertwine as expected. There is no unilateral 'one court' approach to handling of witness protective measures.<sup>38</sup> Further, despite existence of a legal framework for cooperation purposes within the Rome statute, the Court continues to experience piece-meal support and cooperation from states parties and cooperating partners.<sup>39</sup> Even though the Court has tried to reach out to states parties,

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<sup>26</sup> D'Amato, Anthony 'Jurisprudence: A Descriptive and Normative Analysis of Law', (Martinus Nijhoff, Leiden, 1984), 182-183.

<sup>27</sup> Myres S. McDougal, 'Fuller vs. The American Legal Realists' (1940) 50 YLJ 827.

<sup>28</sup> Harold D. Lasswell & Myres S. McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 YLJ 237.

<sup>29</sup> Frank Jerome, 'Law and the Modern Mind', Transaction Publishers, New Brunswick, 2009), 108-126.

<sup>30</sup> William Michael Reisman, 'McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 ASILP 279.

<sup>31</sup> *Ibid.*

<sup>32</sup> Myres McDougal, 'Jurisprudence for a Free Society: Studies in Law Science and Policy', (New Haven, New Haven Press, 1992), xxii.

<sup>33</sup> *Ibid.*, xxi.

<sup>34</sup> Myres McDougal, *et. al.* 'The World Community: A Planetary Social Process' (1988) 21 UCCLR 807.

<sup>35</sup> Harold D. Lasswell, 'On Political Sociology' in Dwaine Marvick, (Eds.) *The Heritage of Sociology*, (Chicago, University of Chicago Press, 1977), 116-117.

<sup>36</sup> Adherents to the approach would ask the following questions: (i) To what extent is power widely or narrowly held by the decision-makers? (ii) How many members of the community being investigated or observed are involved either directly or indirectly in enacting prescriptions, recommendations or invocations for that community? (iii) To what extent are the processes of adjustment coercive or persuasive? (iv) How intense is the expectation of violence? (v) How intense is the expectation of peaceful agreement? These are some of the vexing questions that considerations of policy-oriented jurisprudence can have in terms of power as a cherished goal.

<sup>37</sup> Markus Eikel, 'External Support and Internal Coordination – The ICC and the Protection of Witnesses' in Carsten Stahn (Ed.) *The Law and Practice of the International Criminal Court*, OUP, Oxford, 2015), 1105-1131.

<sup>38</sup> *Ibid.*

<sup>39</sup> ICC, 'Report of the Bureau on Cooperation (Addendum)', ICC-ASP/13/29/Add.2, 28<sup>th</sup> November, 2014, paras 6 – 8 , [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP13/ICC-ASP-13-29-Add2-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-Add2-ENG.pdf),

very few states parties are willing to step forward and engage in negotiations for confidential relocation agreements whereby they would be willing to accept and host witnesses that are under the ICC's witness protection program.<sup>40</sup> As of November, 2014, numerous witnesses were in need of relocation. Despite this, statistics showed that only 60 witnesses out of 21 cases and 9 situations had been relocated to various countries.<sup>41</sup> This has led to numerous risks in form of intimidation, tampering and death on behalf of witnesses desperately seeking protection and relocation. Citing sovereignty claims<sup>42</sup>, states parties and cooperating partners have been reluctant to help, support, enforce and respect decisions of the Court. States parties have cited regional interests<sup>43</sup> and national laws<sup>44</sup> or the lack thereof<sup>45</sup> as excuses for not cooperating with the court when it comes to the implementation of witness protective measures.

ii) Wealth<sup>46</sup> as a value should enable decision-makers to explore possibilities of control over community's economic assets and its flexibility.<sup>47</sup> The ICC lack the financial means to effectively protect witnesses and is thus in need of different arrangements due to the resource limitations of the Court. States parties have been unwilling to engage in confidential relocation agreements due to financial constraints and the burden that comes with witness protective measures. The 2013 Anglophone African States parties to the Rome Statute Meeting organised by the ICC is a case in point. The meeting was held to discuss reinforcement of national capacities in the area of witness protection and sharing best practices and experiences. It was observed that one of the reasons behind States reluctance in entering into confidential relocation agreements with the Court, was due to the challenges of budget allocations in relation

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accessed on 28 July 2015; *see also*, Sussane D, Mueller, 'Kenya and the International Criminal Court (ICC): politics, the election and the law,' (2014) 8(1) JEAS 25-42.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, p. 5-7.

<sup>42</sup> States parties and cooperating partners such as international and regional bodies, non-state actors and individuals should help enforce and respect decisions of the Court when it comes to witness protective measures. *See also* Robert Cryer, 'International Criminal Law –v- State Sovereignty: Another Round?' [2006] 16(5) EJIL 982-983; Kasaija Philip Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' (2006) 4 JICL, 179; Julie Flint., & Alex de Waal, 'Case Closed: A Prosecutor Without Borders' (2009) 171 WA 23; Myres McDougal, 'The World Constitutive Process of Authoritative Decision' in Falk, R. & Black, C. (Eds.) 'The Future of the International Legal Order: Trends and Patterns' (Princeton, Princeton University Press, 1969), 73.

<sup>43</sup> Regional body interests to stop cooperating with the ICC; *see* Jalloh, Charles Chernor 'Africa and the International Criminal Court: collision course or cooperation' (2011) 34 NCCLR 203; *see also* Mills, Kurt "'Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34(2) HRQ 404-447.

<sup>44</sup> On polygamous witnesses not being welcomed in countries that outlaw such marriages; *see* ICC, Summary Report on the Seminar on Protection of Victims and Witnesses Appearing before the International Criminal Court, 29<sup>th</sup> – 30<sup>th</sup> January, 2009, pp. 5-7, [http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf), accessed on 13 August 2015.

<sup>45</sup> On infiltrated or dirty handed witnesses not being liable for prosecution for lack of legal processes that can absorb them such as plea bargaining laws; *see Ibid.*

<sup>46</sup> Policy oriented approach advocates would question wealth value in the following manner: (i) To what extent is the economy focused on savings and investments? (ii) What fiscal measures make for forced saving or discourage saving and investment? (iii) Are there minimum income guarantees available?

<sup>47</sup> Economic growth, production and distribution of goods, services and consumption in a community should be put to test. How are resources being produced, distributed and consumed? Do decision-makers have enough resources at their disposal for effective decision-making? *See also* Godefridus Hoof, 'Rethinking Sources of International Law', (Deventer, Kluwer Publishers, 1983) 42; Myres McDougal, & Harold D Lasswell, 'Jurisprudence in Policy Oriented Perspective' (1966-1967) 19 UFLR, 506.

to complementary national systems of protection.<sup>48</sup> The Court has furthermore been unable to make post-testimony follow-ups for witnesses due to inflexible budgets.<sup>49</sup> An estimated eight per cent<sup>50</sup> of the Court's total budget is allocated to the needs of both witnesses and victims. As it now stands, the budget is insufficient to assist decision-makers to attain human goods in the context of witnesses. A collective resource base and effective funding, fiscal management and planning would enable the Court achieve its objectives for witnesses.

iii) Enlightenment<sup>51</sup> points to the degree of knowledge accessibility on which balanced or rational choice depends. In order for a decision-maker to come up with a coherent decision towards a desired goal or change, there is need for availability and easy access to all necessary and practical information.<sup>52</sup> Witness protective measures litigation before the Court's chambers faces challenges regarding the evidential threshold for determining appropriate protective measures.<sup>53</sup> Participants and actors in the Court are limited in terms of what information is to be placed before the Court. The OTP at times engages intermediaries from NGOs for the purposes of gathering evidence and meeting potential witnesses, especially in situations of on-going conflict where it is almost impossible for its officers to be on the ground.<sup>54</sup> During these engagements intermediaries have been accused of manipulating witnesses to exaggerate testimonies for purposes of advancing agendas on behalf of their NGOs.<sup>55</sup> This example shows that when faced with allegedly exaggerated information, a decision-maker is likely to have challenges regarding evidential threshold for protective measures decision. Only concrete and persuasive information about such witnesses' physical, psycho-social well-being enables the OTP, VWU, and the defence to persuade judges as decision-

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<sup>48</sup> Summary of the Arusha Seminar on Witness Protection (29-30 October 2013) (Adopted on 7 November 2013), ICC-ASP/12/36/Add.1, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf), accessed on 13 August 2015.

<sup>49</sup> According to the ICC's Proposed Programme Budget for 2015 submitted at the 2014 Assembly of States Parties (ASP) meeting, only eight per cent of the total budget was for both Victims and witnesses. Eight per cent is a very negligible figure to enable the Court attain human good for witnesses. Proposed Programme Budget for 2015 of the ICC, ICC-ASP/13/10, p.10, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP13/ICC-ASP-13-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-ENG.pdf), accessed on 28 July 2015.

