

THE ICC'S WITNESS PROTECTION 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 decisionmaking 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, led to numerous interpretational and applicability challenges of both policy and law. This article aims at designating policy-oriented jurisprudence as a possible theoretical approach and solution to the ICC's international law making of witness protection measures. Policy-oriented jurisprudence approaches international law as a decision-making process, where decisions are made pursuant to shared community interests and expectations. This will likely aid advisers, scholars, 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.¹ The Rome Statute of the International Criminal Court ('Rome Statute'),² and the Rules of Procedure and Evidence (RPE)³ provide for appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses.⁴ Despite this, these guarantees are muddled with numerous interpretational and applicability challenges on the bases of policy and law.⁵ Such challenges range from little, or lack of, internal coordination⁶ among the different organs of the Court – namely, the Chamber, the Office of the Prosecutor, and the Witnesses

* Doctoral Researcher (DPhil) (School of Law, Politics and Sociology, University of Sussex). He holds an LLB (Hons) (University of Malawi), and an LLM (University of Sussex). He is also a Commonwealth PhD Scholar, International Fellow of the National Attorneys General Training and Research Institute – NAGTRI (Washington DC), Senior Assistant Chief State Advocate (Ministry of Justice and Constitutional Affairs, Malawi). The interpretations and conclusions in this article are entirely those of the author. They do not necessarily represent the views of Malawi's Ministry of Justice, Attorney General or the institutions the office represents. Email: s.kayuni@sussex.ac.uk / skayuni@lawyer.com

¹ Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa* (Institute of Security Studies Pretoria 2010), 1.

² 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.

³ 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 IIA (RPE).

⁴ Rome Statute (n 2) article 68(1).

⁵ Heidi Hansberry, 'Too Much of a Good Thing in Lubanga and Haradinaj: The Danger of Expediency in International Criminal Trials' (2011) 9(3) ACLYIR 358.

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

and Victims Unit⁷ – to cooperation with states parties, cooperating organisations, and financial issues. This makes it difficult for the International Criminal Court (ICC) to act according to the values envisaged by the world community during the Rome negotiations, and the intentions of its negotiators. 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. Article 68 provides for the substantive measures the ICC is to take in relation to victim protection. It reads:

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

⁷ Rome Statute (n 2) articles 43, 68.

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

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

Article 43(6), which is referred to in article 68 and has as its purpose to provide for the establishment of the relevant bodies within the ICC, reads:

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

Both provisions are vague enough to warrant a careful interpretation.

William Michael 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.⁸ 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.⁹

This article examines the legal practices surrounding witness protection measures law through the lens of policy-oriented jurisprudence.¹⁰ It is argued that this approach will enable the ICC to surmount the numerous witness protection measures' interpretational and applicability challenges currently dogging the Court. First, the article provides an overview of

⁸ W Michael Reisman and others, 'The New Haven School: A Brief Introduction' (2007) 32 YJIL 579.

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

¹⁰ 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 and 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.

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 protection measures.¹¹ These likely theoretical approaches are positivism, critical legal studies ('CLS'), law and economics, and feminism. Finally and in conclusion, the article calls for the ICC to take urgent actions to overcome the current challenges surrounding witness protection measures by mirroring a policy-oriented approach. 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

The 'New Haven School'¹² has grown into a worldwide epistemic community of adherents who consider it a revelation, an intellectual liberation and rebirth.¹³ 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.¹⁴ It is an adoption of analytical methods of the social sciences to the prescriptive purposes of law.¹⁵ 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.¹⁶ It has been postulated as a focus on more than rules, and an emphasis on how decisions made from those rules affect human beings.¹⁷ 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.

¹¹There 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 neither likely to be appropriate nor applicable to the interpretation of protective measures relating to witnesses before the ICC.

¹² Siegfried Wiessner, 'Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman' (2009) 34 YJIL 526. The terms 'New Haven School' and policy-oriented jurisprudence are used interchangeably to designate this unique configurative problem and policy-oriented theory about law.

¹³ Siegfried Wiessner, 'Professor Myers Smith McDougal: A Tender Farewell' (1998-1999) 11 St TLR 203.

¹⁴ Steven Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 AJIL 294.

¹⁵ Reisman and others (n 8).

¹⁶ 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 Wiessner 'Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman' (n 12).

¹⁷ Myres S McDougal, 'Jurisprudence For a Free Society' (1961) 1 GLR 2.

By describing international law as a comprehensive process of authoritative decisions,¹⁸ 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.¹⁹ From the viewpoint of policy-oriented jurisprudence, an authoritative decision means that law and policy are interchangeable.²⁰ Legal techniques should be applicable in every aspect of policy decision-making.²¹ Rules dissipate their effectiveness when they guide a decision-maker to relevant factors and presumptive weightings. Contrary to the assumption that courts make legal decisions,²² policy-oriented jurisprudence maintains that decision-making is a *dynamic process*.²³ Decision-makers need to be looked at from many different institutional positions and contexts.²⁴ Rules are only one element in the analysis of a decision,²⁵ with judges accustomed to refocusing attention from rules to decisions²⁶ being anchored in diverse social and personal experiences.²⁷

In clear terms, law is a secular craft or artefact created by human beings to achieve certain goals that a legal system wishes to attain.²⁸ As such, the social engineering function or influence of persons dealing with the law cannot be underestimated.²⁹ Law should be used as an instrument for policy-making;³⁰ in clarifying jurisprudence and securing shared interests in a community.³¹ 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.³² It is suggested that the interpretational scope for such values is open, and a choice among the eight values should guide the decision-maker in roughly approximating categories by which data is obtained and processed.³³ Utilising these values in relation to the ICC's practices of witness protection will clarify the issues currently haunting the Court.

¹⁸ Myres S McDougal, 'A Footnote' (1963) 57(2) AJIL 383.

¹⁹ Anthony D'Amato, *Jurisprudence: A Descriptive and Normative Analysis of Law* (Martinus Nijhoff 1984), 189.

²⁰ Richard Falk, 'International Legal Order: Alwyn V Freeman vs Myres McDougal' (1965) 59 AJIL 66.

²¹ D'Amato (n 19) 189.

²² Anthony D'Amato, 'The Neo-Positivist Concept of International Law' (1965) 59 AJIL 321.

²³ Arthur Jay Silverstein, 'Emigration: A Policy-Oriented Inquiry' (1974) 2 SJILC 150-151.

²⁴ D'Amato (n 19) 182-183.

²⁵ Myres S McDougal, 'Fuller vs The American Legal Realists' (1940) 50 YLJ 827.

²⁶ Harold D Lasswell and Myres S McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 YLJ 237.

²⁷ Frank Jerome, *Law and the Modern Mind* (Transaction 2009), 108-126.

²⁸ William Michael Reisman, 'McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 ASILP 279.

²⁹ *ibid.*

³⁰ Myres S McDougal, *Jurisprudence for a Free Society: Studies in Law Science and Policy* (New Haven Press 1992), xxii.

