The Need for 
WITNESS PROTECTION 
and Transitional Justice in Zimbabwe
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and Transitional Justice in Zimbabwe

TRANSITIONAL JUSTICE UNIT

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List of Acronyms

CEDAW  Convention on the Elimination of All Forms of Discrimination Against Women

ICC    International Criminal Court

ICCPR  International Covenant on Civil and Political Rights

ICTR   International Criminal Tribunal of Rwanda

NPRC   National Peace and Reconciliation Commission

OHCHR  Office of the High Commissioner for Human Rights

TRC    Truth and Reconciliation Commission

UNCAT  United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

UPR    Universal Periodic Review

WPA    Witness Protection Agency
List of Legislation

The Constitution of Zimbabwe Amendment (No.20) Act 2013

The Convention on the Elimination of All Forms of Discrimination against Women


The Kenyan Witness Protection Act of 2006

The International Covenant on Civil and Political Rights

The South African Promotion of National Unity and Reconciliation Act of 1995 (Unity Act)

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The United Nations Convention against Corruption

The UN Convention against Transnational Organised Crime
Witness and victim support and protection form an important part of truth and justice seeking mechanisms. The protection of witnesses and victims is crucial in any effective investigation and prosecution of perpetrators of human rights violations, be it in criminal justice or transitional justice processes. The failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth.

The Office of the High Commissioner for Human Rights (OHCHR) considers witness and victim protection an essential component of its efforts to monitor and investigate human rights violations.

This paper will focus on witness protection in transitional justice, drawing from South Africa’s Truth and Reconciliation Commission (TRC) and Kenya’s Witness Protection Programme experiences.

In countries emerging from a violent conflict, prosecution of human rights offenders is severely hampered by the reluctance of witnesses to testify at trial because of fear for their lives or families. In most cases alleged perpetrators or those acting on their behalf threaten witnesses. This imposes self-imposed censorship on witnesses whose potential testimonies render them vulnerable to attacks from perpetrators.

This problem is common in most African countries, particularly those emerging from a violent past and in which witness protection programmes are lacking. Witness protection in Africa faces challenges that include lack of budgetary support and human resources, non-existent legal frameworks for witness protection and in cases where such statutory frameworks exist, weak enforcement that compromises the security of witnesses.
1.0 Introduction

Witness and victim support and protection form an important part of truth and justice seeking mechanisms. The protection of witnesses and victims is crucial in any effective investigation and prosecution of perpetrators of human rights violations, be it in criminal justice or transitional justice processes. The failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth. The Office of the High Commissioner for Human Rights (OHCHR) considers witness and victim protection an essential component of its efforts to monitor and investigate human rights violations.¹ This paper will focus on witness protection in transitional justice, drawing from South Africa’s Truth and Reconciliation Commission (TRC) and Kenya’s Witness Protection Programme experiences.

In countries emerging from a violent conflict, prosecution of human rights offenders is severely hampered by the reluctance of witnesses to testify at trial because of fear for their lives or families. In most cases alleged perpetrators or those acting on their behalf threaten witnesses.² This imposes self-imposed censorship on witnesses whose potential testimonies render them vulnerable to attacks from perpetrators.³ This problem is common in most African countries, particularly those emerging from a violent past and in which witness protection programmes are lacking. Witness protection in Africa faces challenges that include lack of budgetary support and human resources, non-existent legal frameworks for witness protection and in cases where such statutory frameworks exist, weak enforcement that compromises the security of witnesses.