<sup>50</sup> *Ibid.*

<sup>51</sup> Policy-oriented jurisprudence adherents would be asking the following questions: (i) To what extent does the community protect the gathering, transmission, dissemination of information? (ii) guarantees for freedom of press, freedom of research, freedom of research reporting?.

<sup>52</sup> The Court's intermediaries, investigators, NGOs and national bodies help collect and report crucial issues dealing with witnesses. Such knowledge necessitate an urgent need for purposive relocation of a witnesses where necessary.

<sup>53</sup> *Prosecutor -v- Ruto and Sang*, (Decision on Victims' Representation and Participation) ICC-01/09-01/11 (3 October, 2012) para. 14; *Prosecutor -v- Bemba*, (Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings), ICC-01/05-01/08-807 (12 July 2010) paras. 29–32; *Prosecutor -v- Katanga*, (Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial") ICC-01/04-01/07 (16 July 2010) paras. 40, 44; Michael Kurth, 'Anonymous Witnesses Before the International Criminal Court: Due Process in Dire Straits' in Stahn & Sluiter (Eds.) *The Emerging Practice of the International Criminal Court*, (Leiden, Martinus Nijhoff Publishers, 2009), p. 615.

<sup>54</sup> Glasius, Marlies. 'What is Global Justice and Who Decides?: Civil Society and Victim Responses to the International Criminal Court's First Investigations' (2009) 31(2) HRQ 496-520; Ambos, Kai, 'The first judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive analysis of the legal issues' (2012) 12(2) ICLR 115-153.

<sup>55</sup> Cryer, Robert, 'Witness Tampering and International Criminal Tribunals, (2014) 27(1) LJIL 191-203.

makers to come up with appropriate procedural and non-procedural protective measures.<sup>56</sup>

iv) Skills<sup>57</sup> of the decision-makers are essential to the facilitation of better decision-making. Decision-makers within the ICC Community should be given an opportunity to acquire and exercise capability in vocation, professions and other social activities.<sup>58</sup> Required qualifications and refresher trainings in areas relating to rule interpretation, psychology, counselling, sexual violence, and security that are necessary in order for the ICC to have the human capacity that will better serve witness protective measures. There are no clear policies regarding skills and training within the Court to the extent that intermediaries have been used instead of properly trained investigation officers leading to accusations of witness tampering and exaggerated testimonies.<sup>59</sup> Furthermore, psychological and social expertise has not been readily available.<sup>60</sup> Decision-makers need to have requisite skills to properly interpret and accord the right purpose of law and policy. People with abilities in administering protective measures need to be readily available. These abilities could be prosecutorial, investigative, or psychosocial welfare skills.<sup>61</sup>

v) Well-being as a goal or value relates to the degree of comfort, safety and health of a community. There is need for the ICC to aspire for the best circumstances relating to the welfare of the witnesses it is protecting.<sup>62</sup> Witnesses protected by the Court need to access utmost physical and psycho-social protection. Currently, pre-testimony protective measures such as physical protection, relocation are falling short of the expected standards. The problems is worse when it comes to the post-testimony stage where there is lack of follow-up processes, psych-social support and a general

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<sup>56</sup> Rules 76(4), 87(3), 87(3)(d) of ICC RPE; *see also* Articles 43(6), 64(6)(e), 68(1) (2) & 75 of the Rome Statute.

<sup>57</sup> Decision-maker will ask the following: (i) To what degree is the body politics committed to optimum opportunity for the discovery and cultivation of socially acceptable skills on the part of everyone? (ii) Is there universal and equal access to educational facilities? Are new skills recognised and assisted readily?.

<sup>58</sup> Eisuke Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence' (1974) 1 YSWPO 22; William Michael Reisman, 'A Jurisprudence From the Perspective of a Political Superior' [1996] 23(3) NKLR 610.

<sup>59</sup> De Vos, Christian M, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26(4) LJIL 1009-1024; C, Buisman, 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment,' (2012) 11(3) NUJIHR30-82.

<sup>60</sup> Louise Chapell, *et. al.*, 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia' [2013] 7(3) IJTJ455-475; <http://www.refugee-rights.org/Assets/PDFs/2011/icc-intermediaries-commentary-20110818.pdf>, accessed on 29 July, 2015.

<sup>61</sup> Are there requisite skills to properly articulate, interpret and accord appropriate protective measures? There is need for an increased pool of specialised skills in legal, physical and psychological expertise for the protection and dignity of witnesses. The levels of training and refresher courses impact heavily on how they can skilfully articulate policy and law towards witness protection; Eisuke Suzuki, 'The New Haven School of Jurisprudence and Non-State Actors in International Law in Policy Perspective' (2012) 42 JPS 46.

<sup>62</sup> *Ibid*, 22.



disregard of relocation requests.<sup>63</sup> There is also need for affection<sup>64</sup> or amiable relationships among community members. Positive sentiments towards others and loyalty to group values will help human good excel within the ICC. Further, negative attitudes towards each other only lead to hostilities and withering implementation strategies within the Court. The internal antagonistic relationship obtaining among those responsible for protective measures implementation such as OTP, VWU, Chambers and Defence is having a huge impact on witnesses. There is little or no coordination among the ICC organs when it comes to protecting witnesses.<sup>65</sup> Further, the relationship between the Court and states parties including its partner organizations both national and international needs to improve.<sup>66</sup> This will promote better implementation strategies for inclusive witness protection.

vi) Respect or recognition is central to any decision-making process.<sup>67</sup> Notwithstanding the antagonistic and disjointed relationship amongst the ICC organs, they have the same goal which is the amelioration of witness circumstances. There is need for a minimum respect on the basis of merely being organs of the Court. In other words, members of the same community with the same goal in mind. Currently, the OTP seems to not only receive the attention, but also the resource allocation that the defence does not have despite that the defence is not an organ of the Court but a section within the Court's registry.<sup>68</sup> The perceived inequality of the arms among these participants leaves defence short witnesses vulnerable.<sup>69</sup> ICC actors such as the defence need to consider themselves as self-directed participants with full rights and access to witness protective measures in their own right with minimal presence of discriminatory tendencies. Affording a higher hierarchical status whether it be the OTP, the VWU, the Defence, or the Chambers, would negatively affect efforts to achieve the goals of human dignity since there is recognition for some organs while withholding the same to others. A decision emanating from such a hierarchy would give more weight to considerations of one organ while giving less weight to considerations of another organ. In the end, it is the interpretation and applicability of the protective measures of witness

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<sup>63</sup> Human Rights Centre – UC Berkeley School of Law, 'Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses,' University of California, Berkeley, [https://www.law.berkeley.edu/files/HRC/Bearing-Witness\\_FINAL\(3\).pdf](https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf), accessed on 29 July 2015; Rome Statute, Art. 68(1); Marianna, Pena & Gaelle Carayon 'Is the ICC Making the Most of Victim Participation?' [2013] 7(3) IJTJ 520; Renne Blattmann, & Kiersten. Bowman, 'Achievements and Problems of the International Criminal Court: A View From Within' (2008) 6 JICJ 714.

<sup>64</sup> This affection goal has vexed minds of those following the policy oriented theory with questions such as: (i) what is the protection given to the family and other institutions of congeniality? (ii) How is are relations, friendliness and loyalty among family and friendship circles?.

<sup>65</sup> Markus Eikel, 'External Support and Internal Coordination – The ICC and the Protection of Witnesses' (n37), 1105-1131.

<sup>66</sup> Silvana Arbia, 'The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits' [2010] 36(3) CLB 520-522; Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, [http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf), accessed on 28 July 2015..

<sup>67</sup> Myres McDougal & Harrold Lasswell 'Non-Conforming Political Opinion and Human Rights: Transnational Protection Against Discrimination' (1975-1976) 2 YSWPO 1.

<sup>68</sup> ICC, 'The Office of Public Counsel for the Defence', [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/defence/office%20of%20public%20counsel%20for%20the%20defence/Pages/the%20office%20of%20public%20counsel%20for%20the%20defence.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/defence/office%20of%20public%20counsel%20for%20the%20defence/Pages/the%20office%20of%20public%20counsel%20for%20the%20defence.aspx), accessed on 17 August, 2015.