³¹ *ibid.*, xxi.

³² Myres S McDougal and others, 'The World Community: A Planetary Social Process' (1988) 21 UCDLR 807.

³³ Harold D Lasswell, 'On Political Sociology' in Dwaine Marvick (ed) *The Heritage of Sociology*, (University of Chicago Press 1977), 116-117.

i) *Power*³⁴ 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 the Office of the Prosecutor (OTP), Victims and Witness Unit (VWU), Defence, and Chambers.³⁵ 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 the handling of witness protection measures.³⁶

Despite the 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.³⁷ The Court has tried to reach out to states parties in relation to accepting and hosting witnesses under the ICC's protection program, but very few states parties are willing to step forward and engage in negotiations for confidential relocation agreements. Despite numerous witnesses being in desperate need of relocation, statistics showed that out of 650³⁸ witnesses, victims, and families under the ICC protection program, only 60³⁹ witnesses had been relocated to 14 countries.⁴⁰ This has led to tampering in the form of intimidation, and even the death of witnesses seeking protection and relocation. Citing

³⁴ 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.

³⁵ 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 2015), 1105-1131.

³⁶ *ibid.*

³⁷ ICC, 'Report of the Bureau on Cooperation (Addendum)' ICC-ASP/13/29/Add.2, 28th November, 2014, paras 6-8, <www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-Add2-ENG.pdf> accessed 28 July 2015; see also Susanne D Mueller, 'Kenya and the International Criminal Court (ICC): politics, the election and the law' (2014) 8(1) JEAS 25.

³⁸ ICC, 'ICC Deeply Concerned with reported death of Mr. Meshack Yebei; stands ready to assist Kenyan Investigations,' ICC-CPI-20150106 <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082.aspx> accessed 11 August 2015.

³⁹ Coalition for the ICC (CICC) quoting ICC Registrar Von Hebel during an ASP side event on encouraging cooperation from states parties; CICC, 'ASP 13 Day Three: General Debate Begins as Elections Continue (Side Events)' <<https://ciccgloballjustice.wordpress.com/2014/12/11/asp13-day-three-general-debate-begins-as-elections-continue/>> accessed 11 August 2015.

⁴⁰ ICC, 'Report of the Bureau on Cooperation (Addendum)' ICC-ASP/13/29/Add 2, 28th November 2014, 5 <www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-Add2-ENG.pdf> accessed 11 September 2015.

sovereignty claims,⁴¹ states parties and cooperating partners have been reluctant to help, support, enforce, and respect decisions of the Court. States parties have justified this reluctance in the form of regional interests,⁴² national laws,⁴³ or the lack thereof,⁴⁴ as excuses for not cooperating with the court when it comes to the implementation of witness protection measures.

ii) *Wealth*⁴⁵ as a value should enable decision-makers to explore possibilities of control over a community's economic assets and its flexibility.⁴⁶ The ICC lacks the financial means to effectively protect witnesses and thus relies on states party to the Rome Statute to support or take action in its stead. States parties have been unwilling to engage in confidential relocation agreements due to financial constraints and the burden that comes with witness protection 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 to complementary national systems of protection.⁴⁷ The Court has furthermore been unable to make post-testimony follow-ups for witnesses due to inflexible budgets. According to the ICC's Proposed Programme Budget for 2015 submitted at the 2014 meeting for Assembly of

⁴¹ See also Robert Cryer, 'International Criminal Law vs 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 and Alex de Waal, 'Case Closed: A Prosecutor Without Borders' (2009) 171 WA 23; Myres S McDougal, 'The World Constitutive Process of Authoritative Decision' in Richard Falk and Cyril Black (eds) *The Future of the International Legal Order: Trends and Patterns* (Princeton University Press 1969), 73.

⁴² On regional body interests to stop cooperating with the ICC, see Charles Chernor Jalloh, 'Africa and the International Criminal Court: collision course or cooperation' (2011) 34 NCCLR 203; see also Kurt Mills, "'Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34(2) HRQ 404.

⁴³ 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, 29th-30th January 2009'

<www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf> accessed 13 August 2015, 5-7.

⁴⁴ 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 ICC (n 40).

⁴⁵ 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?

⁴⁶ 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 Godefridus Hoof, 'Rethinking Sources of International Law', (Kluwer 1983) 42; Myres S McDougal and Harold D Lasswell, 'Jurisprudence in Policy Oriented Perspective' (1966-1967) 19 UFLR 506.

⁴⁷ Summary of the Arusha Seminar on Witness Protection (29-30 October 2013) (Adopted 7 November 2013), ICC-ASP/12/36/Add.1

<www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf> accessed 13 August 2015.

States Parties (ASP), only eight per cent of the total budget was allocated for both victims and witnesses. Eight per cent is a negligible figure to enable the Court in attaining human good for witnesses.⁴⁸ As it now stands, the budget is insufficient to assist decision-makers to attain human goods in the context of witnesses.

iii) *Enlightenment*⁴⁹ points to the degree of knowledge accessibility in 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, availability and easy access to necessary and practical information is needed. The Court's intermediaries, investigators, NGOs, and national bodies support the collection and reporting of essential issues dealing with witnesses. However, a general suspicion towards participants and actors, effectively limits what type of information is placed before the Court. At times, the OTP 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 the OTP's officers to be on the ground.⁵⁰ During these engagements, intermediaries have been accused of manipulating witnesses to exaggerate testimonies for the purposes of advancing their own agendas.⁵¹ With allegedly exaggerated information, the decision-maker is likely to have challenges regarding the evidential thresholds for taking protective measures decisions. Only concrete and persuasive information about such witnesses' physical, psycho-social wellbeing enables the OTP, VWU, and the Defence to persuade judges as decision-makers to come up with appropriate procedural and non-procedural protective measures.⁵² Despite the engagement of intermediaries, witness protection measures before the Court's Chambers face challenges in relation to the evidential threshold for determining appropriate protective measures.⁵³

⁴⁸ Proposed Programme Budget for 2015 of the ICC, ICC-ASP/13/10, 10

<www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-ENG.pdf> accessed 28 July 2015.

⁴⁹ 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?

⁵⁰ Marlies Glasius, '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; Kai Ambos 'The first judgment of the International Criminal Court (Prosecutor v Lubanga): A comprehensive analysis of the legal issues' (2012) 12(2) ICLR 115.

⁵¹ Robert Cryer, 'Witness Tampering and International Criminal Tribunals, (2014) 27(1) LJIL 191.

⁵² RPE (n 3) Rules 76(4), 87(3), 87(3)(d); see also Rome Statute (n 2) articles 43(6), 64(6)(e), 68(1) (2) and 75.

