# The justice sector afterthought:

## Witness protection in Africa

Chris Mahony

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**Cover photograph**
© (AP Photo/Karel Prinsloo) With a bullet wound on the forehead, Emmanuel Muranjira, 43, recounts his harrowing experience of the 1994 genocide in Rwanda while standing in front of a memorial in Gikongoro province on Monday, Oct. 1, 2001.

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**Disclaimer**

In representing and commenting on views about the work of the ICC, the ICTR, the SCSL, the South African, Kenyan, Ugandan and Sierra Leonean states and their protection efforts, the author has sought to be critically constructive in discussing various aspects of the protection of witnesses. The views expressed in this book in no way bind the individuals or institutions listed above; neither do they necessarily reflect the views of the ISS or its donors. Any inaccuracy or perceived misrepresentation in this book is the responsibility of the author alone.

# Acronyms and abbreviations

| | |
|---|---|
| AFDL | Alliance of Democratic Forces for the Liberation of Congo |
| AFRC | Armed Forces Revolutionary Council |
| ANC | African National Congress |
| AU | African Union |
| CAR | Central African Republic |
| CDF | Civil Defence Force (Sierra Leone) |
| CID | Criminal Investigations Department |
| CIPEV | Commission of Inquiry into Post-Election Violence |
| CNDP | National Congress for the Defence of the People |
| DFID | British Department for International Development |
| DPP | Directorate of Public Prosecutions |
| DRC | Democratic Republic of the Congo |
| FNI | Nationalist and Integrationist Front |
| FPLC | Patriotic Force for Congolese Liberation |
| FRPI | Force for Patriotic Resistance of Ituri |
| FSU | Family Support Unit |
| GJLOS | Government, Justice, Law, Order and Security |
| ICC | International Criminal Court |
| ICCPP | International Criminal Court Protection Program |
| ICCPR | International Covenant on Civil and Political Rights |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IDP | Internally Displaced Person |
| IGG | Inspector General of Government |
| IMLU | Independent Medico-Legal Unit |
| JEM | Justice and Equality Movement |
| JSDP | Justice Sector Development Program |
| KHRC | Kenya Human Rights Commission |
| KNCHR | Kenya National Commission on Human Rights |
| LRA | Lord's Resistance Army |
| MLC | Movement for the Liberation of the Congo |
| MONUC | United Nations Mission in the DRC |
| MOU | Memorandum of Understanding |
| NPA | National Prosecuting Authority (South Africa) |
| NPFL | National Patriotic Front of Liberia |
| OEO | United States Office of Enforcement Operations |
| OHCHR | Office of the UN High Commissioner for Human Rights |
| PAGAD | People against Gangs and Drugs |
| RCD | Rally for Congolese Democracy |
| RPF | Rwandan Patriotic Front |
| RUF | Revolutionary United Front (Sierra Leone) |
| SAPS | South African Police Service |
| SCSL | Special Court for Sierra Leone |
| SLDF | Sabaot Land Defence Force |
| TRC | South African Truth and Reconciliation Commission |
| UNHCR | United Nations High Commissioner for Refugees |
| UNODC | United Nations Office on Drugs and Crime |
| UPDF | Ugandan People's Defence Force |
| VWSS | Victims and Witnesses Support Section (ICTR) |
| VWU | Victims and Witnesses Unit (ICC) |
| UPC | Union of Congolese Patriots |
| WEL | Witness Evaluation and Legacy Project |
| WITSEC | United States Witness Security Program |
| WPU | Witness Protection Unit (South Africa) |
| WVS | Witnesses and Victims Section (SCSL) |

# Executive summary

This book seeks to address the frictions between protecting the rights of accused persons and protecting the physical and psychological wellbeing of witnesses in Africa. Developed states are still attempting to refine the weighing of these two public goods. The African challenge is complicated by poor capacity and integrity in the justice sector, as well as by lower living standards. These issues commonly cause justice inefficiencies which impede both witness protection and the rights of the accused. While the latter are critical to the integrity of the criminal justice process, witness protection is often the essential component of the successful prosecution of organised crime. Witness protection's importance is tied to African states' growing willingness to address the phenomena of organised crime.

The book addresses witness protection in South Africa as well as initiatives to create protection programmes in Kenya, Uganda and Sierra Leone. It also examines witness protection at the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). Its interpretation of witness protection is wide and includes sensitive investigatory, prosecutorial and judicial practices as well as relocation and identity change.

The research shows that African witnesses are subject to severe threats, particularly when these emanate from elements within the state itself. Smaller state budgets and protective capacity increase the vulnerability of witnesses. Consequently, crime carried out by elements of the state, or those with links to it, is rarely prosecuted. The book finds that tribunals, as well as South Africa's protection programme, have largely been effective in securing witnesses' physical security. However, programme design has been woefully inadequate. The book illuminates some common themes at the international criminal tribunals, including protection programme dependence on state cooperation, ambiguous responsibility for protecting witnesses when tribunal proceedings conclude, jurisdiction over protective measures within tribunals, and the effect of protective measures on the rights of the accused.





The book focuses in particular on the ICC programme. This is because of the comparatively progressive practices the court has adopted, its permanent nature, and the potential role of ICC complementarity in the proliferation of protection programmes in African states. Various elements of ICC protection have already been contested by the prosecution, defence and registry before the court itself. The book notes the need for the registry and prosecution to negotiate a memorandum of understanding on their respective practice and jurisdiction, with contentious elements contested before the court. This would avoid controversial issues of protection being settled intermittently over many years and would thus provide the same level of protection to witnesses who testify in the short- to medium-term, as it would to those who appear many years down the road. It would also mitigate criticism of witness inducement by establishing transparent, standardised witness material benefit.

'Complementarity' is the concept of ICC restraint from prosecution when it is satisfied that fair criminal justice processes have occurred domestically relating to crimes within the ICC's jurisdiction. The book highlights the need for a publicly available threshold of capacity and independence required by a domestic programme to meet the requirement of complementarity. A public threshold would guide states seeking to avoid ICC prosecutions and dispel criticism relating to the subjective application of complementarity.

Witness protection at the SCSL constitutes an important step forward from the ICTR in facilitating the psychosocial wellbeing of witnesses while fulfilling its core task of physical protection. Two issues of concern, however, surrounding the SCSL are the protective practices of the prosecution and the form residual protection might take. Discretionary measures adopted by the prosecution's witness management unit were found to so egregiously affect the rights of the accused that the fairness of proceedings was brought into question. The book suggests the need for a full and impartial investigation of witness management unit practices, particularly support such as stipends, retreats and other material ad hoc measures.

The issue of residual protection will also confront other tribunals. At present a local protection programme within Sierra Leone's criminal justice system, with initial SCSL oversight, has been mooted. The book strongly recommends that this should not take place. Individual and collective avenging of grudges during the conflict demonstrated long Sierra Leonean memories. The potential for a local programme to be compromised by future governments or instability is real. The book suggests that a mechanism permanently attached to a UN entity, without a

government role, would be the best residual alternative. It may provide a future residual protection solution for other non-permanent international criminal tribunals.

In the case of the ICTR, engaging a party to the conflict in witness protection has seriously compromised witness security and the legitimacy of the justice processes. The ICTR's design suffered from an absence of witness protection consideration. Created without a witness protection programme, this oversight resulted in 99 witness murders. A full and impartial inquiry into the ICTR's legal and operational creation is required. The issue of independence from state security services cuts across all tribunals. The use of local security apparatus must be temporary, and, even then, will still pose a potential future security risk. The objectivity of prosecution protection decisions remains an issue for all international criminal tribunals discussed in this book.

Among cases of national witness protection, prominent themes relate to the politics and drivers that come into play in the creation of a protection programme, as well as capacity problems and the novel nature of the threat to African witnesses, including threats from the state or elements connected to it. South Africa – Africa's only current domestic protection programme – has been enormously successful in its core role of protecting witnesses' physical security. Only one witness has been killed, and that as a result of the witness contacting family outside of protection agreement channels. However, South Africa's programme has also encountered problems, primarily the perception that its location under the National Prosecuting Authority (NPA) compromises its independence. Enabling legislation establishes an autonomous entity reporting to the minister of justice.

Some critics also cite budgetary expansion in South Africa's programme that is not reflected by increased witness admission. However, increased prison sentences in protection cases point to a focus on high value cases. While lower level offending can now be admitted, the programme is still vulnerable to problems emanating from the interdependent nature of a criminal justice system. Witness-oriented reform of justice sector practice should be led by protection programme personnel. Two issues the book cites as requiring immediate attention are the provision of psychosocial care for staff and witnesses, and the establishment of a fund for victims of witness recidivism or other protected witness who have been harmed.

Kenya is the most topical domestic African model. Progressive legislative amendments have been provided to cabinet. They include the repositioning of the





yet-to-commence programme as an independent agency outside the attorney-general's office, under a board including Kenya National Commission on Human Rights (KNCHR) representation. Amendments also include a genuine avenue for appeal, the allocation of discretion to admit witnesses to the programme director, and a fund for victims of protected witnesses. Proposed amendments create a programme that will be more progressive than its western counterparts. A recognition of the incapacity and vulnerability to corruption of Kenyan justice processes informs the avoidance of politically sensitive and organised crime cases in the programme's infancy. Witness intimidation is but one method to obstruct criminal proceedings. Until justice sector reform puts alternative obstructions beyond the reach of criminals, operations should focus on politically less sensitive, lower level violent and gender based offending. A reform process also facilitates review of justice sector witness-oriented practice.

Similarly, Sierra Leone requires completed justice sector reform before witnesses in organised crime and high level corruption cases could be admitted for protection. Uganda's ostensible movement towards protection, through drafting and attempted passage of a whistleblower protection bill, has been an ongoing disappointment since the start of the decade. Its passage, and the drafting and passage of protection legislation, are still required for protection to become a possibility. However, Uganda must now consider the requirements of ICC complementarity after stating that it would prefer to conduct war crimes trials domestically. As shown by the ICC prosecution's meeting with Kenyan officials, the creation of a witness protection programme is a critical element of ICC complementarity considerations. ICC complementarity may well be a future driver of African protection mechanisms. It has been a critical form of pressure for consolidating political will around witness protection in Kenya.

Unfortunately, what protection has not been driven by is the right of African citizens to protection from serious threats to their physical wellbeing. Both the UN Convention against Corruption and the UN Convention against Transnational Organised Crime only obligate a state party to take protective measures 'within its means'. Alternative interests have therefore driven protection to date. South Africa's original programme was directed at criminality associated with political opposition. In Kenya donor driven justice sector reform and an inability to address organised crime prompted original witness protection legislation, while, in Sierra Leone, the interests of a UN backed tribunal has prompted its consideration.

African states need to consider carefully what interests they are pursuing in creating protection programmes and what forms of criminality the programmes

will pursue. The African witnesses most at risk are those who hold testimony that incriminates those in political power or their affiliates. For political actors to create a mechanism which may increase their chances of being held to account is to present a progressive indication of state willingness to divest power to the citizenry as witnesses in justice processes. A tentative approach from politicians will likely continue for the foreseeable future. Civil society groups and donor agencies must be cognisant of potential manipulation of protection programme creation and function by demanding capacity and independence for African witness protection.



Chapter One

# Protecting those most vulnerable: Overview of the key issues

The protection of witnesses from intimidation or harm is imperative to the integrity and success of a judicial process. Witness protection in criminal cases begins with formal police or ad hoc protection. Ad hoc protective measures may continue during testimony in the form of judicial or 'in court' protective measures. When the threat is high, special protective measures, such as relocation and identity change, as part of a formal protection programme may be employed. Over the last 20 years the need for special protective measures and the creation of protection programmes have become more common. This concept is now also becoming popular in Africa. A witness can be defined as:

> … a person, other than the defendant, having knowledge of a fact (possessing information) to be ascertained in criminal proceedings or summoned by the judicial authority to provide testimony on that fact.[1]

Initially, the primary objective of witness protection was to protect the physical security of witnesses for the purpose of securing their testimony in a criminal justice process. However, as protective practice has developed, improving witness-related conduct throughout the justice system has become important because of the need to achieve witness cooperation at each phase of the justice process.

Psychological, health and socioeconomic considerations have taken on a more prominent role in the engagement and protection of witnesses prior to, during and after testimony. A witness protection programme can be defined as:

> … a program regulated by legislation, aimed at the protection of witnesses and victims in cases of serious intimidation, which cannot be addressed by other protection measures, and where the testimonies of such witnesses are of special significance for criminal proceedings.[2]

'Other protection measures' above refer to police protective or support measures. These include good or witness sensitive practices in the investigatory and prosecution stages that ensure expedient investigation, investigative confidentiality, and monitoring and mitigating security issues. These good practices also include providing anonymity during investigation, opposing bail or imposing stringent bail conditions, prosecuting incidents of intimidation and providing judicial or in-court protection measures. Adoption of the above measures, as well as in-court measures such as closed-court testimony or physical separation from the defendant, may fully mitigate the threat to a witness in many instances. If these measures, along with physical protection and other protective measures are inadequate, best practice calls for a referral to a formal witness protection programme where supplementary methods of protection, such as relocation and identity change, are considered. These supplementary measures are what have normatively constituted a witness protection programme.

## AIMS OF THE BOOK AND RESEARCH METHODS

The protection of witnesses straddles the professional spheres of policing and other investigative operations such as counsel, particularly the prosecution, and the judiciary. For this reason, few coherent analyses of witness protection have been conducted. This book seeks to provide a primarily descriptive rather than analytical contribution to inform policymakers and stimulate further research. It therefore seeks to sensitise policymakers to the practice of witness protection, as well as its implications. For this reason, individual cases are examined without presuming that readers have read other chapters. A comparative analysis of the themes emerging from the individual cases is reserved for the concluding chapter.





The book examines four cases at the domestic level: South Africa, Kenya, Uganda and Sierra Leone. These four cases are instructive as they are at disparate stages of conceptualising and implementing witness protection at the state level. The book also considers witness protection programmes at the following international criminal tribunals which are prosecuting African citizens: the International Criminal Tribunal for Rwanda, the International Criminal Court and the Special Court for Sierra Leone.

The impact on protection measures of the gravity of crimes in many parts of Africa, the extent of the threats faced by witnesses, and the socioeconomic environment in which investigations are undertaken, has yet to assessed. This book seeks to provide a framework for further analysis and discussion of these issues. For this reason, the greatest attention has been given to the ICC because of the permanency of this court. Moreover, many of the practical and theoretical challenges evident at other tribunals and local jurisdictions are addressed in the ICC chapter. At the local level, greater emphasis has been placed on the design and operationalisation of the Kenyan protection mechanism. This is due to its topical nature, particularly in relation to the 2007-08 post-election violence and potential ICC prosecutions.

The research data for this book was sourced from the author's experience with designing a proposed domestic witness protection programme for Sierra Leone from March to July 2008. In designing the programme, the available literature was found to be grossly inadequate for informing protective measures to deal with contemporary African threats. To fill this void, three weeks of field research in South Africa, Kenya and Uganda as well as meetings in Vienna with the UN Office on Drugs and Crime (UNODC) informed the project. The Institute for Security Studies (ISS) funded a further three weeks of fieldwork in Uganda, Kenya and the Netherlands to supplement the data already collected.

The safety of informants who do not testify in a criminal proceeding is a critical element of prosecuting crime in any justice system or institution. However, this research addresses the protection of witnesses in criminal proceedings only, whether they be insider witnesses, scene-of-crime (or crime based) witnesses (including victims), expert witnesses, or character witnesses. In considering the protection of witnesses, the author also deliberately conflates a narrow understanding of 'witness protection' with 'witness support'. In doing so a wide interpretation of witness protection is adopted. This allows for the importance of the psychological wellbeing of witnesses to be placed alongside that of physical safety.

## THEORY OF WITNESS PROTECTION

The dearth of literature on protection of witnesses is a result of the scarcity of institutionalised protection entities. Because Western states played a prominent role in creating and funding the few functioning protection programmes, these programmes have been established and examined from an Anglo-Saxon perspective. This lens has neglected many of the novel aspects of protecting African witnesses.

Five key elements determine the functioning of state and international criminal justice witness protection programmes:

1. The financial, security and political parameters within which a protection programme functions.
2. The structure and independence of the protection mechanism.
3. The extent to which a programme is able to procure cooperation from state and non-state institutions locally and internationally.
4. The efficacy and efficiency of the justice system or institution as a whole.
5. The nature and scale of the threat to witnesses.

The fourth element above goes to the heart of state legitimacy. A critical indication of state competence is its ability to prevent witnesses at all stages of a dispute resolution process from being harmed, or threatened with harm. Witness protection is generally dependent on what the state can offer in this regard. Unlike in the West, many African governments do not hold a monopoly over justice and security. Indeed, hybrid states, or polities with their own rules of governance and relationships to society, exist within states.[3] In such states, institutions either exist as parallel forms of authority to pre-existing systems, or have been progressively indigenised through their interactions with local social forces. This interaction results in hybridised forms of order and governance that combine elements from both Western and indigenous political traditions.

The typical post-colonial state in Africa is one whose structure, says Chabal, is composed of 'overlapping layers of formal and informal spheres of power',[4] or where Western processes and institutions 'easily co-exist with social and political relations and practices which may continue much as before'.[5] A distinct feature of these hybrid states is that non-state authorities play a major role in the distribution of public goods, such as policing. It is a polity where familiar Western distinctions between public and private, state and non-state, modern and customary frequently





blur and where historical 'indigenous mechanisms of socio-legal and political organisation' have been retained as more appropriate than those offered by donors.[6]

In addition to confronting state and non-state relations as outlined above, witness protection in Africa faces other challenges. The African state has proven particularly vulnerable to producing weak institutions where arbitrary power is wielded by elites who are rarely, if at all, subjected to the ordinary law courts. The discretionary exercise of power by elite state actors fosters discontent and distrust. This distrust results in a reluctance to engage a justice system perceived to be easily manipulated by those in, or with connection to, power.

Physical evidence is often dependent on a suspect being identified by a witness. For example, forensic evidence is strengthened where a suspect already exists. In states with minimal or no forensic investigating capacity, such as those in Africa, witness testimony becomes extremely important. The evidence provided by a witness can itself lead to a suspect confessing, particularly when multiple witnesses are available.

## US AND EUROPEAN PROTECTION MODELS

Greater consideration of witness protection has occurred as a result of the perceived increase in organised crime and the prioritisation of policies to address it.[7] Witness protection literature has commonly focused on US and European protection models.

### United States model

The US Federal Witness Security Program (WITSEC), established by the Organised Crime Control Act 1970, is the oldest witness protection programme in the world, and has thus drawn the greatest literary comment. Particular attention was originally paid to the discretion of the attorney-general in imposing protective methods. Under the 1970 legislation poorly delivered promises and erratic assistance ended in tragedy on occasion.[8] The competing public interests of an accused's right to a fair trial and the protection from harm of witnesses are critical to the debate on witness protection. Despite even the threat of death, US citizens have a legal obligation to provide testimony in civil and criminal proceedings.[9]

The US government holds no legal obligation to provide protection despite the harm which might ensue for witnesses who fulfil their legal obligation to testify.[10]

WITSEC has been described as the 'paradigm program' and a model for the prosecution of organised crime. It sought to tackle the threat of death for those who broke the Mafia code of secrecy by providing relocation and identity change. The Organised Crime Control Act provides discretion to the attorney-general to apply criteria for admission and determine protective measures to be applied. This discretion is ordinarily delegated to the Office of Enforcement Operations within the criminal division of the Department of Justice.[11]

Soon after the inception of the US programme, poor practice, protocol and oversight undermined its effectiveness. These problems related to the boundaries of protection and unintended victims, such as creditors, persons with custody rights over children and unsuspecting neighbours of relocated former criminals.[12] The programme also suffered from breaches of security, poor administration and poor psychosocial witness assistance.[13] These issues brought about legislative review which sought to better reflect the interests of the public.[14] The challenges were addressed in the Comprehensive Crime Control Act 1984, which defines the support the attorney-general may provide and requires him to provide written assessment of the benefits and risks.

Critics of the system question the practical feasibility, intrinsic morality and fairness to the public when excessive expenditures and interference with innocent persons are involved.[15] Calls have also been made for greater weight to be given to the potential harm of a witness's admission as opposed to the value of his/her evidence.[16]

The most dangerous time for a witness is between arrest and trial.[17] As a consequence, alternative state-led protection programmes have also been established in the US to address protection of victims and witnesses in less organised or lower level criminal cases.[18] Although intimidation is difficult to measure, some prosecutors have estimated that it is a factor in between 75 and 100 per cent of localised violent criminal offending.[19] Community-wide intimidation has been the most difficult form of intimidation to counter because it is the most indirect or ambiguous. Indirect threats, such as nuisance phone calls or in-court staring, are not specific acts which may be cited. However, witnesses are often affected by such threats.[20]





## European protection models

The UK recently passed the Serious Organised Crime and Police Act 2005. The act provides for witness protection, plea bargaining and immunity from prosecution for those who assist. The fact that British protection has developed only recently suggests a lack of consideration, recording and study of witness intimidation in the UK up until this point.[21]

Variations in the criminal justice landscape as well as differences in legal systems result in different witness protection systems. Fyfe cites four main elements that differentiate European protection mechanisms from the US model.[22] The first is legislative, where protective mechanisms, like that of the UK, have only recently been enshrined in law despite protective measures and admission criteria being broadly congruent. The second element is the variance in jurisdiction or location. The police are generally provided a greater role but in some cases the judiciary, government or special boards are empowered to admit and protect witnesses.[23] The third source of variance between European and US protection systems is the nature and scale of criminality that threatens witnesses. In Italy, where organised criminality is prevalent, thousands of participants enter the programme, while there are only around 650 per year in Germany. Finally, an attempt to negate differences that impede cooperation among EU member states is evident in the creation of the European Liaison Network, which comprises the heads of protection programmes.[24] Despite its establishment, the formulation of standardised admission agreements and other common areas of practice have proven difficult to conclude.[25]

## EFFECTIVENESS OF PROTECTION MEASURES

Little research has been conducted into the effectiveness of protection measures. Despite the gaps in the literature, generic claims are made as to the 'relationship between efficient investigation and prosecution … and a successful witness protection program'.[26] Across European states, cost estimates vary between US$8 000 and US$160 000 per year per witness.[27] The US programme, even in 1985, was spending as much as US$30,9 million per year.[28] Because of the covert nature of protective measures, much of the data about their effectiveness is sourced from agencies which have an interest in justifying their continued operation and expansion. The data is difficult to corroborate. Statistics appear to

show that in states such as Germany and the Netherlands no protected person has been the victim of retribution relating to a case for which they were protected.[29]

The general consensus among proponents of protection is that testimony could not otherwise be procured, and cases therefore prosecuted, were it not for protective measures. Based on the results of prosecutions, some observers have cited the US programme as the most effective tool of organised crime control.[30] In the US, between 1979 and 1980, 75 per cent of the defendants charged, using evidence from 220 protected witnesses, were convicted.[31] When contrasted with the loss of some 25 potential informant witnesses in attempts to prosecute high ranking organised crime figures in the pre-protection early 1960s,[32] the above statistics appear convincing.

However, it is not enough to consider success only in terms of protection against physical threats to witnesses. The social and psychological wellbeing of witnesses is also a critical indicator. When evaluated from this broader perspective, witness protection efforts do not appear as successful. This is demonstrated by the higher-than-average suicide rates of protected witnesses in the US.[33]

## WITNESS ANONYMITY AND THE RIGHT OF CROSS-EXAMINATION

One of the most contentious elements of witness protection relating to the rights of the accused is the provision of anonymity to witnesses. In *Prosecutor v. Tadic* before the International Criminal Tribunal for the former Yugoslavia (ICTY), the court held that the identities of witnesses could be withheld indefinitely from the accused and the accused's counsel.[34] This was an important and severely mitigating precedent for the rights of the accused. Justice Stephen's dissenting opinion, however, found the provision of anonymity would deny the accused a fair trial and may lead to convictions on the basis of tainted evidence.[35]

Authorities on international law, such as Christine Chinkin, err on the side of the majority in that 'other interests' need to balance an accused's right to know and confront prosecution witnesses.[36] Clearly, these interests involve the safety of witnesses and victims. International instruments which instruct the accused's right to a fair trial, such as article 14 of the International Covenant on Civil and Political Rights (ICCPR), should not, in practice or perception, appear to be compromised. To do so paints some protective measures as impeding a fair and





equitable justice process at best, and, at worst, severely undermines the legitimacy of justice institutions and processes.

Chinkin cites the novel dimension of protecting witnesses where large-scale violent conflict has taken place. In such circumstances she finds that a climate of fear and intimidation exists and that witnesses are spread across borders, thereby limiting protective capacity to engage normative measures.[37] Under article 14 of the ICCPR, a fair trial includes the right to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.[38] Chinkin qualifies the clear abrogation of such rights through the provision of indefinite anonymity by citing article 14 as non-derogable, not absolute and, therefore, requiring qualification in a situation of public emergency.[39]

However, the European Court of Human Rights also found that when anonymity is provided to a witness, the defence is 'deprived of the very particulars enabling it to demonstrate that the witness is prejudiced, hostile or unreliable'.[40] The court found that dangers for a fair trial emerge when the defence has not had an opportunity to observe and cross-examine the evidence of the anonymous witness. In such circumstances, testimony incriminating the accused may be untruthful or erroneous by design, elements the defence may be unable to illuminate without information relevant to witnesses' credibility.[41] The court found such encroachment upon 'controllable and fair judicial procedure' could not, by a civilised society, be acceptably mitigated by an increasing organised criminal threat to a witness.[42]

This leading jurisprudence requires full disclosure to the defence, but not necessarily the public, prior to trial. This allows adequate defence preparation and witness cross-examination. In circumstances of great threat, pre-trial physical protection, particularly surrounding disclosure and testimony, is critical to achieving observation of the accused's right to fair trial, as well as the physical and psychological wellbeing of witnesses.

## WITNESS PROTECTION AND THE PUBLIC INTEREST

There is great public interest in avoiding the protection of witnesses who might pose a threat or whose protection might alienate the rights of others to whom witnesses and the state owe a duty of care. These interests must be weighed against

the public good of fighting forms of organised crime often resistant to rudimentary law enforcement procedures.

Observers cite numerous protection cases in the US in which witnesses still owed debt, posed a threat to those in the community in which they were resettled, or exercised sole custody over relocated children, thereby excluding others with legal custody rights.[43] The threat posed by protected witnesses to those in their new environment has been shown to be severe. Over 95 per cent of witnesses admitted to the US programme have criminal records.[44] One study showed that in the US, 21 per cent of protected witnesses were arrested within two years of admission.[45]

Because of the covert nature of protection, data on these issues is notably absent from the case studies included in this book. Cursory observation is made of the provision for removal from protection or other measures to address the negative consequences of protection.

## WITNESS IMMUNITY, PLEA-BARGAINING AND DUE PROCESS

Witness immunity, plea-bargaining and due process focus on the trial element of protection and therefore involve only a few key actors namely judges, counsel and witnesses. However, when witnesses are relocated, the effect of decisions regarding plea-bargaining and immunity can be felt across society more generally.

The role of insider testimony and the extent to which insiders are rewarded for cooperation is an issue that has solicited much debate. Immunity and plea-bargaining are pursued in the US, Italy, Germany, Northern Ireland, Spain and, more recently, the UK. Other countries, such as Japan and France, have no such system.[46] In France, which only considered and enacted plea-bargaining in 2004, strong opposition to plea-bargaining, let alone immunity for cooperating witnesses, exists. The main source of opposition emanates from magistrates and lawyers who view such action as undermining the rights of the accused by empowering prosecutors at the expense of the judiciary.[47] Greater prosecutorial discretion is common in African domestic justice systems. It is also arguably greater at the international criminal tribunals mandated to try those ambiguously defined as 'most' responsible for crimes.





## FORMS OF CRIMINALITY ADDRESSED

Protective measures in the West have largely been used to combat organised crime. However, when one considers that threatened witnesses are twice as likely not to cooperate in the criminal justice process,[48] it becomes clear that witnesses in other forms of criminality also require protection. In the US, for example, 50 per cent of victims of violent crime report fear of reprisal.[49]

At particular risk are women who have suffered from domestic or other violence. A 1978-82 US survey estimated that 32 per cent of 'battered women' were re-victimised within six months of the original assault, at an average of three times per victim. However, when victims were strangers to the offender, only 13 per cent of victims were assaulted in the subsequent six-month period.[50]

The fact that many female victims are often in a relationship with, and economically dependent on, the offender subjects them to greater risk. This risk again increases when a woman attempts to leave a relationship and participate in a criminal justice process.[51] A victim's interest in preventing further violence is not congruent with that of the state in punishing criminal behaviour. Victims may be seeking to maintain an amicable or even pre-offence relationship with the accused. Various communities and cultures may stigmatise or, through other prejudice, fail to endear victims to cooperation as witnesses. Witness-sensitive investigation, prosecution and adjudication, as well as a specialised entity to monitor these practices, can provide less costly local alternatives to formal protection.[52]

## WITNESS PROTECTION IN AFRICA

Witness protection is a recent and rare phenomenon in Africa. While countries such as Sierra Leone and Uganda tentatively consider the idea of witness protection, South Africa is the only African state with a formal protection programme. The only contemporary effort to create a domestic protection unit outside South Africa is ongoing in Kenya, where proposed amendments to enabling legislation were recently approved by parliament. Kenya has been encouraged to accelerate the founding of its protection unit for witnesses of the 2007-08 post-election violence under conditions agreed with the ICC.[53] Other than the South African and Kenyan cases, protection of witnesses in Africa has been a matter for the international criminal tribunals, including the ICC, ICTR and SCSL.

Literature on witness protection in Africa reflects the sparse nature of protective practice, and that which is available focuses on protection at the ICTR and in South Africa.[54] The literature is oriented towards the specific nature of criminality and the threat posed to those witnesses before the ICTR and domestic South African law courts. While the literature is broadly instructive as to these cases, a study of the structure and mandate of both functioning and proposed domestic and international law mechanisms to protect African witnesses has yet to be done. Instead, the literature commonly focuses on the practical obstacles as well as the tension between protective measures and the rights of the accused in Anglo-Saxon circumstances.

The Western framework for evaluating witness protection provides an inadequate lens through which to view current and potential African protection models. It assumes properly functioning state security and justice sector apparatus. Levels of capacity and independence found in Western justice systems are rarely, if ever, apparent in the African context. It also assumes the capacity of the state to fund expensive protective measures, such as identity change and permanent relocation, when required. Most importantly, normative witness protection theory fails to consider the diversity of criminality, particularly the extent of state criminal complicity, and thus the diversity and scale of the threat witnesses face, both real and imagined.

Witness protection best practice calls for a unit independent from the police and state prosecuting authorities in order to maintain objectivity, confidentiality, operational readiness and accountability.[55] The need for independence and capacity is greater in African states which suffer from widespread corruption. While independence facilitates greater capacity to maintain confidentiality, it can also impede accountability, which may lead to abuse of state resources by protection personnel. The need for internal checks and balances and highly classified internal audit procedures are therefore enhanced.

The elements of protection practice described above are all particularly resource intensive. The parsimonious nature of African state coffers often requires corners to be cut on even the most essential state services despite the long-term socioeconomic benefit their prudent provision might provide. Weighing the need for protective measures against the resources of the African state means that domestic protection programmes are even more likely to focus on criminality of the highest priority for the state law enforcement apparatus.

In this sense, protection units at the domestic level are broadly analogous to those attached to the international criminal tribunals in Africa. These





programmes all target a smaller number of cases, with the greatest focus on the proliferation of human rights abuse and organised criminality. They also share the preference for a smaller number of witnesses and, in particular, insider witnesses who are able to expose and decode the innermost workings of an armed militia or criminal enterprise.

The challenges inherent in using local security forces and state institutions for providing protection are also faced by domestic and international protection programmes. Were local security forces to withdraw cooperation due to fear of their own prosecution, political interference or other reasons, protective capacity would very quickly be diminished. The problem posed by witnesses providing evidence which incriminates those with control over the very mechanism established to protect them, is comparatively new to Western states.

The challenges facing protection programmes in Africa might require that low level offences of little political impact are targeted to begin with. This has not been an option for international criminal tribunals, which have had to deal with those bearing the greatest responsibility for the gravest of crimes, many of which have been committed at state level or with state support. Inadequate protection for witnesses in these circumstances can have disastrous affects. For example, a 1996 UN report found that 99 witnesses had been murdered by Hutu extremists as a consequence of their cooperation with the ICTR.[56] In other cases the protection unit has arguably served as a vehicle for manipulating justice outcomes in favour of the prosecution.[57] In South Africa, more localised organised criminal networks were targeted in the programme's infancy, compared to the larger and more sophisticated criminal networks of those targeted in the US or Europe.

The success of witness protection is largely dependent on ethical and proper investigative practice, the availability and effectiveness of judicial protection and the expediency of the investigative and judicial process. The ethical and efficient functioning of all justice sector entities is a prerequisite for the creation and operational success of a protection programme.

The justice system in many African states is arguably not yet at the point where investigative and judicial functions are operating so as not to impede, let alone complement, a formal protection mechanism. Domestic protective services therefore face greater obstacles, with lesser capacity than their European and American counterparts. Similar arguments could also be made about the international criminal tribunals, some of which (particularly the SCSL) have very limited capacity with which to provide protection. The diversity and magnitude of the threat witnesses face before these institutions is often just as, if not greater than

that experienced by witnesses in organised crime cases in the West. The sophistication and capacity of the threat posed, particularly to witnesses involved in war crimes trials or high profile corruption cases in Africa, are often far more advanced than the ability of an African state to address it.



Chapter Two

# International Criminal Court's Victims and Witnesses Unit: A mandate to protect all?

The ICC was established by the Rome Statute of 1998.[58] The court is currently pursuing cases relating to alleged offences in Sudan, Democratic Republic of the Congo ('the DRC', or 'the Congo'), Central African Republic (CAR) and Uganda. Assessing witness protection at the ICC is somewhat constrained by the fact that trials and investigations have only recently commenced. It is, however, the most prominent and arguably sophisticated example of protection of African witnesses.

Article 43(6) of the Rome Statute provides for the establishment of a Victims and Witnesses Unit (VWU) under the office of the registrar. It also criminalises corruptly influencing, obstructing, intimidating and tampering with a witness as offences against the administration of justice.[59] The VWU is novel compared to its predecessors in that it is established in the Rome Statute rather than included in the rules of evidence and procedure of the court.

The wide geographic mandate and unique structure of the ICC present challenges for witness protection. When the UN Security Council refers non-states parties, the court's jurisdiction extends to any country. Such potential case diversity poses great problems for the VWU. The unit is already dealing with a great diversity of witnesses, threats and security situations. Protection must be provided from governments, potentially sophisticated criminal enterprises and militia organisations. These entities have intelligence and other localised capabilities which can rarely be matched by a protection unit or investigative body.

Intimidation methods, such as witchcraft, are also deployed against suspected ICC collaborators. Protecting witnesses from diverse and often better capacitated threats is arguably the most ominous task given to any protection mechanism.

In terms of its structure, the court is distinguished from its peers in that it is established by a treaty and not a Security Council resolution or UN agreement. Its international character means that, without the cooperation of national authorities, it cannot compel witnesses to testify and even subpoena witnesses at all. The court's statute and rules have been criticised by some for favouring state sovereignty, thereby limiting its own future effectiveness.[60] Protective measures and the nature of engagement are therefore critical in establishing the willingness of witnesses to testify without crossing the line of inducement.

The court has engaged around 520 witnesses and has yet to lose a life, despite intimidation, which includes incidences when witnesses' homes have been broken into. However, the court's ability to protect witnesses could be more seriously tested as more witnesses, particularly insider witnesses, are engaged.

Nevertheless, important strides are being made at the ICC on witness-related matters with jurisprudence playing a central role in developing protective practice. Judges have played an aggressive and early role in interpreting the rules of procedure and evidence in the Rome Statute. Antagonisms between court organs, inherent within the statute, have required the intervention of the bench to define jurisdiction and methodology. Judicial intervention of this nature has been evident in witness-related matters. Contentious issues of protection have therefore been resolved in a more transparent manner. This has provided a forum in which many normative practices, adopted at other tribunals, have been rejected or amended after open debate on the merits of jurisdiction and practice. As a result, the ICC is the leading institution of protection in Africa as well as the leading forum for debate on witness-related matters.

Due to the ICC's prominent role in protecting African witnesses, many contentious elements of witness protection and their associated debates will be examined more closely in this chapter. The permanency of the ICC means that the court's practice, decisions and directions are more relevant to future witnesses than those of institutions whose proceedings will soon conclude. The ICC also adopts a policy of complementarity, whereby the court refrains from prosecution where fair criminal justice processes are satisfactorily carried out domestically in relation to crimes within its jurisdiction. Statements by the ICC prosecutor indicate that adequate witness protection mechanisms are required for a fair criminal justice process.[61] As a result, the ICC may encourage the creation of protection mechanisms in Africa in the future.





**An enhanced role for victims at the ICC**

Victims are provided a unique and active role in proceedings before the ICC. An office of public counsel and a trust fund for victims and their families have been set up as part of the court. The victims may select or be provided legal representatives, who may question witnesses and present the views and concerns of victims during trial.[62] The role of legal representatives and their relationship with the Victims and Witnesses Unit (VWU) provide novel opportunities and impediments to the protection of witnesses before the court.

The VWU's protective processes are closer to Western domestic models and best practice than those at other international tribunals. As such, the VWU is breaking new ground in the protection of African witnesses. The unit has attempted to sensitise other organs of the ICC to all aspects of witness and victim interaction with the court. It is hoped that improved consideration and practice will positively affect the more prominent role of victims and witnesses before the court.

Article 43(6) of the Rome Statute requires the VWU to provide protective measures and security arrangements, counselling and other appropriate assistance for 'victims who appear before the court' as well as associated 'others who are at risk on account of testimony by such witnesses'.[63] Initially the victims who the VWU was mandated to protect were narrowly defined. Trial Chamber I expanded the interpretation to include all victims who have submitted a court-received application to participate. The VWU, and not the prosecution, is provided with this responsibility with a caveat that recognises the enormous task of providing protection to all victims who have submitted applications.

The court cited the 'undoubted limitations' of the VWU's capacity to provide protective measures for victims that reflect those provided to witnesses.[64] Advocacy groups have sought increased VWU capacity to provide protective measures; however, this appears unlikely to occur.[65] VWU personnel do not foresee their office as having the capacity to fulfil such a broad mandate.