¹Witnesses Protection Judicial Colloquium: Keynote address of the acting Chief Justice of Uganda-Bomah Hotel, Gulu 1-3 August 2011. Justice/09witness protection
³ibid
In the search for justice for past human rights violations, the lack of functional witness protection is an obstacle. In Kenya for example, following the 2007 and 2008 post-election violence that left 1,333 people dead and 350,000 displaced, very few cases resulted in convictions in the Kenyan courts. The failure to prosecute perpetrators was, to some extent, a result of a lack of witness protection. Most of the suspected perpetrators occupied influential positions in state institutions and potential witnesses were reluctant to testify for fear of repercussions for testifying. Such repercussions included recriminations for making testimonies and loss of economic and physical security, including death. Confidence in the justice system was eroded when in 2014 charges of crime against humanity, leveled against Kenyan President Uhuru Kenyatta at the International Criminal Court (ICC), were withdrawn due to, among other reasons, lack of sufficient evidence, witness tampering, bribery and obstruction of justice. Had the key witnesses been given protection, the outcome would probably have been different.

Transitional justice mechanisms incorporate measures to protect the rights of victims and witnesses. These include the use of victim-sensitive procedures that guarantee victims' safety and dignity, and the development of specific measures to assist, support and protect victims and witnesses. Transitional justice programmes should thus recognise the centrality of victims and witnesses and their special status in the design and implementation of witness protection programmes. The UN Guidance Notes on Transitional Justice notes that placing victims at the centre of transitional justice requires ensuring that their rights and views are fully

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5Ibid

6Ibid

7Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice
respected in the implementation of transitional justice processes. In countries emerging from a violent past such as Zimbabwe, the prosecution of perpetrators of gross human rights violations is expected and may be hindered by the reluctance of witnesses to freely testify due partly to covert or overt threats to their lives and those of their families.

Drawing from the litigation experience of the Zimbabwe Human Rights NGO Forum's Public Interest Unit, victims of organized violence and torture in Zimbabwe are generally reluctant to take up the role of witnesses or whistle blowers. Fear of assuming such role is exacerbated by the absence of a witness protection programme. Resultantly witnesses have not been forthcoming, even in situations where they were competent witnesses. In the light of such realities, any country emerging from a conflict situation needs to institutionalize a witness protection programme in order to make witness testimonies safe and viable.

Witness protection includes:

- Vetting;
- Monitoring and making police, prosecutors and judges accountable and facilitating training and material assistance, to promote impartial involvement in investigation;
- Prosecution and adjudication of crimes;
- Rebuilding police stations, prisons and courthouses to separate witnesses from accused persons, and;
- Strengthening the legislative and executive capacity to enact appropriate measures through legislation, standard operating procedures or guidelines.⁸

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2.0 Conceptual Framework

The protection of witnesses and victims is an essential part of any transitional justice process as it promotes victims’ and societies’ right to the truth. Protection, in this context, refers to the application of measures that can be instrumental in the prevention or minimization of the risk of harm and/or reduce any threats to witness. These harms or threats are believed to have the potential to jeopardize the life or physical integrity of cooperating persons and/or stop harm being inflicted on them. Witness protection enables witnesses to give testimony in judicial and non-judicial settings and to cooperate with law enforcement officers without fear of intimidation or reprisal. This is essential in maintaining the rule of law.

Concept of a Witness

The general understanding of the term witness is of a person, other than the defendant, with knowledge of a fact (possessing information) to be ascertained in criminal proceedings or summoned by the judicial authority to provide testimony on that fact. It should be acknowledged that the concept of witness is broad in nature ranging from those who testify in courts of law to those who certify the legitimacy of legal documents. Thus the definition will vary depending on the circumstances of each case. This paper defines a witness as a person who has agreed to give evidence and witnesses protection is a mechanism of protecting witnesses from threats or harms that would hinder their evidence from being known to the members of the public or the state. Witnesses are key to justice delivery and their security and well-being should be protected.


