

Judicial Colloquium on Witness and Victim Protection in Uganda



Introductory Remarks

by

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Your Lordship, the Deputy Chief Justice, Hon Justice Elizabeth Mpagi-Bahigeine,
Your Lordship Hon Justice Akiki Kizza
Hon. Justice Yorokamu Bamwine, Principal Judge High Court
Your Lordships of the Courts of Judicature present here,
The Honourable Resident District Commissioner,
Dear Colleagues,
Distinguished Participants,
Ladies and Gentlemen,

INTRODUCTION

I wish to convey my appreciation to the Judicial Studies Institute and the Justice Law and Order Sector (JLOS) for accepting to host this event jointly with the United Nations Office of the High Commissioner for Human Rights and in collaboration with the International Centre for Transitional Justice (ICTJ). I also take this opportunity to welcome all Honourable judges and experts from the international courts and ad hoc tribunals and participants to this important dialogue on victim and witness protection in Uganda.

Your Lordships, the Office of the High Commissioner for Human Rights' global mandate is to promote and protect the enjoyment and full realization, by all people, of all rights as established by international human rights instruments. Within its mandate, the UN Office of the High Commissioner for Human Rights makes a considerable effort to integrate systematically a human rights perspective into Rule of Law matters given that the Rule of Law since Hans Kelsen's constitutional theory accepts as the highest level in the legal hierarchy the Constitution and its declaration of fundamental rights.

Witness protection including victims under Transitional Justice is part of Rule of Law matters and has to express a human rights lens. In this regard witness protection not just instrumental for succeeding in a judicial process, it also protects and promotes human rights for a group of persons who are key for justice delivery and who's security and well being should not be compromised at any given time.

OHCHR-Uganda office was established in 2006 and has since then undertaken several efforts to strengthen the judicial system in the country, but also at the level of the clients of the justice system tackling access to justice for vulnerable groups and women. From the perspective of both the judicial system and the its users, it could not be overlooked that witness protection is an issue that deserves attention, especially under transitional justice settings, but also considering cases within the criminal justice related for instance to corruption, terrorism, organized crime and others. During the past year the Office therefore started to lend its support to national counterparts in developing legal and policy considerations on witness protection in Uganda.

This has included supporting the Uganda Law Reform Commission's consultations through hosting a **Consultative Practitioners' Conference** held in September, 2010 which engaged various actors from the administration of justice, policy makers, relevant national commissions and civil society in a dialogue on best practices to form the basis for a witness protection framework for Uganda. This was followed up with an **Expert Seminar** addressed to decision makers in November 2010 and hosted in partnership with Uganda Law Reform Commission. It brought together senior Ugandan policy makers and prominent national and international technical experts to discuss key issues surrounding a potential witness protection framework for Uganda, and to exchange experiences and lessons learned from other jurisdictions. The outcomes of these dialogues were translated into an official publication that shall be shared with you in this forum and is a living document that should inform any future plans and processes on witness protection tailored to the Ugandan situation.

One of the significant proposals from the 2010 consultative dialogues on witness protection was the need to further discuss with judges, prosecutors and police on their roles and possible measures to be implemented subsequently.

In this regard, it is of great significance to note that the JLOS-Commissioned Needs Assessment Mission Report published in March 2011 also identified among its key recommendations, *the need to organise trainings on Uganda-relevant protection and support issues, including how to handle 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.

These recommendations therefore form the backdrop for this judicial colloquium that is intended to equip justice actors with knowledge and standards on witness protection, share relevant practical tools and resources that can assist to build institutional capacity on victim and witness protection within the national justice system.

Witnesses are key players to successful judicial or quasi-judicial processes. Ensuring that witnesses can testify in safety, and without any intimidation under conditions where their security and wellbeing is considered not as a luxury but as an essential element of the judicial process is crucial for the investigation and prosecution of any crimes; including crimes related to gross human rights violations. Their inability to testify of account of fear or threat to life is a loss to the justice system and the pursuit of justice for the society as a whole and for the victims of such crimes. The capacity of a country to render justice to the victims and end impunity regarding crimes and past and current human rights abuses could come into question if the justice system is unable to secure convictions because of failures in the production of witness evidence and the participation of victims.

