ISS INSTITUTE FOR SECURITY STUDIES

POLICY BRIEF 88 | AUGUST 2016

Witness protection

Facilitating justice for complex crimes

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Recommendations

1 Governments should promote greater understanding of the pivotal role of witness protection services among policymakers and legislators in governments, where such services do not exist.

2 Governments should undertake costing exercises to provide legislators with an understanding of the cost implications for envisaged new witness protection services, and to allocate adequate annual budgets.

3 Governments should pass domestic witness protection legislation to create independent witness protection services that can address the needs of witnesses in a holistic way.

4 Governments should seek technical support from experienced external organisations and other governments to design witness protection legislation and systems.

5 Governments should explore the range of approaches to managing the costs of witness protection, e.g. incremental implementation of services and prioritising witness protection based on the level of the potential threat.

Summary

Responding appropriately to complex transnational and international crimes requires a multifaceted approach that includes a robust criminal justice response. Witness testimony is a crucial part of this. Witnesses, and often their family members, can face significant danger given their crucial role in obtaining a conviction. Africa has seen situations where witness intimidation and harm have led to case dismissals and acquittals. Ultimately, justice fails in these circumstances. Obstacles such as insufficient funding, shortage of skills and weak political will must be addressed.

SERIOUS TRANSNATIONAL CRIMES, such as terrorism, corruption and organised crime, are a major cause for concern across Africa. The impact of such crimes can be grave and complex, and many of these crimes are known for their high cost to development, security and stability.[1] In 2014 alone, at least 13 370 terrorism attacks took place across the world.[2] This led to the deaths of at least 32 685 people[3] and more than 40 900 injuries.[4] Moreover, a 2014 PricewaterhouseCoopers (PwC) survey found that more than one in three organisations worldwide have experienced commercial crime,[5] and half of all such crimes have taken place in Africa.[6]

Responding appropriately to these kinds of complex and serious crimes calls for a multifaceted approach, including a robust criminal justice response. A strong and fair criminal justice system asserts the rule of law and gives effect to the rights of all concerned. Sound investigations, effective prosecutions and adjudication that are free from external interference are integral to ensuring that justice is served, so that impunity does not gain a foothold.[7] Strong and fair justice systems assure citizens that the state is willing and able to take action against criminals.

The clandestine nature of certain crimes – and many other factors, including the social status associated with their perpetrators, who are often dangerous criminals – can prevent many criminal activities from being reported or detected. Even where arrests are made, the successful investigation of complex crimes and

prosecution of their perpetrators are difficult. The reliable testimony of witnesses is therefore central to presenting a strong case in court.[8] The witness becomes even more crucial in crimes that are shrouded in secrecy (e.g. terrorism and corruption), where investigating can be extremely difficult.[9] Lack of reliable witness testimony to strengthen such cases can result in insufficient evidence for prosecution or, where prosecutions do take place, it may lead to acquittals.[10] The potentially decisive nature of a witness's testimony can provoke threats, prompt interference with the legal process or even lead to witnesses or people associated with them being harmed. Importantly, such cases often involve accused people who have resources and power. Protection for witnesses is therefore central to effective rule-of-law-based responses and robust criminal justice systems.

The absence of witness protection services in most African countries and weak or inconsistent protection for witnesses, continue to hamper efforts to successfully prosecute serious crimes.

> The potentially decisive nature of a witness's testimony can provoke threats, prompt interference with the legal process or even lead to witnesses being harmed

The purpose of this policy brief is threefold. First, it briefly discusses the current status of witness protection in African countries. Secondly, it investigates the main factors hindering progress in establishing witness protection systems in Africa. Thirdly, it provides recommendations on how to address the current challenges.

Defining witnesses, witness protection and a witness protection programme

Who is a witness?

For the purpose of this brief, a witness is defined as a person with information that is crucial to judicial proceedings, including criminal proceedings.[11] Broadly, there are three types of witnesses who may require protection:

- Justice collaborators: These are people, including convicted offenders, facing related criminal charges who decide to cooperate with prosecutors by giving testimony.[12]
- Victim-witnesses: These are witnesses who are direct victims of the crime undergoing prosecution.[13]
- Other types of witnesses: These include expert witnesses who testify because of their specialist knowledge, such as forensic experts.[14] Other witnesses could be police officers or insider witnesses, who may or may not have criminal charges against them despite their close affiliation to the accused, or eyewitnesses to the criminal activities under question

IN MOST AFRICAN COUNTRIES, WITNESS PROTECTION SERVICES ARE ABSENT OR WEAK

What is witness protection?