⁵³ *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 and Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009), 615.

iv) *Skills*⁵⁴ of the decision-makers are essential to the facilitation of good 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.⁵⁵ Required qualifications and refresher trainings in areas relating to rule interpretation, psychology, counselling, sexual violence, and security are necessary in order for the ICC to have the human capacity that will better serve witness protection measures. There are no clear policies regarding skills and training within the Court as intermediaries have been used instead of properly trained investigation officers. This has led to accusations of witness tampering and exaggerated testimonies.⁵⁶ Furthermore, psychological and social expertise has not been readily available. An increased pool of specialised skills in legal, physical and psychological expertise for the protection and dignity of witnesses is needed. The levels of training and refresher courses impact heavily on how decision-makers can skilfully articulate policy and law towards witness protection.⁵⁷ Decision-makers need to have the 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.⁵⁸

v) *Well-being* as a goal or value relates to the degree of comfort, safety and health of a community. ICC should aspire for the best circumstances relating to the welfare of the witnesses it is protecting.⁵⁹ Currently, pre-testimony protective measures such as physical protection and relocation are falling short of the expected standards. The problem is worse when it comes to the post-testimony stage, where there is a lack of follow-up processes, psychosocial support, and a general disregard of relocation requests.⁶⁰

⁵⁴ Decision-makers 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?.

⁵⁵ 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.

⁵⁶ Christian M De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26(4) LJIL 1009; Caroline Buisman, 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment' (2012) 11(3) NUJIHR 30.

⁵⁷ Louise Chapell and others, 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia' (2013) 7(3) IJTJ 455; Commentary on the ICC Draft Guidelines on Intermediaries (2011) <www.refugee-rights.org/Assets/PDFs/2011/icc-intermediaries-commentary-20110818.pdf> accessed 29 July 2015.

⁵⁸ Eisuke Suzuki, 'The New Haven School of Jurisprudence and Non-State Actors in International Law in Policy Perspective' (2012) 42 JPS 46.

⁵⁹ *ibid* 22.

⁶⁰ 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

vi) *Affection*⁶¹ or amiable relationships among community members. Positive sentiments towards others and loyalty to group values contribute to the well-being of individuals involved in the working of the ICC. Further, negative attitudes toward each other only lead to hostilities and withering implementation strategies within the Court. The internal antagonistic relationship among those responsible for protective measures implementation – such as the OTP, VWU, Chambers, and Defence – has a huge impact on witnesses. There is little or no coordination among the ICC organs when it comes to protecting witnesses.⁶² Further, the relationship between the Court and states parties including its partner organisations both national and international needs to improve.⁶³ This will promote better implementation strategies for inclusive witness protection.

vii) *Respect or Recognition*. Notwithstanding the antagonistic and disjointed relationship amongst the ICC organs, they have the same goal, which is the amelioration of the circumstances of witnesses. As such the the organs of the court need, by virtue of the interrelationship between them, to respect each other in light of their being members of the same community, and 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, even though the Defence is not an organ of the Court but a section within the Court's registry.⁶⁴ The perceived inequality among these participants leaves defence witnesses vulnerable.⁶⁵ ICC actors such as the Defence need to consider themselves as self-directed participants with full rights and access to witness protection measures in their own right, with minimal presence of discriminatory tendencies. Affording a higher hierarchical status whether it benefit the OTP, the VWU, the

<[www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL\(3\).pdf](http://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf)> accessed 29 July 2015; Rome Statute (n 2) art 68(1); Pena Marianna and Gaelle Carayon 'Is the ICC Making the Most of Victim Participation?' (2013) 7(3) IJTJ 520; Renne Blattmann and Kiersten. Bowman, 'Achievements and Problems of the International Criminal Court: A View From Within' (2008) 6 JICJ 714.

⁶¹ 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? and (ii) How are relations, friendliness, and loyalty among family and friendship circles?.

⁶² Eikel, 'External Support and Internal Coordination – The ICC and the Protection of Witnesses' (n 35) 1105-1131.

⁶³ Silvana Arbia, 'The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits' (2010) 36(3) CLB 520; Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court <www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf> accessed 28 July 2015.

⁶⁴ ICC, 'The Office of Public Counsel for the Defence'

<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 17 August 2015.

⁶⁵ Xavier-Jean Keita, Melinda Taylor and Mark Chadwick, 'The Office of Public Counsel for the Defence and Challenges for the Defence Before the International Criminal Court' <www.iccnw.org/documents/OPCD_Asser_presentation.pdf> accessed 17 August 2015.

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 from 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. Ultimately, it is the interpretation and applicability of the protective measures of witness protection that are going to face serious challenges as they can only be fully implemented if there is a concentrated effort.

viii) *Rectitude*,⁶⁶ that is, tolerant, responsible conduct within a community can help with successful attainment of human good.⁶⁷ 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. Its vertical approach to cooperation that requires states parties to fully adhere or sign up to confidential relocation agreements with the Court as part of their obligations is not working.⁶⁸ For instance, during the Arusha seminar for Anglophone African States on witness protection, the Court stressed the importance of states parties' cooperating by entering into relocation agreements or any other ad hoc arrangements.⁶⁹ Decision-makers at the Court need to work towards norms of responsible conduct,⁷⁰ where 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.⁷¹ 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.⁷²

⁶⁶ 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 SLR 814.

⁶⁷ There should be integrity in sharing common standards of conduct; McDougal and Lasswell (n 46).

⁶⁸ Goran Sluiter, "I Beg You, Please Come Testify" – The Problematic Absence of Subpoena Powers at the ICC' (2009) 12(4) NCLR 590.

⁶⁹ Summary of the Arusha seminar on witness protection (29-30 October 2013) (adopted 7 November 2013) ICC-ASP/12/36/Add 1

<www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf> accessed 17 August 2015.

⁷⁰ William Michael Reisman, 'International Law and The Inner Worlds of Others' (1996-1997) 9 St TLR 25.

⁷¹ Summary Report of the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court (29 and 30 January 2009), 5-7 <www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf> accessed 17 August 2015.

⁷² *ibid.*

Having outlined the eight values that aim for human dignity, a clearer picture of the challenges facing the Court emerges. If we look at the ICC through the lens of policy-oriented jurisprudence, the eight values as outlined are far from being fulfilled in the context of witness protection. Delving deeper in to how best decisions may be reached, policy oriented jurisprudence offers techniques that will help a decision maker to attain the values cherished by the community on which the decision will have an impact.

C. THE MAPPING PROCESS

Policy-oriented jurisprudence regards those endowed with the decision-making process as *participants*, the subjective dimensions that animate them as their *perspectives*, the resources upon which they draw their power as the *bases of power*, and the ways they manipulate those resources as *strategies*.⁷³ The approach advocates for a superstructure mechanism,⁷⁴ where the decision-maker takes an *observational standpoint*.⁷⁵ Such a decision-maker is assumed to be in 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. When analysis and applicability of facts to the situation before them is complete, a decision-maker is said to have reached his or her *appropriate perspective*.⁷⁶ 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.⁷⁷ Consideration and choice of the policy intended is the meaning of goal clarification.⁷⁸ Past trends are an indication of precedents or history,⁷⁹ and how similar decisions have been made in the past. Factor analysis can thus be explained as a scientific breakdown of the decision,⁸⁰ and predictions are a forecast of intellectual enterprise,⁸¹ while considerations of policy alternatives refer to possible courses of action in the future.⁸²

⁷³ Reisman and others (n 8).

