

Witness protection in the Kenya cases: balancing secrecy with accountability

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When Chief Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, announced in December 2014¹ that the Court had been forced to drop crimes against humanity charges against Kenyan president, Uhuru Kenyatta, she attributed the poor state of evidence to lack of cooperation and ‘unprecedented interference’ with witnesses. She spoke of death, bribery and intimidation. Bensouda called it “a dark day for international criminal justice”.

The Office of the Prosecutor (OTP) was explicit about the situation of witnesses relating to arrests warrants issued for three persons over allegations of witness interference in the Kenyatta case.² It also emphasized witness interference when the case against Kenya’s deputy president, William Ruto, was terminated, saying:

“The fact is that Prosecutions before the ICC can stand or fall on the willingness of witnesses to come forward and tell their story in the courtroom. In this case, 17 witnesses who had agreed to testify against the Accused subsequently withdrew their cooperation with the Court. Prosecution witnesses in this case were subjected to intimidation, social isolation and threats to prevent them from testifying. In the end, the Trial Chamber was in effect prevented from having the opportunity to assess the true merits of the Prosecution case”³.

After the initial statements and interviews⁴ explaining why the charges had to be dropped, however, the ICC went essentially silent on the fate of the witnesses.

It has shed no further light on how witnesses were affected in the Kenya cases⁵ or how the ICC systems and policies failed to protect them. This yawning information hole has added to fear and speculation. The fate of one particular witness, confirmed to have been assisting at different times both the prosecution and defence, became symbolic of Kenya’s ICC horror. On January 2nd, 2016, Meshak Yebei’s body was found four hundred miles from his home, dumped in a shallow river in a national game park, tortured, mutilated and shot in the back of the head⁶.

¹ <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>>

² Walter Barasa, Paul Gicheru and Philip Bett 2013, <www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>

³ <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406>>

⁴ Journalists for Justice Interview with Fatou Bensouda, <<https://jfjustice.net/>>

⁵ Update: See **Postscript**; and Statement of the Prosecutor on external expert review of Kenya cases, released 26th November 2019: <<https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf>>

⁶ <<https://www.theguardian.com/world/2015/jan/06/witness-mutilated-body-kenya-government-killing-meshack-yebei-william-ruto>>

Since the Chief Prosecutor’s “dark day” statement, there has been a public absence of institutional self-reflection commensurate to the event of “unprecedented interference”. This, despite the fact the Court continues to rely heavily⁷ on live witness testimony⁸, and that witness interference has been alleged in nearly every case before the ICC.⁹

The continued reluctance of the Court to interrogate these failings begs the question: is the ICC invoking secrecy to protect witnesses, or its own reputation?

The ‘no information’ policy publicly imposed by the ICC regarding its institutional protection failures should not be confused with the secrecy necessary for active protection. Understanding why the ICC protection systems and policies failed in the Kenya cases is a matter of accountability and transparency, which has critical implications for the lives and safety of present and future witnesses.

International witness protection

International witness protection is, without doubt, uniquely challenging for the global court. The Court does not have its own territory or enforcement agency, and works within a principle of complementarity in countries characterized by impunity and the absence of the rule of law.

Article 68 of the Rome Statute governs the protection of witnesses, stating that the Court “shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. Art 43(6) sets up a Victims and Witnesses Unit (VWU) within the Registry at the ICC, responsible for ‘protective measures and security arrangements’.

The ICC must rely first on the national government concerned to provide protection. In Kenya, the Court was coming into a situation where there was no appropriate or trusted state-run witness protection program.¹⁰ The Court had to rely on willing member states for protection.¹¹ Agreements on relocation and support of witnesses and family members are negotiated between the ICC and States on a confidential basis, and the Registry enters into framework relocation agreements with willing States. Agreements mainly provide for relocation. In some instances, when there is severe risk - for example, an insider witness - a member state will take the witness into its own national protection program,

⁷ The Court is looking at ways to reduce this reliance, see page 13 <<https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>>

⁸ Witnesses Before the International Criminal Court, July 2013, IBA <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4470A96B-C4FA-457F-9854-CE8F6DA005ED>>

⁹ Witness Interference in Cases before the International Criminal Court, November 2016. Open Society Justice Initiative, <<https://www.justiceinitiative.org/publications/witness-interference-cases-international-criminal-court>>

¹⁰ ICJ Kenya’s Critique of the Witness Protection (Amendment) Bill http://www.iccnw.org/documents/Critique_of_the_WitnessProtection_Act_and_Amendment_Bill.pdf

¹¹ Currently 122 States to the Rome Statute

taking full and permanent responsibility for that individual for as long as they comply with protection agreement conditions.