The term 'witness protection' denotes a range of actions applicable at any stage of criminal proceedings to safeguard witnesses and thereby ensure their effective cooperation in terms of providing testimony.[15]

There are various forms of witness protection that can be implemented in the criminal justice process. First, there is police, or ad hoc protection. This is usually applicable

before a trial but can also be organised during and after. Secondly, judicial or trial protective measures can be prescribed by a judicial officer and these are usually applied during the trial but can continue after its conclusion. Lastly, there is witness protection under a formal protection programme.[16]

Witness protection is a covert process that involves various measures. These may include:

- Concealing the identity of a witness through the following:
  - Facial concealment and voice distortion
  - Closed trials and closed-circuit television
  - Giving witnesses pseudonyms or referring to them using numbers
  - Expunging witness names and other information that may allow them to be identified from records[17]
- Admission to a witness protection programme, which may include changing a witness's identity and relocating him or her, either temporarily or permanently.

According to the UN Office on Drugs and Crime (UNODC), a witness protection programme may be described as a 'formally established covert programme subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities'.[18]

The challenges of witness intimidation and harm

Witness intimidation or interference of any kind is a serious threat to criminal cases and other judicial procedures, and is often treated as an offence in national legislation. Intimidating witnesses – or those close to them – by harming them or issuing threats to do so[19] is a common practice used to prevent witnesses from testifying in court.[20] After witnesses have testified, accused individuals or their associates may retaliate against them or those related to them as a punishment for their cooperation with the authorities.[21] Such acts of intimidation may also be used to dissuade them from cooperating with criminal justice authorities in the future.

> A case in point is Nigeria, where a crucial prosecution witness declined to testify during the trial of alleged Boko Haram member Dr Muhammad Nazeef Yunus

A case in point is Nigeria, where, in April 2014, a crucial prosecution witness declined to testify during the trial of alleged Boko Haram member Dr Muhammad Nazeef Yunus. The judge's earlier decisions to disallow the use of masks to conceal the identity of witnesses in favour of using a cubicle and to maintain an open court is likely to have resulted in the witness's withdrawal.[22] The trial is still to be finalised.[23] (Information correct at time of print.)

Similarly, the withdrawal of certain key protected and unprotected witnesses in the International Criminal Court (ICC)[24] case against the Kenyan president, Uhuru Kenyatta, relating to crimes committed during post-election violence in 2007/08 in Kenya led to postponements[25] and the eventual withdrawal of charges for lack of evidence.[26] Some of those who withdrew are said to have been insider witnesses who represented substantial evidence for the prosecution's case.[27] Kenyatta's lawyers have denied involvement in any form of witness intimidation.[28]

FACIAL CONCEALMENT AND VOICE DISTORTION ARE WAYS OF PROTECTING A WITNESS' IDENTITY

On 5 April 2016 the ICC ruled that the Kenyan deputy president, William Samoei arap Ruto, and his co-accused, a radio journalist, Joshua Arap Sang, had no case to answer for in the charges of crimes against humanity allegedly committed during the 2008 post-election violence.[29] The termination of the case was due to interference with witnesses, recanting of testimonies, disappearances or as a result of political meddling and intimidation.[30] The accused denied the allegations, despite an ICC warrant for the arrest of a Kenyan journalist, Walter Osapiri Barasa, in 2013 on charges of being involved in a 'witness interference scheme' in the same case.[31]

Witness intimidation, and/or harming witnesses, is believed to have played a role in the 2004 disappearance of Peter Mulamba, a key witness in the corruption case against former Malawian finance minister Friday Jumbe.[32] Reports pointing to Mulamba's death surfaced but were allegedly untrue.[33] The witness remains at large and the case is yet to be finalised. (Information correct at time of print.)

Preventing witnesses of serious crimes – or crimes involving high-profile or influential people – from being intimated or harmed is therefore central to witness protection.[34] Individuals are more likely to testify if they can be guaranteed of their safety (and that of their families).[35] Nevertheless, harming, threatening, interfering with or intimidating witnesses are not sufficiently addressed, either in legislation or protection services, in most African countries.

It is worth noting that justice processes other than criminal justice ones, such as transitional-justice measures, are also subject to these concerns if witnesses do not feel safe to testify.[36]

Witness protection in the international setting

There are many global instruments and agreements that acknowledge the central role played by witness protection in supporting efforts to tackle complex and serious crimes. These include the UN Convention against Transnational Organised Crime[37] and the UN Convention against Corruption,[38] which note the need for witnesses to be protected from acts that may force, threaten or interfere with them.[39] The UNODC's Model Law on Witness Protection outlines good practices for the implementation of witness protection internationally.[40] Provisions for witness protection may also be found in a range of other UN conventions and declarations as part of the UN's norms and principles.

