

HAWASSA UNIVERSITY



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**WITNESS PROTECTION UNDER ETHIOPIAN LAW: JURISPRUDENCE,
CONSTITUTIONALITY AND THE RIGHT TO CONFRONTATION**

**A THESIS SUBMITTED TO THE SCHOOL OF GRADUATE STUDIES COLLOGE
OF LAW AND GOVERNANCE SCHOOL OF LAW IN PARTIAL FULFILLMENT
OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS IN
CRIMINAL JUSTICE (L.L.M)**

BY: BERHANU DEMISSIE FEYISSA

NOVEMBER, 2023

HAWASS, ETHIOPIA

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SCHOOL OF GRADUATE STUDIES, SCHOOL OF LAW

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This is to certify that the thesis entitled on the “**WITNESS PROTECTION UNDER ETHIOPIAN LAW: JURISPRUDENCE, CONSTITUTIONALITY AND THE RIGHT TO CONFRONTATION**” submitted in partial fulfillment of requirements for the degree of LLM with specialization in criminal justice the Graduate Program of the School of law, and has been carried out by **BERHANU DEMISSIE FEYISSA ID No: PGCJR/0001/14** under my supervision. Therefore I recommend that the student has fulfilled the requirements and hence hereby can submit the thesis to the School of law.

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Declaration

I hereby declare that the thesis entitled “Witness Protection under Ethiopian Law: Jurisprudence, Constitutionality and the Right to Confrontation” is my original work and has not been presented for a degree in any other university, and all sources of material used for this thesis have been duly acknowledged.

Name: Berhanu Demissie Signature: _____ November, 2023

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Dedication

This thesis is dedicated to my mom, Askele Geradew.

Abbreviations and Acronyms

ACHPR	African Charter on Human and People's Rights
CCI	Council of Constitutional Inquiry
CJP	Criminal Justice Policy
CJS	Criminal Justice System
COE	Council of Europe
CPC	Criminal Procedure Code
FDRE	Federal Democratic Republic of Ethiopia
FHC	Federal High Court
FSC	Federal Supreme Court
ICC	International Criminal Court
ICCPR	International Convection on Civil and Political Right
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
NGO	Non-governmental Organizations
OAG	Office of Attorney General
UNCTOC	United Nation Convection against Transitional Organized Crime
UNHRC	United Nation Human Right Commission
UNHROHC	United Nation Human Right Office of High Commissioner
UNODC	United Nation Office of Drug and Crime
WP	Witness Protection

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Abstract

The general objective of this thesis is seeks to address the rubbing between protecting the wellbeing of witnesses and protecting of accused right to confrontation in Ethiopia criminal justice system. Analysing the existing law of witness protection and the practice were the main theme of this study. The study covers relevant Ethiopian laws and jurisprudence practices in criminal proceedings and also reviews literatures; international covenants and jurisprudence and world classic jurisdiction are highlighting. The author's attempt to highlight the necessity and justification of effective witness protection measures, through enactment of a comprehensive law and independent institution on criminal justice dispensation. To this end, under umbrella of qualitative methodology both doctrinal and non-doctrinal legal research approaches have been employed. Both secondary and primary data were collected. Laws and jurisprudence practices via semi-structured interviews were done with 12 federal justice respondents as a primary source. To that end, thesis finding out the loopholes in the existing laws and huge practical gaps between the law and practices of Ethiopia on witness protection and respecting interests of the right to confrontation. It also rejects on why witness protection measures are important for effective functioning of criminal justice system. To that end, the research also found out Ethiopian criminal justice system has not been legitimate limitation grounds with standards of balancing mechanism anonymity witness protection and accused right to confrontation. Regarding the witness protection in Ethiopia, progress is achieved in improving legislation and establishing special program for implementation of witness protection, but still remain many challenges that Ethiopia justice institutions face such as international cooperation and national coordination between justice machineries. Based on these challenges, the researcher recommends for enacting comprehensive and amending of the existing laws on clear legal, procedural and institutional challenges for effective criminal justice system.

Keywords: *Witness protection, protective witness vis-à-vis the right to confrontation, constitutionality and Ethiopian jurisprudence.*

CHAPTER ONE

1.1 Background of Study

For the purpose of effective and sufficient criminal justice system the concept of international legal, jurisprudence and the experience of other jurisdiction are disclosed in the criminal proceeding processes; specifically ‘*on the area relating to the protection of witness vis-à-vis respecting interests of the right to confrontation*’. Among those an overviewed the current status of protection of witness in Ethiopia and examined the lacuna within the existing legal framework for needs to balance the protection of witness’s with disclosure of accused right to confrontation. Though those many global instruments and agreements that acknowledged the central role played by witness protection in supporting efforts to tackle complex and serious crimes. Those include the UN Convention against Transnational Organised Crime¹ and the UN Convention against Corruption,² which note the need for witnesses to be protected from acts that may force, threaten or interfere with them.³ The UNODC’s Model Law on Witness Protection outlines good practices for the implementation of witness protection internationally.⁴ Provisions for witness protection may also be found in a range of other UN conventions and declarations as part of the UN’s norms and principles.

Witness protection under international jurisprudence is composed practice of both permanent and ad-hoc international courts and tribunals that demonstrate the use of witness protection in administering justice. Witness protection at the permanent and ad-hoc international criminal courts; the international criminal tribunal also developed jurisprudences that resolved the competing interest, which are the disclosure right of accused and competing interest such as witness protection when they are at risk of danger.⁵ Jurisprudence basis under permanent ICC; according to the Rome statute, measures and support are a responsibility of the Court, the Prosecutor and the Registry. Thus, the protection of witnesses is a key responsibility for

¹ UNODC, *UN Convention against Transnational Organised Crime and the Protocols thereto*, 2004, www.unodc.org/documents/middleeastandnorthafrica/organised-crime/united_nations_convention_against_transnational_organized_crime_and_the_protocols_thereto.pdf.

² UNODC, *UN Convention against Corruption*, 2004, www.unodc.org/documents/brussels/UN_Convention_against_Corruption.pdf.

³ United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders Fourth Regional Seminar on Good Governance for Southeast Asian Countries, 7–10 December 2010, recommendation document, www.unafei.or.jp/pdf/seminar/GG4_Recommendations.pdf.

⁴ UNODC, *UN International Drug Control Programme Model Witness Protection Bill*, 2000, www.unodc.org/pdf/lap_witness_protection_2000.pdf.

⁵ *Prosecutor v. Tadic*, (1995) ICTY Case No. IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, p 27.

the court.⁶ Jurisprudence basis under ad-hoc tribunal the witness protection measures, the ICTY Tribunal has at its disposal a number of protective measures ranging from expunging names and identifying information from tribunal records through testimony under a pseudonym, electronic facial distortion, voice distortion and closed session.⁷

Ethiopia's efforts to protection of witness as well as protecting other competing interests are relatively recent. The first witness protection mechanism law is proclaimed under protection of witnesses and whistle-blowers of criminal offences Proc, No.699/2010 in Ethiopia.⁸ However the law relating to protection of witness as well the need to balance with respecting interest of the right to confrontation is found fragmentary and bridled with certain inbuilt fragility and disconfirmations. Since Ethiopia has already enacted witness's protection law after 2010, is still in its infancy. Though are example, reformed attempts at witness protection in Ethiopia have inspired different legislative framework such as: Revised Federal Ethics and Anti-corruption Commission Establishment Proc, No. 235/2005, prevention and suppression of trafficking in persons and smuggling of person's Proc. No.1178/2020, Federal ethics and anti-corruption commission Proc, No.1236/2021, Ethiopian CJP in 2003EC, Anti-Terrorism Proc, No.652/2009 also provides strict rules which prohibit disclosing / mentioning the name of the witnesses in any order, judgment or records related to the case,⁹ Witness Protection and Whistle-blower protection Proc, No.699/2010. A fundamental issue underlying these inconsistencies is the absence of a precise definition of what witness protection means; that is, the specific nature and scope of the concept of witness protection. The Proclamation starts with why it is necessary to have witness protection law and simply defined what witness or whistle-blower means and who protected person is.¹⁰ Thus, inferred meaning of witness protection is, measures that maybe taken in order to protect witness or whistle-blower and/or families from intimidation or threats against their life, security or property; because of cooperation with law enforcement or judicial authorities in the maintenance of justice.¹¹

⁶ Rome statute of International Criminal Court, arts 57 (3) (c), 64(2), 64(6) (e) and 68,' Rules of Procedure and Evidence' (r 87-88) of 17 July 1998 entered into force on 1 July 2002.

⁷ ICTY, 'Measures for the Protection of Victims and Witnesses' (r 75[B] [ii])

⁸ Protection of witness and whistle-blowers of criminal offence, 2010, proc. No.699, 17th year.No.16, Federal Negarit Gazzeta article 4, [here in after, proc. No. 699/2010].

⁹ Anti-Terrorism Proclamation, 2009, Federal Negarit Gazzeta, Proc. No. 652, 15th year, no.57, Art. 32 [hereinafter cited as 'Anti-Terrorism Proclamation No.652/2009'].

¹⁰ WWP Proclamation, No. 699/2010, *supra note*, 8 art 2 (1&2)

¹¹ *Ibid*, Art 3(1)b) & Art 4.

Constitutionality basis for witness protection in states such as Colombia¹² and Chile¹³ is rooted in their constitutions. These countries are selected from the world broadest civil law legal system because they are having best experience on witness protection mechanism than Ethiopia in terms of establishing the constitutionality legal frame work. In these states, there is a constitutional duty on the state to protect the rights of its citizens, and this includes a right to witness protection. However, to start with FDRE constitution, Art 20(1) refers to in camera proceedings with the view to ensure the privacy of parties, public moral and national security. Here the word party, if interpreted literally, does not cover the witness. Thus, the personal safety of the witness has no constitutional basis for protection in Ethiopia.¹⁴ Other piecemeal rules include a provision in the CPC that requires judges to deny bail if the suspect is likely to interfere with witnesses or tamper with the evidence.¹⁵ Once again, the concern here is not the witness's security rather the preservation and integrity of his/her testimonial evidence. There is lacuna of clear rule in the FDRE constitution¹⁶ and the ECPC about witness protection including testimony of witnesses with detailed relevant personal information of the witnesses.

In Ethiopia the jurisprudence practice on witness protection is sparse. There have however been instances where protective measures have been adopted to protect witnesses testifying in criminal proceedings in Ethiopia. In adopting protective measures in these cases, the court relied on the witness protection provisions especially in the Proc, No.699/2010. In these instances, the prosecution required protection from the court claiming that the witnesses were susceptible to intimidation from the defendants. In latest time, also the Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proc, No.1176/2020, specifically includes issue of witness protection under article 14(1). The provision stipulates¹⁷ also provides the measure taken by court in hearing of the case and provides

¹² Article 250 of Colombia's Constitution of 1991 (rev 2013) provides for the protection of victims and witnesses, Available at https://www.constituteproject.org/constitution/Colombia_2013.pdf?lang=en, accessed 6 July 2017.

¹³ Art 83 Chile's Constitution of 1980 (rev 2015) provides for the protection of victims and witnesses and empowers an autonomous body to adopt measures to protect them. Available at https://www.constituteproject.org/constitution/Chile_2015.pdf?lang=en, accessed 6 July 2017.

¹⁴ David Lusty, 'Anonymous Accusers, : An Historical and Comparative Analysis of Secret Witnesses in Criminal Trial, (2002) 24 ,Sydney Law Review) 377, accessed Jan 17,2022

¹⁵ Criminal Procedure Code of the Empire of Ethiopia, Negarit Gazeta Extraordinary Issue No.1 of 1961, art 67(c).

¹⁶ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation, No. 1/1995, Art 20(4).

¹⁷ Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proc, No. 1176/2020, Art 14 (2) and (3).

punishment for the criminals who endanger the life, well-being of property of any person or his family for the mere reason the individual associated with law enforcement authority and being witness.