Non-testifying victims are, it must be said, less likely to be targeted than witnesses. Intermediaries, particularly informants, arguably suffer from a higher level of threat than victims. For example, human rights activists suspected of facilitating contact between witnesses and the court, or of being witnesses themselves, have been detained by the Sudanese state. Discrete investigative practice and redaction[66] of identifying information in court documents are required to protect the identities of intermediaries.

## LEGAL FRAMEWORK OF THE VWU

The ICC's establishment via international treaty holds two critical ramifications. The first is that it is not granted the authority to subpoena or compel witnesses to testify before it. The second is that it arguably derives greater legitimacy from the broad consensus of the 110 states parties to the Rome Statute, than the narrow mandate of the five permanent members and ten non-permanent members of the Security Council. Witnesses must therefore be convinced to testify by either the defence or prosecution investigators. The VWU facilitates testimony if somebody is already willing to cooperate, but it plays no persuasive role. The ICC can also request assistance from the state in which a witness resides or is domiciled,[67] and can seek obligatory assistance from states parties to facilitate voluntary appearance.[68]

The VWU nevertheless has greater prominence than the ICTY or ICTR in that, like the SCSL, it is created and mandated by the court's enabling document, the Rome Statute. It is the first tribunal of its kind to provide such prominence to a victims and witnesses mechanism. Article 43(6) of the Rome Statute states that:

> 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, counseling 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.

The statute also appears to provide sole witness protection responsibility to the VWU, which would consult the prosecution.[69] 'Consultation' is not practically





feasible in all cases. The prosecution would not, for example, be consulted about defence witnesses.

The rules of procedure and evidence elaborate on the role of the VWU. Rule 17 provides that the VWU shall provide protective measures to 'all witnesses, victims who appear before the Court and others who are at risk on account of testimony given'.[70] It also empowers the VWU to recommend protective measures to other organs of the court as well as relevant states. Rule 17 obligates the VWU to provide training to the court and parties in issues of trauma, sexual violence, security and confidentiality. The unit must also provide a code of conduct for investigating parties, as well as court-engaged inter-governmental and non-governmental organisations. Non-governmental organisations have been reluctant to engage in witness protection. However, the UN Mission in the DRC (MONUC) has been responsive on an ad hoc basis although it also refuses to obligate itself to assist the ICC in protecting witnesses.[71]

Rule 17 also governs the relationship between the VWU and witnesses' legal representatives by obligating the unit to advise witnesses on where they can obtain legal advice pertaining to their rights as witnesses or victims.[72] Rules 17, 18 and 19 also provide that gender, age, victim and disability-sensitive measures with respect to witnesses be taken. These rules also describe protective measures and assistance to be taken, the expertise of personnel and the impartiality of the unit from defence and prosecution.[73]

## FUNDING OF THE VWU

Due to the VWU's location in the registry, its budget is derived from the regular court budget. This differentiates the VWU from its predecessors in that its budget is guaranteed from the outset. The ICTY and ICTR had to rely to a great extent on voluntary contributions for the establishment of a victims and witnesses programme. The Rome Statute does allow voluntary contributions from governments, international organisations, corporations and other entities.[74] This provision applies to non-judicial VWU functions where court impartiality and independence must not be affected. This caveat to external funding sources protects court independence by preserving article 115, which establishes assessed contributions as only being from states parties and the UN.[75]

The VWU's budget covers staffing, travel, protective measures, consultation with other court organs and assistance. As the court exercises its jurisdiction in

new fields, its operating expenses increase. From 2004 to 2005, travel expenses more than doubled, while operating expenses increased by €800 000 as expansion occurred in Uganda, Chad and Sudan.[76] To allow the VWU to address new situations of which the nature and scale are impossible to predict, great financial flexibility will be required.

A challenge facing the VWU, which relates to resources, occurs when state or local partners do not have adequate capacity to provide protection, or when the latter's standard of psychosocial service is undermined by the number rather than the competency of personnel, particularly in unfamiliar territory. The use of a larger number of personnel, particularly those experienced with the threats posed to witnesses in new situations, is critical. Psychosocial staff unfamiliar with a new situation may not fully appreciate the sources and means of threatening and intimidating witnesses. This is especially likely when local beliefs such as witchcraft are used as methods of intimidation.

The above analysis only applies to the VWU's capacity to protect witnesses, not victims who apply to the trial chamber to participate in proceedings. If the VWU is to fulfil this expanded mandate, it requires greatly expanded capacity in terms of personnel, finance and diplomacy. The conciliatory tone of the judges in reference to the VWU's practical obligations suggests little is expected.[77] Witness assistance measures rather than witness protection might be more reflective of the financial commitment to meeting this obligation. Provision of psychosocial assistance for victims would likely require the use of local practitioners of which there are few in many areas suffering from conflict.

## PERSONNEL

### Experience and quality of staff

While other tribunals have enjoyed a narrow mandate which required expertise in a particular state or states, the ICC is presently working in, and will continue to work in, a diversity of states and conflict situations. This requires a diversity of expertise. Staff with logistical and methodological expertise should be able to adapt to different settings, but local intelligence and understanding of the historical and contemporary background of the threat posed to witnesses is critical to the functioning of the unit. In 2008, the VWU employed 38 permanent staff, including 13 psychosocial personnel and four temporary positions with 17





personnel in The Hague and 25 in the field. VWU personnel have now increased to 45.[78] Considering the wide range of situations and threats, the number of staff appears to be small compared to the ICTR or ICTY, which employed 29 and 23 personnel in 1999 respectively.[79]

Personnel from the office of the prosecutor and the VWU have cited inadequacies in early appointments by the investigations division of the office of the prosecutor. In many cases, preference was given to those with post-graduate qualifications ahead of those with policing and investigative backgrounds, leaving a dearth of investigatory experience. While this discrepancy has been redressed to some extent, there have been cases of insecurity in the field as a result. In these cases, the critical problem was the selection and engagement of witnesses during the beginning stages of an investigation. It was originally hoped that some investigations could be conducted from outside the country in which the alleged crimes had been committed, a position that has since been corrected. This policy saw some investigative personnel sent to the field without investigative experience. In one case, a French female investigator who had never been to Africa and had no investigative background was sent to Bunia in north-eastern DRC. Her conduct there placed witnesses as well as the investigative teams at risk.

Other sources of discontent within the investigations division have resulted from frustrations relating to the capability of other staff and the attitude of legal staff towards information provided by investigators.[80]

### Gratis staff and outsourcing

Under the Rome Statute, the court may only, in exceptional circumstances, employ gratis personnel offered by states parties, inter-governmental organisations or non-governmental organisations.[81] This caveat seeks to maintain the confidentiality of operations but might also restrict the capacity of the VWU in new situations. The VWU has not yet accepted such personnel but would only likely consider local partnerships in creating local measures and operating capability.

The limitations on using gratis personnel are circumvented through outsourcing. Outsourcing occurs for medical and other field-based assistance services provided to witnesses in the International Criminal Court Protection Programme (ICCPP) as well as those receiving such services who are not in the programme. The obligation to provide protection and the nature of protection provided for local medical partners is unclear. A greater disconnect between VWU

and local medical partners would preserve medical partners' security by keeping their cooperation with the ICC confidential. Providing self-protecting capacity for medical partners, or securing a protection arrangement with local security sector partners might provide some security. However, such an arrangement would be particularly vulnerable to breaches of confidentiality causing security risks to both medical partners and witnesses.

Where local partners are used for protective measures relating to security, local intelligence is of the utmost importance. The VWU uses local security sector partners to contact and extract witnesses from diverse locations facilitated via the prosecution or defence. Misinterpreting the threat to witnesses or the current or historical role local intermediaries have played politically, socially or militarily, could significantly increase the risk to witnesses. Flexibility of personnel and the ability to outsource are critical in the precarious environment in which international crimes occur. However, if local partners become hostile to the court, this would increase the threat to previously protected witnesses.

The ability of governments to protect persons has been problematic for the ICC prosecution investigators, who have allowed domestic authorities to protect witnesses on occasion. Investigators were satisfied with the Ugandan police force's assistance with the movement of witnesses and the provision of some protective measures. However, investigators did not feel they could trust the DRC police and armed forces due to the presence of former militia in their ranks. As a result some witnesses in the DRC were not interviewed because it has been too precarious to contact or move them.

The VWU has provided training to intermediaries on best practices so as to mitigate the security risk their conduct might pose. While this approach enhances local cooperation, long-term risks remain: in Uganda, for example, a new government with a hostile attitude to the ICC would increase the risk to witnesses previously protected by the Ugandan state. And even though the Ugandan armed forces currently have an interest in assisting ICC investigators, ethical questions remain about using local security forces who are widely alleged to have committed abuses themselves. These concerns can also create the impression that the court is partial and politically influenced in its prosecutorial policy.

## NATURE OF CRIMINALITY AND THREAT TO WITNESSES

By focusing on specific witness testimony linked to specific events, it is difficult for the prosecution to allocate sufficient resources to understanding the context





within which crimes are committed. However, a geopolitical and historical understanding of the situation is particularly important when considering the threat to witnesses and the protective measures to be adopted in response.

## Democratic Republic of the Congo

Conflict in the DRC has been perpetuated by manipulating local antagonisms for strategic gain by national, regional and global powers since the early 1990s. Over five million people have lost their lives as a result of the conflict. A 1993 deal brokered by then Congolese (Republic of Zaïre) President Mobuto Sese Seko and Rwandan President Juvenal Habyarimana provided territories in North Kivu province in the east to local, mainly Hutu, Banyarwanda with Rwandan connections. This caused the formation of local militia and thousands died in the ensuing clashes.[82]

This insecurity was exacerbated by the entry of refugees fleeing the Rwandan genocide, with many of the organisers and perpetrators among them, in 1994. The genocidaires who had fled Rwanda continued to kill both fleeing and local Tutsi in the DRC with support from the Congolese army and local militias who had adopted the anti-Tutsi ideology.[83] The post-genocide Tutsi-based Rwandan government supported local resistance to the killings in both North and South Kivu, which formed a 1996 Rwanda-backed rebellion against Mobutu, called the Alliance of Democratic Forces for the Liberation of Congo (AFDL). Its leader, Laurent Kabila, led the AFDL, funded and assisted by Uganda, Burundi and Rwanda, to Kinshasa and political power in May 1997, after dispersing local genocidaires in the east.

### North and South Kivu provinces

President Kabila's foreign sponsors were disappointed when, upon taking power, he appeased some Congolese elements harbouring anti-Tutsi sentiment. He allowed elements in the military to support former genocidaires and other local militia against local militia supported by his eastern neighbours. The main foreign-backed militia was the mainly Tutsi, Rally for Congolese Democracy (RCD), which the Rwandan government supported in attacks against the largest urban centres in the Kivu provinces in August 1998. A peace agreement was secured in 1999, but in 2001 Laurent Kabila was assassinated and replaced by his

son, Joseph. Low level hostilities with widespread abuse continued across the eastern DRC, in particular by the armed groups. Elections in 2006 exacerbated the violence as minority groups, including the RCD, fought against what they feared would be persecution upon seizure of power by the majority.

After Rwandan army elements of the RCD pulled out of the DRC, the RCD leader, Laurent Nkunda, founded the National Congress for the Defence of the People (CNDP), which continued, with Rwandan complicity, to fight against DRC armed forces and local anti-Tutsi militia groups. These groups continued to fight despite hopes that the capture of Laurent Nkunda, in January 2009, and the integration of many CNDP combatants into the DRC army, would bring security in the Kivus.[84]

Despite some of the most brutal conflict in the DRC and harrowing documentation of abuses,[85] North and South Kivu have seen the indictment by the ICC, in April 2008, of only one individual who had been prominent militarily in the provinces, Bosco Ntaganda.[86] However, Ntaganda's indictment was not for any crimes committed by the CNDP, of which he was military chief of staff; instead, he was indicted for his role in recruiting child soldiers in Ituri in 2002 and 2003 as the third in command of the Patriotic Force for Congolese Liberation (FPLC).[87]

## Province of Ituri

All ICC indictments of DRC cases, as well as the case of Central African Republic (CAR), stem from investigations carried out in Ituri province in 2002 and 2003, and just across the border from Ituri in CAR.

The former commander of the Forces patriotiques pour la libération du Congo (FPLC) and founder of the Union of Congolese Patriots (UPC), Thomas Lubanga Dyilo, was the first indictment released by the ICC. He has been charged for the crimes of enlisting, conscripting and using children under the age of 15 in active hostilities from July 2002 to December 2003.[88] Lubanga's FPLC and then UPC had been party to a conflict in Ituri, which had seen more than 50 000 people killed and over 500 000 forced to leave their homes in the four years leading to, and including, the years referred to in Lubanga's indictment.[89] The UPC, a group of mainly Hema ethnicity which fought other Lendu-aligned militia, was culpable for many of the killings as well as mass rape, mutilation and cannibalism.[90] Ethnic tensions between the two groups have been manipulated by Uganda, the DRC government and Rwanda for their own geopolitical interests.[91]





Since 2003, the security situation has improved. MONUC has engaged in disarmament, demobilisation, reintegration and sensitisation campaigns. The DRC and Ugandan governments have reached a tentative agreement on hostilities in Ituri and oil rights in Lake Albert. However, localised tensions remain. The suspicion between Lendu and Hema can easily be mobilised again for violent purposes, particularly when the prosecution of senior militia figures, viewed by some as ethnic protectors, is involved. In the Lubanga case, a prosecution decision to address crimes committed against Lendu would have required Lendu witnesses. This could easily have inflamed hostilities between the two groups by making suspicion about Lendu witness participation a mobilising element for Hema combatants. Certainly the risk, when mainly insider child combatant witnesses are used, is less inflammatory to those outside the regular combatant cadres.

The theory that a witness-sensitive prosecutorial policy was being pursued in Ituri was dispelled by the October 2007 disclosure of the indictment of Germain Katanga and Mathieu Ngudjolo Chui. Katanga and Ngudjolo were indicted for crimes of murder, causing grievous bodily harm to civilians, and sexual enslavement committed by the Force for Patriotic Resistance of Ituri (FRPI) and the Nationalist and Integrationist Front (FNI) under their respective command.[92] The indictment cites the crimes as being committed on or around 24 February 2003, in the Ituri village of Bogoro, as part of a directed campaign against persons of Hema ethnicity.[93] Prosecutorial policy in this case provided the location of crime-based witnesses in a province still suffering from insecurity and ethnic tension. The threat posed by FRPI and FNI combatants to residents of Bogoro, participating witnesses or otherwise, has been exaggerated by perceived participation in the prosecution of the accused militia.

## Threat to witnesses in other insecure parts of DRC

Threats to witnesses in the DRC are diverse because they emanate not just from those against whom witnesses are testifying. While Germain Katanga or Thomas Lubanga might be in custody, others who might be engaged in conflict elsewhere in the DRC but have also committed abuses would have an interest in impeding a Katanga or Lubanga prosecution. Preventing witnesses from testifying in another Congolese case would delay proceedings. It would also, therefore, delay potential future proceedings against the intimidating party, who is unsure of the threat posed to himself by the ICC. However, threats of this extent have not been

generally substantiated or have emanated from events which have been disproportionately interpreted in favour of the existence of threats.

The threats, like threats elsewhere, increase between indictment and testimony. While an increase in the number of threats was recorded by Human Rights Watch following the confirmation of charges against Lubanga, it did not reflect the intelligence of the VWU.[94]

### Linking Jean-Pierre Bemba to crimes in CAR

The court has also indicted Jean-Pierre Bemba for the crimes of rape, torture, outrages against human dignity and pillaging, carried out by the Movement for the Liberation of the Congo (MLC) between October 2002 and March 2003 under Bemba's leadership.[95] The MLC is a Banyamulenge or Tutsi-based group which sided with the then president of CAR, Ange Félix Patassé, against his former armed forces chief of staff, François Bozizé, who was trying to remove him from power. Bemba lost the 2006 presidential election in a run-off to the current president, Joseph Kabila. Bemba disputed the result, causing instability which culminated in armed clashes between his security personnel and Congolese security forces around the capital after Bemba won the senate seat for Kinshasa. He left the DRC for Portugal and refused to return, citing security concerns. Bemba was arrested in May 2008 in Brussels after an arrest warrant was released.

The threat to witnesses in CAR is difficult to decipher due to the ambiguity about the influence indictees still wield over militia members across the border in the DRC. The extent to which indictees have been isolated from their subordinates affects the extent of the threat.

The threat to insider witnesses in the case against Bemba was made clear in late August 2009. Unidentified persons fired bullets at the houses of the Congolese foreign minister, Alexis Tambwe Mwamba, and the environment minister, Jose Endundo.[96] Envelopes containing a bullet and a letter stating, 'If you testify against Bemba, you're dead,' were left at the scene.[97] The two ministers are both formerly of the Bemba-led MLC but are now commonly viewed as being aligned to Bemba's rival, President Kabila. This incident indicates a clear preference for intimidating more easily identified insider witnesses as opposed to crime-based witnesses.

## Uganda

The ICC has indicted Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya, who form the leadership of the Lord's Resistance Army (LRA). The ICC has been accused of bias and exacerbating violence as well as the threat to witnesses in Uganda.[98]

ICC investigators have used many child-soldier witnesses,[99] who corroborated the design and implementation of crimes at the orders of the accused, including killing, rape, torture, enslavement and abduction.[100] The locations of the crimes, as well as references to the months in which they were committed, have been redacted from the indictments.[101] Redactions were made to protect witnesses by only disclosing that attacks were ordered on camps for internally displaced persons in 2002 and 2003.[102] This makes it difficult for the accused and other LRA combatants to ascertain which specific attacks the prosecutor has targeted for prosecution. It means that LRA combatants still in Uganda cannot be deployed against particular villages or camps to attack persons they perceive as affiliated with those who are cooperating with the court – a possibility many Ugandans perceive as likely. Ugandans have observed that to testify would cause their own families and entire communities to be targeted by rebels.[103] Those in LRA custody now are likely endangered by the existence of the ICC investigations and prosecutions due to LRA concerns that they might testify in the future.

Armed conflict in northern Uganda concluded several years ago with the majority of the active LRA combatant cadres moving to the DRC and, recently, to CAR. This diminishes the threat to witnesses because the LRA now rarely enters Ugandan territory. A policy of non-disclosure of the locations and dates of alleged incidents to be prosecuted mitigates against such threats, were the LRA to return, a possibility that continues to traumatise many in northern Uganda. But these threats are only mitigated to a certain extent. Hostile combatant and civilian elements remain in northern Uganda. Many grievances of ordinary Ugandans in the north remain, and many are inadequately addressed in the Juba peace protocols. Northerners see them as heavily favouring the government and as inadequately addressed by the Ugandan government.[104] As a consequence of this and the government's role in soliciting ICC investigations, many northerners see the ICC as an instrument manipulated against them by government, or as the foreign imposition of unwanted retributive justice instead of reconciliation. A threat therefore remains for witnesses in the north were their cooperation with the ICC to be disclosed to ordinary northerners hostile towards the court.

The removal of a large majority of LRA combatant cadres into the DRC has also diminished the threat to witnesses in Uganda. Were investigations into abuses committed by the Ugandan People's Defence Forces (UPDF) to occur, all

cooperation from the government would likely cease. The security situation for witnesses of crimes committed by both the LRA and the UPDF would likely be diminished by ICC investigations as a consequence of witnesses' mere association with the court. Such a consequence will impede ICC pursuit of the UPDF, despite their citation of non-governmental organisations on the ground as a viable alternative conduit to the Ugandan government. Government military forces have told some witnesses they would not be welcome in Uganda if they cooperated with the ICC against the UPDF.[105]

Cooperation from the Ugandan government in protecting witnesses is a critical mitigating element of the threat posed to witnesses of abuses committed by the LRA. Unlike the DRC, dealing with only two parties in Uganda's conflict and, therefore, fewer variables, has assisted the ICC's assessment of the threat. In northern Uganda, selling a witness the idea that they and their families will be safe is impossible until such time as they are confident of state cooperation rather than threat.

However, state cooperation has become precarious over the previous 18 months after Ugandan President Yoweri Museveni stated that he would not hand over LRA rebel leaders to the ICC.[106] His stance indicates a Ugandan state preference for a deal with the Acholi and, hence, a peace agreement with the LRA ahead of ICC prosecutions. This places witnesses under protection from the ICC and the Ugandan state in a risky situation. Were a peace agreement to be reached, the LRA might attempt to procure the identities and whereabouts of protected witnesses. ICC personnel would be reliant upon Ugandan cooperation to return protection to the VWU under such circumstances. The uncertainty for witnesses with regards to a peace agreement, and the apparent vulnerability of the ICC process, leave Ugandan witnesses' security and psychological wellbeing particularly vulnerable. The VWU needs to exercise total protective control over witnesses, independent of the Ugandan state.

## Darfur, Sudan

On 27 April 2007 the ICC released an indictment for the arrest of former minister of the interior, Ahmed Harrun, and Ali Kushayb, a former Janjaweed commander.[107] The prosecution alleges that the accused are responsible, among others, for crimes of murder, rape, forced displacement and destruction of property, committed by the Sudanese Armed Forces and the Janjaweed militia





against the Fur, Zagawa and Masalit populations, between August and December 2003.[108] On 4 March 2009 the ICC indicted Sudan President Omar al-Bashir for crimes of murder, extermination, forcible transfer, torture and rape.[109] Counts of genocide against Bashir were originally dismissed by the pre-trial chamber before the appeals chamber requested it to reconsider this decision.[110] On 18 May 2009 Bahr Idriss Abu Garda, of the Justice and Equality Movement (JEM), first appeared before the court on charges of murder, attacking peacekeepers and pillaging allegedly committed in late September 2007.[111] The ICC Pre-trial Chamber I declined to confirm charges against Abu Garda, citing insufficient evidence to establish substantial grounds to hold Abu Garda criminally responsible either as a direct or indirect co-perpetrator.[112]

Abu Garda's JEM has been engaged in conflict with the Sudanese armed forces and government-backed Arab Janjaweed militia. Since then hundreds of thousands of people are believed to have lost their lives, with vast numbers also raped and tortured and over two million believed to have been displaced. The conflict has often been cited as an outcome of ethnic cleavages. Some authors suggest these cleavages were historically hardened by British administrative policy and demographic pressures on land and water supply.[113] The security situation remains tenuous in Darfur despite the acceptance of an AU-UN hybrid force (referred to by its acronym, UNAMID) to replace the AU force in June 2007.

The decision by the prosecution not to conduct investigations within Sudan has proved a prudent one. This decision was queried in submissions to the pre-trial chamber by former chairperson of the UN International Commission of Inquiry on Darfur, Sudan, Antonio Cassese, as well as UN High Commissioner for Human Rights, Louise Arbour. Cassese suggested that:

> … the Prosecutor could ask the Sudanese authorities to provide a military or police escort to ICC investigators who go to IDP (Internally Displaced Persons) camps, or to small towns or villages in Darfur designated by the Prosecutor.[114]

Such practice would have alerted authorities to the identity of witnesses as well as their community. This would greatly endanger persons in these locations, regardless of their cooperation with the ICC. Arbour, in relation to the non-punitive inquiry of Cassese in which her office assisted, suggested that:

> The empirical experience has been that retaliation against victims for interacting with the international community, which has at times been suffered, has taken the form of arbitrary arrest and detention and, to a lesser extent, certain forms of physical ill-treatment, but has not extended to loss of life.[115]

Arbour then went on to call for 'an increased visible presence of the International Criminal Court in Sudan'.[116] Such a move would have made ICC personnel and perceived local collaborators potential targets. The Sudanese state has vastly disproportionate capacity to monitor an ICC operation within Sudan compared to its investigative capacity to conduct operations covertly. This is evidenced by the state's decision, after the ICC arrest warrant for Bashir was confirmed, to expel non-governmental organisations which had been cooperating with ICC investigators, and detain many human rights defenders suspected of assisting the investigators.

One of the accused sought by the ICC is a former minister of the interior who had previously been head of the Darfur security desk, which included the police, armed forces, national security and intelligence service and the Janjaweed militia.[117] Another accused is the present head of state who allegedly 'held full control of all branches of the apparatus of the State of Sudan'.[118] An assumption by the ICC that these individuals would not use the state's security and intelligence apparatus to expose witnesses who were participating with the ICC, would have amounted to negligence towards the wellbeing of witnesses.

Greater access to witnesses and a permanent ICC presence in Sudan might prompt witnesses to contact investigators outside secure channels and so expose their cooperation. This would create a security problem for the witness, the witness's family and broader community. A permanent presence would also heighten suspicion and place investigative personnel in harm's way because rapid changes in the security situation can potentially occur. The security implication of a permanent investigating presence is common to all situations under ICC investigation. Investigators should make a point of explaining to witnesses the rationale behind the strategy of short investigative missions.

The prosecution has been fortunate to be able to focus on crime-based witnesses who now have refugee status elsewhere. The threat to crime-based witnesses is low in all of the aforementioned states except Chad, where militias affiliated with the government are still active.

The pre-trial chamber has failed to consult persons familiar with threat assessment, the level of risk and witness protection generally when seeking advice





on investigative policy. Advocacy groups such as Human Rights Watch have also called for a permanent presence for investigative staff in the field. Human Rights Watch concludes that a more permanent focal point for victims and witnesses in the field would provide a more consistent and accessible source for their concerns. This has witnesses' interests at heart but fails to adequately consider the security implications of greater access and visibility.[119]

## THE ROLE OF INVESTIGATIONS

### Prior to initiating investigations

Before investigations are initiated the prosecution sends 'flying teams' to assess, in consultation with the VWU, the risks that an investigation might pose to witnesses. Information is collected about the potential area of operation, the movements of suspects and their affiliates through the area, and their capacity to threaten witnesses. The prosecution then sets up a mitigation strategy, which, if deemed insufficient, results in a decision not to deploy in the examined area. There have been rare occasions when a valuable witness has been particularly enthusiastic about testifying, despite the explained threat, and has been allowed to do so.

The ICC prosecutorial policy is geared towards mitigating the threats to witnesses by focusing on those most responsible for a few key incidents. The prosecution hopes to require only a small number of witnesses, usually between 20 or 30, for each case. This allows for more exhaustive threat assessments because they focus on a smaller number of witnesses. Investigators also conduct short investigative missions, making interference more difficult and maintenance of integrity and secrecy more probable than if a permanent presence were deployed. The flying teams do much of their analytical and familiarisation work prior to deployment in the field. The policy of sending flying teams weighs the potential for discretion provided by short missions heavily against the benefit of a more permanent presence and localised intelligence.

'Foreseeable risk' is used as the threshold for assessing the threats to witnesses. It ascertains whether, given all the prosecution knows about a suspect, the threat is likely to occur. The prosecution considers the circumstances of the witness and the nature and capacity of the threat. When the identity of a witness is disclosed to the defence and not to the public (that is, when a pseudonym is used in court but

the identity of the witness is disclosed to the defence), a threat to the witness should ordinarily be substantiated before further protective measures are taken, including admission to the ICCPP. When a witness's identity has been fully disclosed to the public, a threat to the witness may be assumed. Information from local and international partners, as well as the witnesses themselves, helps inform the security and threat assessment.

A narrow focus by the prosecution also allows refugee communities outside potentially insecure areas where abuses have occurred to be sourced as witnesses. After initial contact, the security risk is re-evaluated at least once a year or when there is a significant advance in judicial proceedings.

In the initial stages non-governmental organisations, displaced communities, inter-governmental organisations, hospitals and other sources provide a list of potential witnesses. These names are cross-referenced with specific incidents and the list of names is then shortened and provided to analysts for further screening.

## Contacting witnesses

The Rome Statute provides the witness-oriented parameters within which investigations must be conducted.[120] It prohibits any form of coercion, duress, threat or arbitrary arrest or detention. The statute also requires investigators to inform witnesses of: the provision of an interpreter, their right to remain silent, the provision of legal assistance, and when there are grounds to believe a person has committed a crime. While article 55 is helpful in preventing the procurement of information from witnesses through coercion, there is little in the statute or rules of procedure and evidence to ensure investigators assess the security situation before deciding to contact a witness.

The VWU, in compliance with rule 17(2)(v) of the rules of procedure and evidence, has provided codes of conduct to investigators at the office of the prosecutor, albeit after some investigations had commenced. The codes of conduct cover investigative best practice in the security, confidentiality and psychological wellbeing of witnesses. Codes of conduct have been established with all court organs that come into contact with witnesses.

The code of conduct ensures that investigators obtain psychosocial assessment and approval of child witnesses, as well as sexual or gender-based violence victims before contacting them. Both the VWU and the prosecutor's Gender and Children Unit have personnel in the field to conduct assessments. Psychosocial personnel





will also conduct an evaluation of other witnesses' capacity to testify and endure protective measures. These assessments inform the protective measures that the prosecutor might implement or request from the VWU.

In some cases, investigators working in the DRC and along the border between Chad and Sudan, have failed to adequately assess the risks associated with: making contact, the place of contact, the method of contact used or the protective measures deployed. The place, time and date of meetings may be removed from witness statements when provided to the defence if the court finds that the danger posed by disclosure outweighs the right to a fair trial.[121]

The VWU does not have any role in the initial contacting of witnesses by investigators other than to provide best-practice guidelines, monitor practice and liaise with investigators. Investigative practice has been to make a security assessment upon first meeting with the witness, which also serves to indicate whether the witness will be of evidentiary use. Investigators then investigate the place and nature of the circumstances where the witness resides, as well as the number of people who depend on the witness. Basic security measures that might be deployed, including a potential alibi, are also discussed with the witness.

One of the greatest perceived threats for insider witnesses is the threat of self-incrimination and potential arrest, by either the ICC or domestic security forces. By testifying against an accused, an accomplice would hope to either avoid prosecution or significantly mitigate the likely sentence were the witness not to testify. The ICC has no mechanism to address the culpability of witnesses who have also committed grave crimes. They are likely to be at greatest risk, yet are the most difficult to relocate due to the reluctance of states to receive, for example, a militia leader who ordered mass executions to assume a new life in their territory.

The prosecution has taken great care to assure insider witnesses that they will not be pursued by the ICC. Emphasising that only those at the very top will be prosecuted has helped to isolate indictees in many cases, and facilitate greater insider-witness cooperation. This is particularly the case with middle-ranking officers who are commonly given guarantees that the ICC will not prosecute them. However, no guarantee is provided as to their liability before domestic courts, or that they will not be returned to these states after testimony.

Insider witnesses, particularly military officers and government officials, are often met outside the states in which crimes have been committed, if they still reside there. European states commonly cite avoidance of asylum claims and an obligation to prosecute culpable witnesses to justify non-cooperation in accepting

witness relocation. The prosecution has only encountered one instance in which a witness claimed asylum unsuccessfully.

VWU personnel also have concerns about investigators' focus on how quickly they can contact witnesses rather than the security and psychological wellbeing of witnesses. Human Rights Watch observers have found that local populations are generally aware of the identities of ICC investigators.[122] This means particular vigilance is required to ensure witness anonymity when meetings are arranged. Investigators have temporarily extracted witnesses from refugee camps or communities outside a witness's ordinary routine using local intermediaries, particularly in Bunia in the DRC. While actual discussions and contact with investigators from the office of the prosecutor might take place in an environment where witnesses cannot be seen, greater emphasis on discretion in contacting witnesses is required to sufficiently mitigate the security risk of contact.

The VWU provided investigators with best-practice guidelines for contacting and maintaining contact with crime-based witnesses. The guidelines instruct investigators to await routine witness departure from his or her place of residence to avoid suspicion. Such routine departures include trips to gain medical attention or to trade. This allows investigators to contact witnesses confidentially without raising suspicion. Investigators from the office of the prosecutor have at times neglected localised measures such as these. A small minority of personnel in investigations in Bunia in the DRC, for example, continued to contact witnesses as and when required, rather than following recommended best practice. While the physical security of witnesses might not always be immediately undermined, such actions affect a witness's psychological wellbeing, his/her ability to provide genuine testimony and his/her freedom to choose to cooperate with investigators.

## Handing jurisdiction to the VWU

As a result of statutory ambiguities it is unclear when investigators should hand over a witness to the VWU. Regulation 80 of the registry appears to provide sole protective power to the VWU. It states that:

> In order to receive services provided by the Registry, the Prosecutor and counsel shall complete a form requesting the provision of services. … Services such as relocation, accompanying support persons, dependent care, extraordinary allowances for lost earnings and clothing allowances shall be provided on a case-by-case basis, in accordance with an assessment made by the Registry.[123]





Article 68(1) of the Rome Statute, however, purportedly provides protective power to the office of the prosecutor. It empowers the prosecutor to take measures to protect witnesses, particularly during investigations and prosecution.[124] However, article 68(1) also states that 'these measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. The second section of article 68(1) appears to provide a caveat intended to ensure that a decision to preventively relocate, and perhaps provide material benefit to a witness, is made in an impartial and objective manner. To what extent the second section of article 68(1) tempers the jurisdiction of the prosecutor in relation to preventive relocation and other protective measures is the point of contention.

This question is further complicated by article 54(3)(f), which empowers the prosecutor to 'take necessary measures, or request that necessary measures be taken'.[125] The pre-trial chamber is also provided with discretion to protect witness privacy.[126]

In practice, there are two scenarios that require custody of a witness to be provided to the VWU. The first is when a person has been accepted to the ICCPP. The second is when a witness has been handed over for the purpose of travelling to court and preparing for trial. However, the VWU is already in the field at the investigative stage, gathering intelligence relating to the threat. When relocation is required at this early stage, the VWU takes over rather than allow prosecution investigators to perform this task. The VWU is also mandated to provide psychological and social assistance to victims, witnesses and their families in the early stages of investigation.[127]

Whether the registry is obliged to act upon a request from the prosecutor, and, if it does not, whether the prosecutor is empowered to unilaterally relocate a witness in the short-term, is a point of contention between the VWU and the prosecutor. 'Preventive relocation' is a provisional, non-permanent measure taken by the prosecutor after determining that a witness is at risk. The witness is relocated despite relocation having been rejected as a protective measure by the registrar after assessment of the risk by the VWU.[128]

This has led to perceptions in the VWU that the prosecutor sees the unit as a mere implementer of prosecution decisions. VWU personnel believe that the prosecution underestimates the enormous impact of relocation on a witness' psychological wellbeing. According to the VWU, all court organs should engage in quality witness-oriented practice so as to assure anonymity and avoid the need for relocation. However, the prosecutor's office has contended that the VWU grossly underestimates levels of threat.

**'Preventive relocation' by the office of the prosecutor**

The debate surrounding preventive relocation was illuminated by the relocation of witnesses by the prosecutor from a refugee camp in Chad near the border with Sudan. According to the prosecution, the security threat in the area was sufficient to warrant their relocation. The VWU countered that the intelligence used to reach this decision was unsound and that relocation was unnecessary. The methodology of prosecution extraction itself aroused suspicion, requiring witnesses to be admitted to the ICCPP as a result.

A similar scenario occurred when two witnesses in the case against Germain Katanga and Mathieu Ngudjolo of the DRC were removed by the prosecutor's office against the advice of the VWU.[129] An 'unnecessarily created and increased risk' was caused to the witnesses by this action.[130] The VWU could not repatriate the witnesses because of the risk created by the prosecution's preventive relocation,[131] and they had to be permanently relocated as a result. The psychological effect on the witness of permanent relocation in such circumstances can be detrimental. It requires a great deal of psychosocial engagement and acculturation in order to fit into a new environment and deal with potentially increased threats to those left behind.[132]

The VWU prefers discrete investigation, disclosure to the defence, public anonymity and voice and face distortion to be adopted in circumstances such as those outlined in the box above. This allows witnesses to return to their ordinary lives without the trauma of relocation away from the witness's community. These measures also provide the least intrusion from the court. Only when the witness's identity is publicly exposed and there is a real risk of harm or death is relocation considered proportionate to the extent of the risk.

After continued friction between the VWU and the prosecutor, the issue of jurisdiction over witnesses within the court was brought to the attention of the appeals chamber after the pre-trial chamber had exercised its jurisdiction under article 57(3)(c) to rule in favour of the VWU holding sole discretion over relocation measures.[133] The prosecutor argued that there are situations in which he must act immediately to provide protection, and that the time taken for independent assessment by the VWU could leave the witness in a precarious security situation.[134] But the registry maintained that the initial response system deployed in such cases by the VWU enables the court to extract witnesses who might be immediately targeted while assessments occur.[135]





In such emergency situations, the VWU uses local security sector partners to assist a witness to move to a new location in response to a call to an emergency hotline. Witnesses are therefore extracted as the first step with the help of local partners who do not know the identities of the witnesses. The partners are only given their description at the time they move to extract them. VWU personnel then assess the need for relocation or other protective measures. The prosecution contends that the VWU is not sufficiently capacitated to provide immediate assistance, particularly in environments where road travel is difficult and communications unreliable.

To further make its case, the registry argued that when witnesses are not preventively relocated, the VWU considers other protective measures that are proportionate to the risk faced by the witness. The VWU maintains that if the prosecution investigators follow best practice when contacting and maintaining contact with witnesses, then, witness anonymity will largely be maintained and the threat mitigated. This means relocation through the ICCPP would only be recommended with circumspection. The prosecutor argued 'that witnesses will often not give statements or cooperate unless the prosecutor can guarantee appropriate protection'.[136] According to the VWU, the decision about the 'appropriateness' of protection should be taken by the unit rather than the witness or the prosecution because the prosecution's own interest in a skewed outcome compromises its ability to remain objective.