Permanent and ad hoc international courts and tribunals demonstrate the use of witness protection in administering justice. The Rome Statute of the ICC, for example, provides for the protection of ICC witnesses.[41] The ICC's witness protection initiatives have been plagued with difficulties. These include the February 2016 erroneous revelation of witness names in the case against former Ivorian president Laurent Gbagbo[42] – and the allegation that the Defence in the case against Ruto and Arap Sang (see above) submitted evidence indicating that ICC staff members may have engaged in sexual relations with witnesses and their families; been bribed by witnesses; and were party to the submission of false financial claims, breaches of Victims and Witnesses Unit protocols by witnesses, and obtaining pecuniary benefits from the false financial claims.[43]

> Witness intimidation or interference of any kind is a serious threat to criminal cases and other judicial procedures

To this end, the defence has submitted a filing to the court. Despite this, the court continues to provide protection to witnesses.[44] The Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the International Criminal Tribunal for Rwanda (ICTR)[45] and the International Criminal Tribunal for the former Yugoslavia (ICTY)[46] all made use of witness protection in their proceedings. Since the closure of the ICTY and the ICTR, the UN Mechanism for International Criminal Tribunals has overseen continued witness protection through its witness support and protection units in Arusha and The Hague.[47]

The US Federal Witness Security Program is a prime example of a national witness protection programme.[48] The US programme has been instrumental in organised-crime cases, such as those relating to mafia activities.[49] Other countries with witness protection frameworks are the UK, Australia, Canada, Italy, Turkey, Jamaica, the Philippines and New Zealand;[50] Hong Kong also has a witness protection framework.[51]

Witness protection: the situation in Africa

African countries have recognised the significance of witness protection in addressing serious crimes.[52] Specifically, the African Union Model National Law on Universal Jurisdiction over International Crimes stipulates both prosecutorial and court responsibility to ensure protection of witnesses.[53] The Rules of Procedure of the African Commission on Human and Peoples' Rights also acknowledge the need to prevent reprisal against witnesses.[54] Other forums, such as the Africa Prosecutors Association,[55] the East African Association of Prosecutors,[56] and the East African Magistrates and Judges Association, also emphasise the crucial function of witness protection in fighting complex crimes.[57] Despite these agreements and bodies, however, there is only limited provision for witness protection at the national level in many African countries.[58]

African states are at various stages in their efforts at implementing witness protection. Some countries have draft legislation in place; others have legislated for witness protection; others are further ahead and already have formalised witness protection programmes in place. But, in all cases, countries have designed their legislation and systems to suit their specific needs and requirements.

South Africa is regarded as the continent's pioneer in witness protection and, of all African countries, has the most developed national level mechanism for protecting witnesses. The South African Office for Witness Protection (OWP)[59] is an independent, covert body tasked with fulfilling the functions of witness protection.[60] Its enabling legislation emanated from recommendations made at the Truth and Reconciliation Commission following the end of apartheid. The nature of protection that the OWP provides is independent from the police and prosecution services, and has proved to be of a high standard.[61] South Africa offers a service that operates 24 hours a day, seven days a week for witnesses and those related to them.[62]

South African witness protection legislation allows for the protection of those who witness a wide range of crimes (including serious and petty crimes), upon the recommendation of the director of the OWP.[63] The kind of protection that is provided to witnesses depends on the nature of the threat to them. Admission to the programme is voluntary and is not forced upon witnesses, following an application and assessment process. Witnesses are then expected to adhere to strict rules if their security is to be guaranteed. The OWP reports that no witnesses who have been placed in the programme have been killed in the past 14 years.[64] South Africa now plays a key role in developing witness protection initiatives on the continent and beyond by delivering high-level training and mentoring programmes.

> The South African Office for Witness Protection is an independent, covert body tasked with fulfilling the functions of witness protection

Kenya's Witness Protection Agency (WPA)[65] provides special protection to people with important information who face potential risk or intimidation as a result of cooperating with prosecution and other law-enforcement agencies.[66] The functions of the WPA include establishing and maintaining a witness protection programme, determining criteria for admission to and removal from the programme, and determining the type of protection measures to be applied.[67] The agency operates as an independent entity and has an advisory board, which provides general oversight.

The WPA has made some concrete steps towards facilitating the implementation of its mandate and objectives.[68] For instance, Kenya's Witness Protection (Amendment) Bill (2016) is aimed at aligning the witness protection framework with the Kenyan Constitution, and achieving compliance with other legal instruments and emerging good practices in witness protection worldwide. The WPA has also drafted witness protection rules of court.[69] In addition, the agency collaborates internationally and engages with countries such as South Africa and Israel, among others, to promote international good practices.[70]

Rwanda's witness protection framework was established in 2006 in response to the challenges faced by witnesses and victims in trials associated with the 1994 genocide, and the increased number of crimes against witnesses and victims of other crimes.[71]