2.0 Conceptual framework

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\(^10\)Ibid

Witnesses testifying in court can be classified according to the roles they play such as; justice collaborators; victim - witnesses;\textsuperscript{12} other types of witness (innocent bystanders, expert witnesses and others).\textsuperscript{13} Such witnesses also include judges, prosecutors, police and even journalists who handle such sensitive information everyday. These groups of people are entitled to witness protection as they can be classified on the basis of their entitlement to special protection before, during or after they testify\textsuperscript{14}. In the case of trials for human rights violations, witnesses are mostly people with first hand awareness or observation of the violations, such as the victims and or their family members, friends or relatives. In an effort to blockade evidence from reaching the public realm, witnesses are intentionally exposed to verbal threats, intimidation, harassment, assault, damage of their property or simply threatened with reprisals as a result of their cooperation with the [authorities].\textsuperscript{15}

The South African Promotion of National Unity and Reconciliation Act 34 of 1995 defines a witness as “\textit{a person who wishes to give evidence, gives evidence or gave evidence for the purposes of this Act and includes any member of his or her family or household whose safety is being threatened by any person or group of persons, whether known to him or her or not, as a result thereof.}”

While the Kenyan Witness Protection Act of 2006 defines a witness as “\textit{a person who; has given or agreed to give evidence on behalf of the State; has

\textsuperscript{12} Victims can be classified as a subsection of the group of people requiring protection. It should be noted that, even though most victims would assume the role of witnesses when they testify in court, it should not be concluded that all witnesses are victims of crimes. Reference to victims in this paper refers to victims testifying as witnesses in courts.


\textsuperscript{14} Kramer K (ud). Witness Protection as a Key Tool in Addressing Serious and Organised Crimes, located at www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf, accessed on 8 May 2015

\textsuperscript{15} ibid.
made a statement to the police or any law enforcement agency in relation to an offence committed in Kenya and is required to give evidence before a court or tribunal outside Kenya.”

Such witnesses come against perpetrators who are often state agents or individuals working in acquiescence with the state. These individuals normally wield power to pervert any course of justice that may implicate them, through either abuse or intimidation of witnesses. This privileged position for the perpetrators creates a conundrum that makes it very difficult to prosecute perpetrators for gross human rights violations and to obtain testimonies from victims. In the Kenyan case involving William Samoei Arap Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta at the ICC, about four of the potential witnesses withdrew with some reportedly citing intimidation and concerns about a possible retaliation against family members.\(^6\)

**Responsibility to Protect Witnesses**

Under the concept of 'sovereignty as responsibility', a State bears the primary responsibility for protecting the rights of all persons under its jurisdiction and within its borders. Therefore, any victim, witness or other person cooperating with state agencies has the right to be protected from threats or reprisals, and to have their intrinsic dignity respected. But this is not always the case.

When a State is unable or unwilling to protect its population against threats to life and security in situations of violence from either itself or from internal and external forces, the responsibility for the protection of the population becomes shared with the international community. This responsibility may be assumed, in part or in whole, by the international community, in

partnership with that State, alone or sometimes against it, within the limits of internationally agreed safeguards.

**Witness protection programmes**

Protection of witnesses is an important tool for securing testimony or evidence. The fear and unwillingness of witnesses to testify has to a large extent been caused by threats and intimidation imposed on witnesses. This has necessitated the introduction of programmes guaranteeing protection to witnesses.

A witness protection programme can be defined as programme regulated by legislation, aimed at the protection of witnesses and victims in cases of serious intimidation, which cannot be addressed by other protection measures, and where the testimonies of such witnesses are of special significance for criminal proceedings. The Council of Europe Training Manual defines a witness protection programme as “a programme regulated by legislation aimed at the protection of witnesses and victims in cases of serious intimidation which cannot be addressed by other protection measures and where the testimonies of such witnesses are of special significance for criminal proceedings.”

At the International Criminal Tribunal of Rwanda (ICTR), protection of witnesses is explicitly provided for in the ICTR Statute and Rules. The general rule governing witness protection states that “a judge or chamber may order appropriate measures for the privacy and protection of victims and witnesses provided that the measures are consistent with the right of the accused.” It should, however, be noted that protective measures may only be granted in exceptional circumstances to victims or witnesses who may be in danger or at risk.

Protection may be granted not just to official witnesses, but also to the potential witnesses and family members or persons close to the witness. It

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is important to understand that witness protection programmes are just one part of an overarching group of actions used to ensure the safety and well being of witnesses.