<sup>69</sup> Xavier-Jean Keita, Melinda Taylor & Mark Chadwick, 'The Office of Public Counsel for the Defence and Challenges for the Defence Before the International Criminal Court', [https://www.iccnw.org/documents/OPCD\\_Asser\\_presentation.pdf](https://www.iccnw.org/documents/OPCD_Asser_presentation.pdf), accessed on 17 August 2015.

protection that are going to face serious challenges as they can only be fully implemented if there is a concentrated effort.

vii) Rectitude<sup>70</sup> and the need for tolerant, responsible conduct within a community can help with successful attainment of human good.<sup>71</sup> The Court has not been able to successfully implement protective measures or obtain confidential relocation agreements in some states parties due to its cooperation strategy that lacks constructive negotiations.<sup>72</sup> For instance during the Arusha seminar for Anglophone African States on witness protection, the Court stressed the importance of states parties' cooperation through signature to relocation agreements or any other ad hoc arrangements<sup>73</sup> instead of actually encouraging such states parties into strategic and horizontal negotiations where there is respect for national laws and interests. Decision-makers at the Court need to work towards tolerant norms of responsible conduct<sup>74</sup> whereby certain standards of decency, integrity, demeanour and credibility are to be maintained. For instance, the ICC has reported that in some cases, states parties find it undesirable to cooperate for the benefit of infiltrated or insider witnesses who are nevertheless protected by the Court because their national laws do not have measures to absorb such suspects unless they are prosecuted.<sup>75</sup> Furthermore, other states parties have been reluctant to embrace relocated polygamous witnesses because such families are against public order laws in their respective national legal systems.<sup>76</sup> Decision-makers at the Court need to be innovative in navigating negotiations with states parties regarding witness protection cooperation.<sup>77</sup>

### C. THE MAPPING PROCESS

Policy-oriented jurisprudence regards those endowed with the decision-making process as participants; the so-called subjective dimensions that animate them as their perspectives, the resources upon which they draw their power as the bases of power,

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<sup>70</sup> The believers in law, policy and science would like the decision-maker to ask himself or herself the following questions pertaining to rectitude: (i) To what degree does the body politic protect freedom of worship and religious propaganda? (ii) What are the degrees of decency, integrity, uprightness, demeanour and credibility in that community? Freedom of conscious, thought, religion, presumption of innocence and freedom from retrospective application of laws or ex post facto; Philip Trimble 'International Law, World Order and Critical Legal Studies' (1990) 42 SLR814.

<sup>71</sup> There should be integrity in sharing common standards of conduct; Myres McDougal & Harrold. Lasswell, 'Jurisprudence in Policy-oriented Perspective' (1966-67) 19 UFLR506.

<sup>72</sup> Its vertical approach to cooperation inspired by ICTY's *Blaskic Case* that requires states parties at all cost to adhere or sign up confidential relocation agreements with the Court as part of their obligations is not working; Goran Sluiter, 'I Beg You, Please Come Testify' – The Problematic Absence of Subpoena Powers at the ICC,' (2009) 12(4) NCLR IIJ pp.590-608.

<sup>73</sup> Summary of the Arusha seminar on witness protection (29-30 October 2013) (adopted on 7 November 2013), ICC-ASP/12/36/Add.1, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf), accessed on 17 August 2015.

<sup>74</sup> William Michael Reisman, 'International Law and The Inner Worlds of Others' (1996-1997) 9 St.TLR25.

<sup>75</sup> Summary Report of the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court (29 and 30 January, 2009), pp. 5-7, [http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf), accessed on 17 August 2015.

<sup>76</sup> *Ibid.*

<sup>77</sup> Sylvia, Ntube Ngane, 'Witnesses Before the International Criminal Court' (2009) 8 LPICCT 439-440; *see also* Alexis Demirdjian, Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference, (2010) 10(2) ICLR, 181-208.

and the ways they manipulate those resources as strategies.<sup>78</sup> The approach advocates for a superstructure mechanism,<sup>79</sup> where the decision-maker takes an observational standpoint.<sup>80</sup> Such a decision-maker is assumed to be at a position where he or she is looking at the process to be influenced. In order to achieve such an influence, he or she needs to concentrate on techniques that will help make a decision. Such techniques are the considerations of values cherished by the community on which the decision will have an impact. When analysis and applicability of facts to the situation before them is done, a decision-maker is said to have reached his or her appropriate perspective.<sup>81</sup> From this, he or she is able to apply the intellectual tasks of the decision by goal clarification, past trends analysis, factor analysis, predictions and considerations of policy alternatives.<sup>82</sup> Consideration and choice of the policy intended is the meaning of goal clarification.<sup>83</sup> Past trends is an indication of precedents or history<sup>84</sup> and how similar decisions have been made in the past. Factor analysis can thus be explained as a scientific breakdown of the decision,<sup>85</sup> and predictions are a forecast of intellectual enterprise,<sup>86</sup> while considerations of policy alternatives refer to possible courses of action in the future.<sup>87</sup>

This type of ‘superstructure’ has a functional analysis method or a mapping process that each decision-maker follows in order for the decision to be authoritative and controlling, which in turn is said to help in maximizing human dignity.<sup>88</sup> Such a decision is said to comprise of seven functions: intelligence, promotion or recommendation, prescription, invocation, application, termination and appraisal.<sup>89</sup> According to this method, these functions bring about a realistic analysis of the relevant decision process.<sup>90</sup> For the purposes of contextualisation, the following sections elaborate on each of these functions and their place in reforming witness protection within the ICC framework.

## A) INTELLIGENCE

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<sup>78</sup> William Michael Reisman *et al.* ‘The New Haven School: A Brief Introduction’ (2007) 32 YJIL 578.

<sup>79</sup> M.Reisman, & M.Schreiber, *Jurisprudence: Understanding and Shaping Law*, (New Haven Press, New Haven, 1987),516-517.

<sup>80</sup> William Michael Reisman, ‘International Law and The Inner Worlds of Others’ (1996-1997) 9 St.TLR25, 12

<sup>81</sup> Doren, Jack, & C, Roederer, ‘McDougal-Lasswell Policy Science: Death and Transfiguration’ (2011) 11 RJGLB 129.

<sup>82</sup> Harold D. Lasswell & Myres S. McDougal, ‘Legal Education and Public Policy: Professional Training in the Public Interest’ (1943) 52 YLJ, 237.

<sup>83</sup> H. Lasswell ‘The Emerging Conception of Policy Sciences’ [1971] 1(1) PS 11.

<sup>84</sup> *Ibid.*

<sup>85</sup> Myres McDougal, *et. al.* ‘Theories About International Law: Prologue to a Configurative Jurisprudence’ [1967-1968] 8 (2) VJIL197.

<sup>86</sup> Frederick S. Tipson, ‘Lasswell–McDougal Enterprise: Towards a World Public Order of Human Dignity’ (1973-74) 14 VJIL535.

<sup>87</sup>Rosalyn Higgins, ‘Policy Considerations and the International Judicial Process’ [1968] 17(1) ICLQ, 58-84.

<sup>88</sup> Tai-Heng Cheng, ‘Positivism, New Haven Jurisprudence and the Fragmentation of International Law’ in Weiler, T. & Baetens, F. (Eds.) *New Directions in International Economic Law: In Memoriam of Thomas Walde*, (Leiden, Martinus Publishers, 2011), 414.

<sup>89</sup> Harold Lasswell, *The Decision Process: Seven Categories of Functional Analysis* (College Park, University of Maryland, 1956).

<sup>90</sup> McDougal, *et. al.* ‘Theories about International Law: Prologue to a Configurative Jurisprudence’ [1967-1968] 8(2) VJIL192.

Intelligence is obtaining, processing and dissemination of information including planning for a decision.<sup>91</sup> This is the information that the decision-maker comes across during consideration of an issue before him or her.<sup>92</sup> All facts must be made available in order for them to be pursued. It then becomes imperative on the decision-maker to use such information or intelligence before him or her to make essential and concrete recommendations. For instance, proper and accurate information gathered through international cooperation namely states parties and states not parties to the Rome Statute, non-governmental organizations and international organizations or gathered by individual actors such as intermediaries and victims/witnesses can be laid before the decision-makers at the ICC. Therefore, such information can be used to strengthen appropriate protective measures for witnesses like securing their physical and psychological protection. To this end, it all culminates into a common interest of the world community, namely fighting for an end to impunity, and human dignity by securing crucial testimony of the witnesses. However, information or intelligence is not without challenges. Markus Eikel for example, contends that there are various coordination challenges as regards witness protective measures between the OTP and VWU.<sup>93</sup> There seems to be no proper direction as to their split responsibilities when it comes to implementation of protective measures in some cases that leads to litigation before the Chambers.<sup>94</sup> Thus, organs implementing the same witness protection measures make the gathering, processing, and dissemination of information on the risks experienced by witnesses rather difficult. There is a need to work towards a centralized procedure like in the UN tribunals<sup>95</sup> in order to consolidate fragmented items of information into a comprehensive frame in order to facilitate rational decision-making.