SOUTH AFRICA IS REGARDED AS THE CONTINENT'S PIONEER IN WITNESS PROTECTION

The Rwandan judicial system has adopted a two-pronged approach to witness protection. This entails the Victim and Witness Support Unit of the National Public Prosecution Authority, which deals with witness protection in Rwanda generally, and the Witness and Victim Protection Unit (WVPU), an entity within the Supreme Court that deals with witnesses in cases transferred from the ICTR to the national courts.[72] These frameworks have existed alongside the ICTR and MICT witness protection programmes.[73] Threatened individuals may apply for protection during investigations, during the trial and/or in the post-trial phase.[74] They can register with the judicial police, prosecution authorities, at the ordinary courts or the Gacaca courts [75] (when these were in operation).[76]

Following an applicant's registration, witness protection officers carry out an assessment and evaluation process to determine the witness's eligibility for protection according to the nature, source and level of the threat, the capacity of the accused person(s), and the vulnerability of the witness, among others.[77] These inform decisions on admission and relevant protective measures for addressing the risk. Rwanda currently has over 24 protected witnesses from extradition cases, and several witness in different types of other cases.[78]

Witness protection in other countries in Africa is still in the early stages of development. Countries such as Cabo Verde, Ethiopia, Morocco and Mozambique have legislation but have yet to establish fully fledged services. Other countries, such as Egypt, Ghana, Namibia, Nigeria, Tanzania and Uganda, have draft legislation awaiting adoption into law. In other African countries some of the main examples of legislation in which witness protection measures are contained are penal codes, criminal procedure legislation, and legislation geared towards countering corruption, money laundering, terrorism and trafficking in persons.

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In various countries, ad hoc measures are used, such as police protection or measures undertaken during trials to protect witnesses' identities. It is inevitable that such ad hoc measures lack consistency in their application and therefore create uncertainty for witnesses. For instance, in terrorism cases involving Boko Haram in Nigeria, the application of witness protection measures has lacked uniformity, with varying degrees of success.[79] As mentioned above, the refusal of a witness to testify in a case relating to Boko Haram was likely due to the judge's decision against wearing masks to protect identity, and to maintain an open court.[80] This led to the trial's postponement. Meanwhile, in another case against a Boko Haram suspect, a court in Nigeria used masks to protect witnesses' identities and excluded the public from court. The trial was concluded and the accused in this case was found guilty.[81] Adopting uniform practices for witness protection creates a measure of trust in the system, especially when witnesses believe their lives, or those of their families, are at risk.

In many African countries there are no special protection programmes.[82] The absence of such programmes facilitated by specialist protection officers means that the police often take up this responsibility. This can prove problematic because the police have

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RWANDA ESTABLISHES ITS WITNESS PROTECTION FRAMEWORK

no structured or long-term mechanism for providing special protection for witnesses, and protection may be given only for the duration of a trial, and not afterwards. There have been armed-robbery cases in Ghana, for example, where witnesses' fear of reprisal from the accused, their family members or the accused's criminal associates has led to cases being dropped, even though protective measures were provided during court proceedings.[83] Post-trial protection is therefore also important, especially where the risk of reprisals remains high after the trial. Short-term protection measures may not serve the ultimate justice outcomes that are sought.[84] The proper protection of witnesses of such crimes requires a comprehensive analysis of the nature of the threat to them and their range of needs. This includes assessing the possibility of a long-term threat to the witness or their relatives after the trial.

In Tanzania, for example, adjournments, acquittals and dismissals of criminal cases involving rape, illegal fishing and grievous harm have been the result of witnesses failing to participate in criminal justice processes for fear of reprisal.[85] The lack of mechanisms to protect witnesses has also been cited in relation to victims of sexual violence during the conflict in the Democratic Republic of the Congo as a key setback in the victims' access to justice.[86]

Barriers to implementing comprehensive witness protection in Africa

Despite a consensus on the need for witness protection, implementation has been slow or non-existent in many African countries. There are several reasons for this.

One main factor is the high financial cost of protecting witnesses, especially in cases requiring either temporary or permanent relocation. South Africa's OWP, for example, had a budget of R153 million (US$12.7 million) in 2014/15 for 324 witnesses and 315 related people in protection.[87] These costs are attributable to services such as maintaining trained staff and the core infrastructure for an independent witness protection service, keeping witnesses and relatives in safe houses, and the payment of medical, schooling and other necessary expenses for witnesses and their families.[88]

Kenya's WPA also faces daunting funding shortages, hampering its capacity building and provision of training in the witness protection units. For example, for the 2014/15 financial year, the Kenyan government allocated about KSh295 million (US$2 894 000) to the agency, when its required budget was US$4 902 000.[89] This is insufficient to sustain the operations of the agency, as demand for its services has increased exponentially. This, coupled with the slow pace of trials, has contributed significantly to the high costs of maintaining witnesses and their dependents in the programme. The WPA lacks the capacity to handle the increasing numbers of witness protection applications. For example, in 2014 and 2015, the agency received 207 new applications for the witness protection programme. The agency had 183 witnesses under the protection programme and 560 of their relatives.[90]