⁷⁴ WM Reisman and M Schreiber, *Jurisprudence: Understanding and Shaping Law* (New Haven Press 1987) 516-517.

⁷⁵ Reisman 'International Law and The Inner Worlds of Others' (n 70) 12.

⁷⁶ Jack Doren and C Roederer, 'McDougal-Lasswell Policy Science: Death and Transfiguration' (2011) 11 RJGLB 129.

⁷⁷ Harold D Lasswell and Myres S McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 YLJ 237.

⁷⁸ Harold Lasswell 'The Emerging Conception of Policy Sciences' (1971) 1(1) PS 11.

⁷⁹ *ibid*.

⁸⁰ Myres S McDougal and others, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (1967-1968) 8(2) VJIL 197.

⁸¹ Frederick S Tipson, 'Lasswell-McDougal Enterprise: Towards a World Public Order of Human Dignity' (1973-74) 14 VJIL 535.

⁸² Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17(1) ICLQ 58.

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.⁸³ Such a decision is said to consist of seven functions: *intelligence, promotion or recommendation, prescription, invocation, application, termination* and *appraisal*.⁸⁴ According to this method, these functions bring about a realistic analysis of the relevant decision process.⁸⁵ 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.

1. Intelligence

Intelligence means obtaining, processing, and dissemination of information, including planning for a decision.⁸⁶ This is the information that the decision-maker comes across during consideration of an issue before him or her.⁸⁷ 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 organisations and international organisations or gathered by individual actors such as intermediaries, and victims or witnesses can be laid before the decision-makers at the ICC. Therefore, such information can be used to strengthen appropriate protective measures for witnesses such as 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 protection measures between the OTP and VWU.⁸⁸ There seems to be no proper direction as to their split responsibilities when it comes to implementation of protective measures in some cases that

⁸³ Tai-Heng Cheng, ‘Positivism, New Haven Jurisprudence and the Fragmentation of International Law’ in T Weiler and F Baetens (eds) *New Directions in International Economic Law: In Memoriam of Thomas Walde*, (Martinus Nijhoff 2011), 414.

⁸⁴ Harold Lasswell, *The Decision Process: Seven Categories of Functional Analysis* (College Park 1956).

⁸⁵ McDougal and others (n 80).

⁸⁶ *ibid.*

⁸⁷ Joseph Goldstein, ‘For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain’ (1975) 84 YLJ 682.

⁸⁸ Eikel, ‘Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice’ (n 6) 97-133.

lead to litigation before the Chambers.⁸⁹ Thus, the involvement of different organs in implementing the same witness protection measures makes the gathering, processing, and dissemination of information on the risks experienced by witnesses rather difficult. In order to consolidate fragmented items of information into a comprehensive frame that facilitates rational decision-making, organs need to work towards a centralised procedure.⁹⁰

2. Promotion or recommendation

Promotion or recommendation relates to processes by decision-makers that actively encourage a community to adopt alternative options.⁹¹ ICC participants in the decision-making process should advocate to the states parties' awareness, shortfalls, and discrepancies with regard to witness protection measures. In the long run, this would demand intervention, improved regulation, and alternative policies. Further to this, initiatives should be taken towards attaining the enactment of prescriptions and mobilising opinion towards a particular policy.⁹² For instance, the ICC's Integrated Strategy for External Relations, Public Information and Outreach⁹³ sets out goals and mechanisms for external communication. The aim is to ensure that the diverse work of the Court's individual organs falls within a common strategy with mutually reinforced messages, activities and goals.⁹⁴ Organisational techniques and a range of mass communication media that ensure a massive flow of information is ideal.⁹⁵ This then helps steer public opinion and transformation of policy alternatives for the ICC into commanding or authoritative recommendation and application.

Notwithstanding that, this 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.⁹⁶ One example would be information processes that manipulate

⁸⁹ 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 and 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), Dissenting Opinion of Judge Georgis Pikis and Judge Nsereko, Case No ICC-01/04-01/07-776, 26th November, 2008, para 15.

⁹⁰ Colin McLaughlin, 'Victims and Witness Measures of the International Criminal Court: A Comparative Analysis' (2007) 6 LPICT 189.

⁹¹ Reisman 'A Jurisprudence From the Perspective of a "Political Superior"' (n 55), 612.

⁹² Lung-chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (Yale University Press 1989) 333.

⁹³ Integrated Strategy for External Relations, Public Information and Outreach

<www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf> accessed 8 March 2015.

⁹⁴ *ibid* 1.

⁹⁵ Chen (n 92) 334-337.

⁹⁶ Richard John Galvin, 'The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicised Prosecution' (2005-2006) 13 UMICLR 44.

witnesses through witness statements for the purpose of achieving the NGOs' special interest of victims' rights. This risk manifested during the *Lubanga* case. It was alleged that several NGOs influenced witnesses through intermediaries who encouraged victims – who were also potential witnesses – to make exaggerated statements as regards the crimes committed by the accused persons with a goal of claiming larger compensation.⁹⁷

3. Consideration or Prescription

Consideration of how general rules are prescribed is of great importance to the policy-oriented theory.⁹⁸ It involves a selection of a particular policy as community law and design for its implementation.⁹⁹ This indicates the expectations of the broader community. This function considers that decision-making by participants in law emanates from varying degrees of authority or certain selected preferences about policy. It is usually accomplished as a result of informal and chaotic processes with outcomes generally referred to as 'customs.'¹⁰⁰ For instance, the initial decision of the ICC to use intermediaries as part of their investigations led to a now settled policy, which is neither within the purview, nor the ambit of the Rome Statute or any other core legal texts of the ICC.¹⁰¹ The policy came about as a result of the *Lubanga* ruling,¹⁰² where the Trial Chamber made policy proposals to improve the relationship between the court and intermediaries.¹⁰³ Thus, in order to overcome the fundamental question of intermediaries' working relations with the Court, law making should provide for the cultivation of more partner-based relationships with individuals and organisations that possess the knowledge of the complex terrain in which the Court is investigating¹⁰⁴, as a rule.¹⁰⁵

4. Invocation

Invocation is a provisional characterisation of a certain action found to be inconsistent with an established law or prescription. This is usually accompanied by a demand for appropriate action to be taken. Facts need to be explored, relevant policies scrutinised, and appropriate action

⁹⁷ Elena Baylis, 'Outsourcing Investigations' (2009) 14 UCLA-JILFA 121; Dermot Groome, 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations' (2014) 3 PSJLIA 1.

⁹⁸ Goldstein (n 87) 683

⁹⁹ Reisman 'A Jurisprudence From the Perspective of a "Political Superior"' (n 55) 605.

