



Concept Note

Judicial Colloquium on Victim and Witness Protection, investigation and prosecution of international crimes in Uganda

August 2011, Uganda

Introduction

1. After the signing of the Juba Peace Agreement and the annexure on Accountability and Reconciliation in February 2008, the Government of Uganda committed to expeditiously prepare and develop the necessary legislation and modalities for implementing the Principal Agreement and its annexure. In line with its commitment under the Juba Agreement on Accountability and Reconciliation, the Government of Uganda created a Special Division of the High Court to deal with those who have committed heinous crimes against humanity and combat impunity.¹ The War Crimes Division of the High Court (now known as the International Crimes Division (ICD)) was established with a mandate to try any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crimes prescribed in domestic penal law.² Central to the investigation and prosecution of international crimes in Uganda is the application of witness protection measures, strategies and good practices that can facilitate victims and witnesses to participate effectively in the judicial proceedings, in line with international standards and best practices.
2. In this regard, the Justice, Law and Order Sector and the Judicial Studies Institute of Uganda and the Office of the High Commissioner for Human Rights in Uganda are jointly organising a judicial workshop on victim and witness protection to take place in Gulu, Uganda on 1 – 3 August, 2011.
3. The workshop will be attended by judges, prosecutors, registrars, defence counsel, interpreters, legal assistants and investigating officers of the International Crimes Division (ICD) of the High Court of Uganda, and will also participated by other judges and court officials of other parts of the Ugandan Judiciary. This multi-disciplinary setting is intended to facilitate dialogue and develop good practices on the protective measures that can be adopted at the national level to respond to the needs of victims and witnesses before, during and after the trial process.

¹ Clause 4 of Juba Agreement on Accountability and Reconciliation and the relevant parts of the Annexure 3 thereto stipulated for the establishment of a Special Court to try those who have committed serious crimes and human rights violation

² Para 6, The High Court (International Crimes Division) Practice Directions, 2011

4. The following are the objectives of the Judicial Workshop:
- a. Share jurisprudence and knowledge on good practices from various jurisdictions around the world on victim and witness protection in the administration of justice
 - b. Enhance knowledge on applicable legal standards and good practices on victim and witness protection in investigation and court proceedings and how they can be applied in the national context of Uganda, ; thus to improve institutional capacity in facilitating the participation of vulnerable victims and witnesses.
 - c. Contribute substantially to the development of culturally appropriate and gender sensitive protective measures and techniques to facilitate the participation of victims and witnesses and safeguard their psychosocial, physical and other well- being.
5. At the Judicial Workshop, emphasis will be placed on sharing relevant tools and resources that can assist ICD and other judicial actors in Uganda to provide interim protection measures; and in this regard, the workshop will delve into key aspects of victim and witness protection particularly the diverse protection needs of vulnerable witnesses such as children, formerly abducted persons, victims of sexual and gender-based violence, victims of trafficking, people with disabilities etc. While discussions will draw primarily from Ugandan experience, comparative perspectives selected on processes from other jurisdictions will be brought in to promote dialogue. Participants at the Conference will be selected primarily from the ICD including presiding judges, prosecutors, court officials and defence lawyers currently supporting cases before the ICD. Additionally, Judges presiding over criminal sessions at the High Court and Magistrate Courts will be invited to participate in the workshop.

Rationale

6. Successful witness and victim protection is central to effective prosecution of perpetrators of serious violation human rights and international humanitarian law. The failure to provide protection to witnesses, victims and others concerned can severely affect the success of the judicial process and undermine their fundamental rights, such as the right to access to justice and the right to effective remedy.
7. The relevance of witness protection in Uganda's justice system has also been echoed in the **JLOS-commissioned Needs Assessment Mission (NAM)** report (March 2011) where the experts included in the list of urgent recommendations, *the need to organise trainings on Uganda-relevant protection and support issues, including on how to work with vulnerable witnesses, for all investigators, prosecutors, judges, defence counsel, court clerks and registry staff, and other JLOS personnel who are likely to come into touch with war-crimes witnesses, and ensure that such trainings are based on targeted written guidelines that must also be made available to all relevant individuals who could not attend the training, including future staff members.* (See, Recommendation No. 5)
8. It is further noted that the practices and jurisprudence of international and regional human rights bodies, as well as international and national tribunals and courts have further

demonstrated that the protection of witnesses and victims is the cornerstone on which combating impunity, providing justice and ensuring effective remedy rest. The International Criminal Court has also emphasized the importance of witness protection in recent decisions, demonstrating that witness protection is a key concern of the ICC. Unlike ordinary criminal proceedings, war crimes proceedings held within national settings can place unusual demands on institutions due to the proceedings' relative novelty or complexity.