Funding shortages have hindered various other attempts to improve the capacity of Kenya's witness protection programme, including awareness campaigns aimed at criminal justice stakeholders and the public, limiting the ability of the WPA to attract sufficiently qualified applicants for protection officer posts. Financial constraints also mean that formal judicial protection measures, including witness protection boxes and screens to protect identity, are absent from most courts.[91]

> Egypt's draft law has also been criticised for lacking genuine political will to establish witness protection

Rwanda's witness protection services also face some special challenges. Protecting witnesses in the absence of legislation falls short of providing a comprehensive backbone for implementation. Analysts note that it would be more prudent to establish a single independent witness protection unit with a designated budget and resources, instead of running two similar institutions.[92] Rwanda is in the process of drafting legislation to address this problem.[93] Rwanda also faces funding constraints in its ability to develop the capacity of witness protection staff and the potential of the WVPU.[94]

Another challenge to establishing witness protection services in Africa may be weak political will hindering prioritisation of the issue. While this may be related to a lack of information on the importance of witness protection in criminal justice processes, it may also be tied to the challenge of funding. In the case of Kenya's relatively advanced witness protection mechanism, for example, legal experts have argued that the WPA's shortage of funding indicates a lack of political will to support witness protection initiatives.[95] They allege that retaining limited witness protection services may serve the personal interests of those in government who live in fear of their own future prosecution.[96] Egypt's draft law has also been criticised for lacking genuine political will to establish witness protection to help address corruption, criminality and governance difficulties there.[97]

A shortage of human-resource skills and capacity to ensure comprehensive protection of witnesses is another key problem holding back witness protection in Africa. Trained protection officers and support staff are essential

if there is to be proper administration of witness protection services. All witness protection staff must be trained to carry out their duties to high standards of integrity, confidentiality and respect for human rights, as the failure to perform their duties professionally could have devastating results for those in their care. Training will ensure that they have the special skills needed not only to provide physical security to witnesses, but also to accommodate their psychological and social needs. The transition to living under conditions of witness protection can be life-changing and traumatic. This is especially so in cases where witnesses are relocated. Witnesses may need various forms of social support in their new lives, especially as trials may take a long time to complete – and these are aspects of witness protection that many African criminal justice systems are ill-equipped to handle because of resource constraints. The UNODC recommends training for all officials involved in the criminal justice system on witness protection, including judges, prosecutors, prison officials and police.[98] This too is a costly endeavour.

Another shortcoming in Africa is the lack of cooperation agreements and mechanisms between states to facilitate witness relocation and other forms of long-term protection. This type of international collaboration is necessary in cases involving powerful or high-profile accused persons and in transnational organised crime. A good example of such collaboration was seen in South Africa's 2012 prosecution of Henry Okah on terrorism charges. The importance of extensive international cooperation in witness protection was emphasised, with witnesses brought from Nigeria to South Africa to testify, who were protected by the South African authorities.[99] Unfortunately, however, for the most part international collaboration for witness protection is limited in Africa, and needs to be improved.

Conclusion

Addressing serious crime on the African continent requires responses founded on the rule of law. Protecting witnesses is central to this, given the critical function they serve in holding criminals accountable for their actions.

Although African countries have acknowledged the importance of witness protection in the criminal justice framework, its implementation at the national and intergovernmental levels has been weak. African countries face significant obstacles in providing witnesses with protection. These include funding shortages in witness protection programmes, limited knowledge, skills, resources and lack of international cooperation, as well as the need for stronger political will in establishing witness protection services. Against the backdrop of the high financial costs of criminal justice infrastructure more generally, as well as the particular challenges posed by the investigation and prosecution of complex cases – such as the need for specialised personnel, investigative infrastructure and forensic services, etc. – witness protection may continue to be relegated to an afterthought, even though it plays a central role in successful trials.

Making witness protection legislation and the institutions that administer it a priority, and strengthening the mechanisms for funding witness protection are some of the ways in which the challenges may be overcome. Witness protection remains at the core of an effective criminal justice system. The onus is therefore on African states to implement effective and efficient witness protection to ensure that justice prevails.

ADDRESSING SERIOUS CRIME ON THE AFRICAN CONTINENT REQUIRES RESPONSES FOUNDED ON THE RULE OF LAW

Notes

1 UN, Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, 12–19 April 2015, www.unodc.org/documents/data-and-analysis/statistics/crime/ACONF222_4_e_V1500369.pdf.