¹⁰⁰ *ibid* 612.

¹⁰¹ The exception is in the Regulations of the Trust Fund for Victims. see 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)

<www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf> accessed 18 August 2015.

¹⁰² *Prosecutor v Thomas Lubanga Dyilo*, (Redacted) Case Number ICC-01/04-01/0, 31 May 2010.

¹⁰³ Report of the Bureau on the Strategic Planning Process of the International Criminal Court, 6 November, 2012, ICC/ASP/11/30 <www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-30-ENG.pdf> accessed 8 March 2015.

¹⁰⁴ This also includes the coordination of witness testimony.

¹⁰⁵ Emily Haslam and Rod Edmunds, 'Managing a New "Partnership": "Professionalization" Intermediaries and the International Criminal Court' (2013) 24 CLF 49.

taken to remedy the situation. For instance, in the case of *Germain Katanga and Mathieu Ngudjolo Chui*,¹⁰⁶ 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. 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* decision left some witnesses in the *Katanga/Ngudjolo* case without any protection, thus prompting the OTP to request redactions to their statements as a remedy for their protection.

5. Application and termination

The function of application is described by proponents of policy-oriented jurisprudence as the final characterisation of concrete circumstances according to prescriptions.¹⁰⁷ In other words, the way the general rules are applied matters. An example of an application function is a court judgment or an Assembly of States Parties (ASP) decision that puts prescriptions into practice. For instance, a decision by the ASP emphasising the crucial importance of states parties' cooperation in the area of witness protection, through the signature of relocation agreements or any other ad hoc arrangements¹⁰⁸ reinforces the prescriptive values of human good to be obtained within the Rome Statute.¹⁰⁹ 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 a decision interpreting the rules, such a decision is an application function, as it has clarified world community 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 redact parts of a witness statement is an example of an application function towards the human dignity of witnesses that testify before the ICC.¹¹⁰ Such an application not only works towards improving the witness security for those that testify before the court, but also contributes towards an end to impunity.

The effect and applicability of judicial and administrative decisions regarding human dignity is slightly different. A judicial decision goes to the actual interpretation or right to

¹⁰⁶ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on 16 Protected Witnesses, Case Number ICC-01/04-01/07.

¹⁰⁷ McDougal and others (n 80) 192.

¹⁰⁸ Decision made at Assembly of States Parties Twelfth Session, The Hague, 20-28 November, 2013, ICC-ASP/12/36/Add 1 <www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-36-Add.1-ENG.pdf> accessed 8 March 2015.

¹⁰⁹ Rome Statute (n 2), articles 68, 86 and 87.

¹¹⁰ *Prosecutor v Thomas Lubanga Dyilo*, Case Number ICC-01/04-01/0 dated 31 May, 2010, Redacted Decision on Intermediaries.

interpret while an administrative decision is an opinion of a body especially familiar with the problem, history and purpose of the legal framework being dealt with.¹¹¹ 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.

The 2008 case of *Jean-Pierre Bemba Gombo*¹¹² highlighted the need for properly constituted legal tools where evidence submitted to the Registry for disclosure between the parties needed to be accompanied by, inter alia, an analysis of each piece of evidence. This would reflect its relevance by way of sufficiently detailed legal analysis relating to the alleged facts with the constituted elements corresponding to each crime charged. This was for the purposes of witness protection measures, efficiency of the criminal process, and protection of the rights of the accused person.¹¹³ 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 2010.¹¹⁴

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 replace it with 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 the failures of a former prescription on the other. 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.

6. Appraisal

Finally, *appraisal* denotes the evaluation of the manner and measure in which public policies have been put into effect as well as their aggregate performance.¹¹⁵ This function calls for an 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 discern 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 NGOs,¹¹⁶

¹¹¹ Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) 3 DLJ 511, 513-514.

¹¹² *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.

¹¹³ *ibid.*

¹¹⁴ Morten Bergsmo, Olympia Bekou and Annika Jones, 'New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project', (2010) 10(4) HRLR 715.

¹¹⁵ McDougal and others (n 80) 192.

¹¹⁶ For instance organisations that monitor the work of the ICC.

or discussions emanating from the ASP.¹¹⁷ A breakdown of all the values a community cherishes or demands will help secure continuing reforms of the decision-making process in light of changing demands and expectations.

For example, 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.¹¹⁸ 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 a lack of access to formal media and reliance on informal channels of communication, 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 and expectations, and to ensure their access to information. There must be a 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 the 'superstructure' facilitates the aim of maximising human dignity by authoritative decisions arrived at through carefully mapped processes. The multi-method dimension¹¹⁹ of policy-oriented jurisprudence makes available an opportunity for exploration and a 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,¹²⁰ environmental law,¹²¹ development,¹²² human rights,¹²³ emigration,¹²⁴ and arbitration.¹²⁵ It goes without saying that the policy-oriented approach is still influential, live, and well¹²⁶ as it continues its active focus on the values and goals of the law, orienting the attention of decision-makers

¹¹⁷ Rome Statute (n 2), art 112.

¹¹⁸ Richard J Goldstone and Janine Simpson 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism' (2003) 16 HHRJ 13.

¹¹⁹ Qerim Qerimi, *Development in International Law: A policy oriented Inquiry* (Martinus Nijhoff 2012), 9.

¹²⁰ Li Wanqiang 'Chinese Foreign Investment Laws: A Review from the Perspective of Policy Oriented Jurisprudence' (2011) 19(1) APLR 37.

¹²¹ Rebecca M Bratspies 'Rethinking Decision-making in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development' (2007) 32 YJIL 388.

¹²² Qerimi (n 119) 7-9.

¹²³ Siegfried Wiessner and 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.

¹²⁴ Silverstein (n 23).

¹²⁵ Tai-Heng Cheng 'Precedent and Control in Investment Treaty Arbitration' (2006) 30(4) FILJ 1014-1049.

¹²⁶ Doren and Roederer (n 76) 125-126.

towards policies to be achieved, and the importance of taking responsibility for choices made in various disciplines of national and international law. 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, some criticisms levelled against the New Haven School of thought are worthy of brief mention.

D. A 'PROPAGATION OF ANARCHY'

Even if policy-oriented jurisprudence proposes a mapping process for conceptualising international law, its broad formulations are sometimes referred to as nothing but a confusion of normative prescriptions, coupled with factual assumptions.¹²⁷ The approach is characterised as a 'propagation of anarchy' within the international arena because it cannot be applied to every problem faced by a decision-maker.¹²⁸ There is no explanation of the approach's flexibility, mapping processes, or functional analysis and how it is applicable in such politically contentious aspects of international law¹²⁹ as witness protection measures. Efforts in overcoming the challenges of protective measures should focus on the Rome Statute and its inadequacies. The ICC should furthermore be reevaluated and reformed so as to foster better protection.