9. In line with the doctrine of positive complementarity, the application of witness protection standards by the Court will serve a great role in demonstrating adequate capacity, competence and credibility of the International Crimes Division of the High Court in handling international crimes.
10. Similarly, Uganda as a State party to the Rome Statute has domesticated the treaty through the adoption of the international Criminal court Act, 2010 (ICC Act. 2010 Uganda) . Section 46 of the International Crimes Court Act, 2010 provides for the protection of witnesses; sections 49 – 51 address facilitating the appearance of witnesses. While no specific protective measures are elaborated in the ICC Act of Uganda, there are a number of protective measures identified within the Rome Statute, (Annexed in Schedule 1 of the ICC Act) that can give practical guidance to domestic courts in ensuring the rights and protection of victims and witnesses appearing before them.
11. Against this background, the workshop will aim to share relevant tools and resources that can provide guidance to the International Crimes Division and other relevant justice actors to develop appropriate procedural protective and other measures for victims and witnesses they come in contact with, and; draw up a plan for the inclusion of human rights, gender and age-sensitive approaches to victim and witness protection within the institutional settings of the ICD.

Human rights and the international legal framework for witness and victim protection

12. Implementing effective measures to provide security, physical, psychological and other well-being to victims and witnesses before, during, and after judicial, administrative, or other proceedings is inseparable from the fight against impunity.³ In this context, Uganda's obligations to protect victims and witnesses are also derived from the following key international human rights standards.
13. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴ the Convention for the Protection of All Persons from Enforced Disappearance⁵ and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography⁶ make reference to States' obligations to adopt specific measures to protect witnesses and victims.

³ See: E/CN.4/2005/102/Add.1 and A/RES/ 60/147.

⁴ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 13.

⁵ Convention for the Protection of All Persons from Enforced Disappearance (CED), article 12.4.

⁶ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC), article 8.1(a).

14. Article 24 of the United Nations Convention against Transnational Organized Crime similarly places an obligation on each State party to take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and, as appropriate, for their relatives and other persons close to them. Article 24 also stresses that protective measures should not prejudice the rights of the defendant, including the right to due process. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the Convention include specific provisions (article 6 and article 5, respectively) that stipulate a series of protective measures for victims of trafficking and smuggling; and have been interpreted and applied in conjunction with the aforementioned provisions of the parent Convention on the protection of victims and witnesses.
15. References to the obligation to protect witnesses and victims can also be found in several other key human rights instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁷ the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol),⁸ the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,⁹ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law.¹⁰
16. Similarly, the UN General Assembly Resolution 61/144 on trafficking in women and girls specifically urged member states to take steps to ensure that criminal justice procedures and witness protection programmes are sensitive to the particular situation of trafficked women and girls and that they are supported and assisted, as appropriate, in making complaints to the police or other authorities, without fear, and being available when required by the criminal justice system, and to ensure that during this time they have access to protection and social, medical, financial and legal assistance, as appropriate.¹¹

The protection of victims and witnesses at the international and regional courts

17. Drawing upon the right to fair hearing guaranteed under Article 14 of the ICCPR,¹² the International Ad-Hoc Criminal Tribunal on Former Yugoslavia and International Ad-Hoc Criminal Tribunal on Rwanda have interpreted that a fair trial does not only apply to an accused person but extends to the witnesses and victims as well.¹³ At international tribunals or courts, the

⁷ Declaration, paragraph 6(d).

⁸ Istanbul Protocol, paragraph 3(b).

⁹ UN Doc. E/CN.4/2005/102 (2005), Add.1, principle 10.