2 Vision of Humanity, 2015 Global terrorism index, www.visionofhumanity.org/#/page/our-gti-findings.

3 Ibid.

4 National Consortium for the Study of Terrorism and Responses to Terrorism, Overview: Terrorism in 2014, www.start.umd.edu/pubs/START_GTD_OverviewofTerrorism2014_Aug2015.pdf.

5 PwC, Global economic crime survey 2014, www.pwc.com/gx/en/economic-crime-survey/.

6 Ibid.

7 K Kramer, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders Fourth Regional Seminar on Good Governance for Southeast Asian Countries, 7–10 December 2010, www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf.

8 J Saland, Criminal contempt in New York: Refusal to testify and its ramifications in a criminal case, 16 January 2012, www.newyorkcriminallawyer-blog.com/2012/01/criminal-contempt-in-new-york-refusal-to-testify-its-ramifications-in-a-criminal-case.html.

9 F Enikö, The rising importance of the protection of witnesses in the European Union, 2006, www.cairn.info/zen.php?ID_ARTICLE=RIDP_771_0313.

10 J Njeri, Witness protection: The missing cornerstone in Africa's criminal justice systems, 1 September 2014, www.issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems.

11 United Nations Office on Drugs and Crime (UNODC), Good practices for the protection of witnesses in criminal proceedings involving organised crime, 2008, www.unodc.org/documents/southeastasiaandpacific//Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf.

12 Council of Europe Committee of Ministers, Recommendation Rec (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, 2005, https://wcd.coe.int/ViewDoc.jsp?id=849237&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

13 Victims of Violence, A victim's guide to being a witness and testifying in court, www.victimsofviolence.on.ca/victim-information-library/a-victims-guide-to-being-a-witness-and-testifying-in-court/.

14 Cornell University Law School, Legal Information Institute, Expert witness, www.law.cornell.edu/wex/expert_witness.

15 J Njeri, Witness protection: The missing cornerstone in Africa's criminal justice systems, 1 September 2014, www.issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems.

16 C Mahony, *The justice sector afterthought: Witness protection in Africa*, Tshwane: Institute for Security Studies, 2010, www.issafrica.org/publications/books/the-justice-sector-afterthought-witness-protection-in-africa.

17 UNODC, Good practices for the protection of witnesses in criminal proceedings involving organised crime, 2008, www.unodc.org/documents/southeastasiaandpacific//Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf.

18 Ibid.

19 Violence Reduction Network, Witness intimidation report in submitted support of ABA resolution regarding witness intimidation, October 2014, www.vrnetwork.org/Documents/Victim%20Witness%20Intimidation%20Report%20for%20ABA.pdf.

20 Ibid.

21 Ibid.

22 A Osazuwa, Boko Haram: Witness refuses to testify in open court, April 2014, www.nigeria-news-world.com/2014/04/boko-haram-witness-refuses-testify-open-court.html#.VkT9qXYrLIU.

23 Kogi Reports, Boko Haram: Absence of lead counsel stalls KSU lecturer's trial, 15 February 2016, www.kogireports.com/boko-haram-absence-of-lead-counsel-stalls-ksu-lecturers-trial/.

24 Similarly, in September 2015 the ICC opened a case against Jean-Pierre Bemba Gombo for subverting the course of justice for, among other things, corruptly influencing witnesses to give false testimony in connection with the ICC case against Bemba for war crimes and crimes against humanity in the Central African Republic.

25 O Maunganidze and A Ngari, Prosecuting Kenyatta: Damned if you do, damned if you don't, 12 September 2014, www.issafrica.org/iss-today/prosecuting-kenyatta-damned-if-you-do-damned-if-you-dont.

26 International Criminal Court, *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, 13 March 2015, www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/chambers/tcVb/Pages/1005.aspx.

27 T Maliti, Prosecutor withdraws seven witnesses in Kenyatta case in past year, 16 January 2014, www.ijmonitor.org/2014/01/prosecutor-withdraws-seven-witnesses-in-kenyatta-case-in-past-year/.

28 N Kulish and M Simons, Setbacks rise in prosecuting the president of Kenya, 19 July 2013, www.nytimes.com/2013/07/20/world/africa/dwindling-witness-list-threatens-case-against-kenyan-president.html.

29 Trial in the Ruto and Sang case: Relevant information and materials, www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/ruto-sang.aspx.

30 *The Prosecutor v. Ruto & Sang* (decision on defence applications for judgments of acquittal) reasons of Judge Eboe-Osuji, ICC-01/09-01/11-2027-Red 05-04-2016 126/258 NM T, www.icc-cpi.int/iccdocs/doc/doc2228553.pdf.

31 *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13: ICC-01/09-01/15, www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/ICC-0109-0113/Pages/default.aspx.

32 Malawi corruption witness missing, *BBC News*, 8 September 2004, http://news.bbc.co.uk/2/hi/africa/3635798.stm.

33 African Financial Markets, Mulamba holds Jumbe, Mvula cases, 28 July 2009, www.africanfinancialmarkets.com/front-news-detail.php?NewsID=54051.