There is a relationship between the efficient investigation and prosecution of perpetrators of gross human rights violations and a successful witness protection programme. If a country's justice system is unable to secure convictions because of failures in the production of witness evidence, its capacity to deal effectively with past abuses as well as the confidence of its people in the justice system are compromised.17 Thus, the failure to provide protection to witnesses can affect the viability of the justice process. Furthermore, lack of such protection amounts to a violation of victims' rights to an effective remedy.

The protection of witnesses is now regarded as critical as evidenced by the proliferation of and attention paid to it by human rights treaty bodies. More than 80 States parties to various human rights treaties have been recommended to develop laws and programmes on witness and victim protection, and ensure appropriate human and financial resources for such programmes, in order to put an end to the climate of fear.18

The main objective of any witness protection programme is to safeguard witnesses in cases of serious threat which cannot be addressed by other protection measures and also in cases where the evidence to be provided by the witness cannot be obtained by any other means. Witness protection programmes are also meant to safeguard the lives and personal security of witnesses as well as of those close to them. In general a witness protection programme encompasses the physical protection of witnesses and collaborators of justice from any form of harm.

17 http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf

Protective measures include arrangements to facilitate the appearance of witnesses before judicial and quasi-judicial mechanisms providing them with psychosocial support, special protection measures such as voice or face distortion where appropriate when they are testifying, and protection to ensure their safety after giving their testimony such as relocation. However, national witness protection programmes are designed to provide a much higher level of physical security than the protective measures. In Africa, South Africa was the first country to set up a witness protection program within the TRC.

**Witness Protection Measures**

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<th>Who to protect?</th>
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<td>Victims, bystanders, cooperating individuals, those who have received immunity from prosecution. They need regulatory and legislative protection</td>
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| When to protect?           | Consider the nature of the crime, the nature of the threat; relationship between the witness and the alleged perpetrator, status of the alleged perpetrator, criminal record of the alleged perpetrator, importance of the testimony, psychological state of the witness and the period in which the witness is likely to be at risk |

| How to protect?            | Policing strategies: investigating procedures that protect the identity of the potential witness  |
|                           | **Close Protection**: this is for witnesses identified to be at risk                              |
|                           | **Change of infrastructure**: enhancing of infrastructure to offer better protection for witnesses; e.g. pre-fabricated places at the police stations and courthouses to create separate waiting and interview facilities to ensure witnesses do not come into contact with alleged perpetrators during and before trial |
|                           | **Trail Observation**: independent monitors can do this to look out for any threats or intimidation |
3.0 Significance of witness protection programmes

Protective measures include arrangements to facilitate the appearance of witnesses before judicial and quasi-judicial mechanisms providing them with psychosocial support, special protection measures such as voice or face distortion where appropriate when they are testifying, and protection to ensure their safety after giving their testimony such as relocation. However, national witness protection programmes are designed to provide a much higher level of physical security than the protective measures. In Africa, South Africa was the first country to set up a witness protection program within the TRC.

Witness Protection Measures

- **Who to protect?** Victims, bystanders, cooperating individuals, those who have received immunity from prosecution. They need regulatory and legislative protection.

- **When to protect?** Consider the nature of the crime, the nature of the threat; relationship between the witness and the alleged perpetrator, status of the alleged perpetrator, criminal record of the alleged perpetrator, importance of the testimony, psychological state of the witness and the period in which the witness is likely to be at risk.