Counsel for Katanga highlighted 'the tension between the decision not to relocate and the prosecutor's objectives' in that the prosecutor had requested relocation for nearly all of its witnesses in the case against Katanga.[137] This position was supported by the registrar, who submitted that relocation was a measure of last resort and should only be adopted when measures to limit the exposure of the witness to threats and other responses were inadequate.[138]

Counsel submitted that only the VWU was positioned to make a judgment about the threat and required protective methods independent of prosecutorial interest in soliciting favourable testimony.[139] This view was supported by the registry, which submitted that the VWU would adhere to principles of neutrality while acting only upon request and with the consent of the beneficiary.[140] The registry argued that 'assessment by VWU protects the parties from allegations of unduly influencing, inducing or rewarding the witnesses for their testimony'.[141] The appeals chamber also found that the location of the VWU within the registry had been deliberately adopted to provide sufficient neutrality.[142]

Katanga's counsel further submitted that preventive relocation be treated as distinct from other protective measures because it deprives the defence of a source of information.[143] Counsel for Katanga also raised the issue of equality of arms, citing the parallel protection by the prosecution[144] as not similarly available to threatened defence witnesses who are fully reliant on the VWU.[145]

The appeals chamber found that the prosecutor cannot unilaterally preventively relocate a witness before or after a registrar's decision as to whether a witness should be relocated.[146] It found that responsibility for relocating witnesses should be assigned to the VWU to ensure that witnesses for both parties are treated equally by those with relevant expertise in matters that will significantly affect their interests.[147] However, the chamber noted the obligation of the VWU to, in accordance with rule 18(b), recognise the interests of, and cooperate with, the parties.[148] It further found that when there is disagreement between the VWU and the prosecution or defence, parties may appeal to the chamber, which shall be the final arbiter of a witness's relocation.[149]

When there is an emergency situation, the appeals chamber ruled that the prosecutor may request the VWU to take a temporary emergency measure (an initial response system) to protect a witness while the overall application for relocation is under construction.[150]

It is significant, however, that the judgment in favour of the registry outlined in the Katanga case above is bound to the protective measure of relocation only. The appeals chamber found that the prosecutor has a more general mandate to provide protective measures, which might be expected to arise on a day-to-day basis during the course of an investigation or prosecution.[151] This caveat gives effect to measures the prosecutor can take under articles 68(1) and 54(3)(f). The judgment appears to infer that only relocation is potentially of enough benefit to a witness to constitute an inducement that compromises the rights of the accused and a fair and impartial trial.

While the judgment of the ICC appeals chamber is the most progressive handed down by an international criminal tribunal on this issue, it was in the end bound by articles in the Rome Statute which unnecessarily facilitate day-to-day provision of protection by the prosecution. This allows for a raft of measures which, for vulnerable and poor witnesses in particular, could be used for or perceived as inducement.





**Tensions between the VWU and the office of the prosecutor**

The friction between the office of the prosecutor and the VWU relating to practice and jurisdiction has had positive outcomes in terms of the more progressive jurisprudence on the assessment and treatment of witnesses. However, it has also caused investigation personnel in both the office of the prosecutor and the VWU to leave their posts. The perception among prosecution staff is that the VWU is belligerent; the VWU in turn views the office of the prosecutor as intolerant of critical thought.

Communication between the VWU and the office of the prosecutor has not always been forthright, with the result that the prosecution exercises jurisdiction over witnesses longer than the court believes is reasonable.[152] Delays in transfer pose a threat to witnesses admitted late to the ICCPP, who remain in a potentially insecure location unnecessarily. Disclosure to the defence is also delayed, which undermines its ability to prepare and the right to trial.[153]

Ambiguity about the protection roles of the VWU and the prosecution inherent in the statute and rules of procedure and evidence has lead to tensions that have not always been constructive. Further jurisprudence is required in order to clearly delineate jurisdiction over protective measures. At present the VWU is only responsible for witnesses admitted to the ICCPP with an advisory function as to protective measures taken by the prosecutor as well as witness-related issues for all organs of the court. Court entities need to be more accepting of VWU recommendations about the most appropriate measures for witnesses based on witnesses' individual circumstances and not on their information value. A memorandum of understanding which clearly outlines the jurisdiction and function of both the prosecution and the VWU as well as methods of cooperation would serve the interests of witnesses as well as the interests of justice. Once agreed the memorandum could be brought before the pre-trial chamber to test its compliance with the statute and rules.

## Office of the prosecutor protection measures

Articles 68(1) and 54(3)(f) of the Rome Statute have been interpreted as removing potential restraint on non-relocation protective measures by the prosecution. This is reinforced by article 68(4), which empowers the registry to advise the prosecution on protective measures.[154]

Some VWU personnel and the defence are concerned that prosecution practices will solicit testimony. When a financial windfall occurs for a witness, it is

very difficult to convince them to maintain discretion in their spending. When a witness experiences a dramatic change in lifestyle, suspicion is created among local communities. This may cause security problems for the witness and the community in which they reside. Some VWU personnel believe the only way to avoid such circumstances is to literally return the witness in the same clothes with the same possessions he/she had prior to court contact. There are real humanitarian problems with such a stance as some witnesses might be sourced from particularly vulnerable situations, such as refugee camps. Upon receipt of witnesses, the VWU informs them that any promises made by the prosecution are null and void. The ICC provides smaller allowances than other tribunals and the unit has had difficulty with witnesses who were allegedly made promises of support by the prosecution in excess of that provided by the VWU.

Witnesses commonly claim to have been promised increased living standards, including relocation to Europe. When the ICC works with friendly governments, the state may be requested to provide protective measures for high level military or government witnesses. Many European states have been reluctant to accept such witnesses.

Other localised protection programmes are also engaged. In Bangui, in CAR, neighbourhood watch programmes have been put in place to mitigate threats to the general population who fear reprisals from affiliates of indictee Jean-Pierre Bemba. Both local citizens and police officers participate in the neighbourhood patrols. The challenge is to ensure that the neighbourhood watch functions within the law and does not take advantage of its own role.

### Protection for defence witnesses

The Rome Statute assures an equal opportunity for both sides to seek approval of measures from the VWU.[155] However, the defence is not, like the prosecution, mandated to undertake protective measures by the statute.

While not comparable to the threat posed to prosecution witnesses, there may be a very real threat to some defence witnesses particularly in Uganda and the DRC where defendants are often hostile towards the state. Defence investigations also coincide with pre-trial litigation and discovery of evidence.[156] The threat from agents of the state, victims' groups and, in some cases, hostile elements of the accused's own organisation, can be just as serious as threats posed to those testifying for the prosecution.





The defence counsel lacks the military and forensic specialists available to the prosecution and enjoys less cooperation from states unless the indictees are government personnel, as is the case with Sudan. The defence is thus in a difficult situation; funding is provided for 90 days' work by a professional investigator and an assistant (or US$110 553).[157] As information comes to light the defence must maintain flexibility, a difficult task with limited capacity in environments where travel and communication are expensive and time-consuming. Defence counsel may also be faced with an absence of cooperation from non-governmental organisations. This stems from the contempt with which the accused might be held, and the history of some organisations in advocating for persons to be brought to justice.

## VWU PRE-TESTIMONY PROTECTIVE AND PREPARATORY MEASURES

### Referral

The ICCPP refers to protective relocation of a witness undertaken by the VWU. Witnesses in the programme may also be provided with other services, such as allowances, and child and dependant care.[158] In order to be assessed for provision of these services the prosecution or defence counsel must apply on the witness's behalf.[159]

### Extraction of witnesses

Immediate relocation through an initial response system is triggered when the VWU concludes, based on adequate information, that there is an imminent threat to the witness. There have been occasions when the office of the prosecutor has requested that an initial response system be triggered but its use has not been merited in the opinion of the VWU.

The initial response system is only used for emergency extraction and is not indicative of admission to the ICCPP. The system is staffed by local partners who are well remunerated personnel from the security sector or have previous security sector experience. They are not informed of the identity of the persons they are relocating or why they are being relocated. Instead they are simply provided with the details of the point of collection and delivery. Once witnesses have been

extracted, a threat assessment is conducted to determine admission to the programme.

## Threat assessment

The VWU threat assessment is conducted independently of the prosecution or defence before proportional protective measures are applied. The VWU is often placed in a difficult situation when assessing the level of risk. A national or localised security sector has much more information on which to base its assessments. Although counsel may be asked to provide information, state sources are not necessarily used because of the politicised nature of the information provided.

The witnesses may be scattered in various countries, and it may be difficult to reach them or to persuade them to travel to the court. Likewise, relevant documents, particularly those coming from the military, may not be available or are withheld by national authorities, who often cite problems of national security. When these states are parties to the Rome Statute, they are obligated to cooperate on matters of information and document sharing.[160] However, the court has no enforcement means available if a state where a witness lives, a state where other relevant evidence could be found, or a state to which an indictee has absconded, refuses to cooperate.

Prosecution and defence information is not used by the VWU when assessing witness interests so as to ensure assessments are independent. Instead VWU personnel on the ground develop their own local sources. The quality of local staff is critical in this respect and differs across the various states in which the ICC functions. As a result threats are often difficult to substantiate independently.

It commonly takes two months for a threat assessment to be made, which can be psychologically burdensome for a witness. Temporary relocation after extraction by the initial response system only removes the security threat to the witness in the short-term, the uncertainty of which can be particularly unsettling.

## Criteria for admission

The trial chamber found the criteria for admission to the ICCPP to be met if, following careful investigation, the witness is exposed to an evidence-based danger of harm or death.[161] After disagreement about the nature and application of criteria for admission, the trial chamber found that the 'harm' might include 'physical as well as psychological harm, and evidence of intimidation – depending on the circumstances – may be powerful evidence of the existence of a danger of harm'.[162] The trial chamber found that the VWU's decisions on the cases in dispute conformed to this criteria.[163]





## Total protective custody

Prior to witness testimony, relocation – even temporary relocation – is avoided in order to have the least impact on the wellbeing of the witness. Defence counsel hopes that relocation will facilitate full testimony in open court, thereby avoiding anonymity and closed sessions which undermine public scrutiny. Witnesses who are admitted and relocated are required to sign a memorandum of understanding. This includes normative requirements such as non-disclosure of the programme and communication with family and friends through VWU staff only.

## Temporary relocation

Temporary relocation is sometimes required prior to testimony. The VWU tries to limit use of this measure to protect others in the witnesses community who might be endangered by association with the extracted witness. At the initial stages of the ICC's operations the decision to relocate witnesses was pressed by the prosecution and the impact on the local security situation not fully considered.

Hiding witness cooperation with the ICC is the preferred methodology because it minimises the risk to witnesses and their families while diminishing localised risk by association. Only if the VWU is not confident of concealing a witness's cooperation, or if there is an unrelated threat to the witness, will it provide relocation.

## Non-disclosure of identity to the public

Two options of identity non-disclosure are available to the court. The first is complete non-disclosure from the public and the defence. The witness's identity is concealed using a pseudonym, and voice and face distortion is adopted. This generally requires a serious and specific threat to the witness. The second and most commonly used is non-disclosure to the public through in-court protections but disclosure to the defence.

The preferred option is to provide public anonymity allowing witnesses to return to their pre-testimony lives without fear of retribution. Chambers are empowered under rule 81(4), upon their own volition or at the request of the parties or any state, to take such steps to protect witnesses, which may include non-disclosure of their identity prior to trial.[164] Pseudonyms have been applied to non-participants who might solicit intimidation as a result of the disclosure of their identities in witness statements or other documentation available to the public.[165] The appeals chamber weighed the need to protect innocent third parties as being of greater value than the potential for those third parties, if disclosed, to provide otherwise inaccessible information in aid of the defence.[166] It further held that these competing interests should be weighed on a case-by-case basis.[167] The appeals chamber found that in weighing such a decision it should consider the same general factors as those considered in a decision to grant anonymity to a witness, namely: the danger disclosure to the defence might cause, the necessity of the protective measure, its level of intrusiveness, and the rights of the accused to a fair and impartial trial.[168]

To what extent anonymity can provide real psychological assurance is difficult to gauge. Many African witnesses strongly believe that witchcraft and other spiritual powers might disclose their participation to those it would aggrieve. When anonymity is possible it is financially preferable to the cumbersome task of relocating a witness and his/her family to a new, unfamiliar life. There have not been reports of witness dissatisfaction surrounding the use of this method.

## Psychosocial preparation

Psychosocial assistance as already stated is initiated at the earliest investigatory stages and provided to witnesses irrespective of admission to the ICCPP.[169] As required by regulation 89(2) of the registry, this means witnesses not admitted to the ICCPP are also, based on need, provided with access to local medical care and clothing as well as counselling from psychosocial personnel.[170]

Prior to the witness departing for court, the party calling the witness provides information about the witness's material and psychological needs while in The Hague. The party is then generally responsible for transporting the witness to the city from which the witness will depart by air, a function the VWU often adopts on behalf of the defence. Best practice in terms of extraction as well as an alibi for the cause for departure is deployed for the witness's extraction from his/her place of residence to the town or city of air departure.





## Familiarisation and witness proofing

### The ICC witness proofing debate

'Proofing', or witness preparation, was initially used by counsel as a method of familiarising a witness with court procedure and protocol. Proofing also previously included going through the statement, refreshing a witness's memory and, if applied unethically, rehearsing testimony. It is a practice which is common at the ad hoc tribunals as well as in varying forms in Australia, Canada, England and Wales, and the US.[171]

The ICC prosecution describes its own practice as providing witnesses with their statements days prior to the proofing session, and, in the proofing session, reminding witnesses of their duty to tell the truth, discussing potential protective measures, and addressing areas in the witness statement that may be raised in court.[172] The prosecution proposes that proofing would acquaint the witness with counsel who would examine them, familiarise and reassure the witness about court proceedings, sensitise the witness to security arrangements and the obligation of the witness to tell the truth, and allow a witness to produce a more accurate and complete account.[173] The trial chamber dealt with these aspects of proofing as 'witness familiarisation'.[174] It ruled that they be carried out by the VWU and that these functions include:

a. Assisting the witness to understand fully the Court's proceedings, its participants and their respective roles;
b. Reassuring witnesses about their role in proceedings before the Court;
c. Ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
d. Explaining to the witnesses the process of examination;
e. Discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
f. Providing witnesses with an opportunity to acquaint themselves with the people who may examine them in court;
g. "Walking witnesses through" the courtroom and its procedure prior to the day of their testimony in order to acquaint them with the layout of the court, and particularly where the various participants will be seated and the technology that will be used in order to minimise any confusion or intimidation.[175]

The aspects of what the prosecution describes as addressing any areas of the witness's statement that might be raised in court were dealt with separately by the trial chamber as 'substantive preparation of the witness'.[176]

The Lubanga defence contended that the VWU should be responsible for witness familiarisation, but should engage that responsibility in consultation with the parties for whom the witness is to appear.[177] They argued that the prosecution had sufficient opportunity to assess the sincerity of a witness and that witness preparation was therefore unnecessary and prejudicial to the rights of the accused.[178]

Victims' representatives also believe that witnesses should avoid the risk of questioning, which might be viewed as harassment or intimidation under rule 88(5).[179] The registry also noted that proofing might cause witnesses to be brought to the court to testify, causing risk and psychological trauma, only for the prosecution to remove that opportunity because of what the witness says in the proofing session.[180] The trial chamber found that while 'article 54(3)(b) allows the Prosecutor to question witnesses, nothing in the text supports the proposition that a preparation session directly preceding testimony is permitted'.[181]

The Rome Statute allows for general principles of law from national jurisprudence where the statute and applicable treaties and rules of international law are insufficient.[182] The trial chamber found that a general principle of law could not be derived from national legal systems worldwide and that substantive preparation of a witness may undermine the establishment of the full truth, although it may provide a more succinct and efficient presentation of evidence.[183] The chamber concluded that a witness should be provided with his or her statement for review by the VWU prior to testimony so as to aid the efficient presentation of evidence and to help the trial chamber establish the truth.[184]

However, it also found that 'discussion on the topics to be dealt with in court or any exhibits which may be shown to a witness in court' may come dangerously close to a rehearsal of in-court testimony.[185] The chamber concluded that this would cause a witness not to provide a true extent of their memory or knowledge.[186] The chamber further ruled that spontaneity in a witness's testimony would be lost were a witness proofed, an element, the chamber found, that enriched testimony.[187] The chamber therefore prohibited contact between the witness and counsel other than meetings conducted by the VWU after VWU familiarisation.[188]





## Implications for practice

The trial chamber's decision means that when the witness enters the country, contact with counsel ceases. In practice, investigators now retain control over non-ICCPP witnesses until they are at the town or city from which they will travel by air to The Hague. Once in The Hague, the witness and accompanying persons are provided round-the-clock assistance as well as full board, accommodation and an attendance allowance equivalent to remuneration of UN General Services 1-level staff in the witness's country of residence.[189] The witness may also receive an extraordinary allowance for lost earnings.[190] When the witness decides not to accept accommodation, he/she is provided with an incidental allowance to cover their board during their stay.[191] For witnesses from a refugee camp in Chad or a local village in Bunia, the attendance or incidental allowance for the period of a couple of weeks is greater than what they might have received in the last six months. The allowance could therefore be viewed as inducement.

The only prosecution or defence contact that occurs is when the witness is familiarised with counsel while the VWU is present. Counsel cannot lead witnesses through their statements. Instead, the VWU provides witnesses with their statements to read and is present if there is psychosocial need. It also provides an interpreter and a reader where required. During the familiarisation process, witnesses are reminded that:

- If any element of proceedings, their statements or a questions put to them by counsel is misunderstood, they may consult the judge.
- Witnesses are able to stop proceedings and provide a narrative if they wish to add an element to the record they think is being overlooked.
- They may question the judges if counsel repeatedly asks a question.

The proceedings facilitate greater spontaneity, but less predictability for counsel. The combination of an absence of proofing and an empowered in-court role for witnesses gives witnesses a more prominent role in determining the truth.

The trial chamber decision also impedes counsel access to witnesses being brought by the opposing party. If defence counsel wishes to discuss issues of substance with a prosecution witness, it must now – providing the witness agrees to meet – meet the witness prior to the witness travelling to The Hague. So although the defence argued in favour of prohibiting proofing, the chamber's decision could serve to entrench the inequality of arms between prosecution and

defence. The budget for defence investigations is considerably less than that of the prosecution. There is no budget for witness evaluation and a very limited budget for investigation. Consultation upon witness arrival in The Hague is critical as the defence has far fewer opportunities to prepare a witness in the field.

Defence counsels are concerned that, because they are not provided with details of the witness, they are unable to query a witness's relationship to the accused and their evidence fully. It also means they are unable to query the adequacy of measures put in place by the prosecution prior to testimony. This only heightens the defence's suspicion of prosecution misuse of protection to solicit favourable testimony.

### Protection for victims

Victims are defined in the rules of procedure and evidence as any 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court', including institutions or organisations.[192] As already stated, there is little capacity for the VWU to provide protection to victims as mandated. With widened VWU jurisdiction, including victims who have applied to participate, the VWU incapacity becomes more glaring. Witness assistance and self-protection sensitisation might be more within the parameters of VWU capability.

Victims should be informed of the inability of the court to provide protection and the ramifications for their own and others' security before they apply to participate in proceedings. This should include a full and detailed security assessment and if thereafter they still wish to participate, they should be sensitised to the measures available, as well as the self-protecting measures they can deploy themselves.

Clearly the most financially prudent option is to retain anonymity if at all possible. Court staff who contact victims require particularly detailed instruction on all victim and security-sensitive conduct. There are real challenges posed by providing protection to witnesses and serious risks associated with some of the recommendations above. Limited budgets for protection mean that finances are also limited for screening victims to ensure that intelligence about VWU protective measures is not being gathered.

The enhanced role of non-testifying victims in proceedings is undoubtedly a progressive step in the delivery of justice. However, their role also poses great





security risks to themselves, to witnesses and to those with a real or perceived affiliation to both. The VWU, advocacy groups and the ICC as a whole need to consider more seriously the implications of this new role.

## DURING-TESTIMONY PROTECTIVE MEASURES

### Reassessment of the security risk

Reassessment leading up to testimony and immediately pre- and post-extraction indicates whether the nature of the threat to witnesses has changed. This informs post-testimony protective measures. Ordinarily, disclosure of a witness list to the defence closely precedes testimony and may affect the threat to the witness. The departure of a witness to The Hague will also affect the security situation. Sudden witness and accompanying-person absence may arouse suspicion and raise the threat level despite the adoption of a well constructed alibi.

### Extraction and transportation to The Hague

Witnesses are discretely extracted and flown to The Hague, accompanied by VWU personnel when necessary. Cooperation from both the Netherlands and the departed state is crucial to obtaining safe and discrete passage for testimony. Purchasing plane tickets and passing customs are potentially compromising due to the requirement of witness-identifying details. Secure channels and focal points with immigration departments and airlines are critical to preserving anonymity. These obstacles are exaggerated when witnesses do not have legal status in the states in which they reside.[193] Such witnesses require particularly concerted diplomacy in order to secure non-binding travel documentation. Witnesses are provided with accommodation, food, basic amenities and an allowance while in The Hague. They are not allowed to see other witnesses.

### Psychosocial support

Witnesses before the ICC face multiple psychological challenges which make testimony an intimidating prospect. These include the unfamiliar nature of a European country, a law court, a criminal proceeding, a foreign language, the presence of the accused, the recounting of a traumatic experience, the adversarial

nature of proceedings, and the possibility that their safety or that of their family might be put at risk.

The VWU seeks to prepare witnesses 'materially, physically and psychologically' for the experience of trial.[194] When good practice is not implemented during initial field contact or maintenance of contact, preparatory measures in The Hague may be rendered impotent in ensuring that genuine testimony is provided. The VWU has a pool of in-court personnel, including a psychologist, who may accompany witnesses during testimony to mitigate trauma. In lieu of a family member or close friend, chambers may approve these personnel to accompany the witness.[195]

In-court witness-related sensitivity from all personnel, including counsel and the bench, is extremely important to the witness's psychological wellbeing and a full and genuine testimony. Neglecting witness-related issues can be devastating for witnesses as well as the interests of justice. While personnel should maintain cognisance of a witness's psychological state, a witness's failure to provide genuine testimony or answer questions under examination may also be a symptom of inadequate protection and preparation prior to testimony.

## Non-disclosure of witness identity in court

Rule 101.4(c) of the ICC staff rules requires staff to keep any information relating to victims and witnesses confidential.[196] Regulation 88 of the registry requires that all information relating to witnesses is kept in a secure electronic database that can be accessed only by designated registry staff and, where appropriate, by the chambers and participants. The Rome Statute (article 57(3)) and the rules of procedure and evidence (rule 87) empower chambers to expunge witnesses' names and personal details from the record, hold testimony in camera or from behind a screen, and use pseudonyms. Non-disclosure to the public of a witness's identity preserves the witness's right to return to his/her former life without the trauma of relocation or potential security risk.

The defence argues that public non-disclosure impinges on the right to a fair trial by removing over 50 per cent of the trial when face and voice distortion and pseudonyms are used. This means that over half of the sources of evidence provided, normally the most critical evidence in terms of culpability, are not available for public scrutiny. Public scrutiny is one of the critical examinations of the evidence before the court that the defence hopes will assist in redressing the





inequality of arms. However, public non-disclosure proponents argue that public scrutiny rarely provides a critical observation not made by the defence which has full disclosure of the witness's identity.

Victims' rights proponents have cited non-disclosure as undermining the potential for the court to allow those affected and other interested parties to follow trials from afar, particularly the most important aspects of evidence. This undermines the legitimacy of the court. In such circumstances, a witness might then be willing to provide testimony which errs away from a genuine recollection of events and towards testimony which serves the purposes of the prosecution. The ex parte hearing, in which witness anonymity is decided, is closed. This means the defence is not provided information to justify the risk posed to witnesses.

## Witnesses and self-incrimination

Rule 74 of the rules of procedure and evidence relate to self-incrimination by a witness. It is particularly pertinent when witnesses hold dual status as both perpetrator and witness. The rule states that 'the chamber shall notify a witness' of the provisions of rule 74, so that the witness is fully informed of the implication of testifying before the court, where the witness has not previously been fully informed.[197] It is not clear, under the statute or the rules, on whom the responsibility falls to ensure that a witness fully understands the implication of potential self-incrimination pre-testimony. The first witness to testify in the case of Thomas Lubanga had not been sufficiently informed of an assurance under rule 74(2) that the ICC would not use testimony against him, but that no such assurance could be given in relation to the courts of the DRC.[198]

The trial chamber ruled that the witness's legal representative should be responsible for bringing rule 74 and its implications to the attention of the witness.[199] It also ruled that the legal representative should fully brief the witness on article 70(1)(a) of the Rome Statute, which criminalises the provision of false testimony. The bench prudently ruled that the legal representative should be familiar with the Rome Statute framework and relevant criminal law in the DRC (in this case).[200] That the bench ruled the process of informing the witness 'must not trespass into the area of witness proofing' suggests that the office of the prosecutor should not play a role.[201]

The trial chamber suggested that, in light of the intimidating environment of the court, a witness should be briefed fully on article 70 and rule 74 well in advance of testimony.[202] As neither the witness's legal representative, the office of the

prosecutor, the VWU or the trial chamber had taken this task upon itself, the witness was instructed about rule 74 by his legal representative, at the instruction of the court, immediately prior to his appearance before the court.[203] This is the precise circumstance the trial chamber seeks to avoid in the future through its ruling.

The chamber further ruled that the obligation to warn a witness about self-incrimination continues during trial.[204] It found that during evidence the witness's lawyer must be 'immediately available to provide legal advice under Rule 74 (10)' when the chamber decides advice on self-incrimination is required.[205]

After the court's first witness had been briefed, he was brought in to testify with voice and face distortion and an in-court assistant sitting near him. He also provided testimony under a pseudonym.[206] The witness was not to testify from behind a screen or from a different room. No requests for such conditions were made by the prosecution. The statute empowers the chamber to grant protective measures based on a party's or witness's legal representatives, or a witness's application.[207] The witness could therefore see and be seen by the accused. The accused was required to repeat the oath three times due to technical difficulties with the microphone.[208]

The difficulties with swearing the oath did not appear to disrupt the witness, who remained calm until counsel for the prosecution asked whether the witness had accompanied soldiers who had come to recruit him.[209] This unnerved the witness, who stated that he found himself 'in a delicate position' after giving the oath that he would tell the truth.[210] The judge then ordered proceedings to be suspended under rule 74(10) so that the witness's legal representative could instruct the witness about any potential issue of self-incrimination.[211] While the witness could not be tried by the ICC because he was a minor, the court could give no assurance that he would not face criminal proceedings in the DRC, were he to provide incriminating evidence. Rule 74(8) states that 'where the prosecutor is aware that the testimony of any witness may raise issues of self-incrimination, he or she shall request an in camera hearing'.[212] The prosecution had negligently failed to do so for this witness.

An in camera hearing might have been avoided if the prosecution had secured an assurance from the Congolese government that a prosecution would not be pursued based on the witness's testimony. Witnesses may question the authenticity of such an assurance, particularly where the state providing the assurance is in





armed conflict with a group to whom the witness belongs, or when the state does not reliably undertake to uphold treaty obligations.

Other elements may well have contributed to the witness's inconsistent testimony. The VWU, after conducting a review of its own role, found that witnesses should visit the courtroom more than once. The impact of the defendant being in the room should be thoroughly discussed, especially when the defendant had effective control over the witness's life or was a father-like figure. In the case of the first witness, his representative and the prosecution seriously erred in not requesting testimony to take place from behind a screen or from another room.

Greater consultation is also required with counsel who leads witnesses in evidence. Recommendations to counsel are provided through chambers on how questions should be posed. While it is recognised that the VWU cannot dictate how counsel should do their job, greater collaboration is required between the two court entities, particularly involving VWU psychologists. Clearly there was inadequate judgment on the part of the VWU. No psychologist was employed by the VWU at the time, which left the VWU support officer to undertake that role. Pursuant to article 68 and rule 88, the psychological wellbeing of child witnesses is to be considered a matter of paramount importance.[213] Qualified personnel are clearly required prior to a witness taking the stand.

## POST-TESTIMONY PROTECTION

### Assessment and reassessment of risk

Reassessment of the risk after testimony should include a comprehensive assessment of the security situation and of key indicators of anonymity preservation. Any variance in the security situation should be closely monitored, particularly local elements with connection to groups that might pose a threat. Fluctuations in risk and the reasons for those fluctuations should be carefully considered in regular post-testimony reassessment. Reassessment should instruct post-testimony protective measures recommended to the prosecution and defence by the VWU.

### Communication

The prosecution has been particularly critical of the isolating nature of VWU communication with witnesses after reintegration. The trauma of not knowing

whether their identities as witnesses have been disclosed to their communities is the most detrimental element of a witness's psychological wellbeing. The prosecution cites a sign made by Lubanga to the public gallery after a witness who was not allowed to testify from behind a screen was seen by the accused. 'Not knowing who knows' causes anxiety to a witness's family as well as the witness, and cannot be easily overcome, particularly for crime-based witnesses. The prosecution generally seeks to have insider witnesses moved to another garrison or place of employment as may be the case. The moving of witnesses by local partners and the allegiance of those partners in the long-term continues to be an issue for the VWU. The level of psychological support provided to non-relocated witnesses after giving testimony is unclear.

## Relocation and resettlement

For some practitioners 'relocation' will imply international relocation, while 'resettlement' refers to relocation domestically. 'Relocation' will be used generically here to encompass both practices.

### Gaining state cooperation

The court has concluded ten agreements with states on the protection and relocation of witnesses, and two ad hoc arrangements.[214] Under article 86, states parties are obligated to 'cooperate fully with the court in its investigation and prosecution of crimes'. The Rome Statute requires state protection of victims and witnesses and any other type of cooperation not prohibited by law.[215] States parties have been reluctant to provide relocation agreements or accept witnesses on an ad hoc basis. Non-cooperation seriously restricts the ability of the VWU to relocate witnesses, which compromises their safety. The prosecution cites a double standard on the part of some Western states parties which have, in one case, provided training at European military academies to a potential suspect but refused prosecution witnesses.

### Logistical, financial and psychosocial services

Witnesses are relocated mostly externally and provided a stipend with a view to them securing their own employment and financial independence. They are





monitored closely after testimony and consistently thereafter. The value of a life supported temporarily by a living allowance, even in the short-term, might well be considered an inducing element. This underlines the need for independently evaluated admission to the ICCPP.

The extent to which a home setting can be replicated is minimal. The greatest element of ordinary witness life – contact with familiar friends, work colleagues and schoolmates – is removed. While a similar culture, environment and trade can be replicated, sometimes even in different states, the personal history and attachment of a witness and his/her family to their original location is generally strong. It is particularly strong among crime-based witnesses, who are often poor and have rarely moved of their own volition.

Psychosocial support is particularly important when witnesses have families and when family members require special medical treatment. Relocating with family can also provide an element of stability for witnesses as the psychological trauma of relocating witnesses by themselves is exaggerated by isolation. In either circumstance, psychological support is an enormous element in the future wellbeing of witnesses and their families. It is also critical to ensuring witnesses do not breach their memorandum of understanding, thereby compromising their, or other witnesses', security. When witnesses do poorly psychologically, they are more likely to contact previous friends or family from home or take other steps which might compromise their security. Clear instruction that communication and even visits will be facilitated through secure channels is important in deterring such behaviour. Even with the most thoroughly explained and understood memorandums of understanding, witnesses often pose the gravest danger to their own safety.

### Relocation's fiscal and bureaucratic restraints

One of the key factors deterring the relocation of witnesses to Africa is that only South Africa has a protection programme that can admit a witness. This means that establishing arrangements – where the court funds the admission of witnesses into a national programme – can only happen there. Handing jurisdiction over a witness to another protection programme is more cost-effective because it does not require the creation of logistical infrastructure on the ground to carry out the relocation.

As stated, the court has found it difficult to reach agreement with states outside Africa where the cost to have witnesses admitted is much greater. Progress towards domestic protection mechanisms has been slow and flawed. This provides little alternative for the VWU other than to relocate and support witnesses itself. This imposes a greater cost burden upon the VWU, but not one that has limited the practice of the unit thus far.

## CONCLUSION

The ICC has taken progressive steps towards witness protection best practice, despite the most challenging protective task of all the international tribunals established thus far. The court's ability to learn from early mistakes, as well as from those of its peers, provides points of reference for its evaluation in the short- to medium-term.

Ambiguity about the protective measures to be provided, and who should provide them, creates tension between court organs, which is healthy. It allows for full and informed consideration and ruling on all elements of witness protection by the court itself. Many elements of jurisdiction and provision remain unclear and further intervention by chambers will be required.

While thorough consideration of all elements of protection is important, the incremental nature with which such consideration occurs mitigates against its benefits. The positive effects of judicial intervention on witness-related issues are therefore less significant for witnesses who testify in the court's initial trials. These witnesses will not have the same considered, contested and adjudicated protective measures as those who take the witness stand 20 years from now.

The court, particularly the VWU and the prosecution, should adopt a memorandum of understanding on jurisdiction and provision of protection. This will require contestation and concession from both parties. Its drafting should be informed by broad consultation of court personnel as well as previous, current and potential witnesses. Former VWU and prosecution personnel should also be consulted since they are best placed to provide a constructive critique without concern for their own careers.

The practical role of investigations in assessing witnesses for contact, maintaining contact with witnesses and providing protective measures in the VWU-provided code of conduct should be debated and included in the memorandum of understanding. The practicalities of witness proofing, the





services to be provided by the VWU throughout the pre-, during- and post-testimony phases, and the criteria under which services are to be provided should also be included, as well as the role of the bench and victims' legal representatives.

The memorandum of understanding could be brought before the pre-trial chamber for consideration. This would provide the chamber the opportunity to consider protective measures in their totality, rather than one issue at a time.

The VWU requires greater independence, an unfettered mandate, and capacity to focus on acting in the interests of victim and witness. In practice the autonomy of the VWU has been constrained by the registrar and confirmed by the appeals chamber. The VWU has consequently not been provided with the same scope to represent witness and victim interests with serious consequences for practice. The continued use of local security personnel further undermines long-term witness safety, as well as the legitimacy of the VWU in providing advice to other court entities.

Like witness protection generally, protective measures and witness-oriented practice need to be retrieved from the periphery of ICC debates. Placing witness protection more centrally ensures that a safe, friendly and secure environment can be provided as an initial priority ahead of, but facilitating, fair and efficient trials. Such an attitude will help avoid witness-oriented malpractice – a far more costly problem to clean up than to prevent.

Chapter Three

# International Criminal Tribunal for Rwanda: A lesson in ensuring protection from the outset

The ICTR was established by the Security Council to prosecute those guilty of genocide and other serious violations of international humanitarian law surrounding and during the Rwandan genocide in 1994. The ICTR was the first internationally backed war crimes court in Africa, and the first African institution to establish a formal witness protection programme. Far from providing a model, the ICTR has presented an example of what not to do when confronted with precarious witness security, while attempting to bring perpetrators to justice soon after the alleged offences.

Protective measures for witnesses were legally required under the ICTR statute in 1994.[216] The Victims and Witnesses Support Section (VWSS) was legally established under the rules of evidence and procedure in July 1995.[217] However, the unit was not physically or operationally established until 1996, after at least 99 witnesses had been killed and many more intimidated.[218] In its belated enthusiasm to appear to be doing something substantive about the genocide the international community neglected to consider those still at risk. This risk was heightened by the decision to prosecute without the means to mitigate the security impact on vulnerable groups.

The inadequacy of witness protection at the tribunal's outset was by no means an institutional anomaly. The tribunal's establishment was inadequately planned and supported. Late establishment of the VWSS and the precarious state of witness

security were symptomatic of a tribunal occupied by personnel lacking adequate competence or direction. Despite the legal mandate, the tribunal had no courtrooms, offices, prison, legal officers or secretaries until September 1995. Judges were not legally regarded as having taken office until mid-1996 when offices were finally made available in Arusha.[219]

This chapter seeks to examine how and why the attempted protection of witnesses by the ICTR fell short. It first examines the mandate to protect and then the structure of protective capacity the mandate prescribed. The chapter examines the adequacy of the mandate and the capacity to protect witnesses in the security environment of the Great Lakes and the Horn of Africa after the genocide.

## LEGAL FRAMEWORK

Article 20 of the Statute of the International Tribunal for Rwanda provides for the right of a witness to examine, or have examined, a prosecution witness. This immediately precedes article 21. Articles 14 and 21 state that the rules of procedure and evidence shall provide measures adopted for the protection of victims and witnesses.[220] Friction between articles 20 and 21 clearly intends to allow chambers to establish the most equitable balance of the rights of the accused with the physical and psychological wellbeing of witnesses. If the rights of the accused were to be seriously compromised by protective measures, the rights of the accused would take primacy at the ICTR.[221] This means other protective measures or evidence should be sought.

The absence of any reference to a protection programme in the statute reveals a fleeting concern for the safety and psychological wellbeing of witnesses on the part of those who drove the tribunal's design and creation. Concerns about the vulnerability of witnesses, particularly given the precarious security situation in Rwanda at the time, should have preceded any public announcement of intended prosecutions. This would have allowed witnesses to be contacted and, if necessary, moved prior to the increased threat accompanying the tribunal's creation.

The establishment of the unit within the rules of evidence and procedure (rule 34) allocates a lesser value to witness-related issues than at the other international criminal tribunals. It also explains why witness issues were not prioritised by the ICTR in the early years. Ambiguous terminology providing for measures deemed appropriate, and the absence of an explicit relocation and identity mandate, meant





almost uniform adoption of public anonymity despite many cases requiring more robust measures.[222]

## FUNDING

Having been established by the Security Council acting under chapter VII of the Charter of the United Nations, the ICTR is guaranteed a budget as part of an assessed share of the UN budget.[223] As a result the ICTR has been able to procure and spend over $1 billion between 1995 and 2007, with the budget for the 2006-07 financial year increasing to over $250 million.[224]

However, support for witnesses is not provided for in the assessed budget. It is instead sourced from the voluntary fund.[225] States have proven inherently less willing to contribute to the voluntary fund because they have already contributed to the ICTR through their ordinary funding of the UN.[226] This has caused critical elements of witness psychosocial assistance and protection to be neglected.

A 1997 report of the UN Office of Internal Oversight Services adopted by the General Assembly found that not a single administrative area of the registry functioned effectively.[227] The finance section had no accounting system and could not produce allotment reports. Neither the registry nor UN headquarters knew how money was being spent. Lines of authority were not clearly defined, weak internal controls were in place, personnel were not qualified for their positions, procurement did not meet UN procedure, and the Kigali office was not provided adequate support.[228]

The meagre and uncertain provision for witness support was demonstrated by the 1997 allocation of US$5 000 to provide rural witnesses with clothes and shoes in which to attend trial.[229]

## PERSONNEL

**Personnel problems in ICTR's early years: a devastating impact for witness relations**

In 1997, a UN report noted that the ICTR prosecution, then based in Kigali, had 'administrative, leadership and operational problems'.[230] It cited a lack of experienced staff, particularly lawyer postings, as well as vehicles, computers and office equipment. Thirty out of 80 investigative posts were unfilled at the time of the report.[231] In attempts to fill some defence posts, the court has been accused of employing former genocidaires,[232] who leaked witness information

to former accomplices.[233] Six genocidaires employed by the tribunal were accused of ordering or participating in the killing of Tutsis.[234] Defence investigators Simeon Nshamihigo (a Rwandan prosecutor) and Joseph Nzabarinda were both convicted for their role in the genocide. Twelve ICTR personnel, including personnel in the registry, were investigated.[235]

In addition to the problems outlined in the box above, allegations have also been made that translation and VWSS personnel were closely related to the accused. Hiring personnel with links to those being investigated, and potentially meriting investigation themselves, is an inexcusable level of negligence. While these personnel issues have been largely rectified, the recruitment approach in the early days has tarnished the perceived competence of those who followed them. It is largely acknowledged that practice and personnel standards have moved more towards that expected of an elite international civil service.