## B) PROMOTION OR RECOMMENDATION

Promotion or recommendation relates to processes by decision-makers actively encourage a community to adopt alternative options.<sup>96</sup> ICC participants in decision-making actively advocate to the states parties awareness, shortfalls and discrepancies in regard to witness protective measures in the long run demanding intervention, improved regulation and alternative policies. Initiatives should be taken towards attaining the enactment of prescriptions and mobilizing opinion towards a particular policy.<sup>97</sup> For instance, the ICC's Integrated Strategy for External Relations, Public

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<sup>91</sup> *Ibid.*

<sup>92</sup> Joseph Goldstein, 'For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain' (1975) 84 YLJ, 682-683.

<sup>93</sup> Eikel, 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice' (n6) 97-133.

<sup>94</sup> Differences have arisen as to who should take a leading role in advocating for protective measures, whether the VWU is merely administrative in its role of implementing protective measures or it goes all the way to adjudication of the same; *Prosecutor –v- Katanga & Ngudjolo* (Judgment on the Appeal of the Prosecution Against the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure Under Article 67(2) of the Statute and Rule 67 of the Rules of the Pre-Trial Chamber I), per Dissenting Opinion of the Judge Georghis Pikis and Judge Nsereko, Case No. ICC-01/04-01/07-776, 26<sup>th</sup> November, 2008, *para* 15.

<sup>95</sup> Colin McLaughling, 'Victims and Witness Measures of the International Criminal Court: A Comparative Analysis' (2007) 6 LPICT 189.

<sup>96</sup> William Michael Reisman, 'A Jurisprudence From the Perspective of the 'Political Superior'' (n58) 612.

<sup>97</sup> Lung-chu Chen, *An Introduction to Contemporary International Law: A Policy –Oriented Perspective*, (New Haven, Yale University Press, 1989), 333.

Information and Outreach<sup>98</sup> sets out goals and mechanisms for external communication. The aim is to ensure that the diverse work of the Court's individual organs fall within a common strategy with mutually reinforced messages, activities and goals.<sup>99</sup> Organizational techniques and a range of mass communication mediums that ensures massive flow of information are ideal.<sup>100</sup> This then helps steer public opinion and transformation of policy alternatives for the ICC into commanding or authoritative recommendation and application. Notwithstanding that, the promotion or recommendation, function is not without flaws or challenges. There is a risk of having disjointed and narrow-minded approaches towards information flow dominated by special interest groups. Some special interest groups such as NGOs may hijack the cause of the Court for their own ends.<sup>101</sup> An example is the information processes that ended up manipulating witnesses through witness statements for purposes achieving the NGOs special interest of victims' rights. This was the case during the Lubanga Case where there were allegations of several NGOs through intermediaries with interest in victims targeting witnesses and encouraging victims who are also potential witnesses to make exaggerated statements as regards the crimes committed by the accused persons with a goal of claiming larger compensation.<sup>102</sup>

### C) CONSIDERATION

Considerations for how general rules are prescribed are of great importance to the policy-oriented theory<sup>103</sup> since a selection of a particular policy as community law and design for its implementation.<sup>104</sup> This indicates the broader community expectations. It is a function that is rather difficult to grasp<sup>105</sup> considering that law making by participants in decision or law making emanates from varying degrees of authority or certain selected preferences about policy. It is usually accomplished in informal and chaotic processes with outcomes sometimes generally referred to as 'customs.'<sup>106</sup> For instance, the initial decision of the ICC to use intermediaries as part and parcel of investigations is a policy that the ICC has settled on, a prescription for law making neither within the purview or ambit of the Rome Statute nor the other core legal texts of the ICC, except in the Regulations of the Trust Fund for Victims.<sup>107</sup> This followed

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<sup>98</sup>Integrated Strategy for External Relations, Public Information and Outreach, [http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402\\_IS\\_En.pdf](http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf), accessed on 8 March 2015.

<sup>99</sup> *Ibid*, 1.

<sup>100</sup> Chen, *An Introduction to Contemporary International Law: A Policy –Oriented Perspective* (n97) 334-337.

<sup>101</sup> Richard John Galvin, 'The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicised Prosecution,' (2005-2006) 13 UMICLR 44-46.

<sup>102</sup> Baylis, Elena. 'Outsourcing Investigations' (2009) 14 UCLA-JILFA 121; Groome, Dermot 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations' (2014) 3 PSJLIA 1.

<sup>103</sup> Joseph Goldstein, 'For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain' (n92) 683

<sup>104</sup> Reisman, 'A Jurisprudence from the Perspective of the 'Political Superior' (n58) 605

<sup>105</sup> Chen, *An Introduction to Contemporary International Law: A Policy –Oriented Perspective* (n97) 341.

<sup>106</sup> Reisman, 'A Jurisprudence from the Perspective of the 'Political Superior' (n58) 612

<sup>107</sup> Guidelines Governing the Relations Between the Court and Intermediaries (For the Organs and Units of the Court and Counsel working with intermediaries), (adopted in March 2014), [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf), accessed on 18 August 2015.

the Lubanga Ruling,<sup>108</sup> where the Trial Chamber made policy proposals that were later seriously considered in order to improve the relationship between the court and intermediaries.<sup>109</sup> Even if such guidelines for intermediaries were adopted, in order to overcome the fundamental question of their working relations with the Court, law-making should extend to cultivation of more partner based relationships with individuals and organizations that have the knowledge of the complex terrain where the Court is investigating and coordinating witness testimony.<sup>110</sup>

#### D) INVOCATION

Invocation is a provisional characterization of certain action as inconsistent with the law or prescription that has been established. Usually, this would be accompanied by a demand for appropriate action to be taken. Facts need to be explored, relevant policies scrutinized and appropriate action taken to remedy the situation. For instance, in the case of Prosecutor –v- Germain Katanga and Mathieu Ngudjolo Chui,<sup>111</sup> the Prosecutor made an application for variation of protective measures, namely the lifting of a limited number of redactions to statements of witnesses, and an additional request for redactions to the statements of some other witnesses as well. This followed an earlier court decision in the Lubanga Case affecting some witnesses who had also made statements in the Katanga/Ngudjolo Case. The Lubanga Case decision left some witnesses in the Katanga / Ngudjolo Case without any protection thus initiating the OTP to request redactions to their statements as a remedy for their protection.

#### E) APPLICATION & TERMINATION

This function is described by proponents of policy-oriented jurisprudence as the final characterization of concrete circumstances according to prescriptions.<sup>112</sup> The way the general rules are applied matters. An example of an application function is a court judgment or any Assembly of States Parties (ASP) decision that puts prescriptions into controlling practice. For instance, a decision by the ASP emphasizing the crucial importance of states parties' cooperation in the area of witness protection, through the signature of relocation agreements or any other ad hoc arrangements<sup>113</sup> reinforces the prescriptive values of human good obtaining within the Rome Statute.<sup>114</sup> If a Trial Chamber of the ICC explores factual circumstances of a witness who is at risk, and analyses available rules and protective policies that in the end leads to interpretational decision, such a decision is an application function as it has clarified world community

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<sup>108</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, (Redacted) Case Number ICC-01/04-01/0, 31 May, 2010

<sup>109</sup> Report of the Bureau on the Strategic Planning Process of the International Criminal Court, 6<sup>th</sup> November, 2012, ICC/ASP/11/30, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-30-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-30-ENG.pdf), accessed on 8 March 2015.

<sup>110</sup> Emily Haslam & Rod Edmunds, 'Managing a New "Partnership": "Professionalization" Intermediaries and the International Criminal Court', (2013) 24 CLF 49.

<sup>111</sup> *Prosecutor –v- Germain Katanga and Mathieu Ngudjolo Chui*, Decision on 16 Protected Witnesses, Case Number ICC-01/04-01/07.

<sup>112</sup> McDougal, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (n103) 192.

<sup>113</sup> ICC-ASP/12/36/Add.1, Decision made at Assembly of States Parties Twelfth Session, The Hague, 20-28 November, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf), accessed on 8 March 2015.