- **How to protect?** Policing strategies: investigating procedures that protect the identity of the potential witness. Close Protection: this is for witnesses identified to be at risk. Change of infrastructure: enhancing of infrastructure to offer better protection for witnesses; e.g. pre-fabricated places at the police stations and courthouses to create separate waiting and interview facilities to ensure witnesses do not come into contact with alleged perpetrators during and before trial. Trial Observation: independent monitors can do this to look out for any threats or intimidation.
3.0 Significance of witness protection programmes

There is no doubt witnesses are key players to any successful judicial or quasi-judicial processes. Ensuring that witnesses can testify in safety, and without any intimidation is important for unearthing the truth in any transitional justice mechanism. The capacity of a country emerging from a violent past to render justice to the victims and end impunity, regarding past and current human rights violations, becomes questionable if the justice system is unable to secure convictions because of failure to obtain evidence from witnesses and ensure their participation.¹⁹

Indeed the right of witnesses to safety and security when testifying is a fundamental human right and not a favour. Witnesses do not lose this right because they are involved in the judicial system either as victims or witnesses. From a human rights perspective, norms relating to the provision of an effective remedy²⁰ require effective investigation and punishment of perpetrators. This is the basis for states to take measures to protect witnesses.

Witness protection is important in that:

- The protection of witnesses and victims is an integral part of the fight against impunity.
- Witnesses are cornerstones of an effective and efficient transitional justice system. As such the intimidation of witnesses causes them to turn hostile to the cause of justice.


• Without the cooperation of witnesses and victims, transitional justice cannot be successful.

• Witnesses and victims should not be placed at an unacceptable risk as a consequence of agreeing to cooperate with the process of justice and accountability.

Elements of a witness protection programme
Most witness protection programmes tend to operate on the basis of similar principles and rely on the same key elements, that include the following:

i. Participation must be voluntary;

ii. Participation is for life, if required. However, the financial support provided will be for a limited duration;

iii. Participation should not be seen as a reward for testimony;

iv. Participation should not make a witness better off than he/she was before entering the programme;

v. All existing legal obligations must be kept;

vi. Due to the emotional hardship for witnesses and their families and due to the significant resources required of the state, relocation and change of identity are tools of last resort.21

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Witness protection is an important human right recognized by various instruments under international laws and conventions. Under the human rights regime, witness protection is the fulfillment of the right to life, liberty and security of the person. Thus witnesses and victims are entitled to protection just like any individual under international human rights law.

The protective mandate of the state is enshrined in various international human rights instruments such as:

- the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
- International Covenant on Civil and Political Rights (ICCPR);
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);

All these make reference to the states’ obligations to adopt specific measures to protect witnesses and victims.

The ICCPR forms the foundation of the right to protection of victims and witnesses. In Article 13 of UNCAT, states have an obligation to ensure that the complainants and witnesses are protected against all forms of ill treatment or intimidation as a consequence of their complaint or any evidence given.

4.0 Legal Framework

Witness protection is an important human right recognized by various instruments under international laws and conventions. Under the human rights regime, witness protection is the fulfillment of the right to life, liberty and security of the person. Thus witnesses and victims are entitled to protection just like any individual under international human rights law.

The protective mandate of the state is enshrined in various international human rights instruments such as; the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); 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. All these make reference to the states' obligations to adopt specific measures to protect witnesses and victims.

The ICCPR forms the foundation of the right to protection of victims and witnesses. In Article 13 of UNCAT, states have an obligation to ensure that the complainants and witnesses are protected against all forms of ill treatment or intimidation as a consequence of their complaint or any evidence given. The Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography form the backbone of the legal framework for the protection and support of children in transitional justice mechanisms by placing an obligation on the state to follow the principles of child-friendly justice. Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution

and child pornography states have an obligation to adopt appropriate measures to protect the rights and interests of child victims at all stages of criminal processes in particular by recognizing the vulnerability of child victims and adopting procedures to recognize their special needs including their special needs as witness.\textsuperscript{23}

In addition the UN Guidelines on Justice in Matters relating to child victims and witnesses of crime emphasise the fact that child victims and witnesses are vulnerable and need special protection and assistance during the proceedings and investigation to avoid further hardship and trauma that may result from their participation in transitional justice processes.

Principle 10 of the updated Set of Principles for the protection and promotion of human rights through action to combat impunity states that “effective measures shall be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission”.\textsuperscript{24} 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 also reaffirm that states should take measures for the protection of victims and witnesses. In particular, states should ensure the safety of witnesses and others from intimidation and retaliation, before, during and after judicial, administrative or other proceedings.