The 1997 UN report also report cited witness-related programmes as not being 'fully developed'.[236] The report effectively found senior personnel in the prosecution and registry to be negligent. The registrar and deputy prosecutor were subsequently replaced.

Witness-related programmes were developed late by staff who lacked specialised training and relevant experience.[237] In 1997, the registrar informed the UN that the gross inadequacy of the protection programme at the time was to be remedied by engaging a non-governmental organisation 'knowledgeable in this area'.[238] It also cited the need for court personnel with protection experience, necessary training, as well as at least some staff with knowledge of Kinyarwanda (one of the official Rwandan languages).[239] The possibility that a non-governmental organisation was being considered to assume responsibility for witness protection is indicative of the challenges facing protection at the time. Since 1997, the standard of personnel within the VWSS has improved, but the psychosocial expertise found within programmes operated by other international tribunals is still lacking.

## LOCATION

The VWSS was located in the registry by the rules of procedure and evidence, despite a UN report recommending it be shifted to the office of the prosecutor. The report recommends that defence witnesses be handled by defence-related





registry personnel with assistance from the prosecution when necessary.[240] The recommendation to locate the unit within the prosecution shows the scarcity of protection expertise at the UN and the ICTR. It also demonstrates that efficiency is prioritised over objectivity, and thus witness security. The VWSS has remained in its original location of the registry. However, the protection of prosecution and defence witnesses is separated within the section by the establishment of two separate units to focus on prosecution and defence witnesses respectively.[241]

## NEED FOR PROTECTION

### Nature of criminality

The ICTR is mandated to prosecute 'persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994'.[242]

While some mass media organisations reported the genocide as spontaneous madness, it was, in fact, a well planned government policy which sought to systematically exterminate Tutsis and sympathetic Hutus.[243] Ethnically charged propaganda was used to mobilise Rwanda's unemployed and other extreme Hutu elements against their Tutsi neighbours. The killing was coordinated by politicians, the Rwandan army and local militia. Localised propaganda and roadblocks had been used to kill more than 2 000 people since 1990.[244] These methods mirrored those employed to kill Tutsi in 1959 and 1963.[245] From 1990 to 1994 the Rwandan government fought an armed Tutsi insurgency led by the Rwandan Patriotic Front (RPF) in the north of the country. The government used the civil conflict to fuel anti-Tutsi propaganda.[246]

When the assassination of the Rwandan president occurred in early April 1994, allegedly by extremist Hutus, it set in motion the previously organised plan to kill political opponents and clearly marked civilian Tutsis. An estimated 800 000 Tutsi as well as perceived Hutu and Twa sympathisers were killed in the following three months. As the RPF moved in to take the capital, Hutu militia – now known as 'Interahamwe' – along with other genocidaires fled with refugee flows and French protection across the border to eastern DRC. Ethnic violence connected to the genocide has continued in the eastern DRC since.[247] Regional volatility after 1994 has been consistently cited as justification for protective measures at the ICTR.[248]

## Threat to witnesses

As demonstrated by the numerous witnesses killed prior to, during and after testimony, the threat to witnesses before the ICTR is extreme. Witnesses have commonly been identified upon their return to Rwanda from Arusha, with many targeted for retribution.[249] Those who pose a threat have also been emboldened by their perception of partial justice. This was demonstrated by the removal of former prosecutor Carla Del Ponte after she sought to investigate abuses by the now ruling RPF. Del Ponte's efforts to investigate were obstructed by the Rwandan government, which restrained witness travel to testify.[250]

It is indeed contentious whether the prosecution of former RPF personnel using witnesses from within Rwanda would be possible. Cooperation from the Rwandan government has been more forthcoming since Del Ponte was replaced with someone more politically acceptable.[251] The inability of the court to function without Rwandan state cooperation has resulted in a politically sensitive prosecutorial policy. It has also made defence witnesses reluctant to cooperate due to fear of retribution from the Rwandan state.[252]

### Status of witnesses

Witnesses before the tribunal reside in Rwanda, other African states, and outside Africa. Witnesses' status – whether as refugees, persons seeking refugee status, those whose refugee status has been denied, and those in illegal situations – influences the threat to their security. When witnesses' status is undetermined within any given state, the risk they face might be elevated by their forced repatriation. In the case of Rwandan defence witnesses residing in Kenya, the court requested the cooperation of the Kenyan state and the UNHCR to ensure witnesses were provided to the ICTR rather than forcibly repatriated to Rwanda where they might not be permitted to testify.[253] However, the ICTR added a caveat which acknowledged that it ought not to interfere with state prerogative over unlawful aliens.[254] The court also found that witnesses could not be protected from prosecution or extradition for prosecution to another state.[255]

The potential threat of prosecution deters defence-witness cooperation due to fear of being extradited for trial in Rwanda.[256] The ICTR confirmed this fear by finding that the decision to extradite a high profile witness and former ICTR accused, Major Bernard Ntuyahaga, was a decision for the Tanzanian government.[257] Instances where defence witnesses were prosecuted also served to deter defence-witness cooperation. One witness made himself available on the understanding that he would be tried in Europe. Upon arrival, however, the judges decided they would not allow it.

A considerable number of potential witnesses are in Rwandan detention. When witnesses are provided to the ICTR, rule 90bis (E) requires their immediate return after giving testimony.[258] The ICTR returns prisoners to conditions considered by some human rights groups to be inadequate. Conflicting human rights treaty and statute obligations appear to allow the court to refuse witness return to conditions of detention, which violate the ICCPR.

### Insider witnesses

The threat from both victims and extremist Hutu elements to insider witnesses has also been great. In October 2004, an insider witness was murdered in his village after giving testimony. Murder of insider witnesses in Rwandan domestic trials have also occurred.[259]

The international threat posed by extreme Hutu elements has been demonstrated many times. High level insider witnesses were killed and threatened in Nairobi and allegedly Brussels. These incidents involved two former ministers, one about to testify for the prosecution and another about to meet with prosecution investigators.[260] Extreme Hutu elements remain at large throughout the Great Lakes region and the Horn of Africa. As demonstrated above, they have the ability to access detailed witness information and find witnesses in diverse locations. Intimate knowledge of witness identity and movement has allegedly been sourced from Hutu genocidaires employed by the court.[261]

### Crime-based witnesses

Crime-based witnesses were targeted in the early years of the tribunal's operation. At this time the VWSS was not properly functioning and post-testimony protection was unavailable. The danger faced by witnesses was made abundantly clear by the murder of 99 prosecution witnesses by 1996.[262] Subsequently, witness protection was taken more seriously, albeit ineffectively so. In the late 1990s, scores of potential witnesses in Rwanda continued to be killed and seriously threatened.[263] Inability to provide public anonymity has undermined protective efforts and increased witness vulnerability. This is further exacerbated by the Rwandan

government's preference for internal rather than external relocation. These experiences explain witnesses' reluctance to cooperate with investigators.

Distrust is still present in Rwandan society. At the local level Rwandans from all ethnicities still interact in a pragmatic manner, circumstances that are stringently monitored by the government. However, the seeds of discontent are sown deeply by the traumatic experiences of 1994 and the continued ethnic violence across the region. To what extent Hutu militia seem willing to seek out crime-based witnesses can only be assessed on a case-by-case basis. However, the threat to insider witnesses from extreme Hutu networks also applies to ordinary witnesses who hope to return to normal lives. The psychological impact of the lingering threat is exaggerated by this uncertainty.

**Protracted nature of ICTR proceedings increases the threat to witnesses**

The protracted nature of ICTR proceedings extends witnesses' waiting time and exaggerates the threat they face. The case of Elie Ndayambaje, while an extreme example, is not isolated.[264] Ndayambaje was arrested in 1995. However, his trial only started in June 2001 and is still ongoing. The inefficiency of the ICTR means witnesses in such cases may remain in the most precarious state – that of pre-testimony – for over a decade. The psychological and socioeconomic burden on a witness in such circumstances is enormous. To draw out this trauma is to impose an incredible and lengthy burden on a witness. In 2007 the court stated it would consider transferring cases to the Rwandan national courts. For witnesses under protection, as well as those who are not, this added uncertainty about future testimony and protection exacerbates an already precarious psychological situation.[265]

## ROLE OF INVESTIGATIONS

The court relies heavily on witness testimony as the key source of evidence.[266] The prosecution has attempted to utilise fewer witnesses since the late 1990s in order to minimise the number of persons under threat.[267] It has also placed greater emphasis on securing guilty pleas from the accused so as to mitigate the need for witnesses.

A major challenge for the court has been the diverse geographic spread of witnesses. The prosecution uses a large number of informants and witnesses who





reside outside Rwanda. Informers, many of whom became witnesses, were tracked down in 26 different countries by the prosecution.

When witnesses assist the prosecution, they are often provided a letter stating that they would not be pursued by the ICTR. Witnesses were also allowed to give testimony under a pseudonym so as to avoid motions for extradition from the Rwandan government. However, the demonstrated inability of the ICTR to protect witnesses in its early years caused witnesses to be increasingly reluctant to cooperate. One ICTR prosecutor told *Time* magazine that witness cooperation is 'a big problem for us … there are people who know names and details but who are too afraid to speak'.[268]

Counsel has the option to disclose a witness's identity if it is of the opinion that disclosure will prevent the witness from committing an act that may be criminal or cause death or serious harm.[269] This potentially facilitates the threat of disclosure in order to procure witness cooperation by counsel, and requires judicial oversight. In the past, accusations of unethical practice have been levelled against counsel before the ICTR.[270] In 2008, a former prosecution witness testified that he and many other prosecution witnesses had testified in order to be freed from prison in Rwanda.[271] The witness went missing from an ICTR-protected safe house just before he was to repeat these claims before the court.[272]

## ADMISSION TO THE PROGRAMME

Clear ICTR guidelines for admission to post-testimony relocation and identity change are not readily available. These circumstances facilitate a dominant prosecution which effectively requests the VWSS to provide protective measures without effective VWSS contention. It may also lead to the absence of protection for some at-risk witnesses when their testimony is not of great value.

The court has found that in-court protective measures should be ordered based on objective assessment of the case rather than information readily provided by the witness.[273] The historical competence of the prosecution and VWSS capacity suggest that objective analysis based on adequate information may be beyond programme capacity. This is particularly so given the diverse and multifaceted nature of threats, militia and criminal networks in the Great Lakes region. The trial chamber has found that the threshold for protection is that the chamber must be satisfied that an objective situation exists in which the security of the witness is or may be at stake.[274]

The number of requests received by chambers for court-ordered protection measures preclude a careful examination of requests by chambers, leaving them to some extent dependent on the recommendation of the VWSS.[275] The extent to which the VWSS is able to make an objective decision depends on its capacity and intelligence gathering capability. The VWSS, and therefore the chamber, is likely to be most influenced by investigating assessments.

This ambiguity has played out in routine rather than considered application of protective measures. The volatility of Rwanda and countries in the region is commonly cited as a generic security threat posed to all witnesses for whom applications for protection have been made.[276] Utilising the 'regional volatility' threshold has facilitated protective measures for witnesses based as far away as Europe due to family members remaining in the volatile area.[277]

## PRE-TRIAL PROTECTION

### Non-disclosure of witness identity

Non-disclosure of witness identity prior to trial is the most commonly used measure by the prosecution. Measures applied prior to testimony have required express prosecution consent before any registry disclosure of witness identity and defence notification of the prosecution prior to contacting prosecution witnesses.[278] Another measure used has been the limiting of information contained in arrest warrants.

However, rule 69(C) of the rules of procedure and evidence states that 'the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and defence'. Rule 69(C) is preferenced ahead of rule 75(A) by the court. It grants a judge or chamber the authority to order appropriate measures to safeguard the privacy and security of witnesses. Unless there is a specific threat from disclosure, it must occur.[279] This places a greater burden on the VWSS to provide physical protection for jeopardised witnesses. The ICTR rightly values disclosure and the right to examine witnesses as being greater than the increased cost of protecting witnesses from insecurity. This follows jurisprudence at the ICTY where victims and witnesses merit protection, even from the accused, during preliminary proceedings and continuing until a reasonable time before the start of the trial.[280] At this point, however, the rights of the accused take precedent while public anonymity may still be upheld.[281]

### Medical support

Under its obligation to provide physical and psychological witness support,[282] the ICTR established a clinic in Kigali in April 2004. The clinic provides counselling, general medical services and antiretroviral treatment to potential and participating witnesses prior to, during and after testimony.[283] In some instances childcare is provided when a witness is absent prior to or during testimony.[284] The clinic was established after the original support programme for witnesses, and potential witnesses, was abolished soon after it was put in place.[285] Until 2004 only basic medical treatment was provided to witnesses while at the tribunal.[286] By August 2006, the Kigali clinic was caring for 59 witnesses. However, the voluntary trust fund which finances the clinic has significantly diminished, thereby adversely affecting the clinic's capacity.[287]

The clinic only provides support to those witnesses able to finance their own travel to the clinic. There is effectively no medical support for witnesses who live outside Kigali. An estimated total of 2 420 witnesses had testified as of 2007, with an estimated 260 of those infected with HIV.[288] The provision for these witnesses requires a substantial increase in funding and geographical coverage.

## DURING-TESTIMONY PROTECTION

### In-court protection measures

The use of pseudonyms and other non-disclosure measures appears to have been particularly inadequate due to alleged disclosure to Hutu militiamen by defendants or their counsel. The prosecution has also alleged that defence counsel attempted to convince witnesses not to testify for the prosecution.[289] The veracity of such allegations is difficult to establish, and they are rarely brought before the court due to the cumbersome nature of the investigative undertaking.[290] The inadequacy of these measures informs the need for more robust post-testimony protection.

As stated above in the discussion on admission, the presiding judge may order in-court measures to preclude public disclosure of information identifying witnesses or their families.[291] The measures available include voice and face

distortion, use of closed-circuit television, assignment of a pseudonym, closed sessions, transcript redaction or non-disclosure.[292] These measures were expanded to include closed-circuit television from an alternative location, placement of witnesses behind an opaque curtain, separation from the public gallery by bulletproof glass, accommodation in a safe house, and the prohibition of photographing, video recording or sketching witnesses.[293]

## Adoption of public non-disclosure

Courtroom technology has commonly been adopted to protect witness identity at the court. The court held the view that many victims and witnesses had been randomly chosen by perpetrators.[294] This meant that ordinary risks associated with public anonymity, such as prejudicial witness motives against the accused or witness fabrications, were diluted.[295] The use of public anonymity measures was viewed by the court as sufficient for many witnesses. This was because it was hoped that the largely corroborating, rather than original or singular, nature of witness evidence would be less threatening to an accused.[296]

The court has established several elements that warrant closed-session testimony which require public anonymity before, during and after testimony. These elements include the ongoing political volatility of the region, the seriousness of the crime in question, and the particular propensity of the witness to speak more freely under such protective measures.[297] As already stated, Rwandan and regional insecurity has been commonly cited in decisions determining exceptional circumstances.[298] The ICTR used measures to protect public disclosure of the identity of 83 witnesses in 1999, and 32 in 1998.[299] The use of public anonymity still facilitates full disclosure to the accused around a month before trial. The dangers of disclosure, particularly in the court's infant years of genocidaire presence in the defence and high witness death rates, are clear.

Apart from protecting witnesses, the use of a video link has enabled many witnesses to testify without travelling to Arusha. This decreases the cost burden and improves the efficiency of proceedings while providing physical and psychological protection.[300] However, the court has only used closed sessions once.[301] A more stringent approach to requests for this measure has been taken comparative to other methods of protection.





## Psychosocial support

Significant risk of re-traumatisation has been demonstrated in proceedings before the ICTR. Rule 75(C) requires the chamber to control the manner of questioning and avoid harassment or intimidation.[302] The incident involving the 'laughing judge' has come to epitomise insensitivity and the potential for re-traumatisation due to the behaviour of court personnel.[303] In this case the judge laughed at the inept questioning by defence counsel rather than at the witness. However, the witness, not knowing English, was not aware of this. Since the incident, no laughing is permitted when witnesses do not understand French or English. Psychological assessment and medical care is provided to witnesses on site and at the clinic in Kigali. However, ICTR support prior to, during and after testimony, as well as sensitisation to court processes, remains inferior to that practiced at the SCSL and ICC.

The appeals chamber upheld the practice of witness proofing as described by the trial chamber in 2007.[304] This allows the prosecution to 'prepare and familiarise a witness with the proceedings before the tribunal, comparing prior statements made by a witness detecting differences and inconsistencies in recollection of the witness to refresh his or her memory in respect of the evidence, and enquiring and disclosing to the defence additional information or evidence'.[305] While the practice of proofing is highly debatable,[306] the preparation and familiarisation of witnesses with proceedings and the courtroom are critical to their psychological wellbeing prior to and during testimony.

## Use of witness statements

The use of witness statements, like via video link, has been adopted primarily for establishing crime-based evidence while increasing trial efficiency. The extent to which the use of witness statements impinges on the rights of the accused is a critical element to be weighed against the likelihood of witness trauma.

Case law allows written statements and summaries of witness statements to be admitted at the discretion of the chamber.[307] Generally such evidence will only be admitted if the witness is unable to provide oral testimony. However, moves toward the use of statements by victim witnesses, particularly victims of sexually related offending, have opened up this protective measure for more normative use.[308]

The use of witness statements clearly contravenes article 20, which grants the accused the right to examine, or have examined, a prosecution witness.[309] However, the court has clearly found that the obligation under article 21 to protect victims and witnesses is paramount in some cases due to its corroborating nature. Jurisprudence on the balance of witness protection and the right to a fair trial has largely followed that of the ICTY.[310] Greater engagement of these two principles is required by the ICTR chambers in consideration of in-court protective measures. A superficial approach will facilitate subtle imposition of counsel's will over and above the interests of both witnesses and a fair trial.

### Moving witnesses to court

ICTR extraction and the moving of witnesses to court have been criticised. The provision of protection surrounding testimony has recently been brought into question by the disappearance of a defence witness from an ICTR-protected safe house in Arusha.[311] The ability of ICTR personnel to assess changes to the threat level at the time of testimony, and accordingly take protective action, is brought into question by such incidences.

Neglect of the perceived threat by witnesses as opposed to the evaluated threat by the court negatively affects a witness's psychological wellbeing.[312] Before testifying, a witness, known as 'Witness B', informed protection personnel that vehicles which collected her were conspicuous and two familiar men she knew to be Hutus saw her at the tribunal.[313] She received no response from protection personnel who had assured her of anonymity. The witness, fearful of retaliation and having witnessed the chamber where she would testify, only then realised that she would not be anonymous from the accused.[314]

Since the experience of 'Witness B', greater consultation prior to the departure of witnesses to testify has been employed.[315] The psychosocial support of witnesses at the ICTR remains of lesser standard than that of the ICC or SCSL.

## PROTECTION POST-TESTIMONY

### Relocation

Only in 1997 was the soon-to-be-replaced registrar advised by the UN to open a post-trial relocation programme.[310] With many witnesses already fending for





themselves after testimony, and many witnesses already dead as a result of real or perceived ICTR cooperation, the need to adopt relocation measures was clear.

In practice, the challenges of relocation have been great, particularly with regard to the issue of cooperation with states.[317] The ICTR has encountered enormous difficulties in securing relocation agreements. By 2002, it had failed to conclude a single agreement with another state. It has instead been forced to rely on ad hoc arrangements and cooperation from the UNHCR. Scarcity of African domestic programmes and the reluctance of non-African states to receive witnesses, particularly insider witnesses culpable of abuses, preclude state cooperation.[318]

A critical element of the ICTR's impotence when seeking external cooperation is the absence of statute provisions placing express obligations on states to assist witness relocation. The statute instructs cooperation and judicial assistance from states in identifying and locating persons, providing evidence, serving documents and arresting and transferring accused.[319] The provision implies obligatory cooperation for investigation and prosecution only.

The court's registrar has failed to secure voluntary cooperation from states in protecting ICTR witnesses other than a small number which have agreed – in very few cases – to accept critical prosecution witnesses.[320] The ICTR has also suffered from an absence of Rwandan government support in relocating witnesses externally. It has instead provided full cooperation for internal Rwandan relocation.[321] The murder of witnesses inside Rwanda could also be viewed as a consequence, to some extent, of poor Rwandan support. ICTR capacity to provide post-testimony relocation is highly questionable.

Internal Rwandan relocation for both defence and prosecution witnesses is implemented in close cooperation with Rwandan law enforcement. Rwandan police and intelligence reports form the basis for relocation measures, which are fully funded by the ICTR.[322] The role of a party to the conflict being engaged in decisions on and implementation of protective measures undermines the objectivity and legitimacy of protection.

The pro-Tutsi nature of the sitting government impedes the relocation of defence witnesses in particular. As a consequence, the UNHCR and the Office of the United Nations High Commissioner for Human Rights (OHCHR) have collaborated with the ICTR on witnesses who meet conditions for their particular protection.[323] Considering the common use by the prosecution of insider witnesses, many witnesses reasonably believed to have committed a crime against

peace, a war crime, a crime against humanity or other serious non-political crime would be excluded from protection by article 1(F) of the refugee convention.[324] This threat is particularly prevalent since the evidentiary burden of proof for the UNHCR is lower than that required by the ICTR for an indictment.[325]

Concerns have also been raised about poor ICTR service delivery with regard to relocation after testimony. A comment from one witness that 'when they need us, they treat us like eggs, and when they finish with us they throw us in the garbage', has been cited by observers of post-testimony witness discontent.[326]

As a result of high witness numbers and the obstacles inherent in state non-cooperation, the prosecution has preferred public anonymity. Its adoption has left many witnesses vulnerable physically and psychologically. Inadequate relocation capacity can be seen in the small number of witnesses relocated.[327] Near-routine preference of public anonymity over relocation will continue to compromise witness security until greater relocation capacity can be achieved.

## Post-testimony assistance

Outside of the practice of relocation or identity change, the ICTR's clinic in Kigali continues to provide medical care after testimony for those witnesses able to travel to Kigali without assistance.[328] The security of local witnesses after testimony is monitored by the Rwandan state security apparatus.[329]

**The residual issue: what are the prospects for witnesses?**

Like the SCSL, the ICTR suffers from the absence of any mechanism to assume responsibility for witnesses once proceedings have been completed. Holding Chapter 7 institutional status carries greater weight when seeking state cooperation in establishing a residual mechanism than tribunals such as the SCSL without it. The ICTR will be monitoring SCSL progress in establishing a residual mechanism. Like the SCSL and the Sierra Leonean government, handing over responsibility to the Rwandan government raises serious security concerns.[330]

Collaboration between the ICTR, SCSL and ICTY under a UN umbrella or other special agency that received jurisdiction for witnesses, might provide an option of shared cost as well as the greatest independence and effectiveness.





## CONCLUSION

The VWSS faced a precarious security situation that required levels of witness protection equal to or greater than the world's leading protective programmes at the time. Any effort to seriously provide protection for witnesses was instead negated by the failure of those who drafted the court's mandate to fully contemplate the threat to witnesses. As a result, insufficient statutory emphasis was given to their protection. This placed witness protection at the fringe in both the establishment of court functions and the provision of funding. As a consequence, an ambiguous and arbitrary mandate to protect was narrowly interpreted by the court's original leadership. Senior court personnel demonstrated a lack of initiative in the face of a clear and urgent need for dramatic improvement in protective practice. The absence of the VWSS until 1996 demonstrated negligent and reckless disregard by ICTR leadership for the safety of witnesses.

The lack of early witness protection can also be viewed as a natural consequence of the tribunal's initial neglect of internal oversight and its inability to attract competent personnel. The potential for a confidentiality breach in the defence, prosecution and registry in such circumstances meant court practice served to worsen rather than improve witness insecurity.

In such circumstances, mitigation of the threat to witnesses was undermined by indiscrete investigative practice, which placed access to information ahead of witness security. Given the large number of indictments, utilising witnesses from within Rwanda was clearly necessary. However, greater engagement of witnesses outside the Great Lakes region would have better served witness interests.

While the VWSS has improved, assessment of threats and application of protective measures have often been inadequate, and at times routine. This is a consequence of inadequate funding and state cooperation, and has caused the neglect of post-testimony relocation and identity change as an option for many witnesses who warrant it. Instead, many vulnerable witnesses have been repatriated home to live in fear.

The improvement of prosecutorial, investigative and protective practice has been undermined by the picture painted by the ICTR in its first five to ten years of practice. The impact on a witness's psychological wellbeing, regardless of their physical security, cannot be underestimated. Greater psychosocial support is required to address these concerns prior to, during and after testimony.

The ethnicisation of politics that has shaped Rwandan violence historically taints the lens through which Rwandans view the ICTR. Local Hutus are more likely to perceive the ICTR as a politicised mechanism working against them, while Tutsis may perceive it as an institution of incompetence with inadequate punitive teeth to right the wrongs of the genocide. The ICTR is unlikely to ever recover from its early failures in the eyes of Rwandans. This has serious ramifications for present and future witness cooperation. Future protection mechanisms must take note of the serious, and to some extent eternal, impact of ICTR failures.



Chapter Four

# Special Court for Sierra Leone: A new model for African witness protection?

The witnesses and victims section (WVS) of the SCSL is often cited as a new international criminal justice model for protecting African witnesses. Its role of 'supporting and protecting'[331] witnesses indicates the widening interpretation of witness protection. The WVS has taken great strides in psychosocial support as well as the refining of normative protective modalities to reflect witnesses' psychosocial needs.[332]

Article 16(4) of the Statute of the Special Court for Sierra Leone establishes the WVS. The WVS is then guided by the rules of procedure and evidence adapted from the ICTR under article 14 of the Statute and section 10 of the Special Court Agreement Ratification Act.[333]

The SCSL can be distinguished from its peers as the first international criminal tribunal to be located in the country in which the alleged crimes occurred. The court's narrow mandate – to prosecute 'persons who bear the greatest responsibility' for crimes committed during the conflict – also differentiates it from its predecessors.[334] This means that only those who played a leadership role would be prosecuted.[335] As a result, insider witnesses are more prominently used to establish or contest the chain of command and the knowledge and orders of the accused. Compared to earlier tribunals, where lower level offenders were also prosecuted, a smaller proportion of crime-based witnesses have been used.

The number of witnesses who come under protection reflects a heightened threat to witnesses as a result of both a high volume of insider witnesses and the proximity of the court to both the witnesses and the families and affiliates of the accused. While 25 per cent and 75 per cent of witnesses at the ICTY and the ICTR respectively were provided protection, 95 per cent of SCSL witnesses are provided some form of protection.

The WVS interprets its protective mandate as 'protection physically, psychologically and financially'.[336] With only one case still remaining before the court, and with one accused (Johnny Paul Koroma) still at large, there has yet to be an incident of serious consequence for the security of a witness.

## LEGAL FRAMEWORK

As already stated, the WVS derives its mandate from the Statute of the SCSL and the rules of procedure and evidence. Rule 34 dictates the mandate of the WVS. Rule 34(A) requires that, in consultation with the offices of the prosecutor and the defence, the WVS should, in accordance with their particular needs and circumstances, provide physical protection and ensure relevant counselling, psychological, medical and physical assistance for witnesses.[337] The rules of procedure and evidence seek to capacitate the WVS to undertake this task by requiring its staff to include 'experts in trauma' and to cooperate with non-governmental and inter-governmental organisations on psychosocial issues, where appropriate.[338]

Rules 69 and 75 empower the court to order appropriate measures to safeguard the 'privacy and security' of victims and witnesses while considering the rights of the accused.[339] Consideration of witness privacy, as opposed to only security, enhances witnesses' psychological wellbeing. Weighing the privacy of the accused so heavily against the rights of the accused indicates the sensitivity of SCSL proceedings involving, for example, children who had perpetrated sexually explicit crimes.

Rule 92 quarter (A) allows for the admission of written statements from persons who have subsequently died or who are unable to testify.[340] However, rule 92 quarter (B) provides that if written evidence goes to the proof of acts and conduct of the alleged offence, a judge 'may' rule against admitting the evidence. At the judge's discretion, the incentive to kill or intimidate witnesses may be significantly lowered by admitting written evidence and removing the need for the witnesses themselves. However, it significantly compromises the rights of the





accused by removing the opportunity for cross-examination, particularly were the judiciary to allow evidence which sought to establish the *actus reus* (the act) or *mens rea* (the intent) of the crime.

Rule 39 mandates the office of the prosecutor to take all necessary measures to provide for the safety, support and assistance of potential witnesses and sources. This allows the prosecutor's office to run a parallel protection programme to the WVS, creating a confused protective mandate. A conflict of interest arises in that the investigators are attempting to procure particular evidence, yet they also have the discretion to provide a source of income to informers and potential sources.

## FUNDING

The SCSL has attempted to avoid the difficulties inherent in maintaining the greater fiscal obligations of the ICTY and the ICTR. Unlike these tribunals, the SCSL does not have Chapter VII status. This means the court does not have access to mandatory financial and administrative support from the UN; instead, it relies on voluntary gifts from UN member states.[341] The looming threat of inadequate funding has on occasion brought the court to the point of closing down. The UN secretary-general warned against such a funding mechanism in 2001, fearing it might make the court unsustainable.[342] The impact on the capacity of the WVS to provide adequate protection is not easily discernable. However, it has become common for witnesses and their families to be moved to safe houses for short periods prior to testimony. Greater emphasis is also placed on capacitating witness self-protection and maintenance of anonymity.

## NEED FOR WITNESS PROTECTION

### Nature of crimes committed

In March 1991, the Revolutionary United Front (RUF), under the direction of Foday Sankoh and backed by Charles Taylor's National Patriotic Front of Liberia (NPFL), entered eastern Sierra Leone and began a conflict that would continue until 2002. The causes and motivations for the conflict are a scholarly point of debate. The Sierra Leone Truth and Reconciliation Commission found that the foundation for state collapse and civil war was one of 'exclusion' of multiple social groups, caused by decades of misrule under an autocratic and patrimonial one-party system which emerged from a political climate of nepotism and cronyism

embedded in the politics of the British colonial state.[343] The war caused the deaths of tens of thousands of Sierra Leoneans. It also caused over one million people to be internally displaced, 500 000 to become refugees and upwards of 400 000 to survive the amputation of one or more limbs.[344]

The war developed distrust between young and old, rich and poor, Freetown and the provinces, north and south, armed and unarmed, male and female, and between ethnic groups and political parties. Allegiances of these many cross-sections shifted between warring parties over the course of the conflict.

## Threat to crime-based witnesses

Distrust of Sierra Leonean institutions, including the SCSL, is a significant obstacle for the WVS. An even greater concern is the threat and the perceived threat to witnesses from family, friends and former political or military affiliates of the accused. When testifying in support of the defendant, the alleged victims of the accused, their families and their associates are also a common threat.

The inherent distrust permeating the society causes witnesses to perceive a threat, where the threat interpreted by intelligence personnel and threat-assessment officers might be absent or comparatively less. The conflict served as an instrument through which many vented long held frustrations on those by whom they felt aggrieved. Sierra Leonean witnesses are conscious of the potential for sentiments of retribution to linger until similar civil unrest presents an opportunity for its expression through violence.

While the then largest peacekeeping force in the world, complemented by the disarmament of militia groups, diminished the threat to witnesses after the conflict, and arguably throughout the function of the SCSL, the threat was not precluded from manifesting itself in the future. Even given these mitigating elements, the immediate threat to witnesses, were they to be identified, still remained very real.

The protection of identities is therefore critical for many witnesses before the SCSL. It allows them to avoid the psychological trauma of perceived long-term threat.

By the conclusion of the conflict, once clear and disciplined chains of command within armed groups were undermined by rank-and-file perceptions of their leadership as purely self-interested. When the SCSL announced a policy of targeting only those in command control, combatants rarely held sufficient loyalty





to act against perceived court collaborators. The short- to medium-term threat to witnesses has been diminished as a result.

The common threat is therefore quite different from other proceedings. One of the key exaggerating elements of violence was the stigma which came to be associated with combatants. Stigmatisation fuelled combatant discontent towards civilians, which in some cases exaggerated violence perpetrated against them. Openly testifying against an accused identifies a witness as one that stigmatises the accused's family and associates. This creates a long-term threat from long-held discontents.

While some grudges might be harboured for a period of time, the immediate threat should not be dismissed. Reports of threats to suspected witnesses continue, particularly in the south against those testifying against the leaders of the government-aligned militia, the Civil Defence Forces (CDF).

## Threat to insider witnesses

The level of threat to insider witnesses has been highest in the Charles Taylor case. Former RUF commander and fellow indictee Sam Bockarie was killed in May 2003. The circumstances surrounding his death remain contentious, but he was reported to have been killed along the border between Liberia and Côte d'Ivoire in fighting with Liberian troops.[345] Observers suspected Bockarie was killed, along with his family, on the order of Taylor to prevent disclosure of incriminating evidence.[346]

The prosecution cites the assault of the daughter of Taylor's former vice-president, turned prosecution witness, Moses Blah, as evidence of a threat.[347] Few corroborated reports of intimidation have actually been reported. While defence witnesses also have access to protection, the threat is significantly less. This is because the defence uses predominantly less threatened expert and character witnesses and fewer victim- and crime-based witnesses.

The concept of insider witnesses is a novel one to Sierra Leoneans. In some cases the stigma of having been a rebel who is then provided a stipend to testify to that fact provides a threat to such witnesses from their communities.[348] The threat is exaggerated where witnesses settled in the communities in which they committed abuses.[349]

## ROLE OF INVESTIGATIONS

### Proximity of WVS to the prosecution

While the WVS is legally situated under the registry by the Statute of the SCSL,[350] it is physically located in the electronically controlled security division of the court in which only prosecution and WVS personnel are allowed. In this division the WVS shares offices on the same corridor as the prosecution's witness management unit and investigators, separated by a security fence from the defence and registry.

The physical proximity of the WVS to the prosecution, and the relative inaccessibility to the defence, creates the perception that WVS independence is compromised. The first contact witnesses generally have with the SCSL is with either prosecution or defence investigators, who then contact the WVS. Unless there is an immediate threat that requires immediate protective care, the witness is only handled by the WVS when close to testimony. In these cases public anonymity is used, unless the witness wishes to testify in open court.[351] The WVS is continually coming under pressure from both the prosecution and defence to increase measures provided to their witnesses. Most often this relates to financial support.

### Distinguishing between witnesses and suspects

The prosecution is required to make critical interpretations about 'those who bear the greatest responsibility', but also to solicit witness cooperation from their former colleagues. Insider witnesses were required to help the prosecution establish the chain of command, orders to commit abuses, or knowledge of abuses without action to stop or discipline them. A decision not to prosecute those without 'a national leadership role' was taken, assisting the solicitation of witness cooperation from former subordinates of the accused.

Some witnesses in the Charles Taylor case were initially reluctant to incriminate themselves until the prosecution's mandate and policy had been clearly explained. The narrow mandate of the SCSL has made soliciting insider testimony more feasible by lowering the suspicion of informants and insider witnesses about the likelihood that they, too, would be prosecuted. As a consequence, investigators were able to avoid a policy of strategically moving up the command chain. Such an investigative process is far more costly and time-consuming. It imposes additional hurdles, including the difficulty of obtaining a





plea bargain that judges would accept, and cooperation from states on asylum for witnesses who have gained plea bargains. The prosecution was able to tell insider witnesses, 'You are below our radar screen,' and to provide them with letters which stated, 'We have reviewed this matter and will not prosecute you.'

In the Taylor case, insider witnesses were of critical importance because of the lower threshold of joint criminal enterprise culpability. 'Joint criminal enterprise' means those:

> Participating in the commission of crime, where several persons with common purpose, embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. [It] requires only joint intent and requires all conspirators accountable for each other's criminal acts.[352]

Lowering the culpability bar, combined with the narrow mandate to pursue only those with national leadership roles, meant less need for crime-based witnesses and a reduced threat of prosecution for insider witnesses. Great emphasis was placed on intelligence gathering and separating informants from witnesses.

Distinguishing between informants and witnesses is important because it raises the issue of inducement. Inducement for informants bears little or no scrutiny; however, all contact which could be viewed as inducing must be disclosed by the prosecution or defence. Inducement can therefore be used to encourage informants to provide an introduction to witnesses.

The line becomes blurred when practice does not make clear if an informant is, or is not, a suspect. The prosecution contends that inducement of RUF field commander Issa Sessay to provide information on senior RUF colleagues only took the form of assurances that he and his family would be kept safe from other indictees, not to provide him with immunity. The ad hoc, confusing and unregulated manner in which witnesses, informants and suspects were originally contacted and questioned is illuminated by the statement of then chief prosecutor David Crane:

> Techniques – investigative techniques and intelligence techniques – that were followed by our office, that didn't have to be written down. It's part of the way things are done… I called it dancing with the devil.[353]

**Informant or witness? The problem of inducement in the case of Issa Sessay, RUF field commander**

The engagement of Sessay is one of isolation from legal counsel, confusion about status as a witness or suspect, and exploitation in a time of political flux. Sessay was told by investigators that if he did not confirm things, investigators would not be able to help him out with 'his problem'.[354] In the days following Sessay's arrest he was held in court custody without access to counsel, offered the prospect of an insider deal without fully understanding the charges against him, and subjected to various forms of pressure and inducement.[355] The pressures included the tacit threat not to assist in the protection of Sessay's family, as well as the potential inducement of a perceived possibility that charges might be dropped or at least downgraded. The court ruled inadmissible more than a thousand pages of testimony taken while Sessay was in custody.[356]

Whether the 'problem' constituted Sessay's potential prosecution or the safety of his family is contested. The use of inducement to provide evidence in exchange for assistance on either interpretation of 'the problem' illuminates serious malpractice within the prosecutor's office.

## Prosecution's mandate to provide supplementary protection

Despite disclosure of all payments by the prosecution, the structure of rule 39 of the SCSL's rules of procedure and evidence appeared open to abuse by investigators. Under this rule investigations are provided their own witness management unit and special fund to facilitate the safety, support and assistance of witnesses.[357] Those working in the WVS experienced the symptoms of perceived inducement as a means to solicit testimony. It commonly facilitated reluctance on the part of witnesses to testify because they had not been provided the 'daily allowance' amounts that investigators had promised them. The defence also alleged prosecution duplication of rent provisions after witnesses had been handed over to the WVS, exaggerated petrol and travel payments, and unnecessary security provisions, such as a fence around a witness's orchard.