<sup>114</sup> Rome Statute, articles 68, 86 and 87.

goals as enshrined in the Rome Statute. It further becomes a conventional conception of law or precedent that will have to be followed in proceedings with similar circumstances for witnesses at risk, because of their contact with the Court. A decision to actually redact parts of a witness statement is an example of an application function towards the human dignity of witnesses that testify before the ICC.<sup>115</sup> Such an application not only works towards improving the witness security for those that testify before the court, but also contributing towards an end to world impunity. The effect and applicability of both judicial and administrative decisions regarding human dignity is slightly different. A judicial decision goes to the actual interpretation or right to interpret while an administrative decision is an opinion of a body especially familiar with the problem, history and purpose of legal framework being dealt with.<sup>116</sup> An administrative decision will therefore act as a guide to what a judicial decision should consider when making a legislative interpretation. It is essentially a management oversight and legislative body. For instance, the 2008 case of *Prosecutor v Jean-Pierre Bemba Gombo*<sup>117</sup> highlighted the need for a properly constituted legal tools whereby evidence submitted to the Registry for disclosure between the parties needed to be accompanied by, inter alia, an analysis of each piece of evidence reflecting its relevance by way of sufficiently detailed legal analysis relating the alleged facts with the constituted elements corresponding each crime charged. This was for the purposes of witness protective measures, efficiency of the criminal process, and protection of the rights of the accused person.<sup>118</sup> Such a decision was followed by wide administrative consultations by the Registry and support of Legal Tools Project for Case Matrix at the Court's first review conference in Kampala in 2010.<sup>119</sup>

In contrast with application, the termination function demonstrates that a prior prescription, policy or rule is no longer commanding and that there is need to either change it, amend it or get it replaced by something that is more approximate to the values of human dignity. Policies, rules or prescriptions need a continuous review or assessment in order to conform to new practices or procedures on the one hand and address challenges that a former prescription was failing in many aspects. There is always need to be live to claims and expectations of events past, present and future in order to progressively realize and clarify goals of human dignity.<sup>120</sup> Witness protection measures at the ICC need to be subject to a continuous process of termination. This enables the Court to take into account when new psychological and physical needs arise that warrant change or adjustment to protective measures.

#### F) APPRASIAL

Finally, appraisal is the evaluation of the manner and measure in which public policies have been put into effect and their aggregate performance.<sup>121</sup> This function calls for an

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<sup>115</sup> *Prosecutor –v- Thomas Lubanga Dyilo*, Case Number ICC-01/04-01/0 dated 31 May, 2010, Redacted Decision on Intermediaries.

<sup>116</sup> A. Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) 3 DLJ 513-514.

<sup>117</sup> *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, 31 July 2008., paras 66-69.

<sup>118</sup> *Ibid.*

<sup>119</sup> Morten Bergsmo, Olympia Bekou, Annika Jones, 'New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project', (2010) 10(4) HRLR 715-729.

<sup>120</sup> Chen, *An Introduction to Contemporary International Law: A Policy –Oriented Perspective* (n97) 368.

<sup>121</sup> McDougal, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (n90) 192.

evaluation of overall performance of all decisions in terms of community requirements. Achievements and failures of a decision need to be evaluated in order to find out how well a decision is functioning and how it can be improved. In order to perform this function, decision-makers may rely on research reports relating to decisions by other appraisers such as non-governmental organizations (NGO's)<sup>122</sup> or discussions emanating from the ASP.<sup>123</sup> A breakdown of all values a community cherishes or demands will help secure continuing reforms of the decision-making process in light of changing demands and expectations. For instance, the Rome Statute did not initially consider terrorism among the crimes that fell within its jurisdiction. The rise in international terrorism led to demands for the amendment of the Rome Statute to accommodate these crimes.<sup>124</sup> Another example is the ICC's consideration of past prescriptions with regards to public awareness, knowledge and participation among crime-affected communities. Essentially, the ICC has begun to examine how the public gathers information about the Court and what factors influence knowledge levels and perceptions of the Court. Such evaluations have shown that mass media and informational meetings are effective at raising awareness and knowledge. Further to this it has been observed that there is lack of access to formal media and reliance on informal channels of communicate, which have created a group of 'information poor' individuals. This then leads to suggestions that outreach must be local in order to respond to individuals' needs, expectations and to ensure their access to information. There must be systematic and continuing basis for assessment of how best various targeted groups can be reached.

What the above elaborations on the functions indicate is that this 'superstructure' facilitates the aim of maximizing human dignity, by authoritative and controlling decisions arrived from carefully mapped processes. The multi-method dimension<sup>125</sup> of policy-oriented jurisprudence makes available an opportunity for exploration and process for best policy alternatives that are likely to promote the common interest of human dignity. The theory has been successfully applied in different spheres of international law such as trade and investment<sup>126</sup>, environmental law<sup>127</sup>, development<sup>128</sup>, human rights<sup>129</sup>, emigration<sup>130</sup> and arbitration.<sup>131</sup> It goes without saying that the policy-oriented approach is still influential, live and well<sup>132</sup> as it continues its active focus on the values and goals of the law, orienting attention of a decision-maker towards policies to be achieved, and the importance of taking responsibility for choices made in various disciplines of national and international law.

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<sup>122</sup> For instance organizations that monitor the work of the ICC.

<sup>123</sup> Rome Statute, Art. 112.

<sup>124</sup> Richard J. Goldstone & Janine Simpson 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism' (2003) 16 HHRJ 13.

<sup>125</sup> Qerim Qerimi, *Development in International Law: A policy oriented Inquiry*, (Martinus Publishers, Leiden, 2012), 9.

<sup>126</sup> Li Wanqiang 'Chinese Foreign Investment Laws: A Review from the Perspective of Policy Oriented Jurisprudence' [2011] 19(1) APLR 37.

<sup>127</sup> Rebecca M. Bratspies 'Rethinking Decision-making in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development' (2007) 32 YJIL 388.

<sup>128</sup> Qerim Qerimi, *Development in International Law: A policy oriented Inquiry*, (n125)7-9.

<sup>129</sup> Siegfried Wiessner, & Andrew R. Willard 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' [1999] 93(2) AJIL 316-334.

<sup>130</sup> Silverstein, 'Emigration: A Policy-Oriented Inquiry' (n31).

<sup>131</sup> Tai-Heng Cheng 'Precedent and Control in Investment Treaty Arbitration' [2006] 30(4) FILJ 1014-1049.

<sup>132</sup> Doren & Roederer, 'McDougal-Lasswell Policy Science: Death and Transfiguration' (n81) 125-126.



However, not all legal scholars are persuaded by this approach. While this paper contends that this type of jurisprudence may very well be used to interpret and apply ICC's witness protection measures, criticisms levelled against the New Haven School of thought are worthy of mention.

### C. A PROPAGATION OF ANARCHY

Even if policy-oriented jurisprudence proposes a mapping process for conceptualising international law, its broad formulations are imbalanced with nothing special but a confusion of normative prescriptions coupled with factual assumptions.<sup>133</sup> Such an approach is a propagation of anarchy within the international arena. It cannot be applied to every problem faced by a decision-maker.<sup>134</sup> There is no explanation of the approach's flexibility, mapping processes or functional analysis and how it is applicable in such politically concentrated aspects of international law<sup>135</sup> like witness protective measures. Efforts in overcoming witness protective measures' challenges should therefore be focused on the Rome Statute and its inadequacies. The ICC should furthermore be reevaluated so as to foster better protection. Allowing a policy-oriented approach to interpret witness protective measures at the Court will only result in differing interpretation of protective values that the Rome Statute and RPE requires the Court to adhere to. Past trends<sup>136</sup>, practice and cooperation regarding witness protection will always be different in each state party. What is required is consistent rule interpretation that will guide states parties to cooperate with the Court as regards to confidential relocation agreements, and concept of justice for witnesses. There is therefore no need for a maze-like or chameleon-like<sup>137</sup> method with a vocabulary that continuously interchanges use of rules and norms. Such a propaganda school masquerading as a theoretical approach to international law<sup>138</sup> cannot help the interpretation and application of witness protective measures. The legal framework for witness protective measures at the Court cannot be subjected to partisan or subjective policies disguised as law and virtually dissolving the restraints of rules put in place by the Rome Statute negations.<sup>139</sup>

Contrasting the positivist approach, Feminist scholars in the field of international law<sup>140</sup> have been wary and critical about the implicit liberalism of dominant theories of

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<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> Rein Mullerson, *Ordering Anarchy: International Law in International Society*, (Martinus Nijhoff Publishers, Hague, 2000) 33.

<sup>136</sup> Myres McDougal, & H.Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 AJIL1.

<sup>137</sup> Stanley Anderson, 'A Critique of Professor Myers S. McDougal's Doctrine of Interpretation by Major Purposes' [1963] 57(2) AJIL 378.

<sup>138</sup> *Ibid.*, 383.

<sup>139</sup> Schachter, O. 'Panel Remarks, McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 ASILP 266-267.