The Rome Statute also contains important protective provisions. Article 68 empowered the International Criminal Court (ICC) to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Furthermore, Article 54(3)(f)

\textsuperscript{23}See Article 8 on the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

\textsuperscript{24}Updated Set of principles for the protection and promotion of human rights through action to combat impunity.
obliges the Prosecutor to take necessary measures, or request that necessary measures be taken, in order to ensure the protection of any person while Article 43 requires the Registrar to set up a Victims and Witnesses Unit to that effect.

Furthermore, the Universal Periodic Review (UPR) mechanism of the Human Rights Council highlighted the importance of witness protection programmes in various country reports by recommending various countries to adopt measures that ensure the effective implementation of programmes for the protection of witnesses and victims.25

The UN Convention against Transnational Organised Crime26 advises state parties on how to provide effective protection to prevent witness intimidation and retaliation. Recommended measures include witness relocation, non-disclosure of identity, and the use of evidentiary rules that ensure safety of witnesses. State parties are encouraged to strengthen international cooperation in order to facilitate adequate protection. Victims are entitled to protection in so far as they are witnesses.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (The Victims Declaration) recommends interventions at the national, regional and international levels to increase the provision of assistance to victims of crime and the steps to be taken to prevent victimisation that is linked to abuse of power. Among the measures that are recommended in judicial and administrative processes include the protection of victim privacy, victim safety and the prevention of intimidation and retaliation to witnesses testifying on behalf of victims.27

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26Convention against Organised Crime, General Assembly resolution 55/25 of 15 November 2000

27Victims Declaration Resolution 40/34 of 29 November 1985 A (1)
The United Nations Convention against Corruption obligates state parties to take appropriate measures within their means and domestic legal systems to provide effective protection to witnesses including expert witnesses from potential retaliation or intimidation. Witnesses are entitled to protective measures provided they do not prejudice the rights of the accused. Such measures include relocation, nondisclosure or limitation of disclosure of information indicating the identity and whereabouts of witnesses, the use of communication technology and other adequate means to ensure the safety of witnesses. The protective measures are applicable to victim-witnesses as well.

The United Nations Economic and Social Council (Resolution 2005/20) adopted Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Guidelines) which provide a framework for assisting states in enhancing the protection of child victims and witnesses in criminal justice systems. The Guidelines are to be implemented in accordance with national legislation and procedures depending on the legal, social, economic, cultural and geographical circumstances of each member state.

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28 Convention Against Corruption, Art 32 (1)(2)

29 Ibid

30 Adopted on 36th plenary meeting of the Economic and Social Council on 22 July 2005
5.0 Witness protection programmes in Africa

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8 Convention Against Corruption, Art 32 (1)(2)
9 Ibid
10 Adopted on 36th plenary meeting of the Economic and Social Council on 22 July 2005
5.0 Witness protection programmes in Africa

Witness protection in Africa is a recent practice. South Africa is the first African country to establish a formal witness protection programme followed by Kenya. According to Mahony, protection of witnesses has been a matter for the international criminal tribunals. The following are case studies of protection programmes in South Africa and Kenya.

5.1 South Africa’s Truth and Reconciliation Commission

Following the 1994 elections, the South African government enacted the Promotion of National Unity and Reconciliation Act of 1995 (Unity Act) which established a Truth and Reconciliation Commission (TRC). The mandate of the TRC was to investigate gross human rights violations perpetrated by both state actors and members of liberation movements during the apartheid period (1960 – 1994). In order to be effective, the TRC established three committees: the Committee on Human Rights Violations mandated to take, investigate, and verify victim testimony; Amnesty Committee authorised to grant or refuse amnesty to individuals who committed human rights abuses and the Reparation and Rehabilitation Committee authorised to develop reparation and rehabilitation policy recommendations for the new government. The TRC had its own investigative unit and a witness protection programme.