The view of the prosecution is that rule 39 makes the prosecution responsible for witnesses until close to testimony or the formal submission of a witness list to the court, even if there is a high security risk. However, the WVS understands that witnesses should be provided to the WVS immediately if there is a real and





immediate threat. The WVS does not have an office in Liberia. In Liberian cases the prosecutor's office provides protection right up until testimony, unless permanent relocation is required. The prosecution's power to protect witnesses is far greater than that experienced in traditional policing models.

The rules of procedure and evidence allow investigative discretion to protect and support 'potential' witnesses (rule 39). Placing the interpretation of 'potential' witnesses at the discretion of the prosecution enables it to provide protective measures up until testimony. More importantly, it also allows it to make its own judgment about the threat and the level of assistance. This facilitates high prosecution threat interpretations and therefore greater material provision to witnesses to encourage them to testify against an accused. The prosecution has a conflict of interest which undermines its objectivity in assessing risk and deciding on protective measures.

A motion to hear evidence concerning payment to witnesses by the prosecution's witness management unit was declined by the court on the basis that no 'material prejudice' had been caused to objecting parties, and that the motion had not been raised at the earliest opportunity.[358] The submission related to witness payments made by the prosecution for items or services ranging from medical supplies to 'maintenance', 'information', 'time wasted', school fees and rent, some of which had been unnecessarily duplicated.[359] The prosecution in its response cited rule 39(ii) as providing an 'unfettered discretion' to 'take all measures necessary for the purpose of the investigation'.[360] It conflated its mandate with that of the WVS in citing the trauma witnesses experienced in coming to trial as prohibitive, were they to also suffer financially.[361]

One incidence of questionable practice has come under particular scrutiny. It relates to a critical insider witness in the RUF case. The witness was repeatedly taken by the WVS on fully funded Sunday lunch excursions to one of the most expensive and exclusive seaside resorts.[362] This occurred until the WVS decided the excursions were unnecessary and that there were insufficient personnel to carry them out.[363] The prosecution contended that the WVS then asked the prosecution's witness management unit to continue the practice.[364] However, the defence contested that the witness management unit had engaged the practice of its own volition, and that the defence wished to call the deputy head of the WVS, Naeem Ahmed, to testify to this.[365] In its decision on the matter, the court weighed enthusiasm for an expeditious process ahead of determining whether the prosecution had induced a key witness.[366] The prioritisation of expediency ahead

of ascertaining a key element of a fair trial is regrettable, and does not uphold the credibility of the justice process.

Whether finance has been used unethically or not, witness payments and previous conduct relating to Sessay's detention create a perception that discredits the prosecution's evidence. The provision of such a wide prosecution mandate to protect was an erroneous one by those who compiled the rules of procedure and evidence. It has undermined the legitimacy of the process and therefore the standard of justice meted out by the court.

Defence counsel has no legal mandate under the rules or provision of finance to facilitate its own protective capacity. It is completely dependent on the WVS for the transport and upkeep of witnesses when they travel. It is only able to provide a set daily subsistence allowance when witnesses miss work to give evidence. An inequality of arms is clear in the discretion of the prosecutor's office to provide, without independent oversight, protection to its witnesses.

## WVS PRE-TESTIMONY PROTECTIVE AND PREPARATORY MEASURES

### Protective measures

Upon receipt of witnesses from either the prosecution or defence, the WVS applies protective measures based on threat assessments carried out with cooperation from Sierra Leonean security and intelligence. Many of the WVS's personnel were recruited or are on secondment from the Sierra Leonean security and intelligence sector. While counsel may recommend protective measures, tension has occurred when the prosecution refused to provide witness statements as part of assessment procedure.

Protective measures may include temporary relocation to a safe house, provision of a subsistence allowance (ordinarily 16 000 leones per day), reimbursement of lost earnings, medical cover, schooling, armed 24-hour protection and temporary provision of a mobile telephone.[367]

During the pre-testimony period, witnesses are rarely taken into total protective care and provided all the support listed.[368] Instead, witnesses are ordinarily admitted only when testimony is imminent and are provided protective measures until shortly after testimony is given.[369] The key protective measure for these witnesses is anonymity. Anonymity allows witnesses to stay safely at home until testimony. At this time legal teams inform the WVS of the identity of





witnesses and they come under WVS care.[370] Late handover of witnesses to the WVS by the defence is more common due to the generally lower threat. The Taylor defence team did not require full protection for any of its witnesses.

### Psychosocial preparation and proofing

WVS psychosocial personnel work with witnesses and threat-assessment officers to establish the most appropriate measures under which a witness should testify. Upon agreement, psychosocial personnel begin to prepare the witness psychologically for trial. This includes touring the courtroom, explaining the testimony experience, protocol and procedure, familiarising witnesses with their statements, and a full preparation for any psychologically difficult aspect of witness testimony.

In its recommendations on pre-testimony preparation of witnesses, WVS personnel cite 'familiarising witnesses with their statements' as an explanation of what to expect during the examination and how the witness should respond.[371] 'Familiarising' implies the rehearsal of witnesses before they testify in the likely areas of examination, cross-examination, re-examination and the form of questions and answers expected.[372] WVS personnel are not present during prosecution or defence proofing of witnesses, where witnesses are 'prepared for their time in court' by their legal teams.[373] It is common practice at the ICTR and the ICTY, but not permitted at the ICC.[374]

The divergent nature of witnesses before the SCSL requires different levels of preparation. Some crime-based witnesses – certainly child combatants or victims – might require WVS-assisted revision of their statements prior to testimony. When witnesses are likely to have forgotten what they said to investigators or when their statements can be of assistance in psychological preparation for potentially traumatic events, proofing might 'be a better modality for enhancing the efficiency, integrity, and legitimacy of trial truth-seeking functions than prohibiting the practice'.[375] However, for highly placed insider witnesses proofing may provide an opportunity to jointly change a statement to the point it no longer accurately reflects the witness's memory, thereby impinging upon the rights of the accused.

In the case of the SCSL, proofing could ease the fiscal pressures the court is under. Proofing facilitates a fully prepared witness, mitigating the potential for extended questioning. Child witnesses, for example, are more likely to have difficulty remembering all elements of testimony given many years prior to their

appearance. Some witnesses make a deliberate attempt to forget traumatic experiences for the benefit of their own psychological wellbeing. Were counsel or the WVS not to proof witnesses, the cost of extended testimony could be detrimental to a fiscally vulnerable tribunal under pressure to conclude operations. The court has received recommendations about such cost-cutting measures from consultants who assessed court efficiency.[376]

## DURING-TESTIMONY PROTECTIVE MEASURES

### Psychosocial support

Psychosocial support continues during testimony. Psychological assessment informs the needs of witnesses who may be accompanied to the courtroom and throughout testimony by a WVS psychosocial support officer. Particularly vulnerable witnesses are allowed to have a support officer sit next to them while they testify, although this does not occur in The Hague.[377] To a large extent, the ability of the witness to calmly testify is facilitated by receiving encouragement and reassurance, and by understanding the process and how to answer likely questions.[378]

The nature of a legal environment is often foreign to witnesses. Many witnesses ordinarily engage indigenous dispute resolution mechanisms to resolve conflicts. Witnesses are therefore sensitised to the focus on facts and the adversarial nature of proceedings. This can be alarming and intimidating for witnesses who have no experience of such a system.[379] WVS sensitisation is tailored to likely cross-examination, which usually causes the greatest anxiety.[380]

### Protection measures

Physical protective measures are continued for the majority of witnesses during testimony. A minority of witnesses who live locally choose to remain in their own accommodation.[381] Communication between psychosocial staff and protection officers about the wellbeing of witnesses and their families is particularly important during this period.

Witnesses are brought to the court in a WVS vehicle which does not have SCSL plates and has tinted windows so that witnesses cannot be identified.[382] Witnesses are driven directly to the entrance of the court and taken straight to a waiting room where they are accompanied by WVS psychosocial personnel until they are called





to testify.[383] They are accompanied into court by both a psychosocial support officer and a protection officer who remain with them during testimony and breaks.[384] All measures are facilitated by rule 75 of the SCSL rules of procedure and evidence.

A common problem arises with the translation of testimony. There have been multiple instances of witnesses, when confronted with the transcript of their evidence in chief, consistently denying its accuracy and blaming interpretation.[385]

#### Anonymity

The most critical and commonly deployed form of protection is witness anonymity, which must be ordered by the court under rule 69.[386] Counsel is dependent on the judges to grant anonymity orders. These orders have generally been provided although the prosecution has lost two witnesses due to court refusal of anonymity. When anonymity is ordered, witnesses are allowed to testify from behind a screen so that they cannot be seen by the public gallery or filmed. In such circumstances, identifying details such as the witness's name or other identifying particulars are not used publicly. Mistakes by counsel on this issue include the court's very first witness. The witness was asked by then chief prosecutor David Crane if he was from a particular village, if he had a brother who had been killed during the conflict, and what his occupation was. The whole gallery knew who the witness was as a result.

Other protective measures are put in place for psychologically vulnerable witnesses, particularly children, who might be allowed to provide testimony in a closed session or via video link from the waiting room.[387] Anonymity has been used to protect around 95 per cent of witnesses before the SCSL without serious incident. The majority of witnesses received by the court have been happy with the treatment they received.[388] The critical element of anonymity is that witnesses do not suffer the trauma of relocation, especially when families are involved. This appears to have been a satisfying element for witnesses, particularly once it was known that relocation would occur within Sierra Leone or the West African region, and not to the West.

Defence counsel feel that the prevalent use of anonymity compromises the judges' obligation, under rule 26 bis, to ensure a fair and expeditious trial that respects the rights of the accused and protects victims and witnesses.[389] They believe that the absence of public scrutiny fails to illuminate testimony falsehoods that the defence has failed to establish. This argument assumes that the public

follows testimony extensively, which is not always the case in Sierra Leone. The prosecution contends that if witnesses provide incriminating evidence they will refuse to testify if anonymity is not provided. They also contend that the onus is on the defence to contest testimony through its own investigations and cross-examination. While witness anonymity is considered alien to the Sierra Leonean justice system, it provides a cost-effective means of protection for a financially restrained tribunal.[390]

## Protective measures offered in The Hague

The Charles Taylor case was shifted to The Hague by order of the president of the SCSL due to the security situation in Freetown, which required proceedings to be moved outside the West African region.[391] The move was arranged so that hearings could take place using the facilities of the ICC.[392] The Hague is clearly an unfamiliar environment for Sierra Leonean and Liberian witnesses, but many are excited about the opportunity of European travel. Witnesses are first assembled in Monrovia or Freetown for medical examinations before leaving for The Hague. The Hague hosts ten witnesses at a time at its safe house, with five witnesses rotated in each time five others leave.[393]

Witnesses receive the same protective care relating to provision of accommodation and other basic daily requirements in The Hague as provided prior to testimony. The daily subsistence allowance is equal to 10 per cent of the UN daily subsistence allowance for travel of UN personnel to The Hague. This is determined on the basis that the full amount is not required due to accommodation, food and other basic amenities already being covered.[394] There are concerns about the accommodation and staff in The Hague being insufficient to ensure that witnesses don't talk to each other about the case.[395] The Hague accommodation's remote location restricts witnesses who leave the facility unaccompanied, meaning their freedom is to some extent limited. In some cases, as witnesses get very close to testimony, they have demanded an increased allowance to follow through with testimony. These threats have not been carried out. Insider witnesses have been particularly demanding after being especially well looked after by the prosecution prior to being handed over to the WVS.





# POST-TESTIMONY PROTECTION

## Reintegration

When witnesses have been provided anonymity they are discretely transported home to continue their lives after testifying.[396] Witnesses are given contact details for WVS personnel in case they require future assistance. In any event, the WVS makes periodic visits to assess witness security and psychological wellbeing.[397] The WVS aims to make an initial visit within six months of testimony.[398] However, the onus is generally on witnesses to express security concerns to the WVS.[399]

When witnesses do not have access to telephones, local police known to witnesses during investigations are used as intermediaries.[400] The fact that many witnesses are known to police potentially compromises their anonymity, particularly in small communities. Successful WVS engagement of local police who are regarded with suspicion indicates effective procedural practice. In the longer-term, however, alternative means of communication are required to mitigate deployment of security forces against witnesses.

A study by the WVS found that witnesses often felt their expectations of financial assistance were not met after giving testimony.[401] This reflects expectations inflated by investigators hoping to secure witness testimony. Others cite the need for greater repetition, before and during testimony, of the nature and extent of the post-trial assistance witnesses will receive.[402] This would alleviate misconception of the material benefit of providing testimony. Clear guidelines are required in order to streamline service provision.[403]

## Relocation

When confidentiality is breached, the WVS claims that witnesses are relocated.[404] However, this appears at odds with the use of police as intermediaries.[405] While it is hoped that police intermediaries are of suitable character, preserving witness anonymity in such circumstances is difficult, particularly in a small community. It would therefore appear that not all those whose anonymity is compromised are relocated. A conscious decision made in consultation with the witness might facilitate a mutually acceptable security environment in such circumstances. Protocol needs to be developed to do so.

When relocation does occur, it is generally within Sierra Leone. Relocation to Europe and America is particularly cumbersome, both financially as well as

politically. There is no relocation agreement with another African state due to political obstacles which broadly reflect some regional discontent with the court, which is associated with regional involvement in Sierra Leone's conflict. However, some witnesses who are able to facilitate their own visa or residency requirements are assisted to relocate in the West African region. This option provides a more familiar environment for witnesses. It is also a less expensive option for the WVS and the witness, who might struggle to find adequate employment in a developed state.

The financial implication of relocation has commonly caused investigators and the WVS to favour the use of anonymity. The ability to get work permits for witnesses has been beyond the SCSL's capacity in some circumstances. This places responsibility for the financial upkeep of witnesses on the SCSL, reinforcing the preference for anonymity. Insider witnesses have been relocated to developed countries, but this has usually occurred when former government or senior personnel are involved. To relocate low income Sierra Leoneans or Liberians to Europe or North America could be seen as inducement.

## THE RESIDUAL DILEMMA

The SCSL hoped to conclude the final case of Charles Taylor by late 2009. After submission of the defence witness list, it now appears that proceedings will continue well into 2010. Nevertheless, the SCSL is expected to be the first of the present ad hoc tribunals to conclude proceedings.

One of the critical residual issues faced by ad hoc tribunals is witness protection post-completion. The SCSL's residual programme will shape the completion strategy at ICTY, ICTR and the Extraordinary Chambers for Cambodia.

The witness protection residual issue is yet to be finally determined. The court had previously promoted other alternatives, without success. One possibility was the receipt of jurisdiction over witnesses by the ICC but this was rejected on fiscal grounds by states parties to the Rome Statute. Another possibility is a joint initiative with the ICTY and ICTR to create a UN-based 'special office' in The Hague. The UN has not been receptive to this option due to difficulties with establishing a homogenous state relocation protocol where diverse relocation agreements have already been reached with different courts and states.





Presently a witness protection programme in Sierra Leone's domestic justice system receiving jurisdiction over SCSL witnesses appears to be the only available alternative. The domestic programme would have a WVS protection officer attached. These personnel would not have the capacity to provide protection themselves, but would engage local protection colleagues within the programme. This option is currently preferred because it encourages the establishment of a local protection programme while providing a less onerous alternative for donors.

If the domestic programme does not go ahead, a liaison office could be established in its absence in Freetown. There may be the same two personnel attached to a liaison office, which would also be responsible for addressing issues pertaining to the outstanding arrest warrant for former Armed Forces Revolutionary Council (AFRC) leader Johnny Paul Koroma. This would involve a prosecutor and judges remaining on standby should the need arise. Koroma has not been corroboratively seen since his attempted arrest in 2003. The prosecution has spent a lot of time tracing Koroma but has not been able to locate his remains, if dead, or whereabouts, if alive.

A coup, or even an election, which brings to power sympathisers of the accused could provide a threat to witnesses. With two SCSL personnel in charge of witness protection, the court would be powerless to stop the state from ascertaining the identities and whereabouts of protected witnesses.

Even if there are not threatening changes in Sierra Leone's political landscape, there is concern that a locally based institution might leak information to those who wish witnesses harm. While the threat to witnesses generally diminishes after trial, it cannot be dismissed entirely, even in the long-term. A more comprehensive residual mechanism must be developed, which takes the long-term threat more seriously. If the present course is pursued the court might well leave those most at risk more vulnerable in the future. To compromise the safety of those critical to implementation of the court's mandate would leave a particularly bitter legacy.

## CONCLUSION

The WVS has established leading best practice in psychosocial practice at international criminal tribunals and in the domestic sphere. It has largely used the prudent, practical and fiscal benefits of anonymity at the expense of more financially and logistically onerous alternatives.

However, prosecution witness engagement, finance and jurisdiction create a conflict of interest and potential inducement. This diminishes the credibility of

evidence provided to the court, and thus the credibility of the justice the court dispenses. The trial chamber's refusal to examine this issue demonstrates contempt for due process and the equitable justice the court was ostensibly established to pursue.

The WVS has managed to avoid a serious security incident thus far. A large UN peacekeeping force initially along with political stability have supported the WVS' own prudent practice. The real test may be yet to come. The greatest question surrounds witness uncertainty upon the court's conclusion. An approach which places jurisdiction in the hands of local actors would undermine the progressive steps taken by the WVS. Such an approach is erroneously premised on three assumptions. First, that the societal cleavages which largely caused the conflict have ceased to exist. Second, that local institutions are sufficiently depoliticised, reformed and capacitated to function independent of criminal or political interference. Finally, that there has been a degree of forgiveness by ordinary Sierra Leoneans at the local level for crimes committed. The nature of the Sierra Leonean conflict shows that insecurity facilitates violent expression of long-held local- and macro-level discontents.

Residual protective measures must seek to avoid inadequate international control and oversight. The SCSL otherwise risks falling victim to local politics. Soliciting external funding and diplomatic support to do so remains the SCSL's major obstacle.



## Chapter Five

# South Africa's Witness Protection Unit: Africa's first domestic protection mechanism

Witness protection in Africa has been led by South Africa's Witness Protection Unit (WPU). South Africa experienced an immense transition and, as a result, both political change and uncertainty became prominent. To address organised criminality, bold new methods that empowered law enforcement without compromising the rights of accused were required.

The challenge for South Africa's legal system was daunting. The post-apartheid human rights framework within which the justice system and security apparatus were required to operate was relatively unfamiliar to officials. At the same time, witness protection was expected to play a leading role in combating organised criminality. The covert nature of the programme has made an external assessment of practice and challenges difficult.

South African witness protection broadly reflects the country's changing political disposition. In 1996 a national programme was put in place in line with other justice sector reform initiatives. In 2000 the programme was restructured and enshrined in law with the passing of the Witness Protection Act 2000. This chapter provides a brief overview of the legal and historical aspects of South African witness protection. It then examines the structure and function of the programme, illuminating successes and suggesting areas for reform. Finally, the chapter considers the WPU as a potential model for African states that are considering setting up their own programmes.

## LEGAL FRAMEWORK

The national witness protection programme was established in 1996 by the Department of Justice under the national crime prevention strategy. The Witness Protection Act 1998, which came into effect on 31 March 2000, provided the legal framework,[406] and the programme received operational and administrative support from the South African Police Service (SAPS) in the nine South African provinces. This was the foundation of the current WPU and most of the operational staff employed in 1996 still work in the programme. State and prosecution interests appear to have usurped those of the South African citizenry in the act's construction, despite its relatively progressive nature.

Another relevant piece of legislation is the Protected Disclosures Act 2000 that was enacted to facilitate and protect private and public sector employee disclosure of unlawful practice.[407] The legislation provides for disclosure of unlawful or irregular practice of legal practitioners, employers, members of cabinet, members of state council, the public protector (the state ombudsman), the auditor-general or other appropriate body, where disclosing parties are protected from occupational detriment.[408] Observers have welcomed the legislation as a crucial tool of corporate governance.[409]

However, the law places no duty on protected disclosure recipients to investigate, does not protect whistleblower identity, provides no independent authority to receive complaints, and requires no parliamentary reporting on legislation effectiveness. While the legislation prohibits penalising or dismissing whistleblowers, it does not prohibit limiting whistleblower career opportunity or pay increases.

Whistleblowers are only protected under the Witness Protection Act if they cooperate as witnesses. Protection of whistleblowers and witnesses is often conflated. Whistleblower legislation seeks to protect persons (informants) who bring illegal or unethical practice to the attention of appropriate authorities. Witness protection legislation seeks to protect witnesses only in a legal proceeding, normally criminal in nature, and it does not protect informants.

## LOCATION

The 1998 legislation creates an Office for the Protection of Witnesses under the authority of the minister of justice and constitutional development, reporting to the director-general of justice.[410] However, due to cost constraints the office did not begin operations as an independent entity. Instead, in 2001 the office was renamed the Witness Protection Unit and relocated to the National Prosecuting Authority (NPA). The unit now reports to the national director of the NPA via a deputy director. Its new structure is illegal under the Witness Protection Act, which requires the director to report to the minister of justice and to function according to ministerial direction.[411]

Problems with the WPU's location are exacerbated by the fact that the NPA's independence has recently been called into question. Critics cite practice based more on political expedience than an objective analysis of evidence when formulating prosecutorial policy.[412] The protection unit's location within the NPA undermines operational objectivity and consequently witnesses' perceptions of NPA political bias are attached to the unit. The police are often a witness's first point of contact in that they deal with original complaints relating to threats. For a more expedient delivery of protective services, the unit should be easily accessbile to the SAPS in terms of its location. The disbanding of the NPA's Directorate of Special Operations (the 'Scorpions') which was empowered to independently investigate serious and organised crime, removes the NPA's specialised security function, and reinforces the view that the SAPS is the most adequate location for the unit. However, the SAPS has its own challenges with regard to objectivity. Ideally, the protection unit should be autonomous in accordance with both international best practice and the Witness Protection Act.

Protection personnel believe a more neutrally located unit reporting directly to the minister of justice and constitutional development would benefit programme objectivity and independence. It would also mitigate any SAPS or NPA tendencies to use the WPU to strengthen the justice sector role of one department at the other's expense.

## PERSONNEL AND UNIT STRUCTURE

No apartheid-era police from the former security branch were inducted into the 1996 national programme. The majority of management personnel in the present unit are from a civilian background, with few intelligence and security sector staff. In the programme's infancy, security sector personnel, including the then Directorate of Special Operations (the Scorpions), who made up the 1996 programme's personnel, were sourced. Military personnel experienced in high profile close protection were particularly sought.

Many of these personnel have since been replaced by persons with a civilian background. The WPU leadership's dearth of intelligence and security sector experience, despite operational prominence of policing and military personnel regionally, negatively affects relations with the SAPS. The unit would likely benefit from the greater knowledge of criminality and threats faced that more balanced leadership would provide.

Ensuring personnel integrity was taken particularly seriously by those involved in recruiting the unit's original staff. These practices remain in force today. Polygraph testing, intelligence agency screening and asset and expenditure disclosure are used to ascertain personnel integrity, which recurs randomly approximately twice a year. All staff are trained on issues of confidentiality, countersurveillance, operations, advanced driving and medical and firearms functions. The WPU director and all other staff members are required to take an oath of office to ensure the maintenance of confidentiality.[413] Personnel integrity is also enhanced by practices that limit knowledge of a particular witness to only two or three personnel. A network of independent monitors has been utilised to evaluate personnel practice.

Personnel are provided better benefits and remuneration than the SAPS so that witness protection careers remain attractive to quality personnel. Observers worry that without long-term employment prospects, personnel loyalty could lie with former colleagues to whom they might return if employment at the WPU concludes. Long-term financial sustainability is therefore required, and will also help to mitigate the influence of corrupt elements in the security sector. Complacency and professional tiredness resulting from prolonged exposure to covert work also threaten long-term protection unit employment, particularly where psychosocial support is inadequate.

## Roles and responsibilities

The director of witness protection is responsible for determining a witness's value, threat to society, vulnerability to intimidation, and ability to resettle.[414] The decision is based on a 'section 9 report' from a witness protection officer and intelligence briefs from security sector agencies. The director is also ultimately responsible for the decision to admit the witness, and the agreement between the state and the witness, and any arrangements with other state or commercial





entities.[415] In practice these arrangements are ordinarily negotiated by protection officers.

A deputy witness protection director oversees coordination of regional protection officers from the head office. Also based at head office are finance and personnel staff as well as an operations officer. The deputy coordinates joint management meetings with regional protection officers and their deputies. All asset management is enforced from head office. A single protection officer in each of the country's nine provinces acts as provincial witness protection director.

Protection officers make original protection application assessments for the director's consideration as well as report on regional operations twice annually.[416] Protection officers provide information to head office only, and are prohibited from sharing or disseminating information without the express permission of the director. Thus only two files are kept for each case: one regionally and one at head office. Regional offices are largely autonomous, managing their own resources and operations with deputy director assistance for interprovincial coordination. Each provincial protection officer has two deputies for administration and operations.

A lack of psychosocial personnel in the WPU is of particular concern. Greater full-time psychosocial expertise is required to address issues of trauma and anxiety relating to the threat, testimony and resettlement. In addition to psychosocial insensitivity, some of the personnel recruited at programme inception demonstrated inadequate understanding of relevant criminal forces. This undermines WPU provision of psychosocially sensitive protective services.

Ensuring that such personnel maintain professional distance and objectivity from the prosecution concerns some observers, particularly given the unit's location. The appointment of 105 new staff in the 2007-08 financial year[417] implies rapid expansion of capacity and greater need for oversight over swelling staff numbers.

## Cooperation with other agencies

The WPU collaborates with intelligence agencies on threat assessments and decisions on protective measures. These relationships are also critical when establishing witness and evidential authenticity. While the unit itself has little complaint about security sector cooperation, observers note that communication has broken down on occasion between security sector agencies. The police, NPA, intelligence services and Scorpions have commonly been cited as supportive of

rival factions within the ruling African National Congress (ANC) party. The location of the WPU in the NPA, as opposed to being more independent, may result in perceptions of political bias which undermines cooperation from some agencies.

## FUNDING

The Witness Protection Act allows material or monetary contributions to be received, upon approval from the director-general of the Department of Justice, from any source to fulfil the WPU's legislated mandate.[418] In practice, the protection unit is almost exclusively funded by the Department of Justice.

While operational costs vary widely between cases, the average costing of goods and services has been ascertained over time. This assists with expenditure projections and reporting, allowing the unit to conceal reporting information that discloses witness identity or location. Potential identification or location via a paper trail or hacking of bank accounts is also carefully avoided.

Prioritisation of WPU cases by the judiciary has helped mitigate costs. It also shortens the length of pre-testimony protection for witnesses, who may turn hostile if defence tactics or an overburdened judiciary stall proceedings. The extent of state cooperation and support is also a critical factor in reducing costs: WPU expenditure of its own resources on intelligence gathering or logistical support increases the fiscal burden dramatically. Similarly, the efficiency and effectiveness of other justice sector entities also affects the duration of costly protective measures.

Under review and cost-reduction initiatives last year, the WPU underspent its goods and services budget by seven per cent.[419] However, witness protection remains costly at US$10,7 million in 2007-08.[420] The Witness Protection Act provides for admission of witnesses for the majority of serious criminal offences.[421] Fiscally the challenge of fully protecting all threatened witnesses is inconceivable. As a result, protected witnesses appear in only 0,033 per cent of cases.[422] In prioritising certain types of criminality, the WPU uses scarce resources for maximum effect. It is unclear, however, whether the lower admission rate is a deliberate WPU tactic or if investigative issues of cooperation, capability or strategy are the cause.

Practitioners and observers argue that the economic benefit of effective prosecution justifies South African witness protection expenditure. This is particularly so when WPU finances are used to help establish precedent which





significantly affects perceived or real cultures of impunity. When prosecution of high level crime is not feasible without witness protection, there is a strong public interest in such expenditure. The economic and social benefit of prosecuting crime should not be overlooked. However, diminishing witness admission while costs and staff numbers increase suggests fiscal caution should be adopted while current expansion might be directed toward admission for diverse forms of criminality.[423]

Oversight of expenditure takes into account the sensitive nature of witness protection work. Intelligence assessments are conducted to ensure that a high level of security clearance is obtained by the auditors who review WPU books while also maintaining WPU fiscal discipline and oversight. The WPU's headquarters and regional offices are audited internally and externally without notice by the auditor-general on an ad hoc basis. They examine ordinary expenditure, petty cash and practices in contracting and procurement. Audits are submitted as classified documents that omit witnesses' identities.

## NEED FOR WITNESS PROTECTION

### Nature of criminality

In the early years of democracy, the security sector concentrated on controlling armed groups hostile to the new government. A retreat from autocratic forms of political and social control – as occurred during South Africa's transition – ordinarily creates greater space for criminal interests. Encouraging legitimate political activity and deregulation of social control facilitated such a space in South Africa.[424] Less stringent border control and the removal of economic sanctions allowed greater post-apartheid flows of migration and international capital. These included flows between criminal elements from South and South-East Asia as well as West Africa – all competing for market share, particularly in the manufacture and supply of illicit drugs such as crystal methamphetamine.[425] Organised criminal syndicates drove the increase in South African crime, with rates in 2009 rising again after a drop-off in previous years.[426]

In the Apartheid-era the security sector was geared toward prosecuting political opponents and guerrilla movements,[427] with little experience of dealing with organised criminal syndicates.[428] Recent crime rates suggest the corner has not been completely turned on this issue. Witness protection prior to the 1996 programme reflected these biases towards counteracting political opposition.

**Witness protection and the TRC**

The Truth and Reconciliation Commission (TRC) formed South Africa's first formal protection programme. The TRC sought to provide protection for high-profile cases but its functions were reduced as proceedings continued and concluded, leading to diminished threats. It then became a limited programme focusing on witness support, and required national programme assistance for threatened witnesses.

The TRC protection programme also had to consider perpetrator protection when testimony disclosed crimes, as well as victim and insider- or crime-based witnesses. Many South Africans did not believe the justice system would prosecute perpetrators if amnesty was not granted by the TRC. This manifested victim and community discontent, which threatened perpetrators. Conversely, the absence of a prosecutorial threat mitigated threats to victim witnesses or others testifying against alleged offenders.

## Threat to witnesses from gangs and syndicates

In the late 1990s, literature described the inability of law enforcement to prosecute high level organised crime figures.[429] Admitted witnesses were primarily perpetrators or high level criminal collaborators (insiders). Foreign criminal syndicates with strong cultural, family and community links and a strict hierarchy and code of conduct posed a particular threat.[430] Insider collaboration in such circumstances would solicit severe violence used to eliminate rivals, particularly given the 'Robin Hood' reverence with which some criminal groups were regarded.[431] It is also believed that comparatively poorly compensated police and NPA personnel could be bribed by wealthy syndicate members to drop charges or disclose witness cooperation.[432]

It became clear to law enforcement that late-1990s organised crime witnesses were being eliminated. In the Western Cape, 168 members of the violent anti-crime group People Against Gangs and Drugs (PAGAD) were arrested with no prosecutions due to the killing of witnesses.[433] PAGAD was also implicated in the murders of magistrates and prosecutors. The group's knowledge of witnesses, witnesses' families and witness family history made PAGAD and other localised gangs particularly threatening.





The contemporary protection programme performed successfully when evaluated on its ability to protect organised crime witnesses. The one death that occurred demonstrates the high level of threat posed to gang violence witnesses. The murder occurred after a witness contacted family members through channels prohibited under his agreement. The witness asked his family to visit him and organised criminal elements who were watching the family followed them to the witness, who they then murdered.

## Threat to witnesses in relation to economic crimes

The WPU encounters subtle forms of intimidation often deployed against witnesses of economic crimes. These include career security, relationship with co-workers and other psychological and material threats and inducements, including the potential for promotion and accumulation of benefits. Whistleblower hotlines have proven relatively ineffective in gathering actionable information. South African investigative capability does not presently appear sufficient to corroborate anonymous disclosure without witness cooperation, meaning crimes are rarely prosecuted.[434]

Economic investigative entities such as the Special Investigative Unit require presidential approval prior to investigating and recovering misappropriated monies by civil remedies.[435] The only independent investigative and prosecutorial authority was the Scorpions, which was disbanded in January 2009 and subsumed by the SAPS. Some observers view the Scorpions' dissolution as 'undermining the legitimacy of and public confidence in the criminal justice system, compounding alleged existing weaknesses of the criminal justice system relative to its susceptibility to political manipulation … making it more vulnerable to police corruption, undermining its ability to address organised crime and negatively impacting on the culture of ethics of law enforcement personnel'.[436]

Witnesses are less likely to participate in witness protection programmes and operations if they believe the criminal justice system lacks legitimacy. If the WPU becomes too effective in assisting with politically sensitive prosecutions, and too readily perceived as a politicised instrument, it risks disbandment once the political opposition come to power. Its location is critical to developing a reputation for independence.

**Importance of a functional criminal justice system**

The WPU's effectiveness, like all protective programmes, is dependent on a properly functioning criminal justice system. Admitting witnesses to the programme only for their case to be impeded elsewhere in the criminal justice process undermines WPU credibility through no fault of its own. Between 1994-95 and 2000, prosecutions brought and convictions secured dropped by around 20 per cent despite a recorded 24 per cent increase in the rate of criminal offending.[437] From 2003-04 to 2007-08, a further eight per cent decline in convictions occurred.[438] An overall increase in expenditure illuminates concerns about NPA efficiency and effectiveness.

In 2000, 46 per cent of criminal cases referred to court were withdrawn. That number rose to over 50 per cent in 2001.[439] Case withdrawals have decreased over the last five years but still remain significant.[440] Withdrawals are cited as caused by court backlog-related delays and issues of witness cooperation.[441] The court system's inability to handle the number of cases brought undermines conviction rates and the effectiveness of protection. The extent to which court incapacity, as opposed to witness fear of retribution, drives witness non-cooperation is unclear. Investigating practice has also impeded case progression and therefore witness cooperation. Many police officers received insufficient investigative training, which undermines their ability to solicit witness cooperation.[442]

Justice sector incapacity and South African attitudes to it attach negative perceptions to the WPU by association. This lack of trust in the justice system informs witness reluctance to cooperate with the WPU. Turning perceptions around requires more than an independent WPU. It requires capacity, accompanied by reform of justice sector practice, including judicial protective methods and witness sensitive investigations. Politics and justice sector language should recognise and emphasise the importance of witness and victim issues.

## ADMISSION TO THE PROGRAMME

### Assessment for admission

Application for protection may be made by the prosecution, police officer or witness via a witness protection officer, who provides reports to the director of WPU to assist his decision.[443] The witness protection director applies criteria to cases to determine their admission, including:





- The threat to the witness
- The effect on the community of admitting or not admitting the witness
- The nature of criminality involved
- The value of the evidence
- The ability of the witness and accompanying persons to adjust to protected life
- The cost
- The availability of other protective means
- Any other issues deemed appropriate by the director of the unit.[444]

Dangers to the community which should be considered include: civil proceedings a witness may be involved in, the likelihood of a witness posing a threat to the public, and any issues relating to the custody of children. Intelligence agency screening and polygraphing are used to verify witness accounts while the threat is reassessed approximately every six months.

Applications for protection brought by the police are ordinarily submitted to the regional protection officers who then provide an assessment to the WPU director. If a protection officer adjudges an immediate risk, temporary protection may be provided while admission is considered. All evidence relevant to the applied criteria is made available to the protection director.[445] This ensures protective measures are based on information as reflective of the threat as possible, prior to and during protection. However, this gives great weight to information provided by the applying party. The WPU has found investigating police officers to be the greatest source of information.

### Selecting protective measures

Once a case is admitted to the programme, a security officer, called a 'protector', makes his or her own determination of protective measures using police, state security and intelligence as well as prosecution information. Thorough witness and witness organisation analysis is then undertaken. Organisational or individual links to malicious elements and the state security apparatus itself are examined.

A witness's background and criminal connection are entered into a database to avoid familiar witnesses making contact with one another. This helps avoid situations where witnesses threaten other witnesses' security through gaining knowledge of their identities or whereabouts. The limited WPU capacity to admit

witnesses means that alternative measures to admission are adopted for lower level and domestic violence cases.

### Agreeing on protection

Once the type of protective measure has been decided, an agreement is drafted establishing party obligations. Agreements are signed with every protected person, including witness family members or partners.[446] Agreements consider a protected person's criminal record, psychosocial background and previous income. The agreement establishes terms and conditions of protection, including the obligations of the protected person and the WPU, any other agreed-on terms and conditions, and procedure for amendment.[447]

When minors or persons not competent to enter agreement are admitted, a parent or guardian may enter on their behalf.[448] It is unclear whether all those with custody rights are consulted about protection of a minor, which raises concerns about their rights were they not informed. A judge may suspend custody rights if such access endangers the minor in question.[449] Such circumstances are a distressing breach of custody rights regardless of how well informed and judicious a court's decision may be. These issues must be carefully considered in the director's decision to admit.

The obligations of the director, unless specifically agreed on, are to take reasonable steps to protect witnesses.[450] The witness accepts far more explicit obligations, including provision of evidence, meeting non-protection financial obligations, refraining from criminality, cooperating with protective measures, informing the WPU of pending or ongoing civil proceedings, and non-endangerment of other protected persons.[451]

## PROTECTION PRE-TESTIMONY

Witnesses who are not admitted by the WPU are provided with alternative localised measures. Police officers are required to check on such witnesses regularly and to ensure that witnesses are able to contact them if necessary. The WPU follows up with these witnesses to ensure that local protection is being provided.

Depending on the level of risk, those witnesses who are admitted to the programme may be placed under temporary protection by the witness protection director or a protection officer who notifies the director.[452] Temporarily protected





witnesses are generally protected for between 14 and 28 days prior to testimony or while admission applications are being considered. During such time a replication salary, or minimum fixed allowance if unemployed, is paid. Anonymity is carefully protected.

## DURING-TESTIMONY PROTECTIVE MEASURES

The Criminal Procedure Act governs in-court protective measures. It provides for closed hearings, anonymity, testimony via closed-circuit television, and testimony without fear of self-incrimination.[453] These measures are important, considering that witnesses surveyed in Gauteng province said they feared court procedures, particularly cross-examination.[454]

In economic crime cases, intelligence is often gathered by the accused and their associates. To counter this, in camera proceedings and sweeping for electronic recording equipment are deployed to protect witness identity. Court 'comfort centres' also provide witness-friendly waiting areas.