The accused right to confrontation in criminal litigation is acknowledged as one of the fair trial rights meant to ensure equality of arms.¹⁸ Witness protection and the accused to right to confrontation has been a key concern of the international criminal system since the establishment of international criminal tribunals in the decade before the ICC.¹⁹ The ICTY and ICTR have incorporated in their statutes an explicit call for the protection of victims and witnesses, alongside respect for the rights of the accused. In Ethiopia the expression “witnesses testifying against” the accused within the meaning of the constitution is undetermined and requires interpretation. The scope of the right to confrontation depends on how broad or narrow the term “witness” is construed. In our case, the term “witness” has not been defined in the context of the right to confrontation thereby leaving those who qualify as “witnesses testifying against the accused” indeterminate.²⁰ The FDRE constitution (herein after the Constitution)²¹ and the Criminal Procedure Code (herein after CPC)²² recognize elements of the right to cross-examination. On the other hand, the Protection of Witnesses Proclamation [herein after Witnesses protection Proc] limits the right to confrontation and addressed that it’s not an absolute rights.²³ Therefore there is inconsistent and serious contradiction between constitutionality principles and other relevant statutory provisions of Ethiopia. Thus, this study is targeted to assess the legal and practical state of protection of witness security and life in Ethiopia by taking the situation threat and intimidation of organized crime in federal justice institution as an instrumental case study.

1.2 Statement of the Problem

The existing legal framework Ethiopia is undetermined: what the concept of witness protection means; who qualifies for witness protection; what stages need for witness

¹⁸ Sarah Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, (Oxford: Hart Publishing, 2007).

¹⁹ *Witness Anonymity at the International Criminal Court: Due Process for Defendants, Witnesses or Both?* The Denning Law Journal (2011), Vol. 23, P 29-46.

²⁰ WWP Proclamation, No. 699/2010, *supra notes*, 8, Article 2(1).

²¹ FDRE Constitution, *supra note*, 16, (Herein after the FDRE Constitution).

²² ECPC *supra note*, 15, Articles 127 (1), 124(1), 125, and 137 (Herein after ECPC).

²³ WWP Proclamation No 699/2010, *supra note*, 8, Art 4

protection; the scope of crimes requiring protection; and the constitutionality or otherwise of certain protective measures. So, the absence of a consolidated law and constitutionality basis on witness protection is a challenge to the development of effective and strong criminal justice system in Ethiopia.²⁴

In Ethiopia there is no autonomous/independent institution with the sole responsibility of administering witness protection. As such, witness protection in Ethiopia is ad-hoc and primarily at the discretion of the prosecutor in the absence of any clear objective criteria for administering witness protection. Therefore, Ethiopian witness protection program does not give sufficient power to the courts in order to make rigorous assessment of the need of anonymity of witness protection and protecting related interest of the right to confrontation. This also presents a basis for ad-hoc arrangements which are extremely sensitive to changes in personnel at the various cooperating agencies.²⁵ An international best practice on witness protection supports the establishment of a single witness protection unit with designated personnel, budget and finance. This aids specialization, accountability and confidentiality needed for effectively protecting witnesses and for facilitating inter-agency cooperation.

Although there is a considerable body of literature on disclosure of witness protection vis-à-vis balancing with accused right of confrontation, they are usually from the perspective of highlighting reviews of witness protection practices within specific national systems²⁶ or international criminal tribunals.²⁷ As a result, apart from these extensive descriptive accounts about witness protection developments and institutional administrative practices, there is a gap in the literature as significant aspects of witness protection are not problematized. It is therefore correct to say that there is no single legal framework for assistance and protection of witness in the cases of intimidation and threat on witness associated with justice institution

²⁴ Ibid, art 2 (1&2)

²⁵ UNGA; 'Extra Judicial, Summary or Arbitrary Execution- Note by the Secretary General Sixty-third Session Item 67 (b) of the provisional agenda*Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms. A/63/313 20 August 2008 para 32 p 13, accessed 20 December 2011.

²⁶ UNODC Good Practices at 1. See also Frank Vincent 'Review of the Witness Protection Act 1991' Victoria State Government (March 2016) 3 available at http://assets.justice.vic.gov.au/justice/resources/81f81a910ad640ff83103a1a45ce9869/review_of_witness_protection_act_1991.pdf, accessed 29 March 2017.

²⁷ Patricia M Wald 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal (2002) 5 Yale Human Rights & Development Law Journal 217-238; See also Groan Sluiter 'The ICTR and the Protection of Witnesses' (2005) 3 Journal of International Criminal Justice 965.

in Ethiopia. In addition to that they do not provide sufficient place for international and NGO cooperation to protect witness identity and relocated witness.

There is the fact that witnesses are playing an indispensable role in the justice system, that they assist the court in deciding the guilt or otherwise of the accused person. However there is no any phrase in article 20(4) of FDRE constitution that envisages restriction of the right in the interest of witness protection. The problem of this issue is not giving protection to witnesses, rather the constitution and other laws has no amicable solution to how can strike a balance between disclosure the right confrontation and non-disclosure for protection of witnesses.²⁸ Therefore, in practice and in different laws the right to know the witnesses and prepare for defense and cross-examination is not respected due to the non-disclosure provision allowed by the relevant statutory provisions.

The study covers whole Ethiopian relevant laws and jurisprudence practices in criminal proceedings and mandated federal justice institutions in challenges of protecting witness as well as respecting interests of accused right to confrontation and also highlighting literatures of international covenants and jurisprudence practices and world classic jurisdiction are highlighting. Therefore, this researcher is interested to assess the state of the legal, constitutionality and jurisprudence frameworks on the friction between protecting the wellbeing of witnesses and protecting the rights of accused right to confrontation by buttressing the theoretical analysis with verifiable evidences collected from federal justice institution.

1.3 Objectives of the Study

This study has both general and specific objectives.

1.3.1 The General Objective

Aims to analysis, the law, jurisprudence, constitutionality relating to the protection of witnesses vis-à-vis respecting interests of accused rights to confrontation under Ethiopian law.

²⁸ Michael Tilahun, The Two Competing Interests: Equality of Arms vis-à-vis Anonymity of Witness; The Case of Ethiopia ‘available at: www.abysinialaw.com accessed at April 28, 2019.

1.3.2 Specific Objectives

The research also has specific objective these are:

- ✓ To examine the effectiveness of the law governing the Ethiopian witness and whistleblower protection Proc, No.699/2010 and protect accused right to confrontation under the current Ethiopian jurisprudence.
- ✓ To investigate the types of crime and timing or the stages require witness protection in criminal proceeding.
- ✓ To examine the indispensability for special witness protective measures and the creation of protection programmes for a success of judicial process.
- ✓ To address the needs to balance between the legal rules ensuring protection of witnesses and the rights to confrontation.
- ✓ To instant evaluate the constitutionality framework of witness protection in Ethiopia.

1.4 Research Questions

This study aims at answering the following central questions:

- ✓ To what extents the existing law governing the whistle-blowers and witness protection Proc, No. 699/2010 is incorporated on the effective protection of to witness and protect accused right to confrontation under the current Ethiopian jurisprudence?
- ✓ How can investigate the types of crime and timing or the stages that require witness protection in criminal proceeding?
- ✓ How can enact special witness protective measures and the creation of protection programmes for a success of judicial process?
- ✓ How the fair trial rights of accused the right to confrontation is balanced with witness protection issues?
- ✓ How can evaluate the constitutionality framework of witness protection in Ethiopia?

1.5 Research Methodology and Methods

1.5.1 Research Methodology

The research employed qualitative research methodology. Because, this methodology is in response to the nature of the research questions and the overall driving objective of study which focused on describing and characterizing the protection of witness as well as

respecting interest of the right to confrontation under Ethiopian law, in the light of internationally existing legislation and jurisprudence and highlighting the experience of world classic states to have effective witness protection programmes and which are reflective of international best practices, including the witness protection programme of the USA, Australian, South African and Kenyan programme. These jurisdictions are incorporated because they are the big-name global countries with a well-established witness protection programme and this would involve argumentation, reasoning and critical analysis of the issue.

Under the umbrella of the qualitative strategy the study applied both doctrinal and non-doctrinal legal research approach. The doctrinal approach is necessitated because of the research question that examines the existing Ethiopian laws enacted to govern, cases and authoritative materials as a whole, how to balancing the of protection of witness with the right to confrontation and to establish enforcing institutions in a view to key out their gaps.²⁹ In order to ensure validity and confidence in the findings, the study also use non-doctrinal research approach to examine the practical and jurisprudence application of disclosure rule in the Ethiopian context. This approach helps to obtain direct experiences of the federal justice machinery. It also helped the researcher to identify the possible challenges and constraints of in the process of balancing the two competing interests.

1.5.2 Research Design

The qualitative research design was preferred because it enables the assessment and analyse of the existing witness protection laws and the jurisprudence practices in Ethiopia. Also the field research was undertaken interviews with a total number of 12 federal justice institutions participants comprising individuals with first-hand information about witness protection in Ethiopia. In addition, flexible and open ended questions are employed because it provides no restrictions on the content or manner of the reply. Then the brief is mainly intended to show the challenges and limitation in Ethiopia's witness protection and relating interest of accused right to confrontation legislation and highlights the contribution of the thesis. Therefore, the data can be generated by analysing various documents that existence already, or through interview transcripts or a number of sources in combination.

²⁹ Vijay M Gawas, 'Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development' (2017) 3 (5) International Journal of Law 128; Amrit Kharel, 'Doctrinal Legal Research' [2018] SSRN Electronic Journal accessed 15 November 2019.

1.5.3 Source of Data and Collection Methods

In the process of data gathering this research would follow qualitative method. It uses both primary and secondary sources of data. The primary source of data includes: documentary sources, interview and questionnaires. Primary data gathered through cases analysis and interview. Documentary sources of data include: policy documents that is criminal justice policy, criminal law, (including the FDRE constitution), the 1961 CPC, other special substantive and procedural laws including; Whistle-blowers and witness protection Proc, No. 699/2010, Anti-terrorism Proc, No.652/2009 and revised anti-corruption special procedure and rules of evidence Proc, No.434/2005, Prevention and suppression of terrorism crime Proc, No.1176/2020, Federal ethics and anti-corruption commission Proc, No.1236/2021, Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proc, No. 1178/2020, Enactment Proc, No.943/2016 and Ethiopian CJP in 2003EC, have been analysed in relation to duty of disclosure witness protection, justifications for non-disclosure, challenges and disproportionate impacts on vulnerable witness and accused. Research methods include national jurisprudence of Lidata FHC and international legal instruments and jurisprudence such as the Rome Statute, Rules of Procedure and Elements, Rules of the Court of the ICC both permanent and ad-hoc tribunal. An experience of well-known jurisdiction is taken into consideration; from jurisdictions of South Africa and Kenya from developing countries and the experience of USA and Australia, from developed countries examined respectively.

Interviews: is used to solicit ideas from people who have been involved in case under study, especially, when the required data are not found via review of literatures. In doing of qualitative research approach interviews are the most common technique of data collection. The researcher will be used semi-structured interview in order to get information for the practical application of disclosure of witness protection vis-à-vis the right of confrontation from key informants. Semi structured interview has been used on the same issue to comply the limited time and willingness of interviewees.

Questionnaires: Question wording can be changed and explanations given. Widely used in flexible, qualitative designs, open questions are employed because it provides no restrictions on the content or manner of the reply other than on the subject area. Allow you to go into more depth or clear up any misunderstandings; encourage co-operation and rapport; can produce unexpected or unanticipated answers.

Cases Analysis: It also carried out on some selected cases decided in Lidata Federal High Court. In addition, the researcher uses cases, both cessation cases and dead files, public record arch-rivals like witness protection documents and related reports.

The secondary source of data that were employed by the researcher includes information obtained from different books, websites, and literatures relevant to theme of research. Here data is gathering through personal effort such as library-based etc.

1.5.4 Sampling Techniques and Sampling Size

For undertaking this study and due to the nature of subject matter of the study and resource constrained, the researcher use non-probability sampling. Among the techniques of non-probability, the research employed purposive sampling technique.³⁰ In this study, the number of participants was determined by those who were likely to yield information being sought. Top four informants were selected from each federal justice institution since they are better placed to give the relevant information. Twelve (12) key informants were drawn from the following: the 4 judges from Lidate FHC, (Respondents: A, B, C and D), 4 public prosecutors from Federal OAG (Respondents: E, F, G and H) and 4 FSC Public Defenders Office (Respondents: I, J, K and L).

1.5.5 Data Quality Control Techniques

All data collected from both primary and secondary sources were systematically analysed along understanding the general concept introduced under chapter two. Doctrinal legal research employed power of reasoning to synthesize, analyse, interpret and compare the data. The case study data has been analysed using thematic analysis and discourse analysis. Data collected from one source has been used to corroborate and augment evidences from other sources to increase the validity of the findings. For instance, information from literatures and doctrinal analysis is supplemented by an interview of relevant persons who had or has witness protection programmes and accused right to confrontation area. The interview is further supplemented by information from observation notes. Thus, the data gathered via these various techniques from numerous sources have helped to triangulate the reliability of the information in this study.