<sup>140</sup> Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law* (Leiden, Martinus Nijhoff Publishers, 2011) 166; Hilary Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' in Dullmeyer (Ed) *Reconceiving Reality: Women and International Law*, (Washington DC, ASIL, 1993) 4-5; Smith K'Shaani 'Prosecutor V. Lubanga: How The International Criminal Court Failed The Women And Girls Of The Congo' (2011)54 HLJ 476.

international law.<sup>141</sup> Though there is an overlap with policy-oriented jurisprudence,<sup>142</sup> ICC witness protection practices and law do not set a platform on which various actors such as women can pursue their desired goal of full protection as witnesses. Clarification of the observer's narrow standpoints and concern about politics of identity can do little to outlaw the creation of a class of outsiders, in this case, women. Policy-oriented jurisprudence will not be able to uproot the fundamentally dominant male cast, including the formulation of rules and policies that recognise that women are in fact the greatest victims of international crimes.<sup>143</sup> The argument goes that the Rome Statute has only taken a very small step towards the crucial recognition of women, and<sup>144</sup> despite the ICC's Sexual and Gender-Based Crimes policy,<sup>145</sup> there are still challenges towards effective investigations, prosecution, cooperation and protection of victims/witnesses.<sup>146</sup> The ICC cannot become a gender-justice-site<sup>147</sup> if sex ambiguity,<sup>148</sup> gender injustice,<sup>149</sup> and undervalue women<sup>150</sup> in decision-making thrives at the Court. The transformative potential<sup>151</sup> of international criminal law is not embraced by policy-oriented jurisprudence since the same cherished values<sup>152</sup> are systematically denied to women.

Further to this, criticism from law and economics has focused on international law as a set of norms expressing individual, rather than state values.<sup>153</sup> The focus is on the functionalist dimension of international law and rules designed to achieve whatever norms are adopted. Its proponents would pose four guiding points towards international law solutions: (a) what the proscription should be, (b) to whom it should apply, (c) by whom it should be enforced, and (d) what the penalties should be.<sup>154</sup> The decision-maker's task is to identify the right incentive and structure to motivate better protection of witnesses. Cooperation strategies for protective measures need to be either prohibiting or inducing. The ICC and its rules need to maximize compliance. Rule interpretation and policy formulation and applicability of protective measures should

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<sup>141</sup> Hilary Charlesworth, 'Feminists Critiques of International Law and their Critiques' (1994) 13 TWLS 2.

<sup>142</sup> Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Cambridge University Press, Cambridge, 2006), 66-69.

<sup>143</sup> Hilary Charlesworth, *et. al* 'Feminist Approaches to International Law' (1991) 85 AJIL 613; Hilary Charlesworth, 'Subversive Trends in the Jurisprudence of International Law' (1992) 86 PIAM-ASIL 125-131.

<sup>144</sup> Rana Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court,' (2001) 16 BYUJPL 317.

<sup>145</sup> Policy Paper on Sexual and Gender-Based Crimes, June, 2014, <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>, accessed on 29 July 2015.

<sup>146</sup> Fatou Bensouda, 'Gender Justice and the ICC: Progress and Reflections,' 16(4) IFJP 541-542.

<sup>147</sup> Louise Chappell, Andrea Durbach 'The International Criminal Court: A SITE OF GENDER JUSTICE?' (2014) 16(4) IFJP533-537.

<sup>148</sup> Valerie Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court' (2014) 16(4) IFJP563-580.

<sup>149</sup> Louise Chappell, Andrea Durbach Elizabeth Benito, 'Judge Odio Benito: A View of Gender Justice from the Bench', 16(4) IFJP 648-654.

<sup>150</sup> Solange Mouthaan, 'Victim Participation At The ICC for Victims Of Gender-Based Crimes: A Conflict Of Interest?' (2013) 21 CJICL 649.

<sup>151</sup> Hilary Charlesworth, 'The Hidden Gender of International Law' [2002] 16(1) TICLJ 95-97.

<sup>152</sup> Dignity, Power, respect, rectitude, well-being, enlightenment, skills, wealth and affection.

<sup>153</sup> Jeffrey Dunoff & Joel Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict' [1999] 93(2) AJIL 394.

<sup>154</sup> *Ibid.*

mirror rational choices<sup>155</sup> and the means that best maximise desired preferences. There should be more than a cost-benefit approach to witness protective measures, an economic analysis that reflects a transaction cost analysis,<sup>156</sup> price theory, public choice and game theory.<sup>157</sup> Factor processes for the measures should focus on relevant variables of witness protection, hypothesis generation and testing for transparent distributive consequences of legal rules.<sup>158</sup> The many flaws and questions that policy-oriented jurisprudence avail can neither provide satisfactory explanations, nor stronger contextualization<sup>159</sup> to the problem of witness protective measures at the Court. The limiting analytical method is only rich in terms of vocabulary and influential in comingling law and politics, but not in solving cooperation, relocation, organ internal coordination, psychological, physical security of ICC's witness protection system.

From the point of Critical Legal Studies (CLS), the core argument suggests that there should not be one approach to international law and ICC's witness protective measures is no exception.<sup>160</sup> It all depends on the circumstances at a particular occasion for each and every witness. Thus, there can never be a blanket approach to how protective measures should be approached. CLS disapprove of the limited objectivity that policy-oriented jurisprudence advocates for. The school of thought vehemently attacks the eight values as vapidly general and inclusive but having all bearings, synonymity and indicativeness of western, liberal and constitutional values.<sup>161</sup> They are described as a sham and cannot be expected to be applicable to a world community. It is therefore suggested that there is already evidence in the international arena of diverse views of world public order manifested by the political and legal divide between the ICC and the African Union (AU).<sup>162</sup> This speaks volumes of the non-applicability of these celebrated values. From this perspective, international law appears solipsistic<sup>163</sup> and blind to the plain facts of reality. Not even policy-oriented jurisprudence can address them competently. Effects of the law should be advocated for and not merely postulating absences with lack of effectiveness in law. For instance, to a policy-oriented adherent, a desired goal for a community's wealth can be right to food, but to the CLS, the poor need food not simply the right to food. Likewise a witness before the ICC needs protection and not just the right to be protected. Just like any other school of thought, policy-oriented jurisprudence should be aimed at objectivity, neutrality and determinacy of international law.

#### **D. PRAGMATIC BENEFITS OF POLICY-ORIENTED JURISPRUDENCE**

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<sup>155</sup> Richard Posner, 'Rational Choice, Behavioural Economics and the Law' [1999] 50(5) SLR 1551-1552.

<sup>156</sup> William Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice' [1996] 17(4) UPJIEL 1002.

<sup>157</sup> Mark Chinen, 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner' (2001-2002) 23 MJIL184-185.

<sup>158</sup> Dunnoff & Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict' (n181)395.

<sup>159</sup> Jeffrey Dunoff, & Joel Trachtman, 'Economic Analysis of International Law' (1999) 24 YJIL 28-36.

<sup>160</sup> Martti Koskenniemi, 'Letter to the Editors of the Symposium', [1999] 93(2) AJIL 351.

<sup>161</sup> Philip Trimble, 'International Law, World Order and Critical Legal Studies' [1990] 42(3) SLR 814.

<sup>162</sup> <http://iccforum.com/africa> (last accessed on 10/03/2015); <http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/>, accessed on 10 March 2015.

<sup>163</sup> Jason Becket, 'A Rebel Without a Cause? Marti Koskenniemi and the Critical Legal Project' [2006] 7(12) GLJ 1045-1047.

It has always been the jurisprudence's position that rule-based approach is incomplete, irrelevant and inapplicable to a contemporary world.<sup>164</sup> It is suggested that international criminal justice needs a theoretical approach that any appropriately regarded system of law should aspire for, namely, a conflation of rule and policy in order to secure human good. Decision-makers need to understand their stipulated intellectual tasks and the only way to achieve this is through an approach that has insights on legal realism and pragmatism. Such ICC decision-makers need to join law and politics while expanding the horizons of inquiry beyond rules, highlighting the role of policy and importance of context regarding witness protective measures.<sup>165</sup> It is trite that the role of the law in world power process cannot be underestimated.<sup>166</sup> The role that an effective organization such as the ICC can play in maintaining the values of a free, peaceful and abundant world society cannot be taken lightly.<sup>167</sup> It does not have to be a 'conformity-imposing textuality'<sup>168</sup> or insistent emphasis upon an impossible to enable a proper interpretation of the witness protection measures. What is required is a well-executed process of inquiry that critically examines the appropriate protective measures. Unlike other theoretical approaches, policy-oriented jurisprudence is arguably the only approach that has a realistic analysis embedded with its own functionality. This functionality will enable the unpacking of each and every value that effective witness protection measures aspire to attain.<sup>169</sup> It is suggested that there is need for increased awareness of the world community<sup>170</sup> that witnesses are serious participants in the ICC's decision-making processes. Such witnesses' security and protection is in everyone's interest so as to achieve justice and contribute towards ending impunity.