Globally, OHCHR encourages States to take proactive and practical means to tackle impunity for gross violations of human rights and breaches of humanitarian law through effective investigations and prosecution, conviction of perpetrators preparing the ground for the reparation of the victims. As the Office advances in this effort, issues of witness and victim protection come forward. Our Geneva HQ based "Rule of Law Unit" started to support witness protection efforts in several countries and now in Uganda and supported actively this event. Our Office on the ground also wishes to acknowledge the financial support of the UN Joint Programme for Gender Equality, funded by DFID, to implement this colloquium and several other efforts in this line, under view of integrating a gender perspective into the witness legislation.

THE HUMAN RIGHTS FOUNDATION OF WITNESS AND VICTIM PROTECTION

We know that most witnesses and victims involved in investigations and prosecutions of human rights and international crimes cases such as the ones falling within the mandate of the International Crimes Division i.e. crimes against humanity, war crimes, genocide among others, have good reasons to fear retaliation. They often live in volatile and insecure environments. Absent appropriate safety nets for the protection of witnesses and victims, their physical and psychological integrity, privacy, dignity, their reputation and even lives may be at risk.

Witnesses and victims are entitled to protection as all individuals under international human rights law. They do not lose the right to such protection simply by being involved in judicial or non-judicial proceedings, either as a witness or a victim. Furthermore, States have the obligation to adopt specific measures to protect the rights of victims and witnesses. A close review of the key human rights treaties and other key instruments reveals few, but clear and unambiguous references to the right of victims and witnesses to be protected from threats and reprisals, and to have their inherent dignity in the pursuit of justice respected.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography make reference to States' obligations to adopt specific measures to protect witnesses and victims.

The International Covenant on Civil and Political Rights creates a comprehensive environment for rights to be considered under witness protection measures as it refers to "respect for the inherent dignity of human persons" (ICCPR, Art.10) and states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, or to unlawful attacks on his honour and reputation." (ICCPR, Art 17) In accordance with the Covenant, States have a general obligation to undertake

necessary steps “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.” 8 ICCPR, Art. 2)

References to the obligation to protect witnesses and victims can also be found in international soft law that guides and supports State action when it comes to develop legislation, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol), the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, 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.

These basic principles have found an echo in the practice of international and hybrid tribunals and courts. Indeed, since the mid 1990s, these tribunals have attempted to address the unique aspects of witness and victim protection in trials of international crimes and gross human rights violations.

The Rome Statute has also incorporated important protective provisions. Accordingly, Article 68 empowered the ICC to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Article 54(3)(f) provides further that the Prosecutor shall take necessary measures, or request that necessary measures be taken, in order to ensure the protection of any person. Article 43 requires the Registrar to set up a Victims and Witnesses Unit to that effect.

With this in mind, it is with great pleasure and appreciation that we have in our midst Honourable judges and distinguished experts from ad hoc tribunals of the Special Court for Sierra Leone, the ICTR and ICTY who will be sharing their experiences on witness protection, which exposition should enable us appreciate the dynamics and complexities of witness protection as we move towards integrating it in our own national justice systems.

Equally important to note is that witness protection measures in ordinary criminal justice processes are often different from those demanded in a transitional justice setting. Witness and victim protection within the framework of criminal procedures relating to gross human rights violations or serious violations of international humanitarian law requires certain particular elements.

First of all, witnesses to human rights violations are frequently victims of the crimes which they testify, rather than co-perpetrators or former associates of the accused alleged perpetrators.

Secondly, by international doctrine human rights violations are perpetrated by State actors or individuals/groups associated with State or supported by it. In some cases, crimes are committed by individuals and groups tolerated or consented by the State and no action is taken by institutions in charge which turns out as complicity of the State and human rights responsibility in this case is qualified as an omission by the State to act and to protect human rights to which it is obliged under international treaties.

In a setting of an internal conflict the non State party in the conflict is responsible under international humanitarian law, international criminal law and national criminal law. It becomes a subject of international human rights law in a limited manner when being in a position of exercising administrative power over population and territory. Anyway and however the concrete circumstances are, back to our matter of witness protection, it is proven that when political or social power is involved in crimes and human rights violations, the witnesses testifying in judicial processes against them are particularly vulnerable.