³⁰ Teddlie, C. & Yu, F. (2007). *Mixed Methods Sampling: A Typology with Examples*.

1.6 Scope of the Study

The geographic scope of this study will focus within federal justice institutions. This is because it is considered this scope to be sufficient because most of these institutions have found within Addis Ababa city the institutions in the area handle are highly influential on matters of disclosure of witness protection and they handle the highest number of cases relating to need balancing the two competing interests in criminal proceedings. The federal justice institutions for the purpose of this research FHC, Federal OAG, and FSC Public Defenders Office. Even though for the theoretical part, the researcher will be primarily used an applicable and relevant national legislation and highlighting international legal basis and the experience of well-known jurisdiction relating witness protection issues.

1.7 Significance of the Study

The study will be, as stated above, primarily examines the legal and jurisprudence inconsistency and identifies legal gaps in Ethiopian Witness Protection and Whistle-blower protection Proc, No.699/2010 and assessed the huge gap of FDRE constitution regarding witness protection with balancing the accused right to confrontation. Then the study will try to address the justifications of witness protection study, stages of witness protection, types of crime need to more witness protection, extent of severity of the problem in protection of witnesses and their families from both physical and psychological threats. The research on other side, it can serve as a standing step for justice sector; to enact, implement and interpret witness protection rule and criminal justice policy. Furthermore, the research will also give insight to the researchers and subsequent studies that might come up with detail and specific study on the jurisprudence, need of constitutionality justification for the disclosure of witness protection and balancing with the competing interests' of accused right to confrontation.

1.8 Limitation of the Research

The potential limitations for this study are epistemological that includes definitional limitation for terms witness protection and indeterminate scope of the right to confrontation. However, the researcher minimized such limitations by contextualization and construction of working definitions. The other challenge encountered the researcher during collecting primary data was regarding prosecutors, advocator, and judges of the federal high courts. Due to the nature and the sensitivity of the issue most respondents were unwilling to allow the researcher take voice recording of the discussion. They felt that it was political and giving

information might bring accountability. Similarly, the researcher faced the same limitation while collecting data from victims of vulnerable witness due to non-identification witness. For the reasons, the researcher has taken notes of the discussion by writing.

1.9 Ethical Considerations

During data collection which requires permission of individuals or authority, the researcher will take due care to get the permission and to properly preserve and to take appropriate measures to any possible harmful information during the data collection process. The researcher will also guarantee to handle data properly so that it does not fall into the hands of other researchers who might appropriate it for other purposes. Further, in the interpretation of data, the researcher will provide an accurate account of the information and will not use language or words that are biased against persons because of racial or ethnic group.

1.10 Organization of the Study

The thesis contains a total of five chapters. The first chapter is an introductory part. The second chapter deals with the understanding the general concept of witness protection and scrutinize international law, jurisprudence and best experience of other jurisdictions framework for witness protection. The third chapter devoted to assess and analysis of the legal and jurisprudence aspects of witness protection vis-à-vis protecting accused right to confrontation under Ethiopian legal framework. Chapter four critically presents data analysis. Finally, chapter presents conclusion and recommendations in the last chapter as ways forward.

CHAPTER TWO

The Concept and Legal Framework of Witness Protection under International Arena

2.1 Introduction

The chapter discusses some basic concepts in witness protection and review literature issues that lies a spring board up on which subsequent chapters' discussion relies. Accordingly, concept of witness protection and related interests of the right to confrontation and justifications discussions on rationale for emergence of witness protection programmes; approaches of comprehensive and formal system of witness protection operates where disclosed as the basis of protection is by a single comprehensive witness protection Act, specifying eligibility requirements, the scope of crimes, the definition of witnesses, and the type of protective mechanisms available and the administrative control of witness protection. Lastly, the indispensable principles are ascertained from the international standard literature review of examples and world classic or best practices of USA, Australia, South Africa and Kenya. Plus the role of NGO and international cooperation is essential examined for effectively protection of witness.

2.2 Understanding Conceptual Framework of Witness Protection

There are both criminal justice and human rights incentives in providing adequate protection to whistle-blowers and witnesses of crimes.³¹ Various, literature on witness protection overlooks the need to define witness protection and how it differs from other interrelated concepts and identifies distinct characteristics of these inter-related terms. The research set out to explore the concept of witness protection with the aim of identifying conceptual and legal issues requiring clarification. Its objective is to identify the organising principles for delineating the scope of witness protection. Its central argument is that the failure to draw clear distinctions between witness protection and other interrelated concepts such as victim protection and whistle-blower's protection affects how the concept of witness protection is construed and the analysis in this title supports the criminal justice arguments limiting the scope of beneficiaries and defining witnesses within definite parameters. Address the rationality and justification for witness protection and explore witness protection trends and ascertained the nature of crimes requiring witness protection. The research argued that witness protection evolved within specific crime contexts and its relevance is limited to

³¹ UNODC, 2008. *Good practice for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*. <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.

crimes of a defined nature and not for all crimes. Here witness protection is justified for crimes that threaten the security and legitimacy of the state from the failure or inability to prosecute the criminals who perpetrate these crimes. Provided an overview of the types of protective mechanisms it confirmed that protection is needed for as long as the harm or threat to which the witness is exposed subsists. The topic examines the constitutionality of procedural protective measures. It examined the circumstances that permit the adoption of procedural measures which are likely to interfere with the rights of a defendant to a fair hearing.

Finally, the thesis disclosed the components of comprehensive witness protection programs. It explores the administrative structures for witness protection. It established that although earlier practices of witness protection favoured locating witness protection in the office of the prosecutor (preferably the Attorney General) or the investigator (police), recent developments favour the establishment of an independent witness protection institution.³² The topic also discussed the principles of witness protection and examined role of NGO and international cooperation are essential for achieving the objectives of witness protection.

2.2.1 Meaning of Witness, Witness and Whistle-blower Protection

This sub-section discusses on attempts to come up with meaning of basic concepts includes witness and class of person as witness, witness protection.

2.2.1.1 Meaning: Witness

Before analysing the concept of 'witness protection', we must identify the person who can be a witness. A few definitions will be useful here. Internationally, the terminology used may vary somewhat, but for the most part the basic concepts remain the same. According to Black's Law Dictionary defines a witness as one who sees, knows, or vouches for something; one who gives testimony under oath or affirmation in person, by oral or written deposition or by affidavit.³³ Although international legal instruments such as the UNCTOC and UNCAC³⁴ provide for the protection of witnesses, the word witness is not clearly defined.³⁵

³² Kramer, K., 2010, Witness protection as a key tool in addressing serious and organised crime. http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GG_Seminar_P3-19.pdf.

³³ Bryan A. Garner (ed) Black's Law Dictionary, (17th ed, West Group & St. Paul 1999) 1596

³⁴ See articles 24 and 32 respectively.

³⁵ Marie Chene 'Good Practice in Witness Protection Legislation' Transparency International 29 November 2012, 4, available at https://www.transparency.org/files/content/corruptionqas/Helpdesk_good_practice_in_witness_protection_legislation.pdf, accessed 14 May 2018.

According to the COE, a witness is...any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law), who is not included in the definition of “collaborator of justice.”³⁶ These definitions by the Black’s Law Dictionary and the COE give a literal meaning of the word ‘witness’ and, from it, a wide range of persons are identified. These include victims of crime, eyewitnesses, justice collaborators, informants, undercover investigators, whistle-blowers, expert witnesses and official witnesses. What these literal definitions have in common is that they overlook the element of witness intimidation, which emphasises the existence of threat or the risk of harm to the individual testifying. The UNODC emphasises that, within the context of witness protection, what is relevant is the function of the witness as a person in possession of information important to the criminal proceedings rather than the status or the form of testimony.³⁷

A manual on Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime of United Nation Office of Drug and Crime, define, “*Witness*” as “any person, irrespective of his or her legal status (informant, witness, judicial official, undercover agent or other), who is eligible under the legislation or policy of the country involved, to be considered for admission to a witness protection programme.”³⁸ Witnesses can be classified into three main categories: justice collaborators; victim-witnesses; and other types of witnesses (innocent bystanders, expert witnesses and others)³⁹

Justice collaborators: These are people, including convicted offenders, facing related criminal charges who decide to cooperate with prosecutors by giving testimony.⁴⁰ A justice collaborator is a person who has taken part in an offence connected with a criminal organization and possesses important knowledge about the organization’s structure, method of operation, activities and links with other local or foreign groups.

³⁶ *Council of Europe, Committee of Ministers Recommendation (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers’ Deputies*, available at <https://wcd.coe.int/ViewDoc.jsp?id 849237&Site COE>, accessed 23 March 2013. See also Council of Europe, *Combating Organised Crime Best Practices Survey of the Council of Europe* (2004) 16.

³⁷ UNODC, 2008, *supra note*, 31, accessed 20 December 2011.

³⁸ United Nations Office on Drugs and Crime, (New York, 2008)

³⁹ United Nations Office on Drugs and Crime [UNODC] (2008) *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*; UN: Vienna

⁴⁰ Council of Europe Committee *supra note* 36.

Victim-witnesses: These are witnesses who are direct victims of the crime undergoing prosecution. In accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁴¹, victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws proscribing the criminal abuse of power.

Other non-witness individuals and groups: Non-witnesses may require assistance and protection. These include expert witnesses who testify because of their specialist knowledge, such as forensic experts.⁴² In most countries, it is only in exceptional circumstances that judges, prosecutors, undercover agents, commissioners, defence lawyers, investigating officers, or expert witnesses and interpreters are included in witness protection programmes. Intimidation or threats against their lives are considered to relate to their posts and the performance of their duties. They can qualify for special police protection, job transfers or early retirement, but their protection differs in nature from the protection measures intended for at-risk witnesses.

Sometimes the issue comes up as to whether informants can be provided protective measures and the legislation of some countries includes informants as persons eligible for protective measures. But it should be clarified that in most jurisdictions an informant is a person who provides information to authorities which is used for the purposes of further investigation and their identity is not disclosed. Therefore, they do not become witnesses. There is frequently confusion about the differences between being an informant, whistle blower and witness so whistle blower protection so it is worth looking at these issues more closely.

2.2.1.2 Witness Protection

As the term “witness” is already defined here in above, ‘witness protection’ can be defined as giving security in life, body, health, liberty, honor, property or any lawful rights of witness before or at the time or upon becoming witness.⁴³ The term ‘witness protection’ denotes a range of actions applicable at any stage of criminal proceedings to safeguard witnesses and

⁴¹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power General Assembly resolution 40/34, annex.

⁴² Cornell University Law School, Legal Information Institute, Expert witness, www.law.cornell.edu/wex/expert-witness.

⁴³ Mohammad Gholasi and MoosaAkefiGhaziani, *Witness Protection in terms of a Fair Trial in Criminal Matters*, Journal of Novel Applied Sciences, 2014, P. 1048.

thereby ensure their effective cooperation in terms of providing testimony.⁴⁴ ”Witness protection is the process in which witnesses who testify in criminal trials are provided with specific procedural and non-procedural protection measures aimed at effectively ensuring their – sometimes including their relatives’ safety before, during and after their testimony.”⁴⁵

Although there is no comprehensive international instrument defining witness protection, a description of what it depicts is captured within academic sources. When used broadly, witness protection means the methods of providing security to witnesses, ensuring their safety and those of their families, including everything that they are entitled to have by law, in exchange for the witnesses’ testimony.⁴⁶ Also, it is described as the application of measures instrumental in preventing or minimising the risk of harm and/or reducing any threats to a witness.⁴⁷ These measures are applied at all stages of the criminal proceedings to guarantee the safety and security of witnesses to ensure their cooperation and testimony.⁴⁸

The UNODC defines witness protection as ‘a formally established covert programme subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.’⁴⁹ The UNODC is not alone in its construct of witness protection as a programme as this approach is also adopted by the COE. Accordingly, witness protection is defined 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

⁴⁴ J Njeri, Witness protection: The missing cornerstone in Africa’s criminal justice systems, 1 September 2014, www.issafrica.org/iss-today/witness-protection-the-missingcornerstone-in-africas-criminal-justice-systems.