It is suggested that the fact that the approach's language makes it dubious,<sup>171</sup> idiosyncratic, and alien,<sup>172</sup> and does not make the approach irrelevant nor unworthy of applicability. Most concepts that the jurisprudence uses, namely, 'effective planning process', 'appraisal', 'decision-making', 'factor processes' are familiar concepts that make it easier to study, contribute, assist in programs execution,<sup>173</sup> and evaluate<sup>174</sup> security and protection for witnesses. These concepts help decision-makers to analyse and understand factor processes for states parties' cooperation and confidential relocation agreements, circumstances and experiences of witnesses, their values, their expectations as regards the ICC goals, technological advancements, and the use of

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<sup>164</sup> Siegfried Wiessner 'Professor Myres Smith McDougal: A Tender Farewell' (1998-1999) 11 St.TLR 203-204.

<sup>165</sup> Frederick Timpson, 'The Lasswell – McDougal Enterprise: Towards a World Public Order of Human Dignity' (1974) 14 VJIL 535.

<sup>166</sup> Myres McDougal, 'Law and Power' (1952) 46 AJIL 102.

<sup>167</sup> Julian Ku & Jide Nzelibe 'Do international criminal tribunals deter or exacerbate humanitarian atrocities' (2006) WULR 777; Kirsten, Ainley 'The Responsibility to Protect and the International Criminal Court: counteracting the crisis' (2015) 91(1) IA 37-54.

<sup>168</sup> Myres McDougal 'The International Law Commission's Draft Articles Upon Interpretation, Textuality Redivivus' (1967) 61 AJIL 992.

<sup>169</sup> Myres McDougal 'The Role of Law in World Politics' (1948-1949) 20 MLJ 254.

<sup>170</sup> Harold Lasswell 'The Interrelations of World Organization and Society' (1946) 55 YLJ 889.

<sup>171</sup> Richard Falk, 'The Place of Policy in International Law' (1972) 2 GJICL 29.

<sup>172</sup> Marti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law*, (Cambridge, Cambridge University Press, 2001) 475.

<sup>173</sup> Myres McDougal, 'Foreword: Regional Planning and Development, The Process of Using Intelligence, Under Conditions of Resource and Institutional Interdependence for Securing Community Values' [1947] 32(2) ILR 196.

<sup>174</sup> Myres McDougal, 'The Law School of the Future: From Legal Realism to Policy Science in the World Community' (1947) 56 YLJ, 1348.

resources. Functional analysis enables decision-makers with the insights to consider the best value(s) applicable to a situation. The arena of authority<sup>175</sup> needs to aspire to a purposive and enlightening interpretation of protective measures that will secure the welfare of witnesses at all times.

The legal regime of witness protection at the ICC is paramount to the aim of combatting impunity. It secures the much needed and crucial testimony before court.<sup>176</sup> Policy-oriented jurisprudence is an approach that takes witness protection to a rare angle, away from sterile positivism<sup>177</sup> and other restrictive approaches that cannot connect law with the context of policy. The relationship of law and politics is the right reflection of a close relationship between community and authority.<sup>178</sup> Authority is central to emergence and sustenance of legal norms. It assumes existence of communities<sup>179</sup> in a cumulated package of past decisions called rules.<sup>180</sup> In order to research, study, and understand such a community and how authority is incorporated in the complex social process of law,<sup>181</sup> policy-oriented jurisprudence is an ideal framework.<sup>182</sup> This platform accords the decision-maker control and security of a desired pattern of behaviour in others<sup>183</sup> including the taking into account of policy goals, analysis and decision-making formulation.<sup>184</sup> Through this jurisprudence, the ICC's legal, interpretive and operational challenges of witness protection<sup>185</sup> can warrant possible policy analysis and formulation that would enhance enforcement mechanisms and cooperation of both states parties and third party states.<sup>186</sup> Witness protection and relocation cannot work if there is lack of cooperation from both outside and within the court. Further, the jurisprudence has a unique perspective to law that accords decision-makers with a roadmap to analyse past trends in witness protective measures and where possible offer alternatives for better protection to witnesses. Thus it will be possible for decision-makers to flexibly identify relevant recommendations taking the form of law, guidelines, principles, articulated practices and shared expectations, applicable to every witness' individual circumstances. Such a comprehensive and systematic analysis and redefinition of ICC's witness protection offers fertile ground for legal and policy responses that may accord witnesses the dignity they deserve and also estimate the ends

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<sup>175</sup> The Court through: (i) the Pre-Trial Chamber (PTC), (ii) Trial Chamber (TC), (iii) The Assembly of States Parties (ASP).

<sup>176</sup> Asa Reydberg, 'Case Analysis: The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC' [1999]12(2) LJIL 445-478.

<sup>177</sup> Tai-Heng, Cheng, 'Making International Law Without Agreeing What It Is' 10 WUGSLR 20-26.

<sup>178</sup> Rein Mullerson 'Martti Koskenniemi. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 -1960' (2002) 13 EJIL 732.

<sup>179</sup> Addis, Adeo 'Authority and Community' [2010] 18(1) APLR 63.

<sup>180</sup> Rosalyn Higgins, 'International Law and Avoidance, Containment and Resolution of Disputes' (1991) 230 RDC 25.

<sup>181</sup> Myres McDougal & Michael Reisman 'The Changing Structure of International Law: Unchanging Theory of Inquiry' (1965) 65 CLR 813.

<sup>182</sup> Li, Wanguang, 'A New Perspective on International Economic Law and the Use of the Intellectual Framework of the New Haven School of Jurisprudence' [2010] 18(1) APLR 73.

<sup>183</sup> William M. Reisman *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, (New Haven, Yale University Press, 1971) 4.

<sup>184</sup> Fred Rodell, 'Legal Realists, Legal Fundamentalists, Lawyer Schools, and Policy-Science – Or How Not to Teach Law' (1947-1948) 1 VLR 7.

<sup>185</sup> Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, [http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf), accessed on 28 July 2015.

<sup>186</sup> Michael Gilligan 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' [2006] 60(4) IO 935.

of justice. Judges, prosecutors, defence lawyers, state<sup>187</sup> and non-state actors<sup>188</sup> should be able to analyse and impact their options and approach on the future of these protective measures and international law-making in general.

This multi-method and problem-oriented<sup>189</sup> emphasis is a unique characteristic that is in tandem with new understanding of human security with its focus on individuals and a serious challenge to both international law and the international legal order.<sup>190</sup> It is an interpenetration of international and national norms of decision-making<sup>191</sup> appreciating different social and political environments through which international law operates. It is suggested that the jurisprudence is an invariably provocative and simulative intervention to the study of international law<sup>192</sup> with clear distinction between political processes and policy-making.<sup>193</sup> What it advocates for is the law function as a structure of guiding rules and principles. It is suggested that this is a legal process and not politics. Human good is the focus and a contemporary zenith or peak of man's long struggle for all his basic human values<sup>194</sup> related to social phenomena.<sup>195</sup> It is an all-encompassing inquiry that exerts influence on a new global order,<sup>196</sup> a process of communication<sup>197</sup> focusing on the rule to its purpose and the process that mankind values.<sup>198</sup>

What counts in modern international law, is the protection of people and nothing less than that.<sup>199</sup> Protection of the people is a matter of urgent security monitoring internationally.<sup>200</sup> Therefore, policy-oriented jurisprudence makes the scholar aware of an integrated context approach of inquiry<sup>201</sup> taking him/her outside of his/her inherited lenses of observation<sup>202</sup> and grasp the reality of what the law is all about and how it

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<sup>187</sup> Fiona McKay, 'Victim Participation in Proceedings before the International Criminal Court,' (2008) 15(3) HRB 1-5.

<sup>188</sup> Mahnoush Arsanjani & William Michael Reisman 'The Law-in-Action of the International Criminal Court' (2005) 99 AJIL 385.

<sup>189</sup> Quirem, *Development in International Law: A policy oriented Inquiry* (n147) 7-9.

<sup>190</sup> Gerd Oberleitner, 'Human Security: A challenge to International Law?' [2005]11(2) GGRMIO 185.

<sup>191</sup> Guiguo Wang, 'International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law' [2010] 18(1) APLR19-20.

<sup>192</sup> Bruno MacChesney, 'Myers McDougal' (1971)1 DJILP 21.

<sup>193</sup> Robert S. Wood, 'Public Order and Political Integration in Contemporary International Theory: The Lasswell – McDougal Approach' (1973-1974) 14 VJIL 423-429.