Basic information on Court protection policies is publicly available on the ICC website.¹² The different categories of witnesses are explained, including crime-based dual status (those who are both victims and witnesses), insider witnesses (those who have a direct connection with the accused) and expert witnesses. There is no archetypal witness situation for generalization. At any one time, there are different types of witnesses receiving different levels of protection in a variety of environments.

No independent complaints body exists for ICC witnesses.

Number of witnesses in the Kenya cases

More than 1,000 witnesses were affected by the Kenya situation, directly or indirectly, according to publicly available ICC court documents and number protocols.¹³ According to these sources, the Prosecution took statements from upwards of 500 witnesses or potential witnesses in the Kenyatta case, and from at least 800 witnesses or potential witnesses in the Ruto case.

Sources

The following overview provides a summary of protection challenges in the Kenya cases. It is based on a review of court documents, social media and mainstream media; interviews with ICC staff, former and present, including from the VWU, Registry, and legal personnel; and, information volunteered by witnesses who have been frustrated by the lack of response from the ICC.

Inability to adapt: The Kenya situation was the first time accused persons became president and deputy president subsequent to being charged by the ICC. There was difficulty on the part of the ICC to adapt approaches and practices to handle suspects elevated to the highest positions of power, and to a hostile state that declared itself 'cooperating' despite the fact witnesses were being targeted and exposed publicly as 'traitors'. The ICC was criticized for not using arrest warrants on the accused to remove them from the political arena.

Once in power, the accused had full use of the state machinery, including intelligence gathering and security agencies. While Kenyatta had initially promised during his presidential campaign he would deal with the charges at the ICC as a personal matter, he mobilized public resources upon becoming president to launch a political and diplomatic campaign against the ICC. A vicious social media campaign against witnesses was linked to personnel at President Kenyatta's State House.¹⁴

¹² <<https://www.icc-cpi.int/about/witnesses>>

¹³ Documentation review August 2019, based on disclosure obligations and case documents. Reference to witnesses is by number protocol only, and sensitive information is redacted.

¹⁴ Campaign blogger Dennis Itumbi, arrested over claims of hacking the ICC's website in 2012, was appointed as Head of Presidential Strategic Communications Unit when Kenyatta became president in 2013.

Social media campaign: Witnesses were publicly ‘outed’ online. There was a well-organized and well-staffed scheme to intimidate, bribe and corrupt witnesses. The main purpose was to enable ‘fixers’. It was irrelevant whether or not the witness saw the campaign online, as it gave middlemen sufficient information to hunt down witnesses and compromise them.

On one key forum¹⁵ people posted on multiple occasions seeking names of witnesses, their locations, their security status and the corresponding ICC witness number to tie the name to the evidence. In one instance, four ‘prosecution witnesses’ were named in a discussion as having been killed. There was also a list of 10 dead witnesses circulated on social media, which has not been verifiable or deniable.

Witnesses were named and shamed on Facebook, triggering a stream of threatening and humiliating comments and links, particularly from their own ethnic community. Some had their email accounts hacked. Family members were targeted, sometimes tricked and persuaded on social media platforms into revealing facts about witnesses. Witnesses have complained they did not receive sufficient – if any - assistance and advice on social media harassment and vulnerabilities. They instead felt criticized by ICC staff for their inability to protect themselves.

“They didn’t know what they were getting into”:¹⁶ The Court seemed unprepared for the realities of the political and security environment. When the ICC took up the cases, Kenya had no appropriate formal witness protection program, a history of state assassinations of political opponents and whistleblowers, and a deeply embedded culture of impunity; but Chief Prosecutor Luis Moreno Ocampo liked to call it “easy”¹⁷. A veneer of state cooperation seemed to remove the initiative from the ICC.

Initial ICC security assessments and analysis were inadequate, according to one legal officer. There were also administrative and policy failings. In the early stages, some witnesses were approached by a series of different international ICC investigators, who operated in Kenya within very short periods of time. Potential witnesses had to start afresh with each new investigation team: they accumulated different phone numbers and instructions, and were subjected to risk in the initial contact phase more times than necessary. ICC investigators also expressed frustration with the conditions they had to work under, including the fact that some crime-related areas were placed off-limits because of UN protocol.