A policy-oriented approach to interpret witness protection measures at the Court would only result in different interpretations of protective values that the Rome Statute and RPE requires the Court to adhere to. Past trends,¹³⁰ practice, and cooperation in relation to witness protection will always be different in each state party. What is required, however, is consistent interpretation of rules that will guide states parties to cooperate with the Court as regards confidential relocation agreements, and the concept of justice for witnesses. There is therefore no need for a maze-like or chameleon-like¹³¹ method with a vocabulary that continuously interchanges the use of rules and norms. Such a propaganda school masqueraded as a theoretical approach to international law¹³² cannot help the interpretation and application of witness protection measures. The legal framework for protective measures at the Court cannot

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ Rein Mullerson, *Ordering Anarchy: International Law in International Society*, (Martinus Nijhoff 2000) 33.

¹³⁰ Myres S McDougal and Howard Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 AJIL 1.

¹³¹ Stanley Anderson, 'A Critique of Professor Myers S McDougal's Doctrine of Interpretation by Major Purposes' (1963) 57(2) AJIL 378.

¹³² *ibid* 383.

be subjected to partisan or subjective policies disguised as law as this would virtually dissolve the restraints of rules put in place by the Rome Statute negotiations.¹³³

Contrasting the critique outlined above, feminist scholars in the field of international law¹³⁴ have been wary and critical about the implicit liberalism of dominant theories of international law.¹³⁵ Though there is an overlap with policy-oriented jurisprudence,¹³⁶ ICC witness protection practices do not set a platform in 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 recognising that women are in fact the greatest victims of international crimes.¹³⁷ The argument goes that the Rome Statute has taken only a very small step towards the crucial recognition of women, and,¹³⁸ despite the ICC's Sexual and Gender-Based Crimes policy,¹³⁹ there are still challenges towards effective investigations, prosecution, cooperation, and protection of victims and witnesses.¹⁴⁰ The ICC cannot become a gender-justice-site¹⁴¹ if sex ambiguity,¹⁴² gender injustice,¹⁴³ and the undervaluing women¹⁴⁴ in decision-making thrives at the Court. The transformative potential¹⁴⁵ of international criminal law is not embraced by policy-oriented jurisprudence since the same cherished values¹⁴⁶ are systematically denied to women.

¹³³ Oscar Schachter 'Panel Remarks, McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 ASILP 266-267.

¹³⁴ Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law* (Martinus Nijhoff 2011) 166; Hilary Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' in Dullmeyer (ed) *Reconceiving Reality: Women and International Law* (ASIL 1993) 4-5; K'Shaani Smith 'Prosecutor v Lubanga: How The International Criminal Court Failed The Women And Girls Of The Congo' (2011)54 HLJ 476.

¹³⁵ Hilary Charlesworth, 'Feminists Critiques of International Law and their Critiques' (1994)13 TWLS 2.

¹³⁶ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 66-69.

¹³⁷ Hilary Charlesworth and others, 'Feminist Approaches to International Law' (1991) 85 AJIL 613; Hilary Charlesworth, 'Subversive Trends in the Jurisprudence of International Law' (1992) 86 PIAM-ASIL 125.

¹³⁸ Rana Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court' (2001) 16 BYUJPL 317.

¹³⁹ Policy Paper on Sexual and Gender-Based Crimes, June, 2014 <www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 29 July 2015.

¹⁴⁰ Fatou Bensouda, 'Gender Justice and the ICC: Progress and Reflections' 16(4) IFJP 541.

¹⁴¹ Louise Chappell and Andrea Durbach 'The International Criminal Court: A Site of Gender Justice?' (2014) 16(4) IFJP 533.

¹⁴² Valerie Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court' (2014) 16(4) IFJP 563.

¹⁴³ Louise Chappell, Andrea Durbach and Elizabeth Benito, 'Judge Odio Benito: A View of Gender Justice from the Bench' 16(4) IFJP 648.

¹⁴⁴ Solange Mouthaan, 'Victim Participation At The ICC for Victims Of Gender-Based Crimes: A Conflict Of Interest?' (2013) 21 CJICL 649.

¹⁴⁵ Hilary Charlesworth, 'The Hidden Gender of International Law' (2002) 16(1) TICLJ 95.

¹⁴⁶ Dignity, Power, respect, rectitude, well-being, enlightenment, skills, wealth, and affection.

Criticism from law and economics has focused on international law as a set of norms expressing individual, rather than state values.¹⁴⁷ The focus is on the functionalist dimension of international law and rules designed to achieve whatever norms are adopted. Its proponents 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.¹⁴⁸ The decision-maker's task is to identify the right incentive and structure to motivate better protection of witnesses.

Accordingly, cooperation strategies for protective measures need to be either prohibitive or inductive. The ICC and its rules need to maximise compliance. Rule interpretation, policy formulation, and applicability of protective measures should mirror rational choices,¹⁴⁹ and the means that best maximise desired preferences. There should be more than a cost-benefit approach to witness protection measures, which is an economic analysis that reflect a transaction cost analysis,¹⁵⁰ price theory, public choice, and game theory.¹⁵¹ Factor processes for the measures should focus on relevant variables of witness protection, hypothesis generation, and testing for transparent distributive consequences of legal rules.¹⁵² The many flaws and questions that policy-oriented jurisprudence brings can neither provide satisfactory explanations, nor stronger contextualization¹⁵³ to the problem of witness protection measures at the Court. The limiting analytical method is only rich in terms of vocabulary and influential in co-mingling law and politics, but not in solving cooperation, relocation, internal organ coordination, nor the psychological and physical security of the 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 or the ICC's witness protection measures.¹⁵⁴ It 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 handled. CLS disapproves of the limited objectivity that policy-oriented jurisprudence advocates for. The

¹⁴⁷ Jeffrey Dunoff and Joel Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict' (1999) 93(2) AJIL 394.

¹⁴⁸ *ibid.*

¹⁴⁹ Richard Posner, 'Rational Choice, Behavioural Economics and the Law' (1999) 50(5) SLR 1551.

¹⁵⁰ William Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice' (1996) 17(4) UPJIEL 1002.

¹⁵¹ Mark Chinen, 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner' (2001-2002) 23 MJIL 184.

¹⁵² Dunoff and Trachtman (n 147) 395.

¹⁵³ Jeffrey Dunoff and Joel Trachtman, 'Economic Analysis of International Law' (1999) 24 YJIL 28.

¹⁵⁴ Martti Koskeniemi, 'Letter to the Editors of the Symposium', (1999) 93(2) AJIL 351.

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.¹⁵⁵ They are described as a sham that 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).¹⁵⁶

This speaks volumes of the non-applicability of these celebrated values. From this perspective, international law appears solipsistic¹⁵⁷ 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 absences not merely postulated with lack of effectiveness in law. For instance, to a policy-oriented adherent, a desired goal for a community's wealth can be the right to food, but to the CLS community, 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. Thus, just like any other school of thought, policy-oriented jurisprudence should be aimed at objectivity, neutrality, and determinacy of international law.