While children are allowed intermediaries,[455] no provision for psychosocial accompaniment of psychologically vulnerable witnesses exists. Psychosocial support and preparation for a non-admitted witness is also notably absent. These inadequacies with respect to the treatment of witnesses no doubt reinforce witness apathy to participate in trials in general, or with the WPU.

## POST-TESTIMONY PROTECTIVE MEASURES

In the WPU's early days, relocation was unstructured, leaving some witnesses to relocate themselves. While this sometimes occurred because the threat had been mitigated or removed, it is particularly debilitating for the psychological wellbeing of witnesses. It is also a consequence of a failing in the legislation to explicitly provide for WPU relocation and identity change.

Under new leadership, the WPU has been focusing on improving post-testimony service delivery, particularly assistance in finding employment and adjusting to social, cultural, religious and ethno-regional change. The impact of these changes is heightened when psychosocial personnel are unavailable and relocation to new areas occurs. These circumstances dramatically increase the likelihood of witnesses turning rogue or breaking their protection agreements.

The unit has encountered logistical difficulties with relocation and identity change. Applications for identity documents are often made in the pre-testimony

phase so they are ready post-testimony, but they can take time to prepare. In the case of relocation outside the country, foreign states have been reluctant to sign memorandums of understanding or accept witnesses on an ad hoc or one-off basis. The absence of African protection programmes has impeded mutual admission of witnesses as provided for in the act.[456] Witnesses are ordinarily relocated within South Africa to a furnished house with regular access to a clinical psychologist and a replacement salary or allowance if the witness is unemployed.

The factor that has compromised security the most has been witnesses' tendency to contact extended family and friends outside secure, facilitated meetings. The strong sense of community among South Africans, along with extended family networks, makes it particularly difficult for witnesses to refrain from making such contact. The absence of any effective complaint mechanism for those who are relocated, has also been a frustration for witnesses.

## Post-testimony public interest issues

The public interest is inadequately considered with respect to WPU protection of former criminal elements as witnesses. Witnesses are legally required to: inform the WPU director of pending or current civil proceedings, settle personal debts and financial obligations, and refrain from criminal offending.[457] The WPU must develop sustained rehabilitative measures to mitigate recidivism.

However, the legislation makes no reference to an obligation on the state to inform or protect the community in which witnesses are relocated. State liability for offences committed by protected persons remains unclear. The director may discharge a witness for breaching the agreement, or disclose a witness's identity if deemed in the public interest.[458] Protected witnesses appear able to participate in civil proceedings as long as disclosing documentation is redacted or not disclosed.[459] However, little avenue for public grievance or compensation is apparent in cases where criminal or material harm is caused by protected witnesses. A compensation fund and adjudicating panel is required to facilitate redress for victims of protected persons.

## Discharging protected witnesses

The WPU director may discharge a protected person from the programme if:

- The threat subsides
- Alternative protective arrangements are made





- The person fails to meet agreement obligations
- Misleading information was provided
- A protection agreement is not entered into
- Another protected person is endangered
- Damage to the place of safety is wilfully caused.[460]

In most cases, a reduction in the threat is the reason for witnesses being discharged from the WPU. Witnesses have also left the programme voluntarily, including 24 per cent in 2007-08.[461] Witness allowances have been one of the main motivators for abandoning the programme. These allowances are presently under review.[462]

## CONCLUSION

The WPU has made great strides since its inception. Its focus on organised criminal leadership reduces the sense of impunity among offenders who are ordinarily beyond the reach of conventional law enforcement.

When evaluated on its core protective function, no witness or related person has been threatened, harmed or assassinated in the previous five years.[463] Also, prison terms handed down in cases involving protected witnesses have increased by 24 per cent, life sentences by a staggering 578 per cent and conviction rates have remained high at over 80 per cent.[464] These statistics suggest a policy of targeting the highest value cases with fewer, but extremely threatened, witnesses. Tightening admission criteria to focus on high value testimony, while allowing more accompanying persons, reflects global trends.[465]

The WPU nevertheless faces several challenges. There is a risk of inefficiency, considering that despite a dramatic budget increase, the number of protective personnel handled by the WPU has decreased.[466] Focusing on high value accused might explain greater capacity requirements to secure the few who are gravely threatened. Most disconcerting is a lack of psychosocial management and the fact that WPU objectivity is being compromised due to the location of the unit within the NPA. This makes the unit reliant on information provided by applicants and the prosecution.

The unit has also been hamstrung by the functioning of the justice system overall. Justice sector capacity as a whole, as well as WPU functioning, would be well served by constant witness-oriented vetting of investigatory, prosecutorial, judicial and administrative practice. The WPU would be well placed to conduct

such vetting. These challenges have been compounded by public perceptions of justice sector inefficiency, politicisation and corruption.

The interdependent nature of the criminal justice system necessitates wider reform aimed at expedient and ethical practice, and would greatly increase WPU efficiency and effectiveness. Justice sector reform is generally incremental. South Africa has attempted to transcend normative reform experiences by shifting attention from autocratic state interests to ordinary South Africans. This process would be particularly well served by a well capacitated, independent WPU, with oversight over justice sector witness-oriented practices.

A compensation fund for protected persons and those they harm while under protection should also be established. Such a fund would serve the interests of redress in cases where poor protective practice contributes to harm of a protected person or unsuspecting civilian. While serving as an insurance policy for the behaviour of protected persons, they would still be required to pay compensation as and when they could. A WPU oversight role over witness-related practice might constitute a widened mandate but would serve WPU interests by better capacitating implementing partners to protect and support witnesses.

While the WPU provides an excellent operational example of how to protect witnesses in extremely precarious security environments, it is also crippled by elements outside its control. South Africa is a long way from providing a sound protection model for Africa. Its physical location and structure neglect its legal mandate. As a consequence, perceptions of political manipulability – based more on practice within the justice system as a whole than within the WPU – undermine its work. An excellent protection record will not be fully recognised if clouded by perceptions that witnesses are protected in order to prosecute politically expedient cases and ordinary offenders, rather than the most powerful and connected criminals, for whom such a mechanism should be designed.



Chapter Six

# Kenya's new protection programme: Can high expectations be matched by political will?

The Kenyan government passed witness protection legislation in 2006, but the creation and implementation of a protection mechanism has since progressed slowly. The attorney-general established a task force which provided technical advice gathered from the ICC, the Commonwealth Secretariat and the UNODC on structure and staff requirements. Personnel from the police, intelligence service and immigration were seconded in February and March 2009 to operationalise the unit. The unit has premises and equipment but is yet to begin protecting witnesses.

After the ICC prosecutor and donor community expressed concern with the situation, the Kenyan government approved and presented amended legislation to parliament in February 2010.[467] On 7 April 2010 the bill was approved by parliament and now awaits presidential assent. This positive development came five months after the government's September 2009 deadline for delivering a progress report to the ICC prosecutor on Kenya's intention to domestically try cases arising from the 2007-08 post-election violence.[468] The ICC declared its intention to investigate and prosecute 'those most responsible', while a domestic 'special tribunal' should deal with other perpetrators.[469]

In November 2009, the ICC prosecutor announced he would formally request the court's judges to authorise the investigations.[470] On 3 March 2010 the

prosecutor provided a confidential list of names of senior political and business leaders associated with Kenya's two leading political parties and who are allegedly linked to the pre-election violence, to ICC judges.[471] Less than a month later (on 31 March 2010) the judges approved the prosecutor's request to begin investigations of alleged crimes against humanity committed between 1 June 2005 (when the ICC's Rome Statute entered into force in Kenya) and 26 November 2009 (when the prosecutor filed the request with the judges). One day later, the prosecutor had announced that he would visit Kenya in May to meet victims, and that witnesses would be independently protected by the court.[472]

Officially the government has welcomed the ICC investigations and pledged cooperation with the court,[473] but the nature of this cooperation remains ambiguous. Kenyan justice minister Mutula Kilonzo suggested that the ICC sit in Kenya so the Kenyan state could hold indicted persons.[474] It remains unclear if Kenya is willing to send suspects to The Hague.[475]

The role of a domestic programme in protecting ICC witnesses is also uncertain. In late September 2009 Kenyan director of public prosecutions Keriako Tobiko stated that Kenya was ready to assist the ICC with witness protection, citing ICC confidence in the Kenyan protection unit evidenced by an ICC memorandum of understanding with the unit.[476] This enthusiasm has been bolstered by the recent presentation to parliament and passage of amendments to the Witness Protection Act. At the time of going to press, the amendments only required the assent of the president.

This chapter shows that civil society and those involved in the witness protection unit's creation do not believe the unit will have sufficient capacity in the near future to admit post-election violence witnesses, irrespective of personnel seniority. The unit will likely begin by focusing on cases that are not politically sensitive. Cases of fraud, corruption, economic crime, organised criminal syndicates, organised militia groups and those relating to post-election violence will initially be excluded.

The material in this chapter is largely informed by research conducted in Kenya in April 2008, and April and November 2009. The chapter examines Kenyan efforts to create witness protection, the obstacles and opportunities ahead, as well as domestic and international pressures that have shaped the Kenyan approach.





# LEGAL FRAMEWORK

## Relevant domestic law

The Witness Protection Act 2006 came into force in September 2008, with the unit commissioned on 3 March 2009, its terms of reference and functions delegated by regulations. The unit composed its initial regulations itself. The regulatory and legislative amendments have been compiled with assistance from the UNODC.

One of the key provisions of the Witness Protection Act 2006 provides for anonymity and criminalises disclosure of witness identity or location.[477] Another critical provision granted the attorney-general 'sole responsibility' for decisions on admission.[478] However, the Witness Protection (Amendment) Bill 2010 that was recently passed by parliament removes the programme from the office of the attorney-general, creating a witness protection agency.[479] The amendments also: confer the attorney-general's powers in terms of the 2006 act to the witness protection agency's director, give the director admission responsibility, and create a witness protection advisory board to approve the unit's budget and advise on the exercise of agency power.[480] The board would comprise the ministers of justice and finance, the director-general of the National Security Intelligence Service, the police commissioner, the prisons commissioner, the director of public prosecutions, and the chairperson of the Kenya National Commission on Human Rights (KNCHR).[481]

The amendment bill also establishes a compensation fund for victims of crime committed by witnesses while under protection, and a witness protection appeals tribunal comprising a high court judge and two experts who will review grievances relating to non-admission of witnesses and the termination of protection.[482]

The 2006 act empowers the chief justice to make accompanying in-court rules of procedure and evidence.[483] The penal code prescribes a three-year sentence for witness intimidation,[484] specifically criminalised for sexual offences by the Sexual Offences Act, which also provides for witness anonymity and other protective measures.[485]

The current absence of any admission decision review mechanism is of concern. Another concern is the long- and short-term ambiguity of protective provision. The witness protection director cites the regulations as the most instructive operational framework for unit function, despite the importance of a protection mechanism enshrined in law.

## External treaty obligations and whistleblowing

Kenya has ratified the UN Convention against Corruption, which encourages domestic legislation that protects whistleblowers against unjustified treatment.[486] Article 5(6) of the AU Convention on Prevention and Combating Corruption requires parties to ensure that whistleblowers do not fear reprisals.[487]

The Official Secrets Act, however, criminalises disclosure of government documents, and requires civil service employees to sign an oath of secrecy. Civil service careers can thus be used on their own or to accompany physical threats when deterring civil service whistleblowers. Justice Bosire cited the effect of the law and the oath on silencing the civil service in his investigation of the Goldenberg affair.[488] He cites senior officers as habitually searching for whistleblowers instead of implementing recommended reforms or disciplinary action upon complaint. While the Freedom of Information Act seeks to amend key Official Secrets Act provisions, jurisprudence has yet to establish which holds precedence. Guidelines on the classification of information and disclosure have not been made public.

Senior personnel in the attorney-general's office admit that the witness protection legislation is not designed with whistleblowers in mind. They hope future whistleblower legislation will be provided to complement whistleblower dismissal protection provided by the Anti-Corruption and Economic Crimes Act 2003, which provides no penalty for the offence.[489] To ensure anonymity for protected witnesses, the Freedom of Information Act requires amendment exempting the witness protection unit or agency.

## FUNDING

Witness protection is inherently expensive, although experience elsewhere suggests that the costs per witness decrease as protection methods develop. A great deal of finance, particularly relating to start-up costs, is required to operationalise Kenya's witness protection legislation. The UNODC resident adviser who is assisting the attorney-general's office with operationalisation of the unit, estimates that more than US$6,5 million per year will be required. This figure is an estimated yearly operational cost and excludes staff remuneration and set-up costs, including the cost of arms and vehicles. The attorney-general recently stated that US$400 000 had been set aside for the programme – a small fraction of the estimated requirement.[490]





A special facility will be used to extract justice sector reform finance from the consolidated fund, but the modalities of how this will work remain unclear. Finance may be sourced directly from the fund or the treasury. Direct appropriation, requiring authorisation from the proposed witness protection advisory board, is facilitated under the proposed legislative amendments. The amendments also provide for annual estimates of agency expenditure to be approved by the board and submitted to the treasury.[491]

It is hoped that in-court rules will give priority to witness protection cases, avoiding prolonged state expenditure for pre-testimony protection. Protection methods such as post-testimony relocation may have to be used as little as possible to avoid high costs.

## Donor involvement

After the post-election violence, funding for the government's Justice, Law, Order and Security (GJLOS) fund from Finland, Sweden, Norway, Denmark, the Netherlands and Germany was frozen. Money from the GJLOS fund was earmarked for the witness protection programme, but slow operationalisation and budget outlay caused witness protection to be excluded from the last GJLOS work programme provided to government. Although GJLOS has been criticised for being too big, too ambitious and too diverse, other methods of supporting witness protection are now being investigated by GJLOS donors who are concerned about the reliability of the unit, particularly with regard to post-election violence cases.

The European Commission is Kenya's largest donor, while the US also has a major donor programme that provides mainly military aid. The US and Britain have recently been reluctant to support justice sector reform and even aid projects due to a lack of faith in government implementation, justice sector capacity to address large scale criminality, and perceived corruption.[492] In March 2010 the EU threatened to withhold aid and refused to endorse Kenya with potential investors if efforts to address corruption, including enactment of amendments to the Witness Protection Act, were not made.[493] Donor frustration is evident by the requests included in almost all EU human rights and corruption implementation statements for witness protection to be implemented.[494]

Donors are now leaning towards an incremental approach of 'give and take' for each reform step required, rather than providing large discretionary funds.[495] Full parliamentary passage of legislative amendments will likely constitute one such step. The Kenyan government originally provided US$459 000 to operationalise

the witness protection unit through the 2008-09 financial year. However, this amount decreased and is now thought to be inadequate, entrenching donor scepticism about unit operationalisation and future government support.

Some civil society actors express concern about the government's inclination to intimidate state agencies by withholding finance. The attorney-general's comments about state provision hint at this possibility. Such tactics could undermine unit provision of costly protective measures, and thereby witness cooperation in high level cases.

Donor support and fiscal influence may assist in assuring the unit's financial independence, particularly given the absence of relevant measures in the present legislation, and donor concern about executive interference through the attorney-general or police. Donors remain unsure if an independent structure can be established, and, even if it is, they remain cynical about the possibility of functional independence.

Protection personnel hope donors will take a wide view of witness protection as including witness-sensitive practice throughout the justice system. Witness protection and a properly functioning witness-sensitive justice system are interdependent. If the independence or competence of any justice sector entity is compromised, the functioning of, and public trust in, all justice sector entities diminish. Donor funding must reflect this if organised or state linked criminality is to be addressed.

Donor concerns are also apparent in relation to unit accounting systems which, for security reasons, aim to work in cash where possible. This problem will be exacerbated if donor funding allocates a certain amount per case. Distinguishing cases on that basis might compromise witness security.

The amendment bill provides for preparation auditing and reporting of accounts in accordance with the Public Audit Act, except where security is impinged upon.[496]

## NEED FOR WITNESS PROTECTION

Attorney-general Amos Wako stated that 'the Witness Protection Act was born out of the difficulties we experienced in successfully investigating and prosecuting corruption, organised criminal gangs and militias and cases arising out of ethnic clashes'.[497] The need for witness protection in Kenya extends beyond these forms of criminality, however. The UN special rapporteur on extrajudicial, arbitrary or summary executions, Philip Alston, stated:





> There is no real witness protection program in Kenya. This is a key cause of impunity. Witnesses to crimes by police, politicians and other powerful actors receive death threats. Some are forced to go into hiding in Kenya, or to seek safety in another country. Some are "disappeared". Some are gunned down in the streets. Witnesses know that speaking out poses a very real threat to their safety. Even high profile members of civil society are not safe. An effective witness protection program, one that is trusted by witnesses and is independent from the very officials against whom the witness is testifying, is essential in the fight against impunity. In the absence of such a program, no accountability measures – whether they be with respect to investigations in Mt Elgon or the setting up of a Special Tribunal – will be effective.[498]

Alston recommends:

> The essential role of witness protection in countering impunity should be recognised. A well-funded witness protection program independent from the security forces and from the Attorney-General should be established as a matter of urgency.

## Nature of criminality

Domestic abuse and gender-based crimes are the most commonly cited forms of criminality in Kenya. Corruption throughout government is also endemic, which in turn facilitates organised transnational and domestic crime in Kenya. Many organised criminal networks have close ties with politicians, the state security apparatus and large-scale legitimate commercial enterprise, which cooperate to abuse public office for private gain.[499] These networks are widespread and commonly function, even when exposed, without a real threat of prosecution.[500] Organised criminal networks are also thought to be connected to piracy and alleged terrorist groups in the Horn of Africa and on the Arabian Peninsula.

In addition to the crimes noted above, a major problem for Kenya is extrajudicial killings by police officials. Alleged police 'death squad' killings between June and October 2007 numbered approximately 500, according to the KNCHR. The KNCHR received insider testimony from a death squad driver, describing 24 instances totalling 58 alleged murders of arrested suspects. His testimony implicated senior police officers, including the police commissioner. According to the UN special rapporteur on extrajudicial, arbitrary or summary

executions, 'Kenyan police are a law unto themselves' who 'kill often, with impunity'.[501] Special rapporteur Alston received 'overwhelming testimony of the existence of systematic, widespread, and carefully planned extrajudicial executions undertaken on a regular basis by the Kenyan police.'

Electoral processes have fuelled state-sponsored violence since their 1992 inception.[502] In the period of the most destructive and widespread violence ever experienced in Kenya (27 December 2007 to 29 February 2008), the Commission of Inquiry into Post-Election Violence chaired by Justice Waki (the Waki Commission) reported 1 133 deaths.[503] Justice Waki also cited the state security forces for violence and gross human rights violations.[504]

The label of 'armed robbers' has commonly been attached to extrajudicial police killings, which included an Anti-corruption Commission lawyer. The police leadership was finally overhauled in September 2009 after more than a year of alleged complicity in abuses.[505]

## Threat to witnesses

The killing of a lawyer investigating corruption highlights the threat faced, particularly when those connected to the state and security forces are involved. Another prominent case is the harassment and intimidation of the whistleblower in the Anglo-leasing and promissory-notes scandal. Anti-corruption Commission personnel encounter black market manipulation by both political parties. When organised crime and fraud are involved, the general view is that as long as finance is available, bribery and intimidation can be used by politicians and state security forces to discourage witness cooperation in corruption cases.

Threats to witnesses are not new. Civil society activists cite politicised assassinations in 1990 which resulted in commissions of enquiry (rather than prosecutions) that were systematically undermined by witness intimidation and murder, despite the assistance of Scotland Yard. The secret documentation of such criminality by a former Anti-corruption Commission commissioner caused the author to flee Kenya due to the threats he faced.[506] His experience is indicative of the draconian response to public exposure of state corruption by members of the civil service.

Personnel in the attorney-general's office cite threats and acts causing death, destruction of property, torture, mutilation, assault and abduction as the most common forms of threat faced by witnesses in criminal proceedings. Civil society





organisations which have drawn attention to or documented crimes have themselves also received threats.

Senior personnel in the attorney-general's office suggest witness protection is required for both conventional and transnational crime. They have found that crime-based as well as insider witnesses are easily located when international criminal elements are involved. Prosecutions in such matters, including post-election violence cases, collapse because of witness non-cooperation due to actual or threatened reprisals. Threats have often caused witnesses to turn hostile, particularly in anti-corruption and economic crime cases, when the state security and political apparatus are suspected of involvement.

Poor justice sector performance, particularly investigative practice, exacerbates witness non-cooperation. The police's inability to investigate discretely and thoroughly slows the justice process and exposes witnesses to threats.

For lower level offending the threat is less sophisticated. In domestic, sexual or gender-based crimes, threats generally emanate from an easily identifiable source. While such cases do not present a diverse threat they remain grave, especially when DNA evidence is submitted for testing, which means culpability is easily proved.

The main challenge, however, is to secure the cooperation of witnesses in KNCHR and Waki Commission investigations, many of whom have been publicly identified by investigations and the text of the subsequent reports. These reports allege abuse by the state security apparatus that Kenyans would supposedly turn to for assistance.[507] Police have refused to document witness reports of police killings, instead threatening those who report the cases with violence.[508] Whole families have disappeared after requesting investigations.[509] It is hoped that new police leadership will restrain such practice.

In April 2008, police and military operations in the Mount Elgon district resulted in numerous allegations of torture.[510] The government refused to acknowledge these assertions until victims reported to the institutions they allege had tortured them.[511] The Independent Medico-Legal Unit (IMLU) reports that torture victims are commonly required to lodge complaints at the stations of alleged police perpetrators.[512]

The KNCHR and Waki Commission enquiries resulted in around 20 witnesses requesting protection. The KNCHR provided approximately seven days ad hoc protection before witnesses were moved to another location if they could afford it. The threat to these witnesses and assisting civil society actors has increased. Justice Waki noted that the implementation of the Witness Protection Act was required

due to the 'capacity for interference with its evidence' by politicians, businessmen and police officers.[513]

Although concerned about threats to witnesses, Justice Waki and the KNHCR have inadvertently contributed to the murder and intimidation of witnesses through their indiscrete investigative practice and disclosure of witnesses' gender and location. Similarly, UN special rapporteur on extrajudicial, arbitrary or summary executions, Philip Alston, pursued witnesses – even at times in the company of police officers – despite being aware of the absence of protective measures, as well as the threat posed by the police. Alston endangered both witnesses and perceived witnesses through negligent investigative practice, the danger of which was already being demonstrated by attacks on Waki Commission witnesses.

The threat to perceived post-election violence witnesses will be exacerbated by the ICC judges' recent approval of investigations in Kenya. The ICC prosecutor's planned May 2010 visit to Kenya to meet with victims may further increase the threat to witnesses and victims.

Post-election violence also saw ethnically organised and politically manipulated local militia perpetrate abuses. Witness cooperation with the Waki Commission and the KNCHR in these cases is often viewed as community betrayal, making witnesses' return home difficult.[514] Cooperating witnesses are already being intimidated and at least one has been murdered.

The ambiguity of the government's position on post-election abuse heightens suspicion and threats to witnesses. Witness cooperation is likely to be difficult to secure after witnesses stated that they no longer wish to be associated with their Waki report evidence.[515] The problem is one of process sequencing. Given the levels of violence, commencing investigations without a protection mechanism or even protective practices constituted gross negligence which created the impression that investigations were more important than the physical and psychological wellbeing of witnesses.

**Kenyans who cooperate with investigations of politically sensitive cases face deadly threats**

Human rights activists Oscar King'ra and GPO Oulu were killed after claiming they had evidence of hundreds of police extrajudicial killings.[516] The police death squad driver, Bernard Kiriinya, was temporarily protected by a human rights defenders' organisation before his murder for blowing the whistle on police killings. The case of Kiriinya illuminates the threat that Kenyans face when they cooperate with investigators. Kiriinya had found the East and Horn of Africa Human Rights Defenders Network assistance inadequate, and was having trouble with his Ugandan asylum application. According to the KNCHR, Kiriinya applied for UN protection but was told it would not happen for two years. Eventually, he and his family fled Kampala due to fear of Ugandan and Kenyan collaboration against him and sought refuge at a Nairobi safe house. He was later shot in front of the safe house.





## Forms of protection used in the past

The Directorate of Public Prosecutions (DPP) and the police rarely used ad hoc protection methods. These ad hoc measures involved short-term physical protection prior to, or during, trial. The prosecution requested court-ordered police protection, but the inadequate legal framework or resources impeded enforceability and implementation. When police posed the threat, requests were never made.

Ad hoc protection has been provided to members of civil society by the Kenya Human Rights Commission (KHRC), a non-governmental organisation with no relationship with the KNCHR. The KHRC often expresses grievances on behalf of smaller civil society organisations, thereby shielding those organisations from state intimidation by concealing their identity. When source anonymity cannot be maintained, the KHRC temporarily shifts witnesses and requests human rights defenders' programmes to take over protection. Unfortunately such protection is available to human rights defenders only and not to whistleblowers or other witnesses.

Economic crime and corruption whistleblowers can make anonymous internet reports to the Anti-corruption Commission. However, difficulties with substantiating anonymous reports often impede investigation and prosecution when a threat of retribution prevents the disclosure of sources. The perceived politicisation of prosecution or non-prosecution of corruption cases only entrenches witness reluctance to cooperate.[517] Twenty-two post-election violence witnesses have been relocated externally or locally by foreign missions and civil society organisations.[518] Almost all Waki Commission and KNHCR witnesses remain exposed to threats.

## LOCATION

The Kenyan witness protection unit is presently located in the office of the DPP which falls under the authority of the attorney-general. The location of the unit has been a contentious issue due to its perceived politicisation and incapacity. The DPP will be further weakened by the allocation of its personnel to the witness protection unit. Civil society actors as well as the UN special rapporteur on extrajudicial, arbitrary or summary executions have called for programme independence from the security forces and the attorney-general.[519]

Donors see the present positioning as dangerous, particularly when investigations are directed against the police. Early preferences for an independent unit within the police were rejected due to the vulnerability to police breaches of confidentiality. An autonomous agency reporting to the minister of justice presently has the most support.

Legislative amendments recently approved by parliament provide for an independent witness protection agency overseen by a witness protection advisory board, with admission decisions provided to the director of witness protection. This would provide a dramatic shift in both functional and perceived independence. If these amendments had not been passed into law, admission jurisdiction and functional sovereignty might have been delegated to the witness protection director or other personnel, as provided for by the Witness Protection Act.[520] Legitimate concerns about subjective decisions to admit prosecution witnesses for protection arise from the witness protection unit's present position on the same floor, and in the same office, as the DPP.

Civil society has expressed distrust in the attorney-general's constitutional power to instigate or discontinue any criminal prosecution by any authority.[521] Even with witness protection unit independence, unethical exercise of the attorney-general's power potentially eliminates that independence by obstructing cases involving witnesses under the unit's protection. A perceived institutional weakness underlies dissatisfaction with all potential authorities within which the unit might be located.

## PERSONNEL

### Personnel procurement

Distrust surrounding the location of the witness protection unit is informed to a great extent by the conduct of justice sector personnel. Diligent, honest and discrete personnel of the highest moral calibre are required in the unit.





In February and March 2009, the attorney-general temporarily seconded personnel from his office as well as the police, provincial administration, internal security, intelligence services, immigration and registrar of persons' office to assist the witness protection unit's acting head,[522] Alice Ondieki, who is a senior principal state counsel in the DPP's serious fraud office and resident adviser in the unit's establishment.[523]

Present legislation does not provide the witness protection director security of tenure, which may undermine independence from the executive. The amended legislation provides five years' security of tenure, with a possible second five-year term at the discretion of the proposed board. If the board seeks the director's removal, a tribunal comprising chief justice-appointed high court judges will investigate grounds for removal and report findings to the board.

A reasonable remuneration package accompanied by systemic oversight is required to ensure that witness protection personnel are not compromised. The amendments are vague on remuneration levels but provide for social security for agency personnel.[524]

While provisional personnel vetting was thorough, the unit plans further vetting of applicants by the intelligence service and the UNODC consultant before permanent staff are appointed, with continual intermittent re-vetting of hired staff. Permanent staff contracts will include an oath of office and integrity and confidentiality non-compliance penalties established in the proposed regulations. Civil society observers advocate personnel finance oversight and polygraph testing as a public interest which overwhelms personnel privacy rights. The amendments provide personnel with powers equivalent to police officers.[525]

### Interagency cooperation

Although relationships between unit personnel and former colleagues can be a security threat, these links are important for the protection unit. The police will assist with physical protection and transportation when required, intelligence personnel will assist with risk assessments, and immigration staff will help with relocation. The unit plans to sensitise internal security, the police, the judiciary and the DPP to cooperation requirements and benefits serving the collective goal of law and order.

Personnel require sufficient authority to command action within their former institutions of employment without providing details that could compromise

witness or operations. Focal points (liaising personnel within other government agencies) will also be important in soliciting cooperation. One focal point of sufficient seniority is to be established within each government agency. Institutional reforms are required to complement focal points and ensure adequate cooperation. Amended legislation empowers the proposed agency to summon a public officer or procure from them any relevant document or information.[526]

The threat assessment officer, most likely a former security sector employee, will be solely responsible for methodologically rigorous threat assessment, and will report to the witness protection director and the attorney-general. The witness protection unit also has DPP-seconded lawyers who will address legal elements of operations and apply for in-court protective measures. Finance personnel have been temporarily seconded to address prudent procurement and expenditure measures, which also protect sensitive information. For functions that do not require full-time personnel, the attorney-general may appoint external expertise.[527] Psychosocial analytical functions will most likely be temporarily seconded.

Staff procurement from other state entities raises capacity concerns, particularly for the DPP, which seconded 12 officers to help operationalise the unit while simultaneously requiring them to fulfil their DPP roles. DPP capacity is already at breaking point, with meagre resources making it difficult to attract competent and motivated personnel. The witness protection unit can only avoid this problem by providing adequate remuneration and benefits as well as a sufficiently capacitated unit.

## ANTICIPATED OBSTACLES TO PROTECTION

The witness protection unit is yet to commence operations. Various methods of protection, along with their respective obstacles and opportunities, have been discussed. The section below is by no means an exhaustive account of the methods of protection to be used. It is instead an examination of obstacles and opportunities potentially encountered, as well as provisional planning for their deployment.

Once the threat has been assessed by the threat assessment officer, a pre-testimony, during-testimony and post-testimony action plan is proposed, and is revised constantly to reflect changing threat assessments. Threat assessments will be taken on an individual, case-by-case basis. They will consider the seriousness of the offending, the nature and relevance of the witness's evidence, the nature of the threat, the willingness of the witness to submit to protective measures, and the availability of protection alternatives.

### Protection before testimony

Protection before testimony begins, in cases where immediate full protection is not needed, upon admission to the programme. Maintaining confidentiality around investigations can greatly mitigate the threat to a witness because the potential suspects and defendants do not know they are being pursued or who the witness is. Good investigative practice removes the need for early admission to the programme, and in some cases, when incorporated with judicial protections, the need for admission at all.

Kenya's protection programme needs to work hard with the police, Anti-corruption Commission and other investigatory bodies to ensure they understand the long-term benefits of discretion for the chances of successful prosecution and witness confidence in the justice system. This element of the justice process particularly illuminates the interdependent nature of various justice sector entities. Indeed, discrete and well planned investigations would normally only require insider witnesses to be placed in the programme when anonymity for other witnesses is maintained in the pre- and during-testimony phases of prosecution. Enormous police, prosecutorial and judicial practice reform is required in Kenya for anonymity to be maintained throughout the entire prosecution process.

When admitted to the programme, the unit intends that witnesses shall not be provided with an increased standard of living. Pre-trial protection will likely include temporary relocation to safe houses, or, where deemed safe, to the residence of relatives. The permanency of safe houses is another matter of concern. Permanent safe houses may be located by defendants or their associates over time. If permanent safe houses are used, security must be robust. Temporary rentals would provide greater witness security.

Sensitisation to personal risk mitigation is also used to capacitate witnesses to identify and report any potential changes in the level of threat they face. If required, armed protection can also be provided. The Waki Commission did not conduct adequate sensitisation of witnesses to the danger of cooperation and to their right not to cooperate. Thorough sensitisation is required, preferably by impartial legal counsel, to mitigate the potential for coaching or other forms of witness manipulation, as well as to ensure that witnesses do not unknowingly endanger themselves.

## Protection during testimony

Witnesses will receive similar protective care during testimony as they received before testimony, depending on ongoing threat assessments. Because most defendants simply seek to stop prosecution processes rather than execute personal vendettas against particular witnesses, testimony and immediate pre-testimony periods are often the most threatening. Giving witness protection unit cases priority in court will facilitate their expedient conclusion and minimise a witness's time under greatest threat.

It is hoped that in-court rules and procedure provided for by the chief justice[528] will prioritise protection cases and provide for anonymity and other psychological witness safeguards. The rights of the accused should be carefully balanced with the perceived threat.

## Protection after testimony

Post-testimony identity change and relocation ensure that the rights of the accused are protected while providing witness protection, but are very costly. It is currently intended that pre-admission standards of living be closely replicated when providing witnesses with financial support until self-sufficiency is achieved.

Financial support is viewed as a less likely problem than witnesses underestimating the psychosocial implications of relocation. Protected persons will be psychologically evaluated prior to admission to gauge their mental fitness for identity change and relocation. Experience elsewhere dictates that threats diminish after testimony to the extent that relocation and identity change are rarely necessary. This trend is anticipated in Kenya, particularly when testimony does not pose a threat to the defendant's colleagues or affiliates.[529]

The trauma of uprooting an African family with strong community, extended family and ethnic attachments is exacerbated when language, custom and traditions are different and the host population is potentially unreceptive. Some Kenyans, particularly those from rural areas, have difficulty accepting their kin's burial elsewhere, a concept linked to their departure without the intention of returning. Psychologists will sensitise protected persons to the environment and culture in which they are about to settle. They must also convince them of the importance of maintaining the confidentiality of their past, a particularly difficult concept to convey to children.





Visa access is often prohibitive where intercontinental relocation is sought. Other witness protection agencies experience little cooperation, especially from European states rarely willing to provide even temporary visas, let alone long-term relocation.[530] The US has stated that it will assist in protecting witnesses of post-election violence but did not say whether that support means they will receive relocated witnesses.[531] The Dutch have encountered particular difficulty with witnesses travelling to testify before tribunals, and who then seek to remain in the Netherlands. Relocation to affluent destinations is unlikely due to cost and inducing considerations.

Internal relocation also has its challenges. Despite an alternative identity, interstate and city links as well as language and accents make it possible for neighbours to establish that a witness's identity is not authentic. Only Kenya's greater metropolitan centres appear of sufficient size for secure witness relocation.

Relocation within the region and within sub-Saharan Africa provides a preferable degree of cultural and climate familiarity when compared to foreign continents. Consideration should be given to Kenya's porous borders and the ease with which threat elements can cross them. Real or perceived benefits of relocation may be seen as inducement to witnesses, particularly during unrest or an economic downturn. In this sense, sub-Saharan relocation mitigates expectations compared to transcontinental relocation.

Relocation within the region is not, however, without its problems. When regime change occurs in the receiving state, other problems arise. Potential regime change empowering a hostile administration should be mitigated through apolitical protection agreements. A memorandum of understanding provided by the UNODC has already been utilised to establish cooperation with the ICC. The proposed legislative amendments also empower the witness protection agency to do so.[532] It is hoped that the Commonwealth Harare scheme, requiring mutual assistance in entrenching the rule of law, provides for Commonwealth African state cooperation in relocating witnesses.[533]

# ADMITTING WITNESSES TO THE PROGRAMME

## Admission process

Admissions will be considered by the director of the witness protection unit,[534] as opposed to the attorney-general. Unless a schedule of offences for admitted cases is added to legislation, the nature of criminality admitted also resides within the

attorney-general's discretion. Civil society observers cite potential conflict of interest with the admission policy, given that the police or the prosecution might be prone to compromising the merit of a case for protection in order to solicit testimony. Robust protection agreements, specifying the level of support comparable to prior income, would assist with internal evaluations of inducement.

The need to be thorough must be tempered with expedience. Protection should begin as soon as possible while ensuring parties fully understand protective arrangements. Pre-admission emergency protection should be provided when the threat requires it. Unfortunately, when they establish contact with the witness protection unit or investigators, witnesses increase the threat they face and their dependency on the state, thus undermining their power to negotiate protection terms.

At present there are no plans to make protective measures available to defence witnesses. There is also presently no official mechanism for reviewing admission decisions. Judicial review would likely prove to be financially prohibitive for ordinary Kenyans, particularly when they would remain unprotected during the process. The public complaints standing committee has also been mooted as a possible mechanism. Amendments to the legislation include a witness protection appeals tribunal on which a high court judge and two other persons, appointed by the president and the minister of justice respectively, would sit.[535] It is unclear whether ad hoc protection will be provided while a case is being considered.

## Admitting security sector abuse cases

Civil society observers note the state's reluctance to protect witnesses to post-election violence and ongoing police abuse.[536] No high profile prosecutions relating to post-election violence have yet occurred – a situation which civil society attributes to politically vested interests in undermining attempts to address impunity, including state abuse. The government may, however, refer to the removal of corrupt police leaders as demonstrative of a shift in police attitude.[537] A corrupt police force is an enormous impediment to protection of witnesses in state abuse cases.[538]

In his report, Justice Waki hinted at amnesty for low level offenders.[539] Low level amnesties are required to secure insider testimony against planners, organisers, financiers and security sector perpetrators. Justice Waki, like special rapporteur Alston, was of the opinion that the protection programme would admit





cases related to post-election violence.[540] The attorney-general has, however, consistently excluded security sector abuses when referring to likely cases that will be admitted to the witness protection unit, instead citing corruption, organised militia and ethnic violence cases.[541] Scepticism pervades the attorney-general's office about the unit's capacity to protect witnesses in the forms of crime cited by the attorney-general that involve high profile defendants, even in the medium-term.

## Corruption cases

Protective measures for corruption cases are being called for by the attorney-general and others.[542] However, protection for these cases will not be considered in the short-term, particularly given the attendant political sensitivities. The witness protection unit does not foresee sufficient programme capacity to protect witnesses in corruption cases that involve powerful political elements in the foreseeable future. An incremental approach is to be taken for politically sensitive cases. In the short-term, protection for women from their husbands is the only form of criminality anticipated to be protected by the witness protection unit.