The Unity Act required the TRC to make recommendations for a witness protection program and to ensure that the identity of vulnerable witnesses remains concealed. It states “The Minister shall, in consultation with the Commission, promote the establishment of a witness protection programme in order to provide for the protection and safety of witnesses in any manner when necessary.” The Unity Act promulgated regulations for the Limited Witness Protection Programme—the Regulations in terms of section 40 of the Unity Act: Limited Witness Protection Programme that regulated the operations of the witness programme. Thus the TRC formed South Africa’s first formal protection programme that sought to provide protection for high profile cases. From the outset, the Commission recognised the need to provide an environment that supported and respected the dignity of all who approached it.

The Limited Witness Protection Programme protected those who wished to testify before the Commission but were in danger. It is estimated that over 150 witnesses joined the programme. The witness protection programme assisted in strengthening the TRC’s investigative powers and allowed witnesses to come forward with information they feared might put them at risk.

5.2 Kenya’s witness protection programme

The Witness Protection Act, No, 16 of 2006 as amended by Act No. 2 of 2010 governs Kenya’s witness protection programme. The Act governs the protection of witnesses who have been intimidated for cooperating with law enforcement officers. It also provides clear guidelines about who qualifies for protection. The Act also establishes the Witness Protection Agency of Kenya to oversee the protection of witnesses. Initially the mandate for witness protection was with the office of the Attorney General (2006). This changed with the amendments to the Kenyan Constitution in 2010 which put witness protection under an independent body, the Witness Protection Agency (WPA).

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32TRC Report Volume 1, 1998

33See sec 35 of the Promotion of National Unity and Reconciliation Act of 1995

34Promotion of National Unity and Reconciliation Act, no. 34 of 1995
Witness Protection Programme - the Regulations in terms of section 40 of the Unity Act: Limited Witness Protection Programme that regulated the operations of the witness programme. Thus the TRC formed South Africa's first formal protection programme that sought to provide protection for high profile cases. From the outset, the Commission recognised the need to provide an environment that supported and respected the dignity of all who approached it.\(^5\)

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\(^5\)TRC Report Volume 1, 1998


\(^7\)TRC Report, Volume 1, 1998
Kenya’s Witness Protection Agency
The Kenya Witness Protection Agency is an independent body established under section 3A of the Witness Protection Act as a body corporate with perpetual succession and a common seal; capable of suing and being sued, holding and alienating property. The objective of the Agency is to provide the framework and procedures for giving special protection, on behalf of the state, to persons in possession of important information and who are facing potential risk or intimidation due to their cooperation with prosecution and other law enforcement agencies. Its functions include determining the criteria for admission to and removal from the witness protection programme; determining the type of protection measures to be applied (relocation, change of identity etc); advising government, or any other person on adoption of strategies and measures on witness protection and perform such functions as may be necessary for the better carrying out of the purpose of the Act.

5.3 Lessons for Zimbabwe
Zimbabwe as a country has witnessed periods of violence that can be traced back to the pre-colonial period. However, the most visible episodes of human rights violations dates back to the Gukurahundi period between 1983 and 1987 where around 20,000 lives were lost. Furthermore, election periods beginning with the 2000 constitutional referendum were marked with systematic political violence. This violent past remains unresolved and unprocessed although efforts towards reconciliation have been attempted. Thus it is right in principle and prudent for peace building prospects that these issues and events be formally and publicly acknowledged and addressed in a way that arrests the pattern of impunity, enables justice and affords victims due redress. Zimbabwe in its efforts to

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recover the truth about past violations and ensure national healing, reconciliation and justice can learn from the experiences of South Africa and Kenya that set up mechanisms for the protection of witnesses with vital testimonies.