Ethnic ‘proximity’: The loyalty and connectivity of ethnic constituencies was a primary means of identifying, intimidating and eliminating witnesses. Ethnic loyalty to the accused was such that even family members felt obligated to reveal, isolate or track witnesses. ICC protection strategies were unprepared for this. One staff member in the field spoke of an institutional tendency to “use the same criteria for every situation.”

¹⁵ Nipate online forum www.nipate.org

¹⁶ Phrase used by a number of interviewees

¹⁷ Interview with Lucy Hannan, Nairobi, May 11, 2010

ICC globalized protection is based on Western-designed witness protection programmes - the genesis being the original American WITSEC prototype - which appear to have been essentially grafted on to situations in Africa by the young court. Security risks to witnesses are typically measured through proximity to the accused. But 'proximity' by ethnicity was fatally undervalued in the Kenya situation – how, for example, a small-scale farmer living in poverty can have a dangerous level of 'proximity' to a president or vice-president through shared ethnicity alone. Social media amplified the difficulties of successfully isolating witnesses from their ethnic community and extended family, even after relocation to another country.

Staffing and bureaucracy: Effective and empathetic handling of Kenyan witnesses was variable. According to some accounts, few ICC staff in the field had witness protection experience; many were former security or military personnel, or worked with other aspects of protection. The level of care and protection was inconsistent.

ICC staff have expressed frustration with an institutional bureaucracy that causes critical delay on the ground – urgent matters that “should be resolved in an hour, take a day, or more”, said one legal officer. Some former witnesses say they were told to contact the nearest police station in the case of an emergency. This is standard practice in many situations, but fundamentally inappropriate in Kenya.

There were incidents when the ICC failed to provide timely funds to relocated witnesses - to register a child at school, for example - creating unnecessary risk when the witness felt forced to seek other sources of support. Some witnesses also experienced a high turnover of staff handling their case - each member of staff used a different personal email account and telephone number; response time to problem-solving dragged; and the lack of a consistent relationship created stress and feelings of insecurity. One former witness described the lack of continuity as having “no sense of a safety net”.

Witnesses as 'beneficiaries': The ICC appears to have an institutional tendency to treat witnesses as dependents and beneficiaries, as if relocation to another country is sufficient reward and care in its own right. Moreover, those relocated to Western countries, who seek or receive asylum as a refugee, have to cope with an increasingly hostile immigration environment. The Court and member states are reportedly looking into expanding use of refugee quotas as the most practical and cost effective means of relocating witnesses.

Witnesses deal with feelings of extreme alienation as they struggle to adapt to relocation, and are susceptible to serious mental health problems. There have been complaints that certain basic needs were treated as unreasonable demands, rather than necessary witness care.

Legal confusion: Concerns about witness interference in the Kenya cases included allegations by the defence of 'coaching'. This was magnified outside the

courtroom, taking advantage of confusion in the Court around differences in the civil law and common law systems relating to the preparation of witnesses. No uniform practice regarding the handling of witnesses in court has been established yet at the ICC, with judges in different trial chambers using different methodologies. The interpretation of what is ‘coaching’ and what is ‘preparation’ is a thin line – making it easy to use against a cohort of witnesses already systematically impugned.

Summary

Witness protection concerns the risk of serious harm and the sanctity of life. Entering and living within a witness program is a deeply traumatic experience. It often involves abrupt relocation and the removal of basic rights, like freedom of movement, speech, and the right to family life. For those who face the most serious risk, witness protection is essentially a form of legal ‘disappearance’ – witnesses lose their legal identity, live in isolation and secrecy, and must sign highly restrictive protection conditions without access to independent legal advice.

Contrary to the hostile narratives established in Kenya – that witnesses are liars and opportunists – the vast majority of witnesses make enormous personal sacrifices. Agreeing to testify is one of the most traumatic life-changing events imaginable, based on an act of faith that justice can and will be done. It is unlikely that any witness who goes into a protection programme, anywhere, will grasp the enormity of the consequences until they are living them.

Removal of fundamental rights can be justified as necessary and proportionate only for as long as protection works. It must be of great concern that so many Kenyan witnesses lost a full spectrum of rights – including life and liberty – in a situation where protection and justice failed.