⁴⁵ Commission of the European Communities. (2007). *Commission working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice*. Brussels. p. 2

⁴⁶ Kerati Kankaew ‘Thailand’s Witness Protection Programme’ in *Securing Protection and Cooperation of Witnesses and Whistle-blowers Fourth Regional Seminar on Good Governance for South East Asian Countries*, Co-hosted by UNAFEI and the Department of Justice the Republic of Philippines, 6-9 December 2010, Manila, the Philippines, November 2011, Tokyo, Japan, 92 available at http://unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GG4Seminar_all.pdf, accessed 9 May 2013.

⁴⁷ Transitional Justice Unit, *The Need for Witness Protection and Transitional Justice in Zimbabwe*, Zimbabwe Human Rights NGO Forum (September 2015) available at http://www.hrforumzim.org/wpcontent/uploads/2015/10/Witness_protection_and_Transitional_Justice_in_Zimbabwe.pdf, accessed 13 April 2017.

⁴⁸ Wilson Kiprono, Kibet Ngetich and Wokabi Mwangi ‘Challenges Facing Criminal Justice System in Relation to Witness Protection in Kenya’ (2015) 20 (10) *IOSR Journal of Humanities and Social Science* 94.

⁴⁹ United Nations Office on Drugs and Crime (UNODC), *Good practices for the protection of witnesses in criminal proceedings involving organised crime*, 2008, www.unodc.org/documents/southeastasiaandpacific/Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf.

proceedings.⁵⁰ The OHCHR, however, admits that definitions of witness protection as a programme is usually within the context of serious organised crimes and terrorism.⁵¹

The definition of witness protection by the UNODC and COE excludes other forms of protective measures, such as procedural protective measures. This exclusion is influenced by the fact that their constructs originate from a criminal justice perspective of what motivates witness protection. On the other hand, human rights influence of witness protection includes procedural protective measures necessary for protecting vulnerable persons as an objective of victim protection. This thesis defines witness protection as all methods of providing security to individuals cooperating with law enforcement, especially those exposed to harm for testifying in court, to ensure their safety in exchange for their testimonies.

2.2.1.3 Whistle-blower protection

A whistle-blower can be a person who merely provides information or he/she can be a witness in a criminal matter. “Whistle-blower” is not a precisely defined legal term. The UNCAC does not use the term. Instead, it refers to “any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention.”⁵² Whistle-blowers do not necessarily become witnesses, but they play an important role of alerting the authorities to wrongful acts that would have otherwise remained unnoticed. For that reason, the UNCAC requires States Parties to “consider” incorporating appropriate measures to protect reporting persons from unjustified treatment. The UNODC Resource Guide on Good Practices in the Protection of Reporting Persons offers further information and suggestions on these points.⁵³ While it is of paramount importance to appreciate the difference between witness protection and whistle-blower protection, they are connected insofar as both are aimed at encouraging persons to speak up. In some instances, the two can overlap as circumstances may arise where a whistle-blower reporting criminal misconduct to a law enforcement agency may require witness protection, especially if they are required to testify in court.

⁵⁰ Council of Europe, ‘Procedural Protective Measures for Witnesses’ (Training Manual for Law Enforcement Agencies and the Judiciary 2006) 30.

⁵¹ United Nations Human Rights Office of the High Commissioner, *The Protection of Victims and Witnesses: A Compilation of Conference Reports and Consultations in Uganda* (2010) 11, available at <http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf>, accessed 7 February 2017.

⁵² United Nations Convention against Corruption (UNCAC) Article 33

⁵³ Marie Terracol, *supra* note, 35, (Berlin, Transparency International, 2018).

2.2.2 Rational and Justification for Witness Protection

The essence of witness protection is captured thus: The primary purpose of witness protection is to give practical effect to the rule of law by as far as reasonably possible, protecting those who are exposed to risk of injury or death because of their participation in or co-operation with the criminal justice system [And] advance the public interest in the efficacy and integrity of the criminal justice system through the provision of protective support to those who are at risk due to their co-operation in its functioning.⁵⁴ The openness of judicial proceedings is a fundamental principle enshrined in Article 14 of the International Covenant on Civil and Political Rights (the right to a fair trial).⁵⁵ This underpins the requirement for a prosecution witness to be identifiable not only to the defendant, but also to the open court.⁵⁶ It supports the ability of the defendant to present his case and to test the prosecution case by cross-examination of prosecution witnesses.⁵⁷ In some cases it may also encourage other witnesses to come forward. However, the principle of open justice can sometimes act as a bar to successful prosecutions, particularly in homicides, organized crime, terrorism and gun crime.⁵⁸ Witnesses may fear that if their identity is revealed to the defendant, his associates or the public generally then they or their friends and family will be at risk of serious harm.

There are different justifications for witness protection and they influence conceptions of witness protection. These justifications are inferred from the literature to make sense of the influences that have shaped the evolution of witness protection. Witness protection is justified for the following reasons: Firstly, witnesses have a right to safety and security when testifying which is a fundamental human right. This is enshrined under the international human rights instruments.⁵⁹ Secondly, it is an opportunity for the State to perform its duty of care, to ensure protection of its citizenry from any harm or intimidation and to ensure rule of law.⁶⁰ Thirdly, victim and witness protection enhances the capacity and integrity of

⁵⁴ Frank Vincent 'Review of the Witness Protection Act 1991' Victoria State Government (2016) 4, available at http://assets.justice.vic.gov.au/justice/resources/81f81a91_0ad6_40ff_83103a1a45ce9869/review_of_witness_protection_act_1991.pdf, accessed 29 March 2017.

⁵⁵ Available at https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668_english.pdf

⁵⁶ David Lusty, *supra note*, Sydney L. Rev. 24 (2002): 361.

⁵⁷ Doak, Jonathan, and Rebecca Huxley-Binns. "Anonymous witnesses in England and Wales: charting a course from Strasbourg?" *The Journal of Criminal Law* 73, no. 6 (2009): 508-529

⁵⁸ Kumar, Miiko. "Secret Witness, Secret Information and Secret Evidence: Australia's Response to Terrorism". *Miss. LJ* 80 (2010): 1371.

⁵⁹ Trotter, Andrew. "Witness intimidation in international trials: Balancing the need for protection against the rights of the accused." *Geo. Wash. Int'l L. Rev.* 44 (2012): 521.

⁶⁰ Kiprono, Wilson, Kibet Ngetich, and Wokabi Mwangi. "Challenges facing Criminal Justice System in relation to witness protection in Kenya." *Journal of Humanities and Social Science* (2015).

investigations, prosecutions or special commissions of inquiry services.⁶¹ Fourthly, witness protection enhances access to justice and promotes the rule of law as the cases depend on witness testimonies given freely and confidently without fear of reprisals whatsoever.⁶² Fifthly, witness protection helps in securing the testimony of threatened and intimidated witnesses, especially in high profile cases.⁶³ Sixthly, witness protection is critical in ensuring efficient and effective prosecution, thus contributing to effective justice delivery and combating crimes.⁶⁴ Lastly, to fulfil international obligations under conventions like the UN Convention against Transnational Organized Crime, Article 24, of which obligates states parties to take appropriate measures to protect witnesses; the UN Convention against Corruption; and the ICC⁶⁵ Statute (the Rome Statute), the Statute of the ICTY⁶⁶ and the Statute of the ICTR.⁶⁷

2.2.3 The Scope of Crime for Which Witness Protection is used

In many jurisdictions, the nature and scope of protection afforded to witnesses is determined in part by the nature of the offences involved. For instance, the Organised Crime Convention requires that witness assistance and protection be provided in cases involving “serious” offences (with possible sentences of four years).⁶⁸ The United Nations Convention against Transnational Organized Crime provides that States parties should take appropriate measures to protect witnesses in criminal proceedings related to crimes covered by the Convention and its Protocols. Those crimes include: (a) Participation in an organized criminal group; (b) Money-laundering; (c) Corruption in the public sector;⁶⁹ (d) Obstruction of justice; (e) Trafficking in persons (see below); (f) Illicit manufacturing of and trafficking in firearms, their parts and components and ammunition; (g) Smuggling of migrants (see below); (h) Other serious crimes as defined in the Convention, encompassing the elements of transnationality and involvement of an organized criminal group. The COE Committee of

⁶¹ Vermeulen, Gert, ed. *EU standards in witness protection and collaboration with justice*. Maklu, 2005.

⁶² Mahony, Chris. “The justice sector afterthought: Witness protection in Africa.” *Chris Mahony, The Justice Sector Afterthought: Witness protection in Africa*, Pretoria: Institute for Security Studies (2010).

⁶³ Demleitner, Nora V. “Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?.” *The American Journal of Comparative Law* 46, no. suppl_1 (1998): 641-664.

⁶⁴ Dandurand, Yvon. “Strategies and practical measures to strengthen the capacity of prosecution services in dealing with transnational organized crime, terrorism and corruption.” *Crime, Law and Social Change* 47, no. 4-5 (2007): 225-246 at 241-2.

⁶⁵ *Ibid*, article 68 (1).

⁶⁶ *Ibid*, article 22.

⁶⁷ *Ibid*, article 21.

⁶⁸ UNODC, *Good Practices*, p. 26.

⁶⁹ General Assembly of the United Nations Convention against Corruption (Assembly resolution 58/4, annex).

Ministers Resolution does not limit witness protection to particular offences. However, the focus is largely on organised crime, terrorism and violations of international humanitarian law. The resolution also states that “no terrorism-related crimes should be excluded from the offences” eligible for witness protection.⁷⁰

2.2.3.1 Organized Crime

By its feature, organised crime is characterised by the readiness of its members to use coercion and intimidation against witnesses.⁷¹ Intimidation within the context of organised crime is achievable because of the enormous powers the criminals enjoy from their connections with economic and political structures within the society.⁷² Although historically linked to mafia-styled organisations, Standing⁷³ recognises that contemporary organised crime groups, such as gangs, are also problematic for law enforcement. Over the years, the threat from organised crime and the difficulty of prosecution has remained a prevailing concern for many states as well as the citizens of these states.⁷⁴ A significant characteristic of organised crime is that it is closed structured in nature⁷⁵ and this makes it difficult to investigate and prosecute using traditional investigative strategies.⁷⁶ According to Kemp and Malcom, responding to this challenge requires a radical criminal justice response usually in the nature of witness protection to reduce impunity and promote justice through the prosecution of organised crime.⁷⁷ Consequently, law enforcement officials increasingly depended on the testimonies of members of the group willing to cooperate and provide evidence against co-perpetrators.⁷⁸ This explains the primary focus of witness protection for

⁷⁰ Council of Europe, Recommendation, *supra note*, 50, Article 11.

⁷¹ Liz Campbell ‘Organized Crime and National Security: A Dubious Connection’ (2014) 17 (2) *New Criminal Law Review: In International and Interdisciplinary Journal* 222.

⁷² Rodrigo Labrdini ‘Mexico’s Federal Organized Crime Act’ (2003) 11 *United States-Mexico Law Journal* 135.

⁷³ Andre Standing ‘Transnational Organized Crime and the Palermo Convention: A Reality Check’, International Peace Institute, December 2010, 2 available at www.cpahq.org/CPAHQ/CMDownload.aspx?ContentKey 6fdc7034- b0e5, accessed 28 August 2017.

⁷⁴ Liz Campbell, *supra note* 71

⁷⁵ Article 2 (a) UNTOC

⁷⁶ Council of Europe, Combating Organised Crime Best Practices Survey of the Council of Europe (Council of Europe Publishing, Strasbourg, 2004) 21.

⁷⁷ Walter Kemp and Shaw Malcom ‘From the Margins to the Mainstream: Towards an Integrated Multilateral Response to Organized Crime’ New York: International Peace Institute (September 2014) 3, available at <http://www.globalinitiative.net/download/general/global/1409 margins to mainstream toc.pdf>, accessed 25 June 2015.

⁷⁸ Institute of Security Studies ‘How can Africa keep witnesses safer?’ 2 September 2016, available at <https://oldsite.issafrika.org/iss-today/how-can-africa-keep-witnesses-safer>, accessed 1 August 2017.

justice collaborators. It is however important to ascertain the type of crimes that fall within the purview of crime organised.