34 UNODC, *Handbook on criminal justice responses to terrorism 2009*, www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf.

35 Public Safety Canada, Witness protection programs in selected countries, research brief no. 43, www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rgnzd-crm-brf-43/rgnzd-crm-brf-43-eng.pdf.

36 C Mahony, *The justice sector afterthought: Witness protection in Africa*, Tshwane: Institute for Security Studies, 2010, www.issafrica.org/publications/books/the-justice-sector-afterthought-witness-protection-in-africa.

37 UNODC, UN Convention against Transnational Organised Crime and the Protocols thereto, 2004, www.unodc.org/documents/middleeastandnorthafrica/organised-crime/united_nations_convention_against_transnational_organized_crime_and_the_protocols_thereto.pdf.

38 UNODC, UN Convention against Corruption, 2004, www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

39 United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders Fourth Regional Seminar on Good Governance for Southeast Asian Countries, 7–10 December 2010, recommendation document, www.unafei.or.jp/pdf/seminar/GG4_Recommendations.pdf.

40 UNODC, UN International Drug Control Programme Model Witness Protection Bill, 2000, www.unodc.org/pdf/lap_witness-protection_2000.pdf.

41 Rome Statute of the International Criminal Court, 1 July 2002, www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

42 Laurent Gbagbo case: ICC judge apologises after witnesses named, *BBC News*, 8 February 2016, www.bbc.com/news/world-africa-35526267.

43 https://www.icc-cpi.int/CourtRecords/CR2016_03167.PD

44 J Easterday, Witness protection: Successes and challenges in the Lubanga trial, 26 June 2009, www.ijmonitor.org/2009/06/witness-protection-successes-and-challenges-in-the-lubanga-trial/.

45 REDRESS, Testifying to genocide: Victim and witness protection in Rwanda, October 2012, http://protectionline.org/files/2012/11/121029ProtectionReport.pdf.

46 International Criminal Tribunal for Yugoslavia, Shefqet Kabashi convicted for contempt of the tribunal, 16 September 2011, www.icty.org/sid/10808.

47 The UN Mechanism for International Criminal Tribunals, Witnesses, www.unmict.org/en/about/witnesses.

48 Public Safety Canada, Witness protection programs in selected countries, research brief no. 43, www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rgnzd-crm-brf-43/rgnzd-crm-brf-43-eng.pdf.

49 JO Finckenauer, La Cosa Nostra in the United States, 12 June 2007, www.ncjrs.gov/pdffiles1/nij/218555.pdf.

50 Government of Canada, Organised crime research brief no. 1.: Witness protection, www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rgnzd-crm-brf-1/index-eng.aspx.

51 United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Criminalization, issues in the investigation and prosecution of corruption, handling of assets, mutual legal assistance and extradition, 10th International Training Course on the Criminal Justice Response to Corruption, August 2008, www.unafei.or.jp/english/pdf/RS_No76/No76_21RC_Group1.pdf.

52 African Union Model National Law on Universal Jurisdiction Over International Crimes, July 2012.

53 Ibid.

54 African Commission on Human and Peoples' Rights, Rules of procedure of the African Commission on Human and Peoples' Rights of 2010, www.achpr.org/instruments/rules-of-procedure-2010/.

55 Department of Justice and Constitutional Development, Republic of South Africa, Keynote address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP, at the International Conference of AU Members on Witness Protections, 2014, www.justice.gov.za/m_speeches/2014/20140825_WitnessProtection.html.

56 Institute for Security Studies, Recommendations: East African Association of Prosecutors Second Training Workshop Responding to Terrorism, International and Transnational Crime, 2013, www.issafrica.org/uploads/Recommendations-EAAP-Training-2013.pdf

57 Institute for Security Studies, Recommendations of the 3rd East African Magistrates and Judges Association Training Workshop on Responding to Terrorism, International and Transnational Crimes, www.issafrica.org/uploads/Recommendations-third-EAMJA-training-workshop.pdf.

58 African Commission on Human and Peoples' Rights, Rules of procedure of the African Commission on Human and Peoples' Rights of 2010, www.achpr.org/instruments/rules-of-procedure-2010/.

59 The OWP was established in terms of the Witness Protection Act 112 of 1998.

60 C Mahony, *The justice sector afterthought: Witness protection in Africa*, Tshwane: Institute for Security Studies, 2010, www.issafrica.org/publications/books/the-justice-sector-afterthought-witness-protection-in-africa.

61 Interview with representative of the South African OWP, 26 January 2016

62 Ibid.

63 Ibid.

64 Ibid.

65 The WPA was established under the Witness Protection Act (Cap. 79 Laws of Kenya) and amended by the Witness Protection (Amendment) Act 2 of 2010.