Transparency about the challenges of providing effective international protection is therefore essential; it does not have to endanger the witnesses themselves.

Contrary to the ICC approach, many successful national witness protection systems have deliberately embraced a degree of openness and self-reflection to establish a ‘social contract’ with the wider population. The public needs to understand how witness protection works in order to respect it and accept it. The original witness protection prototype, WITSEC, is an example of how this balance has been managed successfully. It allows for a significant level of publicity alongside an unrivalled level of protection.¹⁸

¹⁸ Established in the US in the 1960s to break the mafia and organized crime. WITSEC: Inside the Federal Witness Protection Programme, Pete Earley

The ICC should be persuaded to abandon its policy of secrecy around the challenges of protection in the Kenya cases, and work on restoring effectiveness and confidence by employing an inclusive ‘lessons learnt’ approach. It is imperative to include input and perspectives from the affected witnesses themselves.

It should be of particular concern that there is no end in sight for witnesses in the Kenya cases. When the Chief Prosecutor announced charges had been dropped against Kenyatta, she left the cases open:

*‘The withdrawal of the charges does not mean that the case has been permanently terminated. Mr. Kenyatta has not been acquitted, and the case can be re-opened, or brought in a different form, if new evidence establishing the crimes and his responsibility for them is discovered’.*¹⁹

Similarly, when the Ruto and Sang trial was terminated, the trial judges stated that this did not preclude prosecution in the future either at the ICC or in a national jurisdiction.²⁰

These decisions left witnesses in limbo. They precipitated the withdrawal of protection from some witnesses and their families, while leaving others under indefinite conditions of protection without a trial date in sight. It left the accused in power, but constantly threatened by the prospect of a new trial. There is fear and speculation in Kenya about the possibility of a ‘clean up’ as the end of presidential immunity looms.

Moreover, despite all the concerns of the OTP about the obstruction of justice by the Kenyan state, the Chief Prosecutor has made no application to refer Kenya to the ASP for non-cooperation in respect of the arrest and transfer of the three Kenyans for whom warrants of arrest have been issued for interference with witnesses.

The ICC responsibility for Kenyan witnesses has not yet come to an end.

Postscript

The Executive Summary of a 95-page expert review on lessons learnt from the Kenya situation was released on November 26th 2019, with a statement by the Chief Prosecutor, Fatou Bensouda. According to the Prosecutor’s statement, the review focused on “the early years” of the OTP handling of the Kenya situation rather than the later trials, but with no specific dates given.

¹⁹ <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>

²⁰ <https://www.icc-cpi.int/pages/item.aspx?name=pr1205>

Reference is made to sections in the Experts' Report on witness tampering and interference, and the "difficulty the Registry's Victims and Witnesses Unit ("VWU") had at the time in dealing with pervasive witness protection issues".

According to the statement, the Experts' recommendations on witness issues "focus on issues of witness credibility and witness interference, arising out of difficulties encountered in the Kenya cases." In response to those recommendations, the Prosecutor states "the OTP's current practices – as well as those of the Chambers and Registry – have overtaken the recommendations: the Office reacts promptly to trouble, engaging the Chambers and Registry, and looking out for the well-being and security of witnesses."

However, as this paper illustrates, witness challenges have persisted to date. Further light needs to be shed on VWU policies and practices, which have created vulnerabilities and suffering during the entire period of the Kenya cases.

Taking into account there is no foreseeable end, yet, for witnesses in the Kenya cases – and that witness issues have affected nearly every ICC case to date – an independent investigation into the VWU policies and practices is needed for further reform and recommendations.

This should be done with the participation of affected witnesses.

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Kenyans for Peace with Truth and Justice (KPTJ) is a coalition of citizens and organisations working in the human rights, governance and legal fields that came together after the crisis over the disputed results of the 2007 presidential election. Among them are: Africa Centre for Open Governance (AfriCOG), Bunge La Mwananchi, Centre for the Development of Marginalized Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The CRADLE – The Children's Foundation, Constitution and Reforms Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay and Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), InformAction, Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict (ICPC), Inuka Kenya Ni Sisi!, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, the National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF) – Africa and Youth Agenda.

²¹ Remember Me: <https://www.youtube.com/watch?v=9chcCcfKwGk&t=14s>