2.2.3.2 Terrorism

Similar to organised crime, the concept of witness protection gained prominence in the prosecution of terrorism cases. Witness protection has been particularly important in combating terrorism. According to the COE, The protection of witnesses and collaborators of justice is an essential part of the fight against terrorism, since there is an increased risk of witnesses being subjected to intimidation which may result in the criminal justice system failing to bring offenders to trial and obtain judgements because witnesses are effectively discouraged from testifying freely and truthfully.⁷⁹ Consequently, investigating and prosecuting terrorism is complex and challenging.⁸⁰ The complexity is as a result of the highly covert and structured nature of terrorist groups.⁸¹ Also, because of the power wielded by terrorists, they have the capacity to intimidate witnesses, making it increasingly difficult to obtain witness testimony. In the light of the recent global challenges presented by terrorism, it received priority in the security agenda of several states. Practice shifted to include the prosecution of terrorism, thereby revealing its importance for witnesses of terrorism.⁸²

2.2.3.3 Corruption

In the United Nations Convention against Corruption,⁸³ states parties are called upon to take appropriate measures for the protection of witnesses against retaliation or intimidation for their testimony (articles 32, 33 and 37, para. 4). A number of countries include corruption among the crimes to be covered by witness protection programmes. Under that approach, the same criteria are used for the consideration of witnesses in cases involving corruption or organized crime. Although witnesses in serious corruption cases may occasionally face a threat to their lives, they are more often subjected to harassment at work, covert threats of retaliation, demotion or similar action. As a result, the criteria used for assessing the level of threat against witnesses in the majority of corruption cases are less exclusive than in

⁷⁹ Council of Europe, Committee of Ministers Recommendation 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, Explanatory Report, para 1 p 1, available at www.legislationline.org/documents/id/8998, accessed 23 March 2013.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Raneta Lawson Mack, 'The Federal Witness Protection Program Revisited and Compared: Reshaping an Old Weapon to Meet New Challenges in the Global Crime Fighting Effort, (2014) 21 *University of Miami International and Comparative Review* at 206.

⁸³ United Nations Convention against Corruption (General Assembly resolution 58/4, annex).

organized crime cases, where the threat to the witness's life that would give cause for inclusion in the witness protection programme is likely to be much higher. To address those problems and ensure that corruption is tackled effectively, a number of countries have chosen to establish separate protection programmes for witnesses in corruption cases.

2.2.3.4 Other Crimes

Another category of crime for which witness protection is frequently used is capital and other violent crimes, especially in cases where the suspect already knew the victim(s) and the witness (es). If the risk of retaliative measures against witnesses by the perpetrator or his 'friends' is such that they are not willing to testify in court, a witness protection programme can offer a solution. Certain criminal offences that cannot be classified as serious crimes under article 2, paragraph (b), of the Organized Crime Convention (in other words, offences punishable by a maximum deprivation of liberty of a least four years or a more serious penalty) may still have considerable social impact, or they may be of such a violent nature as to necessitate protection measures for witnesses. That is the case, for example, in crimes within the family, where vulnerable witnesses (children, women, the elderly) are often subjected to intimidation or threats not to report abuse against them by other members of the family.⁸⁴

2.2.4 The Forms and Stages of Witness Protection Measures

The need for witness assistance and protection arises before, during, and after the witness testifies (including post-sentence or acquittal). It is triggered from the first interaction creating the risk until that risk is removed.⁸⁵ The Basic Principles and Guidelines on the Right to a Remedy includes a recommendation for States to take measures [...] to minimise the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims".⁸⁶ (Emphasis added). The Council of Europe Committee of Ministers Resolution recommends that protection be available before,

⁸⁴ See in this regard the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex).

⁸⁵ OHCHR's Right to Truth, referring to lessons learned in Sierra Leone, highlights the need for pre-testimony and testimony assistance protection and assistance, para. 53; UNODC, Good Practices, p. 27.

⁸⁶ UN, Right to a Remedy, Principle 12(b)

during and after the trial⁸⁷ and goes on to recommend that “protection measures could be adopted on an urgent and provisional basis before a protection programme is formally adopted”.⁸⁸ This infers that protective measures are required at all stages of a criminal proceeding, including post-trial, to guarantee the security of witnesses at all times.

Protection prior to the filing of a formal complaint or agreement to testify: Without protection from this early stage, witnesses and victims may be reluctant to cooperate with investigators. Protection needs should therefore be considered prior to investigators first approaching a witness. The Santiago Guidelines⁸⁹ recommend: Immediate protection “prior to threat assessment in order to protect the life and integrity of the candidate for protection”, and Regular protection “when a candidate conditions his/her cooperation with the judicial system to the provision of protection.”⁹⁰ Immediate protection would cover witnesses who have not yet agreed to cooperate with a judicial or quasi-judicial process.⁹¹

2.2.4.1 Witness Assistance and Support

A mechanism should provide wide ranges of assistance are provided especially for victim-witnesses, by both the police and public prosecutors offices including logistical, legal, financial, medical and psycho-social services. Specific assistance should be available to children, victim-witnesses of sexual and gender based violence, elderly persons and people with disabilities. Highly trained individuals should provide assistance, as well as civil society or professional organisations. Therefore it is good practice for criminal justice systems to provide assistance and support measures to victims and other witnesses in order to facilitate their ability to participate in the criminal justice system and to give the kind testimony that is required for the maintenance of the rule of law.⁹² Providing such assistance is not the same as protecting physical security. Witnesses’ needs will need to be individually assessed.⁹³ Assistance and support measures should help witnesses in coping with the psychological and practical issues they may have in testifying. The may also be used in coordination with

⁸⁷ Council of Europe Committee of Ministers, Recommendation Rec (2005) to member states on the protection of witnesses and collaborators of justice, 20 April 2005, Article 2.

⁸⁸ Ibid, Article 25.

⁸⁹ Santiago Guidelines on witness and victim protection, June 2008.

⁹⁰ Ibid, Chapter 2(3)

⁹¹ The Indonesian law opens the door to this kind of early protection: “[w]itness means people who can provide information for the purpose of investigation, litigation, prosecution, and examination in court proceedings on an offence...” (Emphasis added). However, a later article clarifies that assistance and protection begins only after the “investigation stage starts.” Indonesian Law, Article 8.

⁹² See also the *UN Guidelines on Justice for Child Victims and Witnesses of Crime*.

⁹³ UNODC, Good Practices, p. 28.

procedural protections and other security measures. Procedural protections are those that may be used both to support a witness' ability to testify as well as to enhance a safety before and during the trial.

The ICC Rules of Procedure also provide for a range of assistance measures including: Assistance in obtaining legal advice and representation, and providing legal representatives with adequate support, assistance and information;⁹⁴ Again, it is important to emphasize that the purpose of witness assistance as distinguished from witness protection, is to achieve efficient prosecution and avoid secondary victimization. While such services are generally provided first by the state, NGO with experience in dealing with vulnerable categories of the population can prove valuable partners in this process.⁹⁵ The OHCHR report on the right to the truth recommends that there should be separate divisions within a witness protection unit for witness assistance and witness protection.⁹⁶ This will help ensure that staff with particular skill-sets concentrates their work in their areas of expertise.

2.2.4.2 The Forms/Stages of Witness Protection Measures

The protection of witnesses is based on three building blocks complimenting and supporting each other with the most complete system being a mixture of all three disciplines. The measures taken should be proportional to the threat and of limited duration. There are various forms of witness protection that can be implemented in the criminal justice process. First, there is police, or ad-hoc protection. This is usually applicable before a trial but can also be organised during and after. Secondly, judicial or trial protective measures can be prescribed by a judicial officer and these are usually applied during the trial but can continue after its conclusion. Lastly, there is witness protection under a formal protection programme.⁹⁷

I. Police Protection/Target Hardening Witness Protective Measures

The police have the primary responsibility for ensuring safety and security of citizens. In this regard, good investigative practices and basic police protection provide the basis of all other protection measures. Good investigative practices include keeping investigations confidential, minimizing contacts with uniformed police and prosecutors, ensuring that all information about a suspect's criminal background, especially related to violence, ties with criminal

⁹⁴ ICC Rules of Procedure and Evidence, Rule 16(b).

⁹⁵ Ibid, p, 28

⁹⁶ Office of the High Commissioner for Human Rights, *Right to the Truth*, A/HRC/12/19, 21 August 2009, para. 53.

⁹⁷ C Mahony, *supra note*, 62.

groups and any acts of intimidation or threats made to witnesses is made known to prosecutors and judges (especially at bail hearings). At all stages, police and investigators should be sensitive to whether the witness has been or is likely to be intimidated, threatened or in danger due to their cooperation.

In cases where a witness feels insecure but there is no ascertainable risk of threat, these feelings of insecurity can be addressed by briefing them on personal security, which may include information on how to increase the security of their homes (fortifying locks and windows), ensuring that they have mobile phones and emergency contact numbers or an advocate or police officer that they can phone, etc. In addition to the above, where there is some level of risk to a witness, the police can provide security measures. Some usual police protective measures are close (body guard) protection, regular patrolling around the witness's residence and place of work, escort to and from the court, installation of security devices at the witness's home and perhaps the place of work, monitoring mail and phone calls, and temporary change of residence etc.⁹⁸

II. Judicial/ Procedural Witness Protection Measures

These are measures adopted by the courts to protect witnesses during criminal proceedings and operate within the scope of criminal procedure and affect its rules.⁹⁹ Court witness protection measures are generally authorized and regulated under criminal (procedural) law. These measures may however be broadly grouped into **three categories**: measures to reduce fear through face-to-face confrontation with the defendant, confidentiality (non-disclosure) measures that limit the witness exposure to the public and anonymity measures to make it difficult or impossible for the defendant to trace the witness's identity.¹⁰⁰ Examples include the use of masks, screens, closed circuit television and the use of audio-visual links, such as video conferencing, pre-trial statements, expunging witness information, in camera trial proceedings, and the use of pseudonyms.¹⁰¹ There are usually no statutory restrictions as to the types of crimes or witnesses for which such measures can be allowed.¹⁰² Procedural

⁹⁸ See also additional information, *UNODC Good Practices*, p.30.

⁹⁹ Goran Sluiter 'The ICTR and the Protection of Witnesses' 3 *Journal of International Criminal Justice* (2005) 962- 966.

¹⁰⁰ United Nations Office on Drugs and Crime 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' 2008, 32-33, available at <http://www.unodc.org/documents/organizedcrime/Witness-protection-manual-Feb08.pdf>, accessed 20 December 2011. See also Sylvia N Ngane 'Witnesses before the International Criminal Court' (2009) 8 *The Law and Practice of International Courts and Tribunals*, 450.

¹⁰¹ Ibid.

¹⁰² *Good Practices for the Protection of Witnesses*, p.3.

measures may also include: **Anonymous testimony**; Presence of an accompanying person for psychological support; shields, disguises or voice distortion; Use of a witness's pre-trial statement instead of in-court testimony; Testimony via closed-circuit television or videoconferencing; Removal of the defendant or the public from the courtroom. They include altering evidentiary rules which may affect the rights of the defendant to a fair trial.¹⁰³ Depending on their purpose, procedural measures can be grouped into three general categories:

- *“Measures to reduce fear through avoidance of face-to-face confrontation with the defendant,”¹⁰⁴ such as the use of pre-trial statements in lieu of in-court testimony (where permitted); removal of the defendant from the courtroom` (while still watching the trial via a video link); and testimony via closed-circuit television or audio visual links, such as video- conferencing.*
- *“Measures to limit the witnesses’ exposure to the public and psychological stress.”¹⁰⁵ Such as by a change of the trial venue, removal of the public from the courtroom (hold the session “in Camera”) and by having the presence of an accompanying person to provide support for the witness.”*
- *“Measures to make it difficult or impossible for the defendant or organized criminal group to trace the identity of the witness,” ¹⁰⁶ by the use of anonymous testimony or a screen, curtain or two-way mirror to shield the witness while giving testimony. Is witness concealment, If the witnesses are not directly visible, the judge and the defendant may not be able to assess the witnesses’ reactions to questions and consequently may not be able to assess their credibility fully.*

Courtroom-based witness protection measures such as video-link testimonies require technical equipment, well-trained personnel and adequate financial resources. Also, require sufficient funding must be made available to the prosecutors and the courts to use them effectively. These measures may be used alone or in combination for greater protection. They could include video-linked testimonies combined with image- and/or voice-altering devices, or testimonies in the courtroom behind an opaque shield. It is important to keep in mind that however procedural measures are used, due consideration should be given to balancing the

¹⁰³ Asa Rydberg ‘Case Analysis- The Protection of the Interests of Witnesses- The ICTY in Comparison to the Future ICC’ (1999) 12 *Leiden Journal of International Law*, 466.