The Constitution of Zimbabwe Amendment (No.20) Act 2013 established the National Peace and Reconciliation Commission (NPRC) in Chapter 12 as one of the five Independent Commissions. The main purpose of the NPRC is to ensure post-conflict justice, healing and reconciliation. This means survivors of past human rights violations can approach the NPRC and also witnesses can submit their testimonies if called upon to do so. It therefore becomes imperative for measures to be put in place to guarantee the protection of any witnesses who will appear before the envisaged NPRC to give testimony on violations. The NPRC should ensure the enactment of legislation for the protection of witnesses. In Zimbabwe most perpetrators of human rights violations reside in the same communities as their victims. Moreover, most of the witnesses are the victims. As such, the risk of threats and intimidation to inhibit transitional justice processes is high. In the absence of a protective mechanism, the likelihood of witnesses resisting participation for fear of retributive violence is high. This compromises the work of the NPRC and any future transitional justice mechanism.

The envisaged NPRC must therefore consider ensuring safe and secure access to justice by witnesses and victims, to whom justice has been denied for years by setting up a mechanism for their protection. One such mechanism is witness protection legislation. Therefore, as soon as the NPRC becomes functional, it must seriously consider drafting a witness protection Act to enable witnesses and victims to freely engage in transitional justice processes.
6.0 Conclusion

Although, witness protection is a relatively new concept in Africa, Zimbabwe if it is genuinely committed to fighting impunity can draw a number of lessons from South Africa and Kenya, which have managed to establish witness protection programmes amid challenges and difficulties inherent in the concept itself. A witness protection programme requires adequate funding from government and resource mobilisation. Regardless of the challenges associated with setting up a witness protection mechanism, in Zimbabwe there is a compelling need for the state to enact appropriate legislation in order to protect witness as a fundamental human right and to deal with the culture of impunity and a past characterized by gross human rights violations.

Indeed, witnesses are the lynchpin in the adjudication of cases and the delivery of justice for the victims. The protection of witnesses is a strategy that any country can use to convince citizens to have faith in any transitional justice mechanisms and the justice system. This is one of the many ways of ensuring truth telling that enables facilitation of amends of the past and the provision of justice, national healing and reconciliation.
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The Zimbabwe Human Rights NGO Forum is a coalition of 21 human rights organisations. The Forum has been in existence since January 1998 when Non-Governmental Organisations working in the field of human rights joined together to provide legal and psychosocial assistance to the victims of food riots of January 1998. The Forum’s vision is to have a society, which promotes and protects all human rights of all people.

The Forum has three operational Units: the Public Interest Unit, the Research and Documentation Unit and the Transitional Justice Unit.

The Forum coordinates the work of its member organisations in the documentation and provision of legal and psychosocial services to victims of human rights violations.

### Forum members

- Amnesty International-Zimbabwe
- Catholic Commission for Justice and Peace in Zimbabwe
- Civic Education Network Trust
- Counseling Services Unit
- Gays and Lesbians of Zimbabwe
- Justice for Children
- Legal Resources Foundation
- Media Institute of Southern Africa-Zimbabwe
- Media Monitoring Project Zimbabwe
- Non-violent Action and Strategies for Social Change
- Research and Advocacy Unit
- Students Solidarity Trust
- Transparency International-Zimbabwe
- Women of Zimbabwe Arise
- Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender
- Zimbabwe Association of Doctors for Human Rights
- Zimbabwe Civic Education Trust
- Zimbabwe Human Rights Association
- Zimbabwe Lawyers for Human Rights
- Zimbabwe Peace Project
- Zimbabwe Women Lawyers Association
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- Zimbabwe Women Lawyers Association

The Zimbabwe Human Rights NGO Forum can be contacted through

### The Executive Director

Suite 4  
Number 1 Raleigh Street  
PO Box 9077  
Harare  
Telephone +263 4 772860, 770170, 770178;  
Fax +263 4 770177; Email: admin@hrforum.co.zw

### International Liaison Office

55 Commercial Street, London E16LT  
Telephone: +44 (0) 20 7619 3641; Mobile:  
+44 7824 562 991  
Email: <IntLO@hrforum.co.zw  
Website: www.hrforum.org
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Number 1 Raleigh Street
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