<sup>194</sup> Myres McDougal, *et. al* 'Rights of Man in the World Community: Constitutional Illusions versus Rational Action' (1949-1950) 59 YLJ 60.

<sup>195</sup> Oscar Schachter, 'Myers McDougal – An Appreciation' (1971) 1 DJILP 23-24.

<sup>196</sup> Harold Hongju Koh, 'Michael Reisman, Dean of New Haven School of International Law' (2009) 34 YJIL 504.

<sup>197</sup> Michael William Reisman, 'International Law Making: A Process of Communication' (1981)75 ASILP 113.

<sup>198</sup> Michael William Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 866-867.

<sup>199</sup> William Michal Reisman, 'Haiti and the Validity of International Action' (1995) 89 AJIL, 82-83.

<sup>200</sup> Richard Snyder, Charles Hermann & Harold Lasswell 'A Global Monitoring System: Appraising the Effects of Government on Human Dignity' (1976) 20 ISQ 221.

<sup>201</sup> Harold Lasswell & Myres McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 YLJ 203.

<sup>202</sup> Siegfried Wiessner 'The New-Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping of Law' [2010] 18(1) APLR 47.

works in a social process.<sup>203</sup> This is the overriding world community goal.<sup>204</sup> For instance, interdependence or multi-disciplinary approach by the theory is what makes it deliver. The ICC has different organs that all work for the good of witnesses under the Court's protection. For these organs to deliver they need to heavily depend on each other in order to effect their differing protection strategies and achieve anticipated outcomes within the rule of law.<sup>205</sup> Through such strategies and bases of power, decision-makers will have to decide which witnesses need what human values, in what circumstances are such witnesses probably needing relocation or stringent protection measures, what base values would be applicable to such witnesses and what strategy would best solve the circumstances they find themselves in.

Notwithstanding the above outlined arguments favouring policy-oriented jurisprudence, the approach cannot be without challenges when it comes to its applicability in the implementation of witness protective measures. The characteristic insistence by both participants and actors upon their own unilateral<sup>206</sup> competence to make their own exclusive interpretations of both customary international law and any agreements to which they may have committed themselves<sup>207</sup> is likely to arise. The law requires that the Court's decision-makers should take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of witnesses.<sup>208</sup> It is not defined as to what appropriate measures amount to. It then suggested that different decision-makers with differing or varied backgrounds and viewpoints cannot have the same interpretation. Some will be heavily influenced by customary international law, others will have regard to age, gender and health of the witnesses seeking protection. Other decision-makers may be prejudiced by the nature of the crime being tried especially where the crime involves sexual or gender violence or violence against children. Another likely challenge of the jurisprudence applicability is a potential reluctance and common refusal of actors and participants to assume competence or jurisdiction with respect to interactions or controversies in the absence of a clear consent and cooperation of states parties.<sup>209</sup> For instance, relocation and international cooperation with states parties or third party states when it comes to witness protection under the ICC legal framework is limited by lack of bilateral treaties with the ICC.<sup>210</sup> It is thus suggested that on the face of this jurisprudence, it is challenging to attain or defend the principle of legality. World community values are very difficult to define proving that such common expectations can be at variance.<sup>211</sup>

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<sup>203</sup> Siegfried Wiessner, 'Law as a Means of a Public order of Human Dignity: The Jurisprudence of Michael Reisman' (2009) 34 YJIL 525.

<sup>204</sup> Myres McDougal 'Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies' (1974) 14 VJIL 406.

<sup>205</sup> Frederick Tse-shyang Chen, 'A Brief Clarification of the 'Rule of Law' in Policy Perspective' [2011] 34(1) TJLR 113-114.

<sup>206</sup> It has been argued earlier own that there is lack of coordination among the organs of the court as there is no centralized system of protecting witnesses. the Article 68 of the Rome Statute only talks about the court without according specificity to who of the organs take a leading role.

<sup>207</sup> Myres McDougal 'The Impact of International Law upon National Law: A policy-oriented perspective' (1959) 4 SDLR 51.

<sup>208</sup> Rome Statute, Art. 68(1).

<sup>209</sup> Myres McDougal 'The Impact of International Law upon National Law: A policy-oriented perspective' (n246) 51.

<sup>210</sup> ICC 'Report of the Bureau on Cooperation, (adopted on 21 November, 2014), ICC-ASP/13/29, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP13/ICC-ASP-13-29-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-ENG.pdf) accessed on 19 August 2015.

<sup>211</sup> Harold Lasswell, & Myres McDougal, 'Trends in Theories About Law: Maintaining Observational Standpoint and Delimiting the Focus of inquiry' (1976) 8 UTLR, 23-50.

Each community would have its own goals or values that it cherishes. Thus by interpreting what constitutes appropriate measures, goals and values for a particular community, another community would have different expectations. Despite this, it is suggested that policy-oriented jurisprudence recognises the whole essence of different expectations by different communities. The fact that each case will be looked at on its own merit makes it conform to the human dignity, rectitude and respect of that particular witness or community. The use of this approach will therefore contribute to knowledge<sup>212</sup> that facilitates applicability of the appropriate protective measures diffusing the convergence of law, political pressures, organ coordination and international cooperation.

#### D. CONCLUSION

Policy-oriented jurisprudence uniquely distinguishes itself from all other traditional schools or theoretical approaches to international law.<sup>213</sup> It offers an interpretational perspective that has a problem solution for most challenges facing witness protective measures at the ICC. The approach suggests empowering, fertile and innovative features to the analytical framework of witness protection system. This article has outlined the theoretical approach to the understanding, interpretation and implementation of witness protective measures at the ICC. This international law theoretical approach is in the form of policy-oriented jurisprudence. This kind of analysis, interpretation and applicability of witness protective measures pursuant to the Rome Statute is a contribution to the development of contemporary international criminal law and an improvement of the welfare and protection of witnesses. Decision processes that have emerged from the Court regarding the protective measures have been filled with conflicting and contradictory issues. Interpretation, applicability, implementation and cooperation regarding witness protective measures have not been easy. Unless this is improved the ICC may not be able, at least not to its fullest extent, contribute to the human dignity<sup>214</sup> of witnesses and an end to impunity and justice. There could be multiple reasons for the impression that the ICC signals a troubled Court.

Coming from a background that shares different values, beliefs and ideas, its participants need to find the middle ground within which to forge ahead as one Court. Further, this is a Court operating with minimal resources, navigating through the states parties' cooperation mechanisms, still developing its own jurisprudence and advancing technologically. Its vertical cooperation mechanism may not appear problematic in itself. The problem however is that it sometimes leads to antagonistic relationships internally and externally leading to risk on witnesses seeking protection. In order to overcome this, ICC decision-makers need to be fully aware that they are undertaking are long term interests for the benefit of the witnesses at risk. Every interpretation, application and implementation of both policy and law if not handled properly will only increase the risk for witnesses. It is important that participants in decision-making understand and appreciate their own duties and complexities of cooperation negotiations with states parties. The ASP has that duty to train and raise awareness to the decision-makers in respect of their obligations, both legal and moral,<sup>215</sup> in dealing

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<sup>212</sup> Zina O'Leary, *Researching Real - World Problems: A Guide to Methods of Inquiry* (London, Sage, 2005),4.

<sup>213</sup> Menachem Mautner, 'Michael Reisman's Jurisprudence of Suspicion' (2009) 34 YJIL 506.

<sup>214</sup> Myres McDougal 'Perspectives of an International Law of Human Dignity' (1959) 53 ASILP 107.

<sup>215</sup> Myres McDougal, & Harold D. Lasswell, 'Jurisprudence in Policy Oriented Perspective' (n47) 506.



with witness protective measures. Such decision-makers should be conscious that their decision-making processes are actually a contribution to not only the protection of witnesses but also formation<sup>216</sup> and evolution of international criminal law.<sup>217</sup> They should interpret the protective measures provisions faithfully whilst taking into account challenges faced by witnesses, the legal culture of the states parties engaging in cooperation and internal organ coordination. These suggestions if supported will enable development of international norms and contribute to the dignity<sup>218</sup> of witnesses at risk due to their contact with the Court.

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<sup>216</sup> Reisman, , 'The New Haven School: A Brief Introduction' (n8) 576.

<sup>217</sup> Robert Sloane, 'More Than What Courts Do: Jurisprudence, Decision, and Dignity–In Brief Encounters and Global Affairs' (2009) 34 YJIL 517-519.

<sup>218</sup> William Michael. Reisman & Aaron Schreiber *Jurisprudence: Understanding and Shaping Law*, (New Haven, New Haven Press, 1987) 11.