¹⁰⁴ Good Practices for the Protection of Witnesses, p.32.

¹⁰⁵ Ibid, p.33

¹⁰⁶ Ibid, p.32

witness's legitimate expectation of physical safety against the defendant's rights to a fair trial¹⁰⁷ and without prejudice to the rights of the defendant to a fair trial.¹⁰⁸

Anonymity measures seek to hide some or all the witness's identity from the defence in instances where the substance of the testimony does not identify the witness.¹⁰⁹ These measures provide partial or absolute anonymity.¹¹⁰ While partial anonymity conceals the identity of the witness from the accused until the end of the pre-trial period or until called upon to testify in court,¹¹¹ absolute anonymity conceals the identity of the witness throughout the proceedings. Croquet,¹¹² Leigh¹¹³ and Trotter,¹¹⁴ describe anonymity measures as the gravest form of interference with the right to cross-examination.

III. Non-Procedural/Covert Witness Protection Programmes

These are covert programs used before and after trial to ensure the continued safety of a witness and involve the relocation of witnesses and giving them new identities depending on the risk posed to the witness.¹¹⁵ This is done as the last resort when there is grave danger against the witness. Witnesses in serious and transnational crime cases are often at risk of intimidation, physical harm, or murder.¹¹⁶ Where law enforcement assesses the witness to be in the category of the highest risk, then efforts are made to relocate them to third countries with changed identity. These may include: Concealing the identity of a witness through the following: Facial concealment and voice distortion; Closed trials and closed-circuit television; Giving witnesses pseudonyms or referring to them using numbers; Expunging

¹⁰⁷ Ibid, p.33

¹⁰⁸ As part of the fundamental human rights, an accused person is guaranteed a right to fair trial. More important is the right of the accused person to cross examine witnesses in court. See Article 14 (3) (b and e) of the ICCPR, Art 6 (3) (d) ECHR (1950) as amended; see article 20 (4) (e) ICTR Statute, Article 67 (1) (e) Rome Statute; Article 21 (4) (e) ICTY Statute; Art 24 UNTOC.

¹⁰⁹ Nicholas Croquet 'Implied External Limitations on the Right to Cross-Examine Prosecution Witnesses: The Tension between a Means Test and a Balancing Test in the Appraisal of Anonymity Requests (2010) 11 *Melbourne Journal of International Law* 3.

¹¹⁰ See *Nora V Demleitner* 'Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?' (1998) 46 *American Journal of Comparative Law* 646.

¹¹¹ See Article 68 (5) Rome Statute. See r 66 (A) (i), and 69 (c) ICTY RPE, Rule 69 (c) ICTR RPE.

¹¹² Croquet, *supra note* 109 at 4.

¹¹³ Monroe Leigh 'Witness Anonymity is inconsistent with Due Process' (1997) 91 (1) *The American Journal of International Law*, 80.

¹¹⁴ See also Andrew Trotter 'Witness Intimidation in International Trials: Balancing the Need for Protection against the Rights of the Accused' (2012) 44 *George Washington International Law Review* 537.

¹¹⁵ Montanino, Fred. "Protecting the federal witness: burying past life and biography." *American Behavioural Scientist* 27, no. 4 (1984): 501-528.

¹¹⁶ Dandurand, Yvon, and Kristin Farr. A review of selected witness protection programs. Public Safety Canada, 2012. At p9.

witness names and other information that may allow them to be identified from records¹¹⁷ Admission to a witness protection programme, which may include changing a witness's identity and relocating him or her, either temporarily or permanently. According to the UNODC, a witness protection programme may be described as a 'formally established covert programme subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities'.¹¹⁸

However, the Council of Europe distinguishes between "protection measures" and "protection programs." The first refers to all individual procedural and non-procedural measures aimed at protecting witnesses and collaborators of justice from intimidation and retaliation, while "protection programs," refer to a set of individual protection measures which are described in an agreement between the authorities and the protected witness or collaborator of justice (Council of Europe 2006b). The way witness protection is globally designed is not homogeneous. Even within the EU these differences are found as well.¹¹⁹ The Commission of the European Communities defined it: "Witness protection is the process in which witnesses who testify in criminal trials are provided with specific procedural and non-procedural protection measures aimed at effectively ensuring their - sometimes including their relatives'- safety before, during and after their testimony".¹²⁰

In the above mentioned definition by the Commission of the European Communities a distinction has been made between procedural and non-procedural protection measures. The difference between the two measures is that procedural protective measures operate within the scope of criminal procedure and affect its rules. Non-procedural protective measures can be described as measures which do not affect the rules of criminal procedure and have no influence on the rights of the defence. Witness protection programmes in which witnesses or

¹¹⁷ UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organised crime*, 2008, [www.unodc.org/documents/southeastasiaandpacific/Publications/Projects/indonesia/Good practices for the protection of witnesses in criminal proceedings involving organized crime.pdf](http://www.unodc.org/documents/southeastasiaandpacific/Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf).

¹¹⁸ Ibid.

¹¹⁹ Fyfe, N.R. and Sheptycki J. (2005) *Facilitating witness co-operation in organised crime cases: an international review*. Home Office Online Report 27/2005. p.5.

¹²⁰ Commission of the European Communities. (2007). *Commission working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice*. Brussels. p. 2

collaborators of justice are being protected can be called non-procedural protective measure.¹²¹

2.2.5 Components of a Comprehensive Witness Protection Program

This section provides guidelines for the establishment of effective witness protection programme, including governance structures, recruitment of staff, funding, and financial accountability. The United Nations has developed principles to help guide the establishment of witness protection mechanisms.¹²² The 2008 Santiago Guidelines have expanded on these principles. In post conflict settings, additional measures may be necessary to address threat levels exacerbated by weak rule of law institutions, a lack of political will to address impunity, and a continuing risk of conflict. Therefore, protection witness is a shared responsibility with several actors or stakeholders (all persons along the justice chain including police, courts, prosecutors, community members and witnesses) intervening at various stages of the life cycle of a criminal case.¹²³ A comprehensive and formal system of witness protection operates where the basis of protection is by a single comprehensive witness protection Act, specifying eligibility requirements, the scope of crimes, the definition of witnesses, and the type of protective mechanisms available and the administrative control of witness protection.¹²⁴ The UNODC advises that because of the implications of protective measures on the rights of witnesses, the defendants, as well as the society, the objectives of witness protection should be well grounded in legislation.¹²⁵ According to Dandurand and Farr, where the system of witness protection is formal, protection is undertaken within identified rules that specify the functions, rights and duties of witnesses and the witness protection authority, and have clear internal governance and accountability requirements regarding personnel, funding and budgetary requirements.²⁸

Formal systems of witness protection established through a single comprehensive Act are recommended by both the UNODC¹²⁶ and the UNHRC,¹²⁷ representing criminal justice and

¹²¹ Council of Europe, 2014, p. 8.

¹²² UNODC, Good Practices, pp. 45-58.

¹²³ Reaves, Brian A., and Timothy C. Hart. Federal law enforcement officers, 2008. Biblio Gov, 2012.

¹²⁴ See for example section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984.

¹²⁵ United Nations Office on Drugs and Crime 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' 2008, 43. Available at <http://www.unodc.org/documents/organizedcrime/Witness-protection-manual-Feb08.pdf>, accessed 20 December 2011.

¹²⁶ United Nations Office on Drugs and Crime 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' 2008, 43. Available at <http://www.unodc.org/documents/organizedcrime/Witness-protection-manual-Feb08.pdf>, accessed 20 December 2011.

human rights perspectives, respectively. They reason that formal systems are more effective because they maximise the efficient use of state resources, are less controversial and more appealing to a broader spectrum of actors within society.¹²⁷ Furthermore, formal systems facilitate a process of evaluation which is crucial to the prospects of effectiveness of witness protection objectives.¹²⁹ These stipulations formalise witness protection and set a uniform and objective standard for witness protection, thereby minimising inconsistencies, the risk of breakdown in communication or cooperation, gaps in services to witnesses, and inefficient or ineffective procedures.¹³⁰ Consequently, the absence of a comprehensive witness protection is detrimental to the effectiveness of witness protection.¹³¹

2.2.5.1 Location and Institutional Structure of the Programme

“Witness protection authority”: a government, police, prosecutorial or judicial authority overseeing and coordinating implementation of the witness protection programme and making decisions on such matters as admittance, duration of protection, measures to be applied, operational policies and procedures. Authority to grant protection and assistance must be delegated by legislation to members of a witness protection unit, or to other officials; for example, a minister, police commissioner, attorney general or to a multi-disciplinary body. Whatever the mechanism, political decisions must not undermine the functional independence and technical assessments of the programme.¹³²

“Witness protection programmes can be institutionalized in different ways. For some countries, the police force is the programme’s natural environment, as out-of-court protection of witnesses is seen primarily as a police function. For others, separating protection from the investigation is of higher value in order to ensure objectivity and minimize the risk that

¹²⁷ Human Rights Council Twelfth Session Agenda Item 2 Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the Truth, Report of the Office of the High Commissioner for Human Rights, Summary, A/HRC/12/19, 21 August 2009, para 44 p 13-14, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf>, accessed 5 May 2015.

¹²⁸ Ibid.

¹²⁹ Peter Finn & Kerry Murphy Healey ‘Preventing gang and drug related witness intimidation’ U.S. Department of Justice- Office of Justice Programmes National Institute of Justice: Issues and Practices November 1996, 60, available at <https://www.ncjrs.gov/pdffiles/163067.pdf>, accessed 10 January 2012.

¹³⁰ United Nations General Assembly; ‘Extra Judicial, Summary or Arbitrary Execution- Note by the Secretary General Sixty-third Session Item 67 (b) of the provisional agenda*Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms. A/63/313 20 August 2008 para 32 p 13, accessed 20 December 2011.

¹³¹ Steven William Kayuni an Edister Jamu ‘Failing witnesses in serious and organised crimes: policy perspectives for witness protective measures in Malawi’ (2015) 41 (3) *Commonwealth Law Bulletin* 425.

¹³² UNODC, *Good Practices*, p. 60.

admission to the programme unwittingly may become an incentive for witnesses to give false testimony that they believe the police or prosecution wants or needs.”¹³³ Where a programme is located within the police force, “the isolation and autonomy (organizational, administrative and operational) of the covert unit responsible for the implementation of the programme from the rest of the police force is of great importance.”¹³⁴ In a second category of countries, programmes are separated organizationally from the police and sit under the equivalent of the Ministry of Justice, the Ministry of the Interior or the State Prosecutor.¹³⁵ “In a third group of countries, programmes are implemented by a multidisciplinary body consisting of high-level representatives of the law enforcement, prosecutorial, judicial and government authorities and sometimes from civil society. That body takes decisions on such matters as admission to the programme and termination. It may also exercise some oversight over implementation of the programme and make budgetary submission to the Government.”¹³⁶

Regardless of the location of the programme, the key issues to a programme’s success seem to be, “separation from the investigation, confidentiality of procedures and operations, and organizational autonomy from the regular police.”¹³⁷ Although methods for achieving independence vary, there is general agreement among the UNODC, OHCHR, and other expert bodies about the necessity of “[...] (a) separation [of the protection function] from the investigation; (b) confidentiality of procedure and operations; and (c) organisational autonomy from the regular police.”¹³⁸

2.2.5.2 Basic Principles of a Comprehensive Witness Protection Program

The following principles are drawn from the international standard literature review of examples and world classic or best practices in USA, Australia, South Africa and Kenya. While not exhaustive, they provide a basic foundation for the development of a robust witness protection mechanism.

Clarity: A clear legal, procedural, and institutional framework is needed to provide the certainty and predictability necessary to ensure that all parties are aware of the protection measures available before agreeing to testify or cooperate with a criminal investigation.

Holistic Approach: In the good practices of witness protection which countries are required to

¹³³ UNODC *Good Practices*, p.45. Countries in this category include, Australia, Austria, Canada, Hong Kong Special Administrative Region of China, New Zealand, Norway, Slovakia, and the United Kingdom

¹³⁴ *Ibid*, p.46

¹³⁵ Columbia, the Netherlands, the Philippines, South Africa and the United States.