## Post-election violence and organised militia

Organised militia, such as the Sabaot Land Defence Force and the Mungiki sect, have nationwide intelligence networks and are widely accused of killings and other abuses. Although the attorney-general and former police commissioner Hussein Ali have stated that witnesses to abuses by local organised militia be admitted, this is not corroborated by current witness protection unit personnel.[543] Admitting such cases during the witness protection unit's infancy would, in the opinion of personnel involved in its establishment, be beyond the programme's capacity. Pursuing organised militia using the unit would require robust security sector cooperation but would serve politically expedient justice by neglecting those aligned to the state. This increases the threat by politicising witnesses' role.

Witnesses of post-election violence have stated that they would not enter government protection, even under a programme created in terms of the amended legislation, because of distrust of state institutions.[544] On 23 March 2010, the ICC prosecutor stated that he did not have any witnesses in Kenya as investigations had not yet proceeded.[545] When the ICC judges approved the investigations, the

prosecutor then stated that his office would independently protect ICC witnesses.[546]

## Domestic violence and gender-based criminality

The witness protection unit seeks to admit domestic violence and gender-based crimes in its initial operations. Admitting politically non-sensitive cases allows consolidation of protection infrastructure and public legitimacy before admitting more sensitive cases. The unit's personnel are concerned that political elites may view the unit's very existence as a threat, and could close it down just as it begins its work. Admitting high threat cases that do not emanate from political groups, the security sector or organised criminal groups, avoids politically motivated operational impediments.

**Public expectation of cases that the witness protection unit will accept**

Taking on political or organised criminal threats requires operational sophistication and substantial finance. The current leadership of the witness protection unit seeks to address such criminality once effective function and autonomy are demonstrated through successful handling of non-sensitive cases. There is a concern that public expectation will pressure admission of high profile cases that the unit is unprepared for. Resulting protection failure could irreparably undermine public trust. Testing the level of cooperation from state entities, particularly in the security and intelligence sectors, using low sensitivity cases is prudent before admitting witnesses against personnel within those entities.

However, some civil society observers want witness protection to address impunity and the lack of credibility in the justice process as a whole. The admission of low profile cases is seen as the 'easy way out' of providing 'effective witness protection for all'. This perspective assumes that the witness protection unit is capable of addressing politically sensitive criminality on its own, neglecting the interdependent nature of justice sector entities. External actors and donors also view witness protection as critical to addressing impunity in Kenya.[547] Most engaged donors are therefore willing to support the programme, despite the initial exclusion of politically sensitive cases.





# IMPLICATIONS OF POTENTIAL POST-ELECTION VIOLENCE TRIALS

Kenya's post-election violence prompted calls for accountability through criminal trials. Few civil society observers believe that fair trials of high profile figures involved in the violence could take place inside the country.

## Trials before the local law courts

Kenya's parliament recently shunned a formerly proposed special tribunal to address the violence, instead favouring reformed local courts.[548] The day preceding this decision the minister of justice had stated that he was 'determined' to establish a special tribunal featuring international judges despite several cabinet colleagues 'running away from justice'.[549] The decision to use local courts facilitates the continued delay of justice and a thoroughly investigated adversarial history of the crimes committed. Slow witness protection unit establishment is indicative of the slow pace of reform elsewhere in the justice system. It is a tactic often used to delay corruption cases that commonly involve lengthy commissions of inquiry that never reach conclusion or simply wrap up when public discontent subsides.

While political divisions within government are clear, Kenyan civil society observes that politicians in all parties involved in post-election violence are united by fears of the 'political risk' that comes with justice processes. A majority therefore obstruct or manipulate a genuine justice process as evidenced by the blocking of the February 2009 constitutional amendment which would have allowed for a special tribunal. President Kibaki and Prime Minister Odinga had to seek an alternative route rather than encounter further political embarrassment. Justice sector reform is the only compromise thus far, despite the attorney-general being held accountable for poor reform implementation.[550]

Perhaps a more discrete and attractive method of manipulating ICC prosecutions is state cooperation on protection and access to witnesses. Without a special tribunal the government will not provide special protection for post-election violence cases. Instead, after justice reform of uncertain duration, it appears that the witness protection unit will be responsible for protecting witnesses in post-election violence cases not prosecuted by the ICC. WPU personnel concede they are a long way from being able to receive such cases. It might also be a long time before justice reform completion and the start of post-election violence trials. However, the threat to witnesses is already prevalent,

meaning immediate protection may be required if witnesses are willing to engage in such a process.

The targeting of Waki Commission witnesses means that witness will be reluctant to testify before a Kenyan judiciary.[551] Witnesses who do cooperate will probably require costly and complicated identity change and international relocation. Kenyan trust in the witness protection unit is first required but this will be difficult to establish due to protection's covert function which seeks to avoid public attention. This is evident in the absence of attention received by human rights defenders' programmes. Civil society actors warn that witness identification should occur prior to an announcement of investigations. Establishing witness protection after announcing investigations, whether by the ICC, a domestic tribunal or the national courts, causes a dramatically increased threat to all witnesses.

## ICC trials

Justice Waki provided former mediator and former UN secretary-general Kofi Annan with an envelope containing the names of high profile Kenyans warranting investigation for the post-election violence. On 16 July 2009 the ICC prosecutor announced he had 'opened the sealed envelope, examined its content and resealed the envelope'.[552] On 3 July 2009 the prosecutor and the Kenyan government had agreed that the ICC had no ground to intervene, 'should the Kenyan authorities carry out genuine judicial proceedings against those most responsible'.[553] The Kenyan delegation agreed to provide, by the end of September 2009, a report on investigatory and prosecutorial status, information on measures to protect the safety of victims and witnesses, and information on which modalities will be employed, whether it be a special tribunal or 'other judicial mechanism'.[554] The Kenyan government did not meet this deadline.

Insertion of the phrase, 'other judicial mechanism', was interpreted to refer to Kenya's ordinary law courts. The government assumed the ICC prosecutor would accept a commitment to reform the justice system as constituting a report on 'the status of investigations and prosecutions'. The government also assumed that the 'existence' of the witness protection unit, witness protection legislation and regulations, would be perceived as adequate to ensure protection in the current Kenyan security and political climate. A copy of the Witness Protection Act 2006 and a letter detailing the then proposed witness protection unit under the attorney-general have been provided to the ICC prosecutor.[555]





The Kenyan government would also have considered the pressure under which the ICC prosecutor finds himself. On 3 July 2009 AU member states decided to cease cooperation with the ICC on the arrest and surrender of President Omar al-Bashir of Sudan.[556] The government gambled that the ICC would not seek further antagonism from already uncooperative African states by issuing indictments for senior Kenyan government officials.

However, when Kenyan failed to meet its September 2009 obligations, the ICC prosecutor announced he would formally request the court's judges to authorise investigations.[557] Key potential witness protection unit donors are of the view that Kenyan leaders did not believe ICC prosecutions would occur. Were Kenyan law courts to pursue even lower level offenders, it is unlikely that witnesses who could link responsibility to those in high office would come forward, particularly when witness protection unit capacity is insufficient.

Ambiguity surrounding intended Kenya–ICC 'cooperation' raises the prospect that Kenya may in future refuse to hand over suspects. More subtle Kenyan obstruction of ICC prosecutions may occur through manipulation of witness protection processes under the guise of 'cooperation'. The government has stated its intent to cooperate on witness protection and the ICC was initially receptive to this intent.[558] However, government cooperation with the ICC on witness protection will further alienate witnesses already apprehensive after their experience with the Waki Commission and the KNCHR.[559]

Were the ICC to focus on insider witnesses and scene-of-crime witnesses outside Kenya, the associated risk of government or other local threats would be minimised. The prosecutor has stated that he will try to use a small number of witnesses to reduce witness exposure to threats, and that the ICC would independently protect witnesses.[560] Total independence in protecting witnesses sourced from within Kenya will be extremely difficult to implement. This means that where possible, witnesses already outside Kenya should be used. However, locally based witnesses may be required for the prosecution to make its case. The practical impediments to safely contacting, gaining cooperation with and bringing witnesses to The Hague in such circumstances will be substantial and will certainly require state cooperation. How forthcoming such cooperation will be remains unclear. Before, during and after the ICC prosecutor's visit to Kenya in May 2010, it is important that he continually stresses that he is visiting victims only and not witnesses, while emphasising the duty of the Kenyan state to protect its citizens.

## PUBLIC TRUST IN KENYAN CRIMINAL JUSTICE

The slow pace with which criminal cases proceed in Kenya means that witnesses in domestic trials would require protection for long periods of time, causing increased risk and cost. Poor or corrupt practice in the justice sector that result in witnesses' identity being disclosed during investigation or trial also increases the risk. At any rate, witnesses must hold sufficient trust in the justice system to participate in the first place. Considering that many view the post-election violence as an expression of Kenyan exasperation with corrupted justice sector channels of dispute resolution, public distrust is a major challenge for witness protection in Kenya.

For the adequate functioning of the witness protection unit, the DPP and other justice sector entities must discharge their functions competently and expediently. Anti-corruption Commission legitimacy has been undermined by the attorney-general's inability to assess, approve for prosecution and pursue its cases.[561] Witnesses in these cases are likely to become hostile, particularly in politically sensitive cases.[562] Witness cooperation depends on the capacity of the entire justice system to execute the rule of law. Justice sector interdependence means any entity could compromise witness safety through neglect of prudent, expedient and witness-sensitive practice. Until conviction rates are more successful and expedient, it is difficult to foresee enthusiastic participation.

**Capacity challenges facing the criminal justice system in Kenya**

The GJLOS programme of reform, frozen after the post-election violence, cites numerous DPP challenges exacerbated by Kenya's economic decline, insecurity, unemployment, poverty and regional insecurity.[563] Other impediments include: inadequate staff and training, poor working facilities, scarcity of legal resources, inability to recruit and retain quality legal professionals, population increase, lack of specialisation, weak internal management and reporting systems, and sophisticated criminality.

The inability to prosecute is symptomatic of an inadequately funded DPP unable to attract or retain staff. There are only 73 state prosecutors nationally, with 300 police prosecutors trying 97 per cent of cases, including 99,9 per cent of cases before magistrates' courts.[564] Police prosecutors have arbitrary prosecutorial discretion which is delegated by the attorney-general but rarely checked. In 2004, a DPP strategic plan sought to replace police prosecutors with trained lawyers. At the time it was hoped that 150 lawyers could be recruited per year, in addition to the serving 57. Instead, from 2005 to 2008, only 25 were recruited and 19 were lost, leaving the DPP overburdened and demoralised.

The dearth of DPP finance causes prosecutors and investigators to seek improved salaries and benefits in commercial practice or at the Anti-corruption Commission, where investigators earn ten times more than their DPP equivalents. Other justice sector personnel, such as judicial officers, receive benefits unavailable to the DPP, such as medical cover. The contrast between the current Anti-corruption Commission annual budget of over US$15,7 million and the DPP's US$830 000 budget illuminates the disparity. In 2008 a prosecutor's income increased by US$40. GJLOS donors are keen to address these discrepancies but require tangible indications of political will.

Solving the problem of DPP wages does not address the fact that the prosecution must work with an inefficient and ineffective judiciary. The Anti-corruption Commission has encountered this problem with cases relating to the Goldenberg and Anglo-leasing scandals continuing to be delayed since 1996 and 2004 respectively.

Inequality of conditions of service is also evident in the judiciary where magistrates earn around US$950 compared to US$9 500 for high court judges, who are also provided with a home, security and a limousine. Equitable scaling of salaries, benefits and conditions of service within and between institutions would assist better justice sector performance.[565] A permanent secretary in Kenya earns more than US$6 800, while their immediate subordinate earns less than 10 per cent of that.

Inadequate police investigating capacity further undermines the DPP's already low conviction rate. The DPP could not prosecute alleged Mungeki sect leader Miana Njenga for firearms offences because of a lack of evidence. Publicly a Mungeki leader escaping prosecution looks poor. However, the DPP is bound by examination of the evidence before it. Causal elements of inadequate police investigation and DPP prosecution are often too nuanced and technical to easily communicate to ordinary Kenyans.

The most troubling justice sector problem is the enormous backlog of 877 000 cases with many suspects unable to post bail and forced to wait in prison.[566] One contributing factor is the justice process, which allows judicial officers, paid less than US$500 per year, to delay or threaten to delay cases in order to solicit bribes from the accused and their families.

Finance is required for increased capacity and reform. The attorney-general cannot be solely held accountable for his office's inadequacies, although he may have lobbied inadequately

on his office's behalf. Parliament holds the purse strings and must also be held accountable for problems in the attorney-general's office. Civil society observers suspect the government will deliberately under-finance the attorney-general's office, avoid reform and under-finance the witness protection unit to facilitate political manipulation.

In addition to capacity constraints, the politicisation of justice is another major area of concern for the public in Kenya. Weak institutions allow real or perceived politicised justice outcomes. Opposition party supporters point to their targeting in the Anglo-leasing scandal. When institutional capacity is weak and underfunded, it is more likely that corrupt lower level personnel will solicit patronage from above to supplement meagre salaries.

The patrimonial state, established by the British colonialists and entrenched by successive post-independence regimes, established justice sector institutions as politicised coercive state tools to persecute perceived enemies and empower patrons.[567] The continuing political impasse entrenches cynicism about government and reform of the justice sector. For example, observers suspect the attorney-general uses his power to approve the prosecution of Anti-corruption Commission cases as bargaining chips with ministers.

Overall, the Kenyan justice system is politicised and inequitable, and suffers from a lack of capacity. This has caused ordinary Kenyans as well as politicians and elites to employ violence when addressing grievances and attempting to obtain or retain power.[568] Violence has retained an ethnic dimension, heightening mistrust among Kenyans and mistrust of state institutions.[569] This sentiment allows politicians to deflect controversy by stirring fears among ethnic constituencies.

Constituencies will likely interpret prosecution of a politician from their own ethnic group as ethnically motivated persecution rather than an impartial state enquiry of evident wrongdoing. Enquiries into post-election violence could trigger similar incitement, particularly during a lengthy prosecutorial process, placing great pressure on witness protection impartiality.

## CONCLUSION

The witness protection unit's establishment as the second such African programme is a notable achievement. Its operational success, particularly its capacity to protect, will establish its legitimacy. Positive signs of its establishment





should be tempered by the unit's present circumstances, which include a powerless director and no operational staff. The attorney-general, who retains ultimate authority over the unit, has been personally singled out for reform inadequacies. Current legislation and unit location do not provide positive signs for the unit's future independence and capacity. The proposed legislative amendments will recast the programme as holding the leading framework for African witness protection, while demonstrating one element of government's willingness to implement reform. Ensuring adequate finance is the next yardstick of political will. A recent statement by the attorney-general hints at the possibility of inadequate financial provision. This could incapacitate the programme from the outset and facilitate fiscal intimidation and manipulation by parliament.

It is hoped that upon admission of low sensitivity cases, public trust will grow. The unit hopes to firstly secure the revised legislative mandate before soliciting finance and personnel and beginning operations. The government has a unique opportunity to diminish criticism by stating specifically what reform is to occur, and to carry out that reform in a timely manner. Passage of the amendments by parliament demonstrates authentic government intent at this point. The attorney-general's office is well positioned to lobby government for specific reforms. Its appeals, and state response, have thus far proved either collectively inadequate or deliberately superficial. Inadequate financing would encourage perceptions that executive and parliamentary interests are pursuing a justice system which can be easily manipulated. Reform of police leadership is a positive step away from this perception but requires accompanying reform of police practice and oversight mechanisms.

The attorney-general's appeal to UN special rapporteur Alston to be appreciative of state efforts to establish witness protection holds a self-imposed bar of reform far too low.[570] Empowering the witness protection unit to address non-politically sensitive criminality, combined with justice sector reform, is preferable to building expectations that the unit appears unlikely to fulfil. Only comprehensive reform and disciplined and expedient practice over a sustained period will solicit state whistleblower cooperation.

For reform to occur, access to the GJLOS fund is required. Convincing donors to reopen the fund will require serious commitments on the part of the government. The ICC's intention to prosecute cases of post-election violence alleviates some reform pressures. Donors should, however, avoid funding any initiative which allows witness protection unit jurisdiction or temporary control over ICC witnesses. If the ICC considers cooperation with the unit, specific

complementarity standards of independence, capacity and practice should be required. This would set a precedent and incentive for witness-oriented justice sector reform for those states where ICC investigations may take place in future.

Failure to amend the witness protection unit's legal and functional autonomy in admitting witnesses, along with other proposed amendments, will hamstring the unit from its outset. Parliament's recent passage of the proposed legislative amendments is an enormously positive sign. The unit requires disciplined and expedient cooperation from other state entities that also require reform. Sensitisation throughout the criminal justice process to witness-oriented practice is as important to witness protection as the establishment of the programme itself.

The government, with some justification, has been accused of endangering witnesses, either deliberately through the state security apparatus, or surreptitiously through maintaining a weak justice sector. Local and international post-election violence investigators accuse the state of incompetent witness protection. However, these investigators also bear significant responsibility for endangering witnesses through negligent investigatory practice.

ICC investigations should avoid using local witnesses where possible and continue to be explicit about the independence of its witness protection. Those witnesses suspected of cooperating with the KNHCR, Waki Commission and special rapporteur Alston have already been linked to ICC investigations and targeted, and have stated that they will not cooperate with a domestic protection programme, no matter how independent it might be. The ICC should be careful not to replicate the mistakes of the aforementioned inquiries. After all that Kenyan victims have already been through, they are surely owed at least that much.



## Chapter Seven

# Uganda: Conflating witness protection and protection of informants

Having come to power in 1986, President Yoweri Museveni was quickly challenged by rebel groups, including the Lords Resistance Army (LRA). In the ensuing conflict, both the LRA and the Ugandan People's Defence Force (UPDF) have since committed abuses, mainly in the north of Uganda. Although Museveni has allowed some human rights progress compared to his predecessors, state levers of power have been used to ensure political survival rather than to uphold the rights of ordinary Ugandans. Despite this, Museveni has proved adept at securing western aid, particularly from the US, which has slowly pressed for political reform.

In December 2003 the Ugandan government referred the situation concerning the LRA to the ICC prosecutor. Investigations began in mid-2004 with indictments issued for five LRA leaders, including Joseph Kony, a year later. To date, no arrests have been made. In the interim, human rights groups have called for the ICC to also investigate crimes committed by government forces.[571]

Peace initiatives between the government and the LRA during 2007 and 2008 suggested that Ugandans might favour local justice mechanisms over ICC prosecutions. However, in order to meet the ICC's fair-trial requirements of complementarity, the government will need to undertake at least partial justice sector reform. The Kenyan precedent shows that 'measures must be put in place to ensure the safety of victims and witnesses pending the initiation and completion

of suitable judicial proceedings'.[572] How independent and robust such measures must be remains unclear. Nevertheless, the Ugandan government might be required to examine and promote, at least superficially, potential protection initiatives.

Under donor pressure, legislation has been drafted which hints at witness protection. The final draft of the bill dealing with international crimes (which was passed by parliament in mid-March 2010) criminalises intimidation of ICC witnesses, facilitates Ugandan state assistance in protecting and making available ICC witnesses, and provides for the protection of witnesses in cases before the newly established war crimes division of Uganda's high court.[573] In addition to this bill, the Whistleblowers Protection Bill was presented to parliament by the ethics and integrity minister, James Buturo, in March 2009.[574] However, it is yet to be passed into law and contentious provisions remain.

Present legislation and the state of the criminal justice system do not solicit witness cooperation with law enforcement on local or international crimes. This chapter examines the extent to which tentative moves toward some legal protections might alleviate witness concerns about cooperation. It also highlights gaps and methods of protection in Ugandan legislation, which might be required to meet ICC complementarity.

## LEGAL FRAMEWORK

### Whistleblowers Protection Bill

The proposed legislation protects whistleblowers from victimisation by employers or any other party. Unlawful disclosure of a whistleblower's identity, the disclosure's substance or whistleblower victimisation are all punishable by up to five years' imprisonment. While victimisation includes work-oriented disincentives or harassment and intimidation, it does not explicitly protect whistleblowers' families.[575]

The bill mistakenly assumes whistleblower confidence in individuals or institutions to which complaints may be made. Disclosure procedures require the whistleblower's full name, address and occupation to be recorded, as well as the name and particulars of the accused.[576] The bill also excludes protection for disclosures made anonymously.[577] Ordinary Ugandans, however, hold little faith in individuals' or institutions' ability to investigate disclosures competently and ethically.





Disclosures may be made to employers, the Inspectorate of Government, the Directorate of Public Prosecutions, the Uganda Human Rights Commission, the Directorate for Ethics and Integrity, or any resident district commissioner.[578] Persons receiving disclosures must investigate or cause investigation and take appropriate action.[579] However, these entities are not altogether endearing to ordinary Ugandans. District commissioners were found to be the only authority outside Kampala empowered to receive complaints, despite political affiliations and alleged ambivalences towards police offending.[580]

Another challenge is that the bill conflates witnesses and informants. The bill provides that a whistleblower 'may request police protection and the police shall provide the protection considered adequate'.[581] It also stipulates that protection provided would not be discontinued upon witness identity disclosure.[582] This wide and ambiguous police mandate could protect whistleblowers unwilling to cooperate as witnesses, but not the cooperative witnesses that subsequent investigations procure. Cases with whistleblower witnesses could thus proceed with protection, but not when unprotected non-whistleblower witnesses are uncooperative.

The Whistleblowers Protection Bill also prevents civil or criminal liability for disclosure which contravenes confidentiality or secrecy legislation, when whistleblowers act in good faith.[583] This provision appears to hold precedent over the Ugandan code of conduct and ethics, which prohibits unauthorised public sector information disclosure.[584] It also appears to assert itself over the Official Secrets Act's wrongful communications provisions prohibiting communication of documents or information relating to state entities.[585] Contract non-disclosure clauses are voided where disclosure is in accordance with the bill.[586]

Whistleblower legislation has been pushed under donor corruption-reduction initiatives in the IMF's poverty reduction strategy paper since 2001.[587] Progress to parliament, let alone to law, has been particularly slow. Civil society observers cite the bill's inadequacies as well as the absence of accompanying witness protection legislation. Before its presentation to parliament, there was no public debate about the bill's legal, financial, social and political elements or the need for witness protection.

### Access to Information Act

The Access to Information Act protects persons disclosing evidence of contravention of law, maladministration or corruption in government bodies,

from legal, administrative or employment-related action.[588] The act's amendment to include additional whistleblower bill protections may have provided an alternative to further legislation. One such amendment would repeal section 27 of the act, barring disclosure when a commercial third party is involved.[589] This section effectively bars all disclosure relating to public procurement and contracting, a common source of state corruption which personnel could disclose under the whistleblowers bill.

## International Crimes/Criminal Court Bill

The final draft of the International Crimes/Criminal Court Bill (which was passed by parliament in mid-March 2010)[590] criminalises intimidation of ICC witnesses (section 16) and provides for Ugandan assistance in protecting and making available ICC witnesses (sections 21, 50-52, 59). Most importantly, the bill provides for protection of witnesses before the war crimes division of Uganda's high court (section 20).[591] The bill does not state what form a protection programme would take, where it would be located, who would hold the power to admit and decide on protective measures, or what protective measures would be available.

Should the war crimes division of Uganda's high court seek to try persons for war crimes with a view to meeting ICC requirements of complementarity, the bill assumes that intent to protect witnesses is sufficient. This is clearly a lower threshold than that adopted by the ICC for witness protection in Kenya, where the establishment of a witness protection programme was required.[592] Intent to protect witnesses without an established protection mechanism is unlikely to meet the ICC's complementarity threshold.

# NEED FOR PROTECTION

## Nature of criminality

High level corruption is a key challenge in Uganda. Although controlling corruption has ostensibly been a donor priority since the early 1990s, donor-led reforms have favoured addressing low level rather than elite corruption.[593] Inadequately capacitated and politically restrained anti-corruption institutions allow high level corruption to proliferate under a quasi-authoritarian system.[594]





Elite corruption has been utilised by the executive to solicit patrimonial support. Donors have also used state corruption to secure external commercial penetration in return for restraining reformist pressures.[595]

**High level corruption is rarely successfully prosecuted**

Few instances of high level corrupt practice have been met with punitive action. In July 2004, the inspector-general of government recommended action against the solicitor-general and a state minister, but President Museveni did not act on this recommendation.[596] In March 2005, the Central Bank, directed by the government, released US$10 million to creditors of a prominent local businessman in a manner the IMF cited as not transparent.[597] Moreover, punitive action over public procurement bribery involving the president's family has ceased without explanation.[598] The previous decade's most prominent corruption case was the theft by senior military officers' of 'ghost soldiers' salaries.[599] While initially blocking the investigation citing 'national security', the president appeared to use the scandal to purge the UPDF of opposition through politically influenced military prosecution.[600]

Compared with corruption, organised crime is regarded as less prevalent. The criminal investigations department has denied the existence of sophisticated organised crime in Uganda. The department cites trafficking in drugs but not organised criminality on the scale of the Kenya's Mungeki or militia groups. While the department's assertions might be plausible, politically affiliated organised criminality is equally conceivable.

Where lower level violent crime is concerned, less sophisticated criminal elements have often avoided prosecution by soliciting protection from local leaders.[601] With the exception of murder, Uganda's crime rate is relatively low, although this may reflect lower levels of reported and recorded criminality, particularly rape and domestic violence.[602]

While Uganda's overall crime levels are low, human rights organisations have regularly recorded criminality, particularly human rights abuses, by both the Ugandan state and the LRA.[603] Abuses have included illegal detention, torture, forced displacement, rape and other egregious state abuses as well as killing, forced conscription, sexual enslavement, mutilation and other LRA crimes. The conflict appears to have temporarily settled, with the LRA largely dispersed into the eastern DRC. Although peace negotiations were concluded in 2008, LRA leader Joseph Kony did not appear to sign the peace agreement.

## Threat to witnesses

Witnesses in Uganda are reluctant to cooperate due to an absence of protection from retribution, an incapacitated criminal justice system, and the lack of material rewards for doing so.

With regard to corruption and other politically sensitive criminality, public sector whistleblowers have commonly suffered harassment, detention and job insecurity, which have impeded cases under investigation by the Inspectorate of Government, Ministry for Ethics and Integrity and Directorate of Public Prosecutions. All entities cite inadequate mechanisms to dissuade witness fears, particularly in politically sensitive cases. Social and political networks threaten corruption witnesses who prioritise the need to progress their careers. Civil society observers describe police collaboration with those seeking to intimidate witnesses in politically sensitive cases. They cite the police media monitoring desk as an example of state apparatus being deployed against perceived political opponents.

Activists who have called for action on corrupt practice have been routinely harassed by the state.[604] This does not encourage whistleblowing, even under legal protection. One senior inspector-general of government officer has left his position due to fear for his life. Threats clearly go beyond witnesses to justice system personnel, including prosecutors and judges, who are essential for justice sector legitimacy.

Witnesses of civil war abuses face different challenges to those involved in corruption or politically sensitive cases. In February 2008, an appendix was attached to a 2007 peace agreement providing for the creation of a special division of the Ugandan high court.[605] The passage of the International Crimes/Criminal Court Bill will operationalise this special 'war crimes division' which will try persons alleged to have committed, or ordered, crimes during the conflict. A truth commission and traditional justice practices were also considered, both of which would potentially elevate localised threats. A formal justice process will require an adequate protection mechanism if local prosecution is to preclude those indicted by the ICC. The ICC-Kenyan precedent establishes ambiguous standards of protective practice and independence.

Different witness interventions are required if non-punitive mechanisms are employed. Because atrocities were committed against victims' own extended family, psychological support must be built into transitional mechanisms to mitigate hostile responses, including victim and perpetrator stigmatisation.





Stigma and potential breakdown of longstanding family and community bonds significantly deter witness participation.

# CURRENT PROTECTION MEASURES

## Inspectorate of Government

The Inspectorate of Government Act, like the Whistleblowers Protection Bill, also conflates witness and whistleblower protection.[606] It provides for the investigation and prosecution of cases of corruption or abuse of public office.[607] The act provides for protection of persons reporting information to the inspectorate, including identity concealment, and a reward of five per cent of recovered monies.[608] The inspectorate's constitutional mandate (articles 223-232) to fight corruption means serious threats to witnesses, particularly in politically sensitive cases.

The inspectorate has the mandate but not the capacity to protect reporting persons. Presently it advises witnesses in conducting their own relocation but cannot provide relocation or identity change itself. The inspectorate finds it difficult to ascertain protection benefits, particularly given alternate means of case disruption in a weak Ugandan justice system. The inspectorate has withdrawn numerous cases due to witness reluctance to cooperate after receiving threats.

The inspectorate has also been hamstrung by malicious and politically motivated complaints, diverting the inspectorate's and the court's resources. When ad hoc protection is provided it has focused on pre-trial anonymity. However, an accused's rights, including pre-trial disclosure of statements disclosing witnesses' details, remove the effectiveness of anonymity. This right has been upheld in Uganda's constitutional court as necessary for a constitutional and fair trial.[609]

## Directorate for Ethics and Integrity

The Directorate for Ethics and Integrity, an Office of the President government agency, is mandated to formulate and coordinate national anti-corruption policy. It does not have investigative or prosecutorial power, but refers received matters to the criminal investigations department of the police and the Directorate of Public Prosecutions. While the directorate might claim preparedness to protect, it has not considered relocation, identity change or other post-testimony measures. On a few exceptional occasions it has requested ad hoc police protection. In one white-collar crime case a witness was externally relocated with funding from an external

group with unclear motives, which undermined the legitimacy of the process for the witness. The directorate has no protection budget or criteria that trigger requests for police assistance.

## Police

The police have undertaken ad hoc protective measures upon request of investigative agencies. Measures have included regular patrolling of a witness's residence, advising and assisting temporary relocation, monitoring of the accused, and informing accused that any intimidation would be prosecuted. These measures have been discontinued post-testimony. The cost of protection has been absorbed by ordinary policing practice.

## Human rights defenders' networks

Human rights defenders have provided ad hoc protection for at-risk human rights activists in Uganda. At a low level of risk, training in risk assessment, risk mitigation and training of others has been provided to activists. When activists are detained, human rights defenders have agreements with EU members whose embassies raise concern with governments about activist safety and rights. When activists are under imminent threat, grants are available for closed-circuit television cameras, electronic door security, unarmed security personnel, mobile telephone communication and digital counter surveillance.

In exceptionally serious circumstances, relocation occurs. Commensurate with threat levels, internal, regional and intercontinental relocation is pursued. Emergency visa arrangements allow relocation in a limited number of European states.

# UGANDAN JUSTICE SECTOR CAPACITY

## Ugandan Police Force

Uganda faces a lack investigative capacity which undermines forensic investigative capability in a witness-sensitive manner that requires cooperation. The criminal investigations department has previously demonstrated reluctance to accept investigative responsibility, instead pointing at witness non-cooperation.[610] While some witnesses, particularly elites, have vested interests in non-cooperation, the criminal investigations department must critique its own witness-engagement practices.

When testimony is of great value, ad hoc plainclothes protection has been provided. Post-trial protection is not provided. This does not encourage witnesses involved in politically sensitive cases to report such crime. The criminal investigations department director has stated that low levels of organised crime reduce the need for witness protection. Were protection to be entrusted to the police, low levels of public trust may undermine witness cooperation. Strong-arm practices, including extrajudicial killings, illegal detention and torture, have – in one instance – required unit closure, which has entrenched distrust.[611] In early September 2009, for example, at least 13 protesters were shot dead by government forces, including the police, military police and the UPDF.[612]

## Directorate of Public Prosecutions and the judiciary

The Directorate of Public Prosecutions has no forensic accounting or serious fraud unit, other than an incapacitated economic crimes desk. The lack of capacity in the directorate and the judiciary, particularly as far as case backlogs are concerned, exacerbates threats to witnesses, causing greater witness apathy. An anti-corruption court is being established to target corruption cases for expedient trial. However, effective legislation, protective capacity and independent investigative and judicial structures are also required, particularly in politically sensitive cases.

When cases are finally decided they are, at times, ignored by officials who yield to political pressure.[613] Judges in the high court, court of appeal and supreme court do not complete appraisal reports, removing any basis on which to assess their independence.[614] Low salaries for judicial officers make delaying tactics and other methods accessible to well financed and politically connected accused.

# CONCLUSION

The Ugandan government has shown intent to pass legislation that provides limited protection to sources and potential witnesses. This constitutes a significant step for Ugandan criminal justice by acknowledging a responsibility to protect, as well as the benefit to criminal justice processes of doing so. The legislation, however, remains vulnerable to political manipulation which raises questions about the government's commitment to robust accountability mechanisms. Uganda's barring from the Millennium Development Goals Fund due to failure on

democracy, transparency and accountability in governance criteria may prompt more serious justice sector reform, including witness protection.[615]

**Political will: the magic silver bullet**

Active civil society, donor and now ICC pressure is required to mobilise political will for reform. Civil society must better engage the legal and political state framework. While space for the prosecution of corrupt practice is being opened, this space may also be used as an instrument to remove or marginalise perceived political opponents. Careful civil society, donor and ICC engagement on possible witness protection location and structure might assist in the creation of a unit. The political will to engage and to be engaged remains the critical determining factor in creating an independent, effective and efficient Ugandan protection mechanism.

## Funding a Ugandan protection programme

If serious consideration of witness protection does occur, finance is likely to pose a major constraint on the design of the programme. Donor engagement has ordinarily concentrated on the executive. However, attention will need to be paid to an increasingly independent parliament if well intentioned legislation is to avoid being watered down. Donors must press for legal and institutional frameworks providing pre-, during- and post-testimony protection if grave crimes are to be taken seriously.

## Relocation and identity change

Some in the criminal justice system believe the post-testimony threat diminishes to the extent that relocation and identity change are not warranted in Uganda. The contemporary political and security climate, however, requires measures like relocation and identity change if politically sensitive prosecution is genuinely pursued. However, these measures are logistically burdensome compared to South Africa or Kenya. Urban centres other than Kampala are dominated by particular ethnic groups, so relocated persons from a different ethnic group would stand out. This means external relocation would often be needed, requiring significant finance.





## Whistleblower protection

The Whistleblower Protection Bill provides the basis for increased participation in prompting investigation only. If statements are used witnesses are exposed through pre-trial disclosure to the defence. If not, cases may fail due to the reluctance of witnesses to cooperate. For this reason, the bill must be supplemented with witness protection legislation.

## Complementarity and an uncertain threshold

There is uncertainty about the capacity, competence and independence required of a witness protection programme in order to meet ICC complementarity requirements. Nonetheless, the ICC might yet provide the stimulus for tangible justice sector reform, including a protection programme.

## An interdependent justice sector

Speculating about witness protection's fit within justice sector reform is difficult, but there are clear opportunities and dangers in its location. Some justice sector personnel suggested a separate unit within the police. The police standards unit, which investigates misconduct, is cited as effective, impartial and a possible location. Major justice sector reform is required to ensure witnesses are not further discouraged from cooperating with the criminal justice system.

## Chapter Eight

# Sierra Leone: Domestic protection conceptualised by an international tribunal

Sierra Leone recently emerged from devastating civil conflict, lasting from 1991 until 2002. The key causes of the conflict have been described as the breakdown of executive institutional checks and balances and Sierra Leoneans' inability to assert their rights in a patrimonial society. These circumstances fomented conflict between young and old, rich and poor, men and women, north and south, Freetown and up-country, the government and the opposition, the armed and the unarmed, and one chiefdom house and another.[616] These and other discontents were played out individually by those armed by various internal and external actors whose interests were served by continued violence and conflict. The already fragile systems of economic and physical protection further enabled the conflict.[617]

Erosion of the state began under colonial rule and continued under the patrimonial conditions it created. Historically, political obligations are first and foremost to family, clients, communities, regions and ethnic groups before any state allegiance is entertained.[618] Reform issues, including witness protection, must be addressed in this context. The absence of protection for Sierra Leoneans as state citizens, rather than individuals with certain tribal, family or community ties, illuminates this problem. Key Truth and Reconciliation Commission recommendations required justice sector reform and provision of citizens' basic rights.[619] These recommendations responded to the historical antecedents to the conflict, which consisted of a systematic breakdown of the rule of law and

executive manipulation of the justice system. As a result, dispute resolution mechanisms were seen as little more than an adjudicating officer's rent-seeking device, through which elites asserted power.

## LEGAL FRAMEWORK

The Anti-corruption Act protects informant identity and empowers the Anti-corruption Commission to provide immunity to cooperating witnesses.[620] However, the act places no protective mandate or obligation on the Anti-corruption Commission. Sierra Leone's only legal protective obligations, therefore, reside in its signatory status to a number of international conventions and treaties.

Under the UN Convention against Transnational Organised Crime, states parties are required to take appropriate measures to encourage organised crime participant cooperation with law enforcement for investigative and evidentiary purposes.[621] The convention affords such persons protection as well as amnesty or a mitigated sentence.[622] Victim and/or witness protection is also explicitly addressed in the convention's protocols, specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[623] and the Protocol against the Smuggling of Migrants by Land, Sea and Air.[624]

Section 40(4) of the 1991 Sierra Leone constitution requires that conventions be supported or enacted by parliament.[625] Section 40(4) notwithstanding, Sierra Leone, as a contracting party to international treaties, by its mere signature expresses its consent to be bound internationally, even when treaties are yet to enter into force domestically.[626]

Sierra Leone has ratified the UN Convention against Corruption, which requires appropriate protection for insider, victim or crime-based witnesses and their families or close persons.[627] Measures envisaged include relocation, public anonymity, in-court protection and the establishment of interstate relocation agreements.[628]

A robust witness protection legal framework is critical to a unit's establishment and function. This would require that a proposed amendment to the Criminal Procedure Act goes ahead, establishing in-court protections, bail conditions enforcement and other procedural protections.[629] It also requires legislation which empowers and capacitates an independent protection programme. The Official Secrets Act should also be abolished or amended to remove disclosure's consequence of redundancy or prosecution.[630]





## NEED FOR WITNESS PROTECTION

The absence of witness protection and support, as well as a justice system that lacks capacity, contributes to the inefficient and ineffective delivery of justice. When the scale of reported offending – 973[631] offenses per 100 000 persons (July 2008 population estimate)[632] – is considered in the context of widely acknowledged low criminal reporting, and compared to Ghana where 461 offenses are reported per 100 000 people,[633] these rates are alarming. Gender-based violence, organised crime and corruption cases experience the least witness cooperation. Threats against witnesses are not recorded statistically. However, physical and psychological threats[634] are constantly cited as a major impediment to witness cooperation and criminal prosecution.