E. PRAGMATIC BENEFITS OF POLICY-ORIENTED JURISPRUDENCE

A rule-based approach has often been submitted as being incomplete, irrelevant, and inapplicable to a contemporary world.¹⁵⁸ It is thus suggested that international criminal justice needs a theoretical approach that any appropriately regarded system of law should aspire to; namely, a blending 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. ICC decision-makers need to join law and politics while expanding the horizons of inquiry beyond rules, highlighting the role of policy and the importance of contextualisation of witness protection measures.¹⁵⁹

¹⁵⁵ Philip Trimble, 'International Law, World Order and Critical Legal Studies' (1990) 42(3) SLR 814.

¹⁵⁶ <<http://iccforum.com/africa>> accessed 10 March 2015; <www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/> accessed 10 March 2015.

¹⁵⁷ Jason Becket, 'A Rebel Without a Cause? Marti Koskeniemi and the Critical Legal Project' (2006) 7(12) GLJ 1045.

¹⁵⁸ Wiessner 'Professor Myers Smith McDougal: A Tender Farewell' (n 13) 203-204.

¹⁵⁹ Frederick Timpson, 'The Lasswell-McDougal Enterprise: Towards a World Public Order of Human Dignity' (1974) 14 VJIL 535.

The role that an effective organisation such as the ICC can play in maintaining the values of a free, peaceful, and abundant world society cannot be taken lightly.¹⁶⁰ It does not have to be a ‘conformity-imposing textuality’¹⁶¹ or insistent emphasis upon the impossible in order to enable a proper interpretation of 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 within its own functionality. This functionality will enable the unpacking of each and every value that effective witness protection measures aspire to attain.¹⁶² It is suggested that there is need for increased awareness among the world community¹⁶³ that witnesses are important 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.

The suggestion that the approach’s language makes it dubious,¹⁶⁴ idiosyncratic, and alien,¹⁶⁵ does not make the approach irrelevant nor unworthy of applicability. Most concepts this account utilises – such as ‘effective planning process’, ‘appraisal’, ‘decision-making’, and ‘factor processes’ – are familiar concepts that make it easier to study, contribute, assist in the program’s execution,¹⁶⁶ and evaluate¹⁶⁷ 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 resources. Functional analysis enables decision-makers with the insights to consider the best value(s) applicable to a situation. The arena of authority¹⁶⁸ needs to aspire to a purposive and enlightening interpretation of protective measures that will secure the welfare of witnesses at all times.

¹⁶⁰ Julian Ku and 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.

¹⁶¹ Myres S McDougal ‘The International Law Commission’s Draft Articles Upon Interpretation, Textuality Redivivus’ (1967) 61 AJIL 992.

¹⁶² Myres S McDougal ‘The Role of Law in World Politics’ (1948-1949) 20 MLJ 254.

¹⁶³ Harold Lasswell ‘The Interrelations of World Organization and Society’ (1946) 55 YLJ 889.

¹⁶⁴ Richard Falk, ‘The Place of Policy in International Law’ (1972) 2 GJICL 29.

¹⁶⁵ Marti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (CUP 2001) 475.

¹⁶⁶ Myres S 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.

¹⁶⁷ Myres S McDougal, ‘The Law School of the Future: From Legal Realism to Policy Science in the World Community’ (1947) 56 YLJ 1348.

¹⁶⁸ The Court through: (i) the Pre-Trial Chamber (PTC), (ii) Trial Chamber (TC), (iii) The Assembly of States Parties (ASP).

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 the Court.¹⁶⁹ Policy-oriented jurisprudence is an approach that bring witness protection to a rare angle, away from sterile positivism¹⁷⁰ 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.¹⁷¹ Authority is central to the emergence and sustenance of legal norms. It assumes existence of communities¹⁷² in a cumulated package of past decisions called rules.¹⁷³ In order to research, study, and understand such a community and how authority is incorporated in the complex social process of law,¹⁷⁴ policy-oriented jurisprudence is an ideal framework.¹⁷⁵ This platform accords the decision-maker control and security of a desired pattern of behaviour in others¹⁷⁶ including the taking into account of policy goals, analysis and decision-making formulation.¹⁷⁷ Through this jurisprudence, the ICC's legal, interpretive and operational challenges of witness protection¹⁷⁸ can warrant possible policy analysis and formulation that would enhance enforcement mechanisms and cooperation of both states parties and third party states.¹⁷⁹ Witness protection and relocation cannot work if there is lack of cooperation from both outside and within the court.

Policy-oriented jurisprudence has a unique perspective on law that accords decision-makers with a roadmap to analyse past trends in witness protection measures and, where possible, offer alternatives for better protection of witnesses. Thus, it will be possible for decision-makers to flexibly identify relevant recommendations taking the form of law,

¹⁶⁹ Asa Reyberg, 'Case Analysis: The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC' (1999) 12(2) LJIL 445.

¹⁷⁰ Tai-Heng Cheng, 'Making International Law Without Agreeing What It Is' (2011) 10 WUGSLR 20.

¹⁷¹ Rein Mullerson 'Martti Koskenniemi. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 -1960' (2002) 13 EJIL 732.

¹⁷² Adeo Addis, 'Authority and Community' (2010) 18(1) APLR 63.

¹⁷³ Rosalyn Higgins, 'International Law and Avoidance, Containment and Resolution of Disputes' (1991) 230 RDC 25.

¹⁷⁴ Myres S McDougal and W Michael Reisman 'The Changing Structure of International Law: Unchanging Theory of Inquiry' (1965) 65 CLR 813.

¹⁷⁵ Li Wanqiang, '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.

¹⁷⁶ W Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press 1971) 4.

¹⁷⁷ Fred Rodell, 'Legal Realists, Legal Fundamentalists, Lawyer Schools, and Policy-Science – Or How Not to Teach Law' (1947-1948) 1 VLR 7.

¹⁷⁸ Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court

<www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf> accessed 28 July 2015.

¹⁷⁹ Michael Gilligan 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' (2006) 60(4) IO 935.

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 a fertile ground for legal and policy responses that may accord witnesses the dignity they deserve. Judges, prosecutors, defence lawyers, state¹⁸⁰ and non-state actors¹⁸¹ 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-oriented¹⁸² emphasis is a unique characteristic that is in tandem with new understandings of human security with its focus on individuals is a challenge to traditional readings of international law and the international legal order.¹⁸³ It is an interpenetration of international and national norms of decision-making¹⁸⁴ appreciating the 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 law¹⁸⁵ with clear distinction between political processes and policy-making.¹⁸⁶ What it advocates for is that the law functions as a structure of guiding rules and principles. Human good is the focus, and a contemporary zenith or peak of man's long struggle for all his basic human values.¹⁸⁷ It is an all-encompassing inquiry that exerts influence on a new global order,¹⁸⁸ a process of communication¹⁸⁹ focusing on the rule to its purpose and the process that mankind values.¹⁹⁰

What counts in modern international law, therefore, is the protection of people and nothing less than that.¹⁹¹ Protection of the people is a matter of urgent security monitoring internationally.¹⁹² Therefore, policy-oriented jurisprudence makes the scholar aware of an

¹⁸⁰ Fiona McKay, 'Victim Participation in Proceedings before the International Criminal Court' (2008) 15(3) HRB 1.