States therefore have additional obligations towards witnesses and victims in such cases, and traditional witness protection programmes are usually not designed to meet those particular needs. Therefore witness and victim protection settings can often not be associated with the security agencies when these agencies may have political and ideological allegiance to the accused, the capacity to influence the prosecution or to intimidate witnesses for testifying.

It follows that a system of witness protection related to others than the security forces may be better suited to inspire the confidence and trust of all those concerned who's

testimony is wanted by the judiciary or the prosecution. Countries have found several ways to deal with this dilemma trusting witness protection to independent institutions or creating a new specialized one with its own resources and security system. Such a system must be funded by the State, but not closely controlled by the government machinery. This is the case now in Kenya that has established an independent witness protection authority recently.

PROTECTION MEASURES

Enabling witnesses to come safely forward to collaborate with justice systems requires, at a minimum, two sets of measures. The first encompasses procedures that trial chambers can put in place while taking testimony. The second set pertains to safeguards that are usually provided before, during and after judicial proceedings by formal witness protection programs.

Generally, it emerges from good practices that a court should have authority to introduce measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness. It may also provide protection by controlling the manner of questioning to avoid any harassment or intimidation.

As for practical measures, extensive in-court and out-of-court protection measures have been provided for witnesses in vulnerable situations by international courts and tribunals. Such in-court protection measures include: use of pseudonyms; voice and image distortion; enabling the witness/victim to enter and leave the courtroom during closed session; drawing a curtain to impede visual contact between the witness and the accused; and the presence of a resource person, including psychologist, from the relevant witness protection body seated beside the witness (and able to speak in the witness' native language) in the courtroom. Witnesses such as rape victims have been invited by the International Criminal Court and other international tribunals to take breaks during difficult testimonies. These have now become considered as good practices at the international level. The challenges to reflect on are: What are the standards a witness protection system in Uganda should meet? What are good practices and concerns in Uganda's court rooms and judicial processes? What can international

experience contribute? And how the process should be to achieve a reasonable level of international standards? What are the steps to go? It would be too ambitious to pose all these questions here, but obviously they have to be in our mind to guide the debate at this colloquium.

There are also needs for measures aimed at providing special protection to witnesses and victims of sexual and gender based violence. States must ensure that the practice of assistance to victims tied to their cooperation as a witness in the prosecution of sexual and gender based violence does not undermine the safety and rights of victims.

In consideration of the unique concerns of victims of sexual assault and other vulnerable individuals for example, special measures for the admittance of evidence have been included in the Rules of both international ad-hoc tribunal and of the International Criminal Court. Similar measures have also been adopted in some States. Those aimed at facilitating the testimony of a traumatized victim or witness, a women, a child, an elderly person, in general a victim of sexual violence.

An extremely sensitive issue is providing adequate protection to witnesses who are particularly vulnerable, such as child witnesses. To this effect, the UN Economic and Social Council adopted in 2005 the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. The guidelines recommend care and treatment best suited to the needs and particular traumas of these victims before, during and after the trial. They also invite States to factor these particular needs into their legislation, procedures, policies and practices.¹

Distinguished Participants,

In recent years, as it was explained earlier in my statement, the United Nations has been actively engaged in setting and promoting standards, measures and programs serving the purpose of witness and victim protection. For example, in its resolution 63/182 on extrajudicial, summary or arbitrary executions, the General Assembly acknowledged the importance of ensuring the protection of witnesses and encouraged

¹ Resolution 2005/20.

OHCHR to develop practical tools designed to stimulate and facilitate greater attention to this issue.

The Office has issued three technical reports with detailed specific witness protection measures including; OHCHR's Annual Report on the Right to Truth issued in August 2009 and a subsequent report on the 'Right to Truth' issued before the UN Human Rights Council in July 2010 and most recently OHCHR report on experiences of archives as a means to guarantee the right to the truth that was recently issued in April, 2011.

These could serve as a useful guide to the current debate on witness protection intended to identify existing good practices and main challenges, but most importantly, to flesh out positive aspects and practical guidelines on witness protection that can be tailored to Uganda's context. I am confident that with the composition of this important colloquium we will be able to gather the necessary recommendations to forge a way forward.

In closing, let me assure you that OHCHR stands ready to assist efforts regarding witness protection and the fight against impunity to the best of our abilities. I look forward to the outcome of your discussion and wish you fruitful deliberations.

Thank you