### Nature of criminality

Sierra Leone experiences high rates of unreported gender-based and domestic violence. Fraud and corruption are also particularly prevalent.[635] Organised crime is growing rapidly as West African states are used for the illicit smuggling of goods to Europe. Illicit mining and smuggling of diamonds have proven beyond prosecutorial capability. Diamond and gold scams (known as '419ers'), where unsuspecting buyers are fleeced of goods through official or non-official means upon departure, have been particularly prevalent. These three issues are far from exhaustive but witnesses in such cases commonly refuse to cooperate.

Greater finance is available to organised criminal elements than to the Sierra Leonean state justice sector. These criminal enterprises are therefore able to deploy far greater leverage than the state remuneration provided to justice sector personnel. Even if witnesses and justice sector personnel are willing to cooperate, investigative capability is crippled by the lack of forensic investigative and prosecutorial capacity.

### Threat to witnesses

Threats are clearly evident, particularly in organised crime and corruption cases where large sums of money are involved. Recent examples are prevalent, particularly '419er' cases.[636] In one such case an American citizen, recently tricked into providing US$1 million for diamonds and gold which were never provided, was threatened with death should he return to Sierra Leone to pursue his money.[637]

Criminal offences not classified as serious crimes under the organised crime convention may still have considerable social impact on witnesses, in some cases sufficiently violent to warrant protection. Vulnerable domestic violence witnesses (children, women and the elderly) are often intimidated or threatened.[638] Reporting cases of rape or other violent local crime to magistrates' or local courts often attaches stigma to witnesses within their local communities. Those who report are commonly viewed as troublemakers or persons with vested interests in the prosecution of an accused person, rather than someone with a legitimate grievance or a duty to cooperate.

Sierra Leone's history of executive judicial manipulation to persecute political opponents and protect elites undermines contemporary cooperation in politically sensitive cases. The threat level in corruption cases is difficult to ascertain. According to the Anti-corruption Commission, the main impediment to whistleblowers is the threat to their livelihood. Some Anti-corruption Commission personnel believe there is little historical threat to witness safety. The commission has previously implemented ad hoc protection measures. However, subtle forms of intimidation, such as job security and psychological influence, are believed to have been greater impediments in previous cases. A former commission investigator, however, cites numerous occurrences of physical threats to witnesses, which impede their cooperation. This appears to be substantiated by the commonly reported intimidation surrounding '419' cases.

### Other obstacles facing witnesses

Many justice sector practitioners believe that witness cooperation is undermined by the lack of common law legitimacy, justice sector vulnerability to corruption, and confusion surrounding justice procedures and protocols. Court backlogs cause witnesses' enthusiasm to wane, even among those who have already pursued cases to court. As of May 2008, 8 222 cases were backlogged in Sierra Leone's courts.

While few Sierra Leoneans believe witnesses are explicitly bribed, many believe giving testimony on someone's behalf solicits a future favour upon which a witness may rely. Another common perception is that witnesses have a grudge against someone and use the law as an instrument of revenge.[639]

New forms of drug-, diamond- and gold-related crimes are committed by sophisticated syndicates. Contemporary organised criminals are adept at tracing electronic devices as well as transactions and identities through the Internet.





Organised criminal capacity to monitor witness movement presently outweighs Sierra Leone's protective capability.

## CURRENT PROTECTIVE MEASURES

Protection and assistance for witnesses has been piecemeal and inconsistent at best, and completely absent at worst.

### Physical protection

In a recent perception survey of eight of Sierra Leone's 14 districts carried out by the witness evaluation and legacy project,[640] current protective measures were identified as self-reporting, protective custody and refusing bail.[641] These measures, particularly the first two, were primarily mentioned by police. Approximately 30 per cent of those interviewed were police officers. Three officers mentioned police hotlines, or that they habitually give out their mobile phone numbers to witnesses and ask them to report any threats. Five officers stated that they offer protective custody to high risk witnesses, occasionally removing them to safe houses during trial. In addition, the Foundation for Human Rights Initiative and Democracy in Kono has relocated witnesses in several gender-based violence cases. Judicial and police personnel often make threat evaluations at the same time as bail decisions, refusing bail when threats exist. The survey highlights Sierra Leone's near absence of protective measures.

Only two witnesses in the study mentioned receiving any kind of protection. One witness felt protected in court due to the police presence, while another mentioned sparse police monitoring at the request of counsel. Closed testimony for children and discrete witness-sensitive investigations are rarely employed.[642]

### Psychosocial support

Current psychosocial support falls into three broad categories: general encouragement, trained counselling, and community sensitisation. Confidence building and explanations about the criminal justice process are used on an ad hoc basis by some police and judicial officers.

Police family support units, with female officers trained in gender- and witness-sensitive practices, are attached to some police stations. Family support units and non-governmental organisations provide the most structured and

consistent psychosocial witness support, as well as witness-sensitive environments in which to report crime. Family support units conduct pre- and post-trial witness counselling, continuing after trial where required.[643]

## Financial assistance

No financial assistance is provided by any entity other than, on occasion, the plaintiff or the accused for which the witness is testifying. Such payments could be viewed as inducement, undermining witness authenticity. The state provides no restitution or medical expenses, although the International Rescue Committee provides medical care at their Rainbow centres, located near some police stations. Witnesses are often reluctant to cooperate if doing so will incur financial burdens, such as travel expenditure.

## Monitoring and legal assistance

A number of non-governmental organisations monitor witnesses, although none focus specifically on witness protection. Non-governmental organisations monitor trials, police stations and prisons, as well as advocate when necessary if investigative practice or due process issues impede the safety or psychological wellbeing of witnesses.

The Lawyers Centre for Legal Assistance, Timap for Justice, the Foundation for Human Rights Initiative and Democracy in Kono, and Access to Justice provide legal assistance only for victim and insider witnesses.

**Criminal justice training and capacity building**

Several organisations are involved in judicial and police capacity building. The UN Office for Sierra Leone has conducted judicial and police trainings in Freetown. Amnesty International, the Centre for Human Rights and Democracy, and the National Forum for Human Rights have trained local court officials, paralegals and police respectively. The police have also been working on police, prosecutor and investigator training curricula, which should incorporate protection measures.

The government, with assistance from the UK Department for International Development's justice sector development programme, has embarked on a 2008-10 justice sector reform strategy and investment plan.[644] Justice sector reform would greatly benefit if protection initiatives were coordinated and integrated in the implementation of justice sector development programmes.

Greater community crime prevention and enforcement is being pursued by the justice sector development programme. It is hoped that training of the prosecution service and implementation of a project to fast-track criminal cases will improve justice sector efficacy and efficiency. A criminal case management best practice handbook has also been developed to consolidate training in ethical and efficient investigation and prosecution. However, the handbook provides little information on witness-sensitive practice. While it recommends creating a witness liaison officer, the officer is only mandated to ensure that witnesses are awareness of criminal justice processes and the time and location at which they are required. No protective or psychological support measures are provided for.[645]

# EFFORTS TO CREATE WITNESS PROTECTION

At the Special Court for Sierra Leone's residual issues expert group meeting in February 2008, Sierra Leone President Ernest Bai Koroma stated:

> The Government of Sierra Leone would welcome international efforts directed towards promoting and enhancing the Sierra Leone legal system, especially in the areas of protection of witnesses and victims.[646]

A potential witness protection programme has been conceptualised by the witness evaluation and legacy project at the Special Court for Sierra Leone. The proposed programme design was submitted to government for consideration in 2008. The project conducted a feasibility study on the establishment of witness protection and assistance in Sierra Leone's national justice system. The project sought to rectify the explicit absence of a coherent, adequate and inclusive witness protection scheme in order to preserve a credible justice system and maintain the rule of law.[647]

**Potential contribution of the witness protection programme**

The witness protection programme proposed by the witness evaluation and legacy project at the Special Court for Sierra Leone would dramatically assist the police, the Anti-corruption

Commission and the Directorate of Public Prosecutions in soliciting witness cooperation. It is hoped that, combined with justice sector reform, a witness protection and assistance programme would dramatically increase public trust and participation in the justice system. The programme could also protect former witnesses who appeared before the SCSL after its hearings conclude.

A secondary purpose of the witness evaluation and legacy project is the protection of former witnesses before the SCSL after its hearings conclude. (This element is addressed in chapter four on the Special Court for Sierra Leone.) The proposal conceived of a two-tier witness service comprising 'witness assistance' and 'witness protection', with witness protection based in Freetown and witness assistance officers located throughout the country.

The two services would provide distinct but complementary and cooperating functions. Witness protection would provide physical protection, relocation, identity change and training in witness self-protection. Witness assistance would provide sensitisation to formal justice processes and witnesses' rights in those processes, counselling, financial assistance, transportation and a place of refuge. The assistance programme would also provide these services to protection programme witnesses when required. These measures would be complemented by in-court protections available on request at the presiding judge's discretion under amendments to the Criminal Procedure Act.

## FUNDING

In order to succeed in the long-term, the witness protection scheme requires sustainable and secure funding. Resources should preferably be allocated from the national police budget. Although it is hoped that the initial phases will be funded by donors, the programme's costs will need to be phased into the national budget over time. A combined witness protection and assistance scheme would require approximately US$419 000 for the first year and US$251 000 per year following, excluding operational costs and government pay scale fluctuations.

Donors are set to play a critical role initially, but long-term financial responsibility must reside with the state. The witness evaluation and legacy project's feasibility study was funded by the Oak Foundation as part of the SCSL Legacy Project. The UK Department for International Development's justice





sector development programme may be able to incorporate some witness protection elements, thereby absorbing some of the cost. The UNODC might also be able to provide capacity building and training. Where external funding is provided it should be made available directly to the witness protection unit through the Ministry of Justice.

Auditing must be conducted at the highest level by thoroughly vetted personnel. Internal auditing should be supplemented by random external audits, submitted as classified documents to the minister of justice, with witness names and other operational details excluded.

The economic benefits of witness protection in organised crime and corruption cases justify protection expenditure.[648] Asset seizure, freezing and confiscation should be adopted as prescribed by the UN Convention against Transnational Organised Crime.[649] Windfalls could then be used to fund protection. However, seizure difficulty makes prosecution windfalls unpredictable. This unpredictability requires a state guarantee of steady and adequate funding at least two years in advance. Consideration should also be given to extraordinary expenses, such as multiple relocation of a witness.

The government should also be cognisant of any formal or informal financial support conditionality. The SCSL may wish to pressure the government to assume responsibility for Witnesses and Victims Section-protected witnesses. However, these witnesses were admitted on the understanding that the SCSL would assume protective responsibility. To breach this trust, and in doing so endanger witnesses, would be seriously unethical. The protection unit should also be prudent by admitting politically non-sensitive cases in its infancy. In evaluating which type of crime to admit, its socioeconomic impact should be considered. Donor pressure to admit crime affecting commerce or social imbalance elsewhere should also be treated cautiously. Focusing protective measures on politically non-sensitive cases with greater socioeconomic benefit advances ordinary Sierra Leoneans' interests. External support should not negatively affect these considerations.

## LOCATION

Three different locations for the witness protection programme were mooted, namely, the police, the Directorate of Public Prosecutions, and a sovereign entity reporting to the minister of justice.

The police present the ostensibly natural location. Police cooperation would be more readily available in such a location. Decisions on admission, funding,

recruitment and other matters in the UK, for example, are vested with the police commissioner.[650] However, unit isolation and autonomy are critically important factors. Concerns might be raised about whether the Sierra Leonean police will maintenance confidentiality, causing witness apprehension about engagement.

The Directorate of Public Prosecutions might be better placed to determine testimony value and the corresponding threat in any case. Admission decisions would remain with the director of public prosecutions or the attorney-general. This location may compromise objective admission in politically sensitive cases.

A sovereign entity comprising law enforcement, prosecutorial, judicial and other security justice sector personnel would receive Directorate of Public Prosecutions and police referrals for independent corroboration and admission decision. A sovereign entity avoids real or perceived vulnerability to criminal co-option. Other successful programmes have practiced autonomy, impartiality from investigation and prosecution, confidentiality of procedure and operations, organisational autonomy and personalised focal points with cooperating entities.[651]

## PROPOSED PROGRAMME

Two different programmes are proposed, reporting to the same authority. The proposed witness assistance programme would report to, and assist where necessary, the Witness Protection Unit. The unit would deal with high risk witnesses and the assistance programme with threatened witnesses involved in lower-level offences.[652] This allows disproportionate resource allocation towards prosecutions which wield large economic and social state benefit. It also creates a programme capacitated to drive reorientation of justice sector witness-sensitive practice, particularly in conjunction with justice sector development programme initiatives through family support units.

Witness assistance and protection should be clearly distinguished. Witness assistance's purpose is not to provide physical security but to ensure efficient, witness-sensitive investigation and prosecution, and to address witnesses' pre-, during- and post-testimony psychological wellbeing. The assistance programme should also provide financial assistance for transportation and, when necessary, accommodation.[653]

The protection programme would provide ad hoc and formal protection via pre-trial relocation and, when necessary, post-trial relocation and identity change. A Sierra Leonean programme will face the familiar African problem of a scarcity





of large, diverse urban centres, making external relocation necessary but beyond the available budgets. However, Sierra Leone has the advantage of possible training from the SCSL, which might also provide a great source of experienced, well trained personnel. This would greatly advantage a Sierra Leonean protection programme in its early stages of operation.

## CONCLUSION

The proposed witness protection programme described above deviates from conventional protection mechanisms. However, it reflects the circumstances encountered in Sierra Leone as opposed to those of more developed states. Until justice sector reform occurs, alternative methods of delaying and impeding prosecution will remain available to accused persons. The threat to witnesses will increase as reform removes alternatives to witness intimidation.

Local organised crime could potentially be targeted by the unit in its early years. Unlike Kenya and Uganda, the present Sierra Leonean administration has opened space for checks and balances, particularly in the prosecution of corruption. Space for admitting corruption cases is more conceivable in Sierra Leone than in other countries discussed in this book. Such cases should be tentatively pursued once less politically sensitive cases have been implemented successfully. Once public confidence in the unit is consolidated, greater resources may be directed to witness assistance in gender-based, domestic and other community level violent offending.

The SCSL has thus far provided impetus for the establishment of witness protection. Its pursuit would begin to address crimes that the state has previously struggled to deal with. However, external motives for creating a protection mechanism may not align with the needs of the Sierra Leoneans the government purports to represent. Sierra Leone has returned to multiparty democracy in its post-conflict years. A progressive protection programme would complement ongoing justice sector reform. It might just place Sierra Leone in an unfamiliar position: that of a post-conflict justice sector model.

Chapter Nine

# Towards an African right to protection: Conclusions and recommendations

This book has sought to address the multiple dimensions of witness protection on a case-by-case basis, and has found many common and differentiating themes that cut across the cases examined. This chapter examines these themes and the way in which they may play out in the future. It is hoped these themes will provide a source for further discussion and analysis of African witness protection as a whole, rather than on a case-by-case basis, as has occurred here.

## EXTREME THREAT ENCOUNTERED IN AFRICA

Where insecurity is apparent, the threat to participating witnesses, or witnesses who are perceived to participate, in criminal justice processes is intensified. Such circumstances are apparent in states where the capacity of law enforcement is lower than that of criminal groups. These circumstances are even more evident in states that suffer from armed conflict. This differentiates African witnesses in high profile cases from those protected in Western states.

## INTERNATIONAL CRIMINAL TRIBUNALS

Very high threat levels, including in some cases the deployment of the state apparatus, face witnesses in cases before international criminal tribunals. The

relative impunity with which the accused are alleged to have committed crimes points to a high likelihood that they would give such orders again in order to prevent proceedings against them. Understanding and evaluating the threat requires a thorough insight into the crimes committed, the political, social, cultural, security and economic context in which they occurred, and the way in which this context has changed and might continue to change in the future.

In the award winning documentary, The fog of war, Vietnam-era US secretary of defence Robert McNamara explains the phrase that became the film's title. The 'fog of war', according to McNamara, is the confusion created by the inadequacy of the human mind to understand or make a judgment about the many variables and complexities of war. International criminal tribunals face just such a challenge. McNamara had the entire security and intelligence apparatus of the world's leading superpower at his disposal. The ICC, on the other hand, is (somewhat) limited in its capacity by comparison.

The ICC faces an enormous task which has never before been undertaken: staff of the Victims and Witnesses Unit have to ascertain the threat within and beyond multiple and often ongoing cases of conflict. The VWU has enjoyed enormous success in its core function of threat assessment and protection in incredibly difficult circumstances. This has required critical examination and revision of practice within the VWU as well as other court organs. It has also necessitated careful consideration from investigators of the consequences, outside the control of good practice, of initiating and continuing investigations.

In complete contrast, the ICTR has performed poorly in protecting witnesses from what was a similarly extreme threat. The ICTR's hurried creation, without adequate consideration of the security environment and the safety of witnesses, facilitated the intimidation and murder of many witnesses who remained unprotected. The ICTR's local partner, the Rwandan government, came into power in the year of the tribunal's creation and consequently did not have adequate intelligence to identify threats or threatened witnesses.

The ICTR provides a lesson in the need for careful examination of a security situation, as well as competent and well capacitated intelligence and security capability, prior to the creation of a punitive mechanism. Indeed, an international criminal tribunal may have to wait to begin operations so as to avoid exaggerating pre-existing threats without the capacity to adequately address them.

The SCSL, on the other hand, was established under less hostile local political and security conditions. The losing party to the conflict was attempting to appease a suddenly more aggressive and well capacitated enemy. The victorious party had





the support of regional and, eventually, UN peacekeepers, which would soon make up the largest UN peacekeeping force in the world. When the SCSL began operations, the security situation had dramatically improved from a couple of years earlier. This was supplemented by more prudent protective practice and investigative solicitation of insider witnesses. Lessons had been learned from the Rwandan experience, which ensured a greater legal mandate for protection and a greater amount of finance.

## NATIONAL PROTECTION PROGRAMMES

The ability of national protection programmes to ascertain the threat to witnesses is greater than that of programmes at the international criminal tribunals. This is due to the fact that protection personnel are ordinarily procured from intelligence, military and law enforcement agencies. They therefore have greater experience with the forms of criminality that threaten protected witnesses than those international personnel at the international criminal tribunals.

The threat to witnesses in South Africa and Kenya is particularly severe. South African organised criminal groups as well as local gangs have access to networks which can be deployed easily against witnesses, using a variety of methods. South Africa's Witness Protection Unit has not encountered problems inherent in the prosecution of high profile political crimes. However, the organisational structure and location of the unit facilitate this possibility in future if the National Prosecuting Authority continues to be perceived as functioning in a politicised manner.

Kenyan state security forces, along with Kenyan politicians, have been linked to the post-election violence. Enormous capacity to intimidate or eliminate witnesses resides among such accused. Those involved in establishing the Kenyan programme have already hinted that witnesses in crimes involving those who are politically connected will not be pursued through the utilisation of witness protection, yet public rhetoric indicates it might. To exclude such cases provides for more achievable protection results in the short-term, particularly when considering that the threat to witnesses in extrajudicial killings and cases of post-election violence emanates from the state. It is important, however, that admission is widened to more politically sensitive cases in the medium- to long-term. This will assist the programme to avoid being regarded as an instrument of political manipulation.

In Uganda, the threat to witnesses in cases of high level corruption is so severe that on the rare occasion when they are prosecuted, it is those of political expedience that are brought before the court. Crimes committed by the politically connected require witness protection in order to make prosecution a possibility.

## DEPENDENCE ON THE INTEGRITY AND EFFICIENCY OF THE JUSTICE SYSTEM

Finance, technical and logistical capacity, and knowledge of the crime problems are all critical to a criminal justice system and protection mechanism that seek to protect witnesses. National protection programmes and international criminal tribunals vary greatly in relation to these key variables. The international criminal tribunals have far greater finance, technical and logistical capacity per witness than their African counterparts.

Despite poorly functioning justice sector entities, national law enforcement and intelligence agencies generally have more intimate knowledge of the threat to witnesses. Local understanding has proven effective in protecting witnesses in South Africa. However, the procurement of international personnel not familiar with the local language impeded protection at the ICTR. The ICC has proved adept at utilising its advanced capacity to overcome diverse threats of which its personnel have no, or little, prior experience. Protection mechanisms themselves have utilised their respective advantage with varying success. However, all cases have experienced setbacks resulting from poor practice by entities which affect witnesses' psychological and physical wellbeing.

### At the domestic level

The threat to witnesses in Africa who are involved in high level cases of corruption cannot simply be mitigated through adopting protective measures. A degree of integrity and efficiency is required throughout the criminal justice process to ensure that prosecution is not undermined at the investigative, prosecutorial or judicial stages of the criminal justice process.

Witness protection therefore requires justice sector competence and independence sufficient to prosecute crime without external interference. Uganda, Kenya and Sierra Leone are critical examples of the need to reform investigative, prosecutorial and judicial practice and independence. Historically efforts at reform in these states have produced spectacularly inadequate results. Genuine





reform would ensure that witnesses admitted for protection are actually able to testify in a fair and expedient trial process. When the accused are able to interfere elsewhere in the criminal justice system, protective measures for witnesses are rendered impotent.

This can be applied to witnesses in cases involving drug trafficking in Sierra Leone. The finance at the disposal of organised criminal elements behind trafficking overwhelms the capacity of the Sierra Leonean justice system to the extent that threatening witnesses is not yet warranted. Likewise, in Uganda, the capacity of the Inspectorate of Government and the Directorate of Public Prosecutions as well as the judiciary must be sufficiently enabled to competently and independently investigate, prosecute and adjudicate politically sensitive cases of corruption.

In such circumstances, the creation of protection mechanisms should initially be directed towards cases devoid of political sensitivity or politically connected elites. This might include cases involving serious violent offending when the accused do not have political connections. Such an entity could also be tasked with overhauling practice in all criminal justice entities so that these become more sensitive to the psychological and physical wellbeing of witnesses. This would help move along at least witness-oriented reform among interdependent justice sector entities, while improving witness cooperation and, therefore, the ability of the state to prosecute crime.

Kenya provides similar obstacles but to a varying extent. The current Kenyan disposition towards justice appears to repudiate serious investigation and prosecution of those in the state sector, particularly the security forces, parliamentarians and their associates. Instruments of political manipulation remain deployed within the justice system, which prevents the prosecution of such personnel. The creation of a donor supported witness protection programme which initially targets crime of a non-politically sensitive nature would establish the protective framework for prosecution of more politically sensitive crimes upon reform of the criminal justice system. It would also allow organised militia groups and criminal syndicates to be more easily confronted through the criminal justice process.

South Africa's recent change in political leadership leaves a few unanswered questions about the independence of the South African criminal justice system. The National Prosecuting Authority, where the protection unit resides, was commonly viewed as supporting the former president, Thabo Mbeki. The perception that cases of political sensitivity are beyond the capacity of the criminal

justice system might well result in non-cooperation from witnesses, even in instances where prosecutions are undertaken. Comparatively the South African criminal justice system has provided an example to other African states of the possibility for rapid reform. While a sophisticated and well capacitated, albeit politicised, justice system was inherited by the post-apartheid government, its rapid reform and the resulting ability to address organised crime has proven superior to that of its African counterparts, yet it remains vulnerable to political manipulation.

Clearly robust reform of criminal justice as a whole is required for witness protection to fully serve its purpose. Complete independence cannot yet be demonstrated by any of the states examined in this book. However, some have proved more robust and less easily compromised by organised criminal entities without political connections. South Africa's adoption of protection measures has proved remarkably successful in such cases. It provides an example to other African states of the type of criminality selected for admission at a particular stage of democratic transition and justice sector reform.

## International criminal tribunals

Witness protection practice at the international criminal tribunals might be expected to be vastly superior to some of the investigative, prosecutorial and judicial practices experienced within domestic jurisdictions. An examination of the tribunals shows that in some cases their practice has undermined the psychological and physical wellbeing of witnesses, as well as the right of the accused to a fair trial.

The most glaring example is the ICTR in its formative and early years of function. The absence of capable staff in investigations and the office of the prosecutor caused investigatory practice which disclosed witnesses' identities to the public. The registry, in failing to immediately establish or even take seriously the issue of witness protection, provided the greatest and most deadly betrayal of ICTR witnesses. Its inept vetting of defence personnel allowed former genocidaires to be employed at the court. This clearly posed a grave threat to witnesses, particularly at the time of prosecution disclosure to the defence and prior to testimony. General insensitivity relating to witnesses' psychological wellbeing within the judiciary and among counsel and the investigation undermined the ability of witnesses to provide genuine testimony and cope psychologically with the testimony process.





In terms of encouraging witness-sensitive practice among all organs of the court, the SCSL took many lessons from the ICTR. Greater witness sensitivity was observed by investigators, counsel and judges, facilitating a more witness-friendly environment. However, other elements of investigative practice also undermined the impartiality or perceived impartiality of witness testimony. Prosecution discretion to provide allowances to witnesses appeared unwarranted and at times dangerously close to inducing testimony from witnesses. This severely undermined the efforts of the Witnesses and Victims Section of the SCSL to provide an impartial witness before the court. Judicial reluctance to examine these issues established a precedent which encouraged such practice in the future and severely undermined the rights of the accused. Some early prosecution practice also undermined the public anonymity of witnesses.

The ICC has adopted some of the witness-sensitive initiatives undertaken by the SCSL. However, the court has also gone further in ensuring the objectivity of witness testimony by addressing the issue of witness proofing. Defining witness proofing so as to limit the potential for undue influence is a progressive step for the rights of the accused and the authenticity of proceedings, without limiting the psychological wellbeing of witnesses. However, some investigative practices in the field have caused the psychological and physical wellbeing of witnesses to be compromised to some extent. The failure of the prosecution and the judiciary to properly inform the ICC's first ever witness of his vulnerability to self incrimination provided a lesson which appears to have been learnt. Subsequent practice has largely been sensitive to the interests and psychological wellbeing of the witnesses as well as to the authenticity of testimony.

## INTERESTS BEHIND THE ESTABLISHMENT OF PROTECTION PROGRAMMES

Many of the challenges facing the criminal justice process described above, as well as inadequacies in witness protection programmes themselves, can be traced to the interests of those that empower them. Examination of a protection mechanism also requires examination of the interests that have encouraged and shaped its construction and function. This approach also informs the potential creation and functioning of future African protection entities.

## International criminal tribunals

While political interference or influence may not be as prevalent in the practice of the international criminal tribunals, it is inherent in their composition. This helps to explain some of the disturbing elements of witness protection observed in their practice.

The ICTR was established with little thought for the practical security consequences for ordinary Rwandans, particularly potential witnesses. It prioritised a public measure aimed at appeasing prior failures of the international community to stop the genocide over the interests of witnesses. This neglect was reflected in the ambiguous protective mandate in the ICTR's statute which effectively allowed for the neglect of witness protection by the registry. The need for protection of witnesses was also evident in the requirement that witness protection finance be sourced from voluntary rather than guaranteed UN contributions. These two elements explain the early ICTR ambivalence towards witness protection.

At the SCSL, the prosecution was given great discretion and budgetary allowance to provide witnesses with protection and support. This reflected the interests of the court's key financial supporters – the UK and the US – who wished to sufficiently empower the prosecution to secure verdicts quickly and with less cost than that incurred at the ICTR and the ICTY. Despite these vested interests, the functioning of the SCSL has been assisted by the recognition of problems experienced at the ICTR.

The ICC has learnt from the experiences of both the SCSL and the ICTR. Perhaps its greatest benefit is that of a broader consultative process in which all states parties to the Rome Statute were able to provide input in creating the court. This provided for greater consideration of the powers, location and rules of the Victims and Witnesses Unit as well as the protective mandate of the prosecution. As a consequence a more equitable balance between the rights of the accused, the authenticity of testimony and the physical and psychological wellbeing of witnesses could be achieved. However, the influence of powerful states and non-states parties at least appears to affect prosecutorial policy, which also affects the wellbeing of witnesses. Addressing or at least mitigating the influence of these interests is a prerequisite to achieving equitable witness protection practice.





## Domestic level

### International legal instruments

While some advocates cite the right to protection as inherent within other rights, it carries little weight for states. International law also places superficial obligations upon states to protect witnesses. These obligations, even when ratified, are paid scant attention by states, particularly in Africa. While legal instruments may provide guidance in conjunction with recommendations from UN organs, they are then only referred to when a decision to create a protection programme has been taken. As a driving interest themselves they carry little weight, and their irrelevance should come as no surprise.

The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides that 'steps' be taken to protect witnesses against related ill treatment or intimidation. Its optional protocol provides for the protection of victims of torture or ill treatment, witnesses, those conducting the investigation and their families from intimidation related to the investigation of torture. Both the UN Convention against Corruption and the Convention against Transnational Organised Crime only obligate a state party to take protective measures 'within its means'. Deciphering what falls within the means of a state is a decision at the state's discretion. Thus any right to protection for witnesses remains at the discretion of a state under international law. States therefore require other driving elements to voluntarily engage protection practices and mechanisms.

### Transition, justice sector reform and donor pressure

In South Africa, the transition from apartheid-era autocracy to multiparty democracy prompted reform of a justice system previously utilised to repress political dissent. The objectives of the criminal justice system were shifted to protecting the rights of all South Africans. This required the justice system to address new forms of criminality which grew in the space provided by the breakdown of the social controls associated with apartheid. The critical driver of witness protection in these circumstances was the inability of ordinary law enforcement to prosecute cases of organised criminality due to witnesses' fear of retribution. The success of the Truth and Reconciliation Commission hearings also showed the positive effect that witness protection could have on witness

participation. Greater oversight by civil society and the donor community of the status quo is now required to review the location and structure of the Witness Protection Unit.

Although the issue of complementarity has played a significant role of late in the establishment of a witness protection programme in Kenya, the early impetus came from donor driven reform of the justice sector. The Witness Protection Act was passed before the post-election violence. Like South Africa, it was initially intended to address criminality which law enforcement was unable to significantly affect. This interest was congruent to that of donor driven justice sector reform programmes. The lack of enthusiasm for implementing the 2006 legislation suggests that the government was more concerned about meeting donor demands than assisting the prosecution of organised criminal groups.

In Uganda, requirements for whistleblower legislation have been included in donor justice sector reform indicators of good governance for many years. The absence of a provision for capacity to protect witnesses or a protection entity, and the bill's laboured drafting and consideration by parliament, are not positive indicators of the Ugandan government's intention to protect witnesses. Meeting donor conditions appears to be the goal of Ugandan attempts to provide real protection and an avenue for redress for witnesses. Greater donor pressure is clearly required to stimulate genuine efforts to establish sound protective measures for Ugandan witnesses.

Potential donor driven reform as well as the maintenance of positive bilateral relations with the largest donors of the SCSL appear to drive cursory interest in witness protection in Sierra Leone. The possibility of donor funding of an element of justice sector reform that is not addressed by current donor support is naturally attractive to a government with limited state coffers. The primary driving force appears to be the SCSL, which seeks to provide a potential residual facility to which it can hand over responsibility of SCSL-protected witnesses. However, the establishment of a protection programme appears to be premature. This is because of insufficient justice sector reform to bar criminal interference through means other than witness intimidation or elimination. It is clearly in the interests of ordinary Sierra Leoneans to focus justice sector reform on better witness- and victim-sensitive practice, particularly relating to sexually oriented and domestic crimes. Establishing a protection mechanism that would receive responsibility for SCSL witnesses would abuse the trust witnesses have placed in the court to protect them. It would also potentially subject them to a future government hostile towards their cooperation with the SCSL.





## ICC complementarity

ICC complementarity may provide a compelling stimulant for the creation of witness protection mechanisms in the future. Requirements for the capacity and independence of witness protection mechanisms remain unclear. The absence of prosecutorial criteria for state protection programmes suggests that prosecutorial policy is discretionary and potentially politically informed. A clear statement on the requirements of a protection programme under complementarity would prioritise the psychological and physical wellbeing of witnesses, as well as the rights of the accused, ahead of politically informed discretion. It would also, of course, encourage the creation of independent and better capacitated protection mechanisms.

The issue of complementarity has clearly taken precedence as the driving influence behind the creation of a witness protection mechanism in Kenya in recent times. Continued diplomacy between the ICC prosecution and Kenyan ministers and the attorney-general indicates that the programme is largely driven by the need to meet a standard of complementarity not yet known to the public. Whether the amendments to the Witness Protection Act have been driven mainly by donors, ICC complementarity requirements or the Kenyan state is difficult to ascertain. One indicator may be Kenyan willingness to provide greater independence to the unit, inherent in the proposed amendments that shift the structure and mandate of the programme closer to that of the Victims and Witnesses Unit at the ICC.

The exercise of complementarity in Kenya will be of interest to others, not least the Ugandan government. A potential point of contention may arise when local justice processes are preferred to ICC prosecutions as intimated in peace negotiations and the International Crimes/Criminal Court Bill. If Uganda does prefer to pursue that route, the establishment of a robust and independent witness protection programme will be required in order to avoid ICC prosecution. The absence of any protection mechanism, as well as the weak intent of the government to protect witnesses inherent in the whistleblower bill, indicates that a great deal remains to be done if this element of complementarity is to be fulfilled.

The witness protection elements of ICC complementarity may also be of interest to states such as Guinea and Sudan, where investigations and indictments have occurred respectively. This element of complementarity has been given little attention. Antagonism between the ICC Office of the Prosecutor and the Victims and Witnesses Unit may explain the reluctance of the Office of the Prosecutor to

settle on an accepted structure and function for a protection programme under the complementarity regime. The court may also want to avoid being seen as attempting to micromanage the affairs of states under investigation.

Nevertheless, the ICC's complementarity mandate requires the assessment of political will and capacity of states to conduct fair trials when abuses have occurred. It is only natural that states would require clearer explanations of exactly what constitutes a fair trial and satisfactory protective measures than those given to Kenya. Transparency about discussions with governments on issues of complementarity will be important. If Sudan and Israel were to undertake trials in the hope that complementarity criteria are met, and the ICC was satisfied with the Israeli process but not the Sudanese process, the ambiguity about their reasons may fuel perceptions that the court targets weak states.

## RECOMMENDATIONS

### International Criminal Court

- Formulate a memorandum of understanding on all contentious elements of witness-oriented practice by personnel in the Victims and Witnesses Unit and the office of the prosecutor.
- Present the memorandum to the trial chamber for an opinion and, if necessary, judgment.
- Provide a statement on the capacity and independence required of a domestic witness protection programme in order to satisfy the protection component of complementarity.
  - This might draw on an agreed-on memorandum of understanding or UNODC best practice.

### Special Court for Sierra Leone

- Conduct an enquiry into prosecution investigative practices in supporting or protecting witnesses.
- Ensure any residual mechanism is attached to a UN entity and does not divulge protective responsibility to the Sierra Leone government.
  - Lobby the UN, its key member states and other international criminal tribunals for a specially established entity to receive responsibility for witnesses from all non-permanent international criminal tribunals.





### International Criminal Tribunal for Rwanda

- Capacitate and reform psychosocial support to witnesses.
- More seriously consider and utilise post-testimony relocation and identity change.
- Lobby the UN for greater finance for protection so that fiscal restraints do not affect decisions on the protective measures to be used.
- Lobby the UN to conduct a full enquiry into the implications for witnesses of ICTR construction and practice in both its infancy and subsequent lifespan.

### Kenya

- Approve the amendments to the Witness Protection Act recently passed by parliament. In particular the following should be implemented:
  - The repositioning of the unit outside the attorney-general's office and under a board comprising the personnel described in the Kenyan chapter above, including a representative from the Kenya National Commission on Human Rights.
  - Provide the power to admit witnesses to the witness protection director.
  - Provide an avenue of appeal for those not admitted.
- Ensure adequate financial support is provided to the programme in line with UNODC advice.
- Begin operations by focusing on cases devoid of political sensitivity.
  - Encourage justice sector reform. This would allow more sensitive cases to be admitted in the future, without fear of delay or other impediment to protection stemming from the criminal justice process.
- Conduct an overhaul of witness-oriented practice led by personnel employed by the protection unit and persons with protection expertise.

### South Africa

- Relocate the Witness Protection Unit outside the National Prosecuting Authority as an independent entity reporting directly to the minister of justice.
- Improve efficiency and expand operations to allow for the admission of a greater number of witnesses in more diverse forms of criminality.
- Conduct an overhaul of witness-oriented practice throughout the justice system led by witness protection personnel.

- Increase the number of psychosocial personnel.
- Improve the quality of post-testimony psychosocial care.
- Establish a compensation fund for victims of admitted witnesses who cause harm after their admission to the programme or fail to disclose prior harm caused.

## Uganda

- Reform the criminal justice system, including an overhaul of all witness-oriented practice.
- Pass the Whistleblowers Protection Bill.
- Draft and pass witness protection legislation which establishes an independent and well capacitated protection programme to admit witnesses in cases pursued by the Inspectorate of Government, the Directorate of Public Prosecutions and any local mechanism established to try crimes relating to Uganda's civil conflict.
- If the Ugandan state is serious about pursuing justice for war crimes locally, it should ensure that any established protection mechanism at least meets UNODC best-practice standards.

## Sierra Leone

- A protection mechanism should not be created in Sierra Leone simply to provide a residual mechanism for the SCSL.
- Any protection mechanism should be instigated as part of wider justice sector reform already underway by the justice sector development programme.
- Justice sector reform should include more witness-oriented reform measures.
- A protection mechanism should be directed at cases of local organised crime and gender-based and domestic violence initially before addressing cases of high level corruption.



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Protection of African witnesses has yet to receive serious academic examination. *The justice sector afterthought: Witness protection in Africa* constitutes a first attempt to address this gap in the literature.

The book examines a critical component of both international and domestic criminal justice processes. Where international criminal tribunals have been established to address genocide, war crimes and crimes against humanity, witness testimony – and therefore witness protection – has been vital to successful prosecutions. Whether it is the dramatic death of almost 100 witnesses in the formative years of the International Criminal Tribunal for Rwanda, the disproportionate power of the prosecution to provide material benefit to witnesses at the Special Court for Sierra Leone, or the International Criminal Court's enormous task of protecting witnesses in multiple conflicts at any given time, *The justice sector afterthought* provides the first description of formerly off-limits processes.

The author of an EU-funded design of a Sierra Leonean national protection programme, Chris Mahony also examines African witness protection at the national level, including South Africa's programme and progress towards protection programmes in Kenya, Uganda and Sierra Leone. This largely descriptive narrative considers the feasibility of conducting witness protection with limited resources despite witness threats emanating from sophisticated criminal enterprises and, in some cases, elements of the state itself.

For policymakers, donors, practitioners and justice sector observers in Africa, this book exposes a critically important cog in the African justice wheel. It is time to begin considering in earnest the many pressing questions this important function poses for contemporary justice sector reform and prosecution of serious criminality in Africa.


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