¹³⁶ Italy and Serbia both have this model. *Ibid*, p.46

¹³⁷ *Ibid*.

¹³⁸ UNODC, *Good Practices*, p. 46.

follow to take a holistic approach to witness protection, funding is key point for effective witness protection. Witness protection measures do not exist in isolation but reflect the overall state of law enforcement or other truth-seeking structures. The work of one agency without the support of other actors involved in the process will be inefficient. Institutional reform as well as the vetting and training of personnel in judicial and investigative agencies are essential.

Autonomy/Independence: According to a 2009 OHCHR report, the “prevailing wisdom” regarding the appropriate nature and scope of authority for witness protection, requires that it “be disconnected from individual prosecutors, investigators or defence counsel, in order to carry out their assessments in an objective way.” The nature of autonomy within the context of witness protection is complex. On one hand, it implies the separation of witness protection responsibilities from prosecution and investigation.¹³⁹ Alternatively, it implies creating a specific witness protection unit to facilitate witness protection.¹⁴⁰ Also, it implies that a specific agency/unit has the financial control of witness protection. When interpreted literally, autonomy implies the expediency of a witness protection authority to act without interference from external authority. The OHCHR categorises these as financial and operational autonomy.¹⁴¹ It should be noted that within national systems the nature of autonomy varies. For example, in the US where protection is prosecutor-based, the operational task of protection is divided within three departments. These departments, although within the Department of Justice, are in practice regarded as independent units.¹⁴² Therefore, these functions should be separated organisationally. However, an appropriate level of cooperation/contact with or between law enforcement agencies should be ensured in order to successfully adopt and implement protection measures and programmes.¹⁴³

Confidentiality: Primarily, confidentiality is defined by the fact that witness protection is recognised as a covert operation.¹⁴⁴ Across all systems of witness protection, confidentiality

¹³⁹ United Nations OHCHR, *The Protection of Victims and Witnesses: A Compilation of Conference Reports and Consultations in Uganda* (2010) 45, available at <http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf>, accessed 7 February 2017.

¹⁴⁰ See section 4 Witness Protection Programme Act 1996 Canada and section 4 (1) Witness Protection Act 1994 Australia.

¹⁴¹ See OHCHR conference compilation at 43.

¹⁴² U.S. Marshals Services, Fact Sheet 2019.

¹⁴³ Office of the High Commissioner for Human Rights, Right to the Truth, para. 51 (*citing Council of Europe, Recommendation*).

¹⁴⁴ United Nations Office on Drugs and Crime ‘Good practices for the protection of witnesses in criminal proceedings involving organised crime’ 2008, 5. Available at

is required for its success and it is required of witness protection officers as well as protected witnesses.¹⁴⁵ Confidentiality obligations are often stipulated in the witness protection agreement between a protected witness and the witness protection authority. The witnesses are obliged to maintain secrecy about the terms of the protection agreements.¹⁴⁶ The breach of confidentiality obligations by the witness constitutes a ground for terminating the protection agreement.¹⁴⁷ Also, penalties are attached to confidentiality breaches by witness protection officials.¹⁴⁸ Where confidentiality is not maintained, the system is compromised, and witnesses may be further exposed to harm and reprisal attacks.¹⁴⁹

Accountability: Like autonomy, the integrity of witness protection is maintained.¹⁵⁰ Accountability requirements encompass review accountability within the context of witness protection implies operational accountability and financial accountability. Accountability requirements are safeguards provided within a system to ensure that mechanisms regarding decisions to protect or to terminate protection. Accountability mechanisms also require the witness protection authority to make reports to a higher authority, about the general operations, performance and effectiveness of witness protection and the exercise of their official powers.¹⁵¹

Inclusivity: All of those placed at risk due to their role in an investigation or proceeding should be given support and protection. While this paper refers most frequently to witnesses and victims, participants may also include commission staff, intermediaries, and other individuals. In addition, witness protection should be available from the moment that engagement with the commission increases risk until that risk has been removed.

<http://www.unodc.org/documents/organizedcrime/Witness-protection-manual-Feb08.pdf>, accessed 20 December 2011.

¹⁴⁵ See section 3521 (b) (H) of the US; section 16 of Australia, Section 11 (4) (b) (ix) South Africa, section 7(1) (b) Kenya and section 11 Canada.

¹⁴⁶ Ibid

¹⁴⁷ See section 17 (iii) Australia, section 13 (1) (f) South Africa and section 10 Kenya.

¹⁴⁸ See section 22B and 28 of Australia WPA; 22 South Africa; Section 21 and 30 Kenya and Section 21 Canada.

¹⁴⁹ Gareth Newham 'Keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa' Research report written for the Centre for the Study of Violence and Reconciliation, (October 1995), available at *<http://www.csvr.org.za/old/index.php/publications/1720-keeping-the-wolves-at-bayissues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa.html>*, accessed 16 May 2015.

¹⁵⁰ Australian Federal Police, Witness Protection Annual Report 2011-2012, available at *<https://www.afp.gov.au/sites/default/files/PDF/Reports/witness-protection-annual-report-2011-12.pdf>*, accessed 23 September 2017.

¹⁵¹ See section 30 (1) Australia, section 10 and 16 (1) Canada, see section 3 (Q) (P) (U) Kenya, section 3 (2) and (9) SA.

The need to balance witness protection and the right to confrontation: Protective measures should be consistent with the rights of the accused, including the right to a fair trial in accordance with international standards. Practices of different jurisdictions have considered it important to balance witness safety and the accused's constitutional rights to confrontation which on prototypes of a fair hearing or trial. For example, States' have permit: cross-examination of witnesses; the presence of the defence lawyer at all stages of the process and allow the witness an accompanying supportive person during the trial; and disclosure of relevant information to the accused's counsel.

Role of NGO and Necessity of International and Regional Cooperation: For various reasons, governmental witness protection programmes often cannot be applied to the protection of witnesses of trafficking. Firstly, they can be extremely expensive. Secondly, to ask the victim and her or his family to adopt a new identity, to relocate and to give up all social contacts places them under considerable additional strain and will very often seem disproportionate to the benefits obtained. Thirdly, the police are not the adequate institution to provide the support in the psychological recovery process that victims of trafficking require. Therefore, agreements with foreign countries can help to protect witnesses when the State is unable or unwilling to provide sufficient protection against reprisals for their participation in criminal or other proceedings. Even where relocation abroad is an option, it is important to select countries where witnesses will not be exposed to continuing threats as a result of international networks of terrorist groups, organised crime syndicates or armed groups. The UNICEF Guidelines on the protection of child victims of trafficking draw attention to the potential need for trafficked children's international relocation and resettlement due to the risk of retaliation from traffickers against whom evidence has been provided. The Guidelines further recommend measures to ensure the security of the child's family members in the country or place of origin, transit or destination.¹⁵² A final consideration is the need to include measures to assist the victim or witness to return to normal life in their home country once the threat level has fallen to an acceptable level.

International cooperation: International cooperation is essential for effectively protection of witness. According to Art 13 Model Law on Witness Protection (2008) Annex, the Protection Authority or the Protection Unit is authorized to enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or

¹⁵² UNICEF, *Guidelines on the protection of child victims of trafficking*, 2006, para. 10.4.

international entities relating to the relocation of protected persons and other protection measures.

Below, international legislative and jurisprudence and regional legal frameworks for witness protection will be discussed. The discussion is aimed at gauging the level of protection afforded to witnesses in general but also specifically those who are witnesses in highly organized and complex cases.

2.3 Witness Protection in International Legal Framework

2.3.1 International Legislation

There are no internationally accepted formal standards for witness protection. Several guiding principles have been articulated over the last decade by the Council of Europe (Council of Europe 2005).¹⁵³ Some of them are referred to in the present review. The UNODC has also published a handbook on good practices for the protection of witnesses in criminal proceedings involving organized crime (UNODC 2008).¹⁵⁴ As mentioned earlier, at least two major United Nations conventions, against organized and against corruption, call for the development of witness protection measures and for greater international collaboration in witness protection.

The United Nations Convention against Corruption (‘UNCAC’): The UNCAC is the first binding global agreement aimed at combating corruption.¹⁵⁵ UNCAC does cater for the protection of witnesses from potential retaliation or intimidation should they testify. Article 32 of the UNCAC specifically provides for the protection of witnesses, experts, and victims.¹⁵⁶ States Parties are also required to take appropriate measures to ensure that witnesses and experts who provide testimony regarding offences under UNCAC are protected from potential retaliation or intimidation.¹⁵⁷ The protection extends to witnesses’ relatives and other persons they are close to. Art 32 allows many protective measures to be taken, provided they are not prejudicial to the defendant's right to due process and other rights. Protection measures may include: Relocation of witnesses, where necessary and feasible; permitting the protection of their identity and whereabouts if appropriate; and utilising

¹⁵³ Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Strasbourg: Council of Europe, 2005.

¹⁵⁴ UNODC. Good practices for the protection of witnesses in criminal proceedings involving organized crime. New York: United Nations, 2008.

¹⁵⁵ Webb P ‘The United Nations Convention Against Corruption: Global achievement or missed opportunity’ (2005) 191.

¹⁵⁶ United Nations Convention Against Corruption, Article 32.

¹⁵⁷ United Nations Convention Against Corruption, Article 32(1).

communications technology to avoid face-to-face testimonies. The States Parties are also required to enter into agreements for the relocation of their citizens with other States.¹⁵⁸

The United Nations in the United Nations Office on Drugs and Crime (‘UNODC’): UNODC was formed in 1997¹⁵⁹ by the Secretary-General of the United Nations to allow the Organisation focus on and improve its capability to deal with the interrelated issues of drug control, crime and international terrorism in all its forms¹⁶⁰. The UNODC is a frontrunner in the international fight against ‘illicit drugs’, ‘transnational organized crime’, ‘terrorism’, and ‘corruption’, and it is the lineage for some conventions like the Palermo Convention and its three protocols (against trafficking in persons, smuggling of migrants and trafficking in firearms), UNCAC and all other international drug control conventions.¹⁶¹

The UNODC published a handbook on good practices for witness protection in criminal proceedings concerning organized crime.¹⁶² According to the UNODC Good Practices for the Protection of Witnesses manual, a witness protection programme is a formally established covert program, subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.¹⁶³

The UNODC organised regional meetings with experts from the police force, the prosecuting and judicial authorities of states parties to compile good practices to be for the establishment and functioning of witness protection programmes.¹⁶⁴ The UNODC started with these regional workshops in 2005, and they were attended by officials from different geographical regions that have been exposed to organised crime and from different socio-political

¹⁵⁸ United Nations Convention Against Corruption, Article 32(2).

¹⁵⁹ ‘UNODC Mandate’, available at

<https://www.unodc.org/southernafrika/en/sa/about.html#:~:text=The%20United%20Nations%20Office%20on,of%20the%20related%20conventions%2C%20particularly%3A&text=The%20international%20drug%20control%20conventions> (accessed 27 November 2020).

¹⁶⁰ ‘UNODC Mandate’, available at

<https://www.unodc.org/southernafrika/en/sa/about.html#:~:text=The%20United%20Nations%20Office%20on,of%20the%20related%20conventions%2C%20particularly%3A&text=The%20international%20drug%20control%20conventions> (accessed 27 November 2020).

¹⁶¹ ‘UNODC Mandate’, available at

<https://www.unodc.org/southernafrika/en/sa/about.html#:~:text=The%20United%20Nations%20Office%20on,of%20the%20related%20conventions%2C%20particularly%3A&text=The%20international%20drug%20control%20conventions> (accessed 27 November 2020).

¹⁶² Dandurand Y & Farr K ‘A Review of Selected Witness Protection Programs’ (2010) 77.

¹⁶³ Kramer K ‘Witness protection as a key tool in addressing serious and organized crime’, available at https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf (accessed 17 July 2020).

¹⁶⁴ United Nations Office on Drugs and Crime ‘Protecting witnesses’, available at

<https://www.unodc.org/unodc/en/frontpage/protecting-witnesses.html> (accessed 30 November 2020).

circumstances and legal systems.¹⁶⁵ Consequently, UNODC adopted guidelines which deal with procedural protection and the establishment of covert witness protection units.¹⁶⁶ Based on the level of participation in the 2005 workshop it may be inferred that the guidelines were probably informed by the experiences of diverse groups.