¹⁰ UN Doc. A/RES/60/147, annex, paragraph III(5).

¹¹ A/RES/61/144; 1 February 2007, para19 (Sixty-first session, agenda item 61 (a))

¹² Article 14 of the ICCPR guarantees equality before a court; a fair and public hearing before a competent body; the right to prepare a defence and to communicate with counsel and the right to examine or have examined through counsel the witnesses against him.

¹³ Article 21 of both the ICTY and ICTR Statutes places procedural limitations on the rights of the accused and balances them with the rights of witnesses in order to create a fair public trial: See, Kevin F. Mitchell, 'A

scope of application of the courtroom measures and their legal effect are generally considered by pre-trial or trial chambers. In this regard, the ICTY in the *Tadic Case*¹⁴ established five basic categories of rights and protection for witnesses to take note of. These include; (1) witnesses seeking confidentiality from being identified to the public and to the media; (2) witnesses seeking psychological protection from confrontation with the accused in court; (3) witnesses seeking anonymity from being identified to the accused and his counsel; (4) miscellaneous measures for certain victims and witnesses, including their current address or whereabouts; and (5) general measures for all victims and witnesses who may testify before the tribunal in the future, which includes protection from photographs, video records, and sketches by the public or media of the witnesses as they enter or exit the tribunal. As mentioned earlier, the ICTY, ICTR and ICC have specially formulated rules regarding evidence, witness protection, testimony, and trial to reflect the characteristics of crimes prosecuted by the court and to provide efficient application without infringing in any way upon the rights of the accused. In addition, witness and victim protection/ support units of these courts have also developed various measures and programmes for the protection of victims, witnesses and other concerned individuals.

National Initiatives on Witness Protection

18. While Uganda has not enacted any law to provide the legal framework for the protection of witnesses that are called upon to testify in court, steps are underway to draft a bill in that regard. There is a growing commitment within national justice actors, including JOLS, to improve national capacity on victim and witness protection in order to enhance performance of the justice system at a sector-wide level. One of the key resolutions of the Fourth National JLOS Forum was to address issues of witnesses and victims of crime (protection, support, participation and restitution). The current JLOS Strategic Investment Plan (SIP) II 2006/7 – 2010/11 in particular, includes witness protection as one of the focus areas of JLOS activities at the sector level.
19. The establishment of the International Crimes Division of the High Court in May 2008 and subsequent domestication of the Statute of the International Criminal Court (ICC) through the enactment of International Crimes Act are positive signs to the country's transitional justice path that is centred on ensuring accountability for international crimes perpetrated against innocent civilians. Key to this process is the meaningful participation and cooperation of victims and witnesses that needs to be safeguarded by the different stakeholders in the justice sector.
20. In 2010, JLOS commissioned an Expert Needs Assessment Mission to assess the readiness of justice-sector institutions for national war-crimes proceedings and for transitional-justice outreach. In their final report and recommendations issued on 4 March 2011, the Experts noted that the development of a comprehensive victim and witness protection and support framework in Uganda is essential to improve service delivery within the justice sector but in the interim, a well designed war-crimes witness-protection and-support mechanism will be needed to bolster the work of the ICD.¹⁵

comparison between the ICTR and the ICC on the Rights of Victims who Testify', a memorandum for the Office of the Prosecutor of the ICTR

¹⁴ *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, 7 Crim. L. F. 139 (1996).

¹⁵ *Id.*,

Expected Output

Based on the study commenced by the Uganda Law Reform Commission (ULRC) on legal frameworks for witness protection in Uganda; the findings of the JLOS Transitional Justice Working Group (JLOS-TJWG) on witness protection in transitional justice; the JLOS-commissioned Needs Assessment Mission report and the substantial work undertaken by civil society on witness protection, the judicial workshop involving judges, justice practitioners and technical experts from international courts and ad hoc tribunals will encourage dialogue between participants on best practices to form the basis of procedural guidance for well-suited and appropriate witness protection measures in Uganda. This will also facilitate consensus-building and contribution towards specific protection guidelines for witnesses to international crimes; the discussions will also provide opportunity to address concerns and provide practical solutions to national stakeholders.