¹⁸¹ Mahnoush Arsanjani and W Michael Reisman 'The Law-in-Action of the International Criminal Court' (2005) 99 AJIL 385.

¹⁸² Qerimi (n 119) 7-9.

¹⁸³ Gerd Oberleitner, 'Human Security: A challenge to International Law?' (2005) 11(2) GGRMIO 185.

¹⁸⁴ Guiguo Wang, 'International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law' (2010) 18(1) APLR19-20.

¹⁸⁵ Bruno MacChesney, 'Myers McDougal' (1971) 1 DJILP 21.

¹⁸⁶ Robert S Wood, 'Public Order and Political Integration in Contemporary International Theory: The Lasswell-McDougal Approach' (1973-1974) 14 VJIL 423.

¹⁸⁷ Myres S McDougal and others, 'Rights of Man in the World Community: Constitutional Illusions versus Rational Action' (1949-1950) 59 YLJ 60.

¹⁸⁸ Harold Hongju Koh, 'Michael Reisman, Dean of New Haven School of International Law' (2009) 34 YJIL 504.

¹⁸⁹ W Michael Reisman, 'International Law Making: A Process of Communication' (1981) 75 ASILP 113.

¹⁹⁰ W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 866.

¹⁹¹ W Michael Reisman, 'Haiti and the Validity of International Action' (1995) 89 AJIL 82.

¹⁹² Richard Snyder, Charles Hermann and Harold Lasswell 'A Global Monitoring System: Appraising the Effects of Government on Human Dignity' (1976) 20 ISQ 221.

integrated context approach of inquiry¹⁹³ taking her outside of her inherited lenses of observation.¹⁹⁴ It makes it possible to grasp the reality of what the law is all about, and how it works in a social process.¹⁹⁵ This is the overriding world community goal.¹⁹⁶

The ICC has different organs that work for the good of witnesses under the Court's protection. For these organs to deliver, they need to depend on each other in order to effect their differing protection strategies and achieve anticipated outcomes within the rule of law.¹⁹⁷ Through such strategies and bases of power, decision-makers will have to decide which witnesses need what human values, in what circumstances such witnesses need 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 protection measures. Participants and actors may insist on their own unilateral¹⁹⁸ competence to make their own exclusive interpretations of both customary international law, and agreements to which they may have committed themselves is likely to arise.¹⁹⁹ 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.²⁰⁰ It is not defined 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 the 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.

¹⁹³ Harold Lasswell and Myres S McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 YLJ 203.

¹⁹⁴ Siegfried Wiessner 'The New-Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping of Law' (2010) 18(1) APLR 47.

¹⁹⁵ Wiessner 'Law as a Means to Public Order of Human Dignity: The Jurisprudence of Michael Reisman' (n 12).

¹⁹⁶ Myres S McDougal 'Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies' (1974) 14 VJIL 406.

¹⁹⁷ Frederick Tse-shyang Chen, 'A Brief Clarification of the 'Rule of Law' in Policy Perspective' (2011) 34(1) TJLR 113.

¹⁹⁸ It has been argued earlier on that there is lack of coordination among the organs of the court as there is no centralised system of protecting witnesses. Article 68 of the Rome Statute (n 2) only talks about the court without according specificity to which of the organs take a leading role.

¹⁹⁹ Myres S McDougal 'The Impact of International Law upon National Law: A policy-oriented perspective' (1959) 4 SDLR 51.

²⁰⁰ Rome Statute (n 2) art 68(1).

Another likely challenge of the approach's 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.²⁰¹ 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.²⁰² It is thus suggested that on the face of this jurisprudence, it is always 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.²⁰³ 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 entire 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 knowledge²⁰⁴ that facilitates applicability of the appropriate protective measures diffusing the convergence of law, political pressures, organ coordination and international cooperation.

F. CONCLUSION

Policy-oriented jurisprudence distinguishes itself from other traditional schools or theoretical approaches to international law.²⁰⁵ It offers an interpretational perspective that has a solution for most of the challenges facing witness protection 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 protection measures at the ICC, and has attempted to convey that this approach 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,

²⁰¹ McDougal 'The Impact of International Law upon National Law: A policy-oriented perspective' (n 199) 51.

²⁰² ICC, 'Report of the Bureau on Cooperation', (adopted 21 November, 2014), ICC-ASP/13/29, <www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-29-ENG.pdf> accessed 19 August 2015.

²⁰³ Harold Lasswell and Myres S McDougal, 'Trends in Theories About Law: Maintaining Observational Standpoint and Delimiting the Focus of inquiry' (1976) 8 UTLR, 23-50.

²⁰⁴ Zina O'Leary, *Researching Real-World Problems: A Guide to Methods of Inquiry* (Sage 2005), 4.

²⁰⁵ Menachem Mautner, 'Michael Reisman's Jurisprudence of Suspicion' (2009) 34 YJIL 506.

implementation, and cooperation regarding witness protection measures have not been easy. Unless this is improved, the ICC may not be able, at least not to its fullest extent, to contribute to the human dignity²⁰⁶ 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. It is a Court operating with minimal resources, navigating through the states parties' cooperation mechanisms, and still developing its own jurisprudence. Its vertical cooperation mechanism may not appear problematic in itself. However, antagonistic relationships can ensue both internally and externally, leading to heightened risks to witnesses seeking protection. In order to overcome this, ICC decision-makers need to be fully aware that they are considering long term interests for the benefit of 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 in the face of the 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,²⁰⁷ in dealing with witness protection measures. Such decision-makers should be conscious that their decision-making processes are actually a contribution not only to the protection of witnesses, but also the formation,²⁰⁸ and evolution of international criminal law.²⁰⁹ They should interpret the protective measures provisions faithfully whilst taking into account challenges faced by witnesses and the legal culture of the states parties engaging in cooperation and internal organ coordination. If the suggestions discussed in this article are found persuasive, the development of international norms and contribution to the dignity²¹⁰ of witnesses at risk due to their contact with the Court will be enabled.

²⁰⁶ Myres S McDougal 'Perspectives of an International Law of Human Dignity' (1959) 53 ASILP 107.

²⁰⁷ McDougal and Lasswell (n 46) 506.

²⁰⁸ Reisman and others (n 8) 576.

²⁰⁹ Robert Sloane, 'More Than What Courts Do: Jurisprudence, Decision, and Dignity - In Brief Encounters and Global Affairs' (2009) 34 YJIL 517-519.

²¹⁰ Reisman and Schreiber (n 74) 11.