66 Interview with representative of the Kenyan WPA, 29 January 2016.

67 Ibid.

68 Ibid.

69 Ibid.

70 Ibid.

71 Interview with representative of the Rwandan Witness and Victim Protection Unit, 3 February 2016.

72 REDRESS, Testifying to genocide: Victim and witness protection in Rwanda, October 2012, www.protectionline.org/files/2012/11/121029ProtectionReport.pdf.

73 REDRESS, Testifying to genocide: Victim and witness protection in Rwanda, October 2012, http://protectionline.org/files/2012/11/121029ProtectionReport.pdf.

74 Interview with representative of the Rwandan Witness and Victim Protection Unit, 3 February 2016.

75 Gacaca courts were traditional community courts used to bring justice for the Rwandan genocide while promoting reconciliation and healing.

76 Interview with representative of the Rwandan Witness and Victim Protection Unit, 3 February 2016.

77 Ibid.

78 Interview with representative of the Rwandan Witness and Victim Protection Unit, 3 February 2016.

79 U Salifu, Fighting Boko Haram: Why Nigeria needs a cohesive witness protection programme, 5 May 2015, www.issafrica.org/iss-today/fighting-boko-haram-why-nigeria-needs-a-cohesive-witness-protection-programme.

80 A Osazuwa, Boko Haram: Witness Refuses to Testify in Open Court, April 2014, www.nigeria-news-world.com/2014/04/boko-haram-witness-refuses-testify-open-court.html#.VkT9qXYrLIU

81 JC Azu, Nigeria: Witness protection law – Enter masked witnesses, May 2013, http://allafrica.com/stories/201305290066.html.

82 C Mahony, *The justice sector afterthought: Witness protection in Africa*, Tshwane: Institute for Security Studies, 2010, www.issafrica.org/publications/books/the-justice-sector-afterthought-witness-protection-in-africa.

83 AfriMAP, Open society initiative for West Africa and The Institute for Democratic Governance, Ghana justice sector and the rule of law, 2007, www.afrimap.org/english/images/report/AfriMAP_Ghana_Justice.pdf.

84 UNODC, Victim assistance and witness protection, www.unodc.org/unodc/en/organized-crime/witness-protection.html.

85 AY Mwenda, Witness protection in Tanzania, work product of the 149th International Training Course of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, resource material series no. 86, March 2012, www.unafei.or.jp/english/pdf/RS_No86/No86_00All.pdf.

86 UN Office of the High Commissioner for Human Rights, Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo, April 2014, www.ohchr.org/Documents/Countries/CD/UNJHROApril2014_en.doc.

87 Interview with representative of the South African OWP, 26 January 2016.

88 K Kramer, United Nations Asia and Far East Institute for the Prevention of Crime and

the Treatment of Offenders Fourth Regional Seminar on Good Governance for Southeast Asian Countries, 7–10 December 2010, www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf; see also UNODC, Good practices for the protection of witnesses in criminal proceedings involving organised crime, 2008, www.unodc.org/documents/southeastasiaandpacific//Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf.

89 Interview with representative of the Kenyan WPA, 29 January 2016.

90 Ibid.

91 Ibid.

92 REDRESS, Testifying to genocide: Victim and witness protection in Rwanda, October 2012, www.protectionline.org/files/2012/11/121029ProtectionReport.pdf.

93 Interview with representative of the Rwandan Witness and Victim Protection Unit, 3 February 2016.

94 Ibid.

95 W Gathu, Big questions about witness protection in Kenya, 27 May 2014, https://iwpr.net/global-voices/big-questions-about-witness-protection-kenya.

96 Ibid.

97 RM Taha, Witness protection law criticized, 1 June 2013, www.dailynewsegypt.com/2013/06/01/witness-protection-law-criticised/.

98 UNODC, Victim assistance and witness protection, www.unodc.org/unodc/en/organized-crime/witness-protection.html.

99 U Salifu, Henry Okah counter-terrorism ruling is a judicial triumph for South Africa and the continent, 1 February 2013, www.issafrica.org/iss-today/henry-okah-counter-terrorism-ruling-is-a-judicial-triumph-for-south-africa-and-the-continent.

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The Institute for Security Studies is an African organisation that aims to enhance human security on the continent. It does independent and authoritative research, provides expert policy analysis and advice, and delivers practical training and technical assistance.

Acknowledgements

This policy brief was made possible with support from the governments of the Netherlands and Norway. The ISS is also grateful for support from the other members of the ISS Partnership Forum: the Hanns Seidel Foundation and the governments of Australia, Canada, Denmark, Finland, Japan, Sweden and the USA.

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ISS Policy Brief No 88

ISSN 1026-0404

9 771026 040004