The United Nations Convention against Transnational Organised Crime (UNTOC): Under the UN Convention against Transnational Organised Crime, states parties are required to take appropriate measures to encourage organised crime participant cooperation with law enforcement for investigative and evidentiary purposes.¹⁶⁷ The convention affords such persons protection as well as amnesty or a mitigated sentence.¹⁶⁸ Victim and/or witness protection is also explicitly addressed in the convention's protocols, specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,¹⁶⁹ and the Protocol against the Smuggling of Migrants by Land, Sea and Air.¹⁷⁰

Witness Protection in the Regional Context: There are various agreements which acknowledge the need for the protection of victims and witnesses during legal proceedings within the regional sphere.¹⁷¹ For purposes of this chapter, only EU and AU instruments will be discussed. The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court of Human and Peoples' Rights states that: [a]ny person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their

¹⁶⁵ United Nations Office on Drugs and Crime 'Good practices for the protection of witnesses in criminal proceedings involving organized crime' (2008), available at [https://www.unodc.org/documents/middleeastandnorhfrica/organisedcrime/Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime.pdf](https://www.unodc.org/documents/middleeastandnorhfrica/organisedcrime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf) (accessed 08 February 2020).

¹⁶⁶ United Nations Office on Drugs and Crime available at <https://www.unodc.org/unodc/en/frontpage/protecting-witnesses.html> (accessed 30 November 2020).

¹⁶⁷ United Nations Office on Drugs and Crime, United Nations Convention against Transnational Organised Crime, adopted by General Assembly resolution 55/25, 15 November 2000, article 26.

¹⁶⁸ United Nations Office on Drugs and Crime, United Nations Convention against Transnational Organised Crime, articles 4, 24, 26(2)–(3); United Nations Office on Drugs and Crime, Good practices for the protection of witnesses in criminal proceedings involving organised crime, 2.

¹⁶⁹ United Nations Office on Drugs and Crime, United Nations Convention against Transnational Organised Crime, A/RES/55/25, 8 January 2001 Annex II, articles 6 and 7, signed by the Government of Sierra Leone 27 November 2001.

¹⁷⁰ *Ibid*, articles 6–7.

¹⁷¹ Oyakhire S.O 'Developing a Legal and Institutional Framework for Witness Protection in Nigeria: Reflections from International Perspectives' (2019) 54.

functions, tasks and duties in relation to the Court.¹⁷² The Council of Europe has also recognised the “right [of witnesses] to not be subject to any undue interference or by placed at personal risk” and urges that governments of member States take legislative and practical measures “to ensure that witnesses, collaborators of justice may testify freely and without being subject to any act of intimidation”.¹⁷³

2.3.2 International Jurisprudence

In addition to international instruments, major international criminal tribunals provide for such protection in their statutes. Witness protection has been granted high profile in the practice and jurisprudence of international tribunals dealing with serious violations of humanitarian law. In response to violations of international criminal and humanitarian law in the former Yugoslavia and Rwanda, the Security Council, exercising its authority under Chapter VII of the UN Charter, established two ad hoc international criminal tribunals. The ICTY was established in 1993 under United Nations Security Council resolution 827.¹⁷⁴ The United Nations ICTR was established in 1994 under United Nations Security Council resolution 955.¹⁷⁵ The Rome Statute for the establishment of an International Criminal Court, creating a permanent ICC, was signed in July 1998, and entered into force on 1 July 2002. In addition, specialised hybrid tribunals, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC), have been established through bilateral agreements with the UN. Victim and Witness Support units exist in each of these tribunals, providing support to victims and witnesses throughout the investigative and trial process. Within the domain of international criminal law, witness protection has come to be viewed as an essential component of the criminal justice process.

¹⁷² Protocol to the African Charter on the establishment of an African Court of Human and Peoples’ Rights, OAU Doc. OAU/LEG/AFCHPR/PROT (III), entered into force 25 January 2004, Article 10(3).

¹⁷³ Council of Europe Committee of Ministers, Recommendations to member states on the protection of witnesses and collaborators of justice, 20 April 2005, preamble and Article 2(1) (“Council of Europe, Recommendation”).

¹⁷⁴ United Nations Security Council Resolution 827 of 25 May 1993, UN Doc. S/Res/827, Para 2

¹⁷⁵ United Nations Security Council Resolution 955 of 8 November 1994, UN Doc. S/Res/955, Para 1

2.3.2.1 International Permanent Jurisprudence

At the international level, it is apparent that witnesses are no less important for the success of the work of the ICC and other special courts and tribunals.¹⁷⁶ Article 43(6) of the Rome Statute of the ICC required the Registry to set up a Victims and Witnesses Unit to provide, in consultation with the Office of the Prosecutor, “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”¹⁷⁷ Article 68 of the Rome Statute sets out some of the assistance and protection mechanisms available such as in camera and video-link hearings. Article 68(1) requires that measures not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁷⁸ This article also stipulates that the Court take appropriate measures, not only in regard to the physical security of victims and witnesses but also to protect their “psychological well-being, dignity and privacy.”¹⁷⁹

The Rome Statute of the ICC, for example, provides for the protection of ICC witnesses.¹⁸⁰ The ICC’s witness protection initiatives have been plagued with difficulties. These include the February 2016 erroneous revelation of witness names in the case against former Ivorian president Laurent Gbagbo¹⁸¹ and the allegation that the Defence in the case against Ruto and Arap Sang (see above) submitted evidence indicating that ICC staff members may have engaged in sexual relations with witnesses and their families; been bribed by witnesses; and were party to the submission of false financial claims, breaches of Victims and Witnesses Unit protocols by witnesses, and obtaining pecuniary benefits from the false financial claims.¹⁸²

¹⁷⁶ The Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Tribunal for Rwanda (ICTR) and the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL).

¹⁷⁷ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force 1 July 2002, Article 43(6) (“Rome Statute”).

¹⁷⁸ Ibid, Article 68(1).

¹⁷⁹ Ibid, Article 68(1).

¹⁸⁰ Rome Statute of the International Criminal Court, 1 July 2002, www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

¹⁸¹ Laurent Gbagbo case: ICC judge apologises after witnesses named, BBC News, 8 February 2016, www.bbc.com/news/worldafrica-35526267.

¹⁸² https://www.icc-cpi.int/CourtRecords/CR2016_03167.PD

2.3.2.2 International Ad hoc Jurisprudence

The Statutes for the ICTR¹⁸³ and ICTY¹⁸⁴ incorporate victim and witness protection within their rules of procedure and evidence. Provisions include in camera hearings and the protection of a victim's identity. The tribunals have also established witness protection programs that continue to be a source of important lessons learned for witness protection programs globally. Since the closure of the ICTY and the ICTR, the UN Mechanism for International Criminal Tribunals has overseen continued witness protection through its witness support and protection units in Arusha and The Hague.¹⁸⁵

2.3.2.3 Specialised hybrid International Jurisprudence

The Statute establishing the Special Court for Sierra Leone (SCSL) states that: The Registrar shall set up a Victims and Witness Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.¹⁸⁶ Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC). The ECCC has a Victims' Unit, which has responsibility for [...] the safety and well-being of victims who participate in the proceedings. This involves ensuring that victims properly understand the risks sometimes inherent in such participation, as well as providing them with protective measures and other assistance, like psychosocial support.¹⁸⁷

2.4 Promising Practice of Various Jurisdictions

This section examines jurisdictions that appear to have effective witness protection programmes and which are reflective of international best practices, including the witness protection programme of the USA, Australian, South African and Kenyan programme. These

¹⁸³ Statute of the International Tribunal for Rwanda, 33 I.L.M. 1598 (1994); and adopted by the United Nations Security Council on 8 November 1994, UN Doc. S/Res/955, Article 21.

¹⁸⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by Security Council on 25 May 1993, UN Doc. S/Res/827, see also UN Doc. S/25704, p. 36, Annex (1993) and S/25704/Add.1 (1993), Article 22

¹⁸⁵ The UN Mechanism for International Criminal Tribunals, Witnesses, www.unmict.org/en/about/witnesses.

¹⁸⁶ Statute of the Special Court for Sierra Leone, established pursuant to United Nations Security Council resolution 1315 of 16 January 2002, UN Doc. S/Res/1315 (2000), Article 16(4).

¹⁸⁷ Website of the Extraordinary Chambers in the Courts of Cambodia, www.eccc.gov.kh/english/victimsunit.aspx.

jurisdictions are highlighted because they are the only global countries with a well-established witness protection programme. The legal systems, socioeconomic contexts, and crime landscapes of these countries are different from those of Ethiopia. These distinctions are acknowledged, and the goal of the discussion is not to suggest that we replicate any programme, but rather to identify what may assist Ethiopia in enhancing protection mechanisms consistent with our state's constitutional obligations. Additionally, factors or characteristics of the programmes which pose a challenge to the safety of witnesses may also be highlighted. The aim is to glean lessons which may inform Ethiopian's response to the protection of witnesses in organized crime, terrorism and corruption cases.

2.4.1 United States of America

The US Federal Witness Security Program (WITSEC) was the first and the oldest witness protection programme in the world. And also it is a prime example of a national witness protection programme.¹⁸⁸ For over 30 years, the US Marshals Service has been operating the WITSEC program. Its core feature is the secret and permanent relocation, often coupled with an identity change, offered to witnesses and their immediate families.¹⁸⁹ WITSEC has become as the 'paradigm program' and a model for the prosecution of organised crime in many jurisdictions, including Canada and Australia. Both of these countries operate similar federal programs, coexisting with those set up by individual provinces or states.¹⁹⁰ Protection measures envisaged under this instrument include: (i) legal assistance for witness's participation in the criminal or administrative proceedings; (ii) the concealment of their identities; and (iii) protection of their working conditions.¹⁹¹

A key feature of the WITSEC is that it provides the witnesses and their families with a Memorandum of Understanding in total secrecy. The witness and his/her family are then relocated temporarily to a new location and are provided with temporary employment and money to survive.¹⁹² The Attorney General is empowered under the program to administer

¹⁸⁸ Public Safety Canada, Witness protection programs in selected countries, research brief no. 43, www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rgnzd-crm-brf-43/rgnzd-crm-brf-43-eng.pdf.

¹⁸⁹ Earley, P. and Shur, G. *WITSEC: Inside the Federal Witness Protection Program*, Bantam Books, February 2002:359:5.

¹⁹⁰ US Code, Section 3521. Although the foundation for the Witness Security Program was authorized by the *Organized Crime Control Act of 1970*, the program was established under Part F of Chapter XII of Public Law 98-473, enacting provisions under this section, may be cited as the '*Witness Security Reform Act of 1984*.'

¹⁹¹ http://www.oas.org/juridico/english/draft_model_report accessed at 23/04/2017

¹⁹² Jaggi R 'Witness Protection' (2020), available at https://heinonline.org/HOL/Page?handle=hein.journals/supami18&div_81&g_sent_1&casa_token_&collection_journals (accessed 12 July 2022).

and grant protection to the potential witness. The program offers protection like physical protection, identity protection, relocation of witnesses, providing accommodation, financial assistance etc. to the witness of his close associates.¹⁹³ The secrecy around the relocation of the witnesses and their families is vital to their successful protection. It is equally important that they are afforded adequate material support to survive while they are under protection as efforts to sustain themselves may also compromise their safety.

Therefore, the US programme has been instrumental in organised-crime cases, such as those relating to mafia activities.¹⁹⁴ Particular attention was originally paid to the discretion of the attorney-general in imposing protective methods. Under the 1970 legislation poorly delivered promises and erratic assistance ended in tragedy on occasion.¹⁹⁵ The competing public interests of an accused's right to a fair trial and the protection from harm of witnesses are critical to the debate on witness protection. Despite even the threat of death, US citizens have a legal obligation to provide testimony in civil and criminal proceedings.¹⁹⁶

As compared witness protection interventions of Ethiopia to USA's initiatives, Ethiopia has no clear, consistent and comprehensive witness protection programme.¹⁹⁷ There is only Witness Protection Coordination Office in charge of calling witnesses and trying its level best despite human resource, expertise, technology and logistic challenges.¹⁹⁸ Consequently, there is poor coordination, poor resource allocation, and poor records management system with regard to the total number of the eligible witnesses benefited as per the existing witness protection law.¹⁹⁹

2.4.2 Australian Witness Protection

Witness protection is not a novel idea in Australia. In 1981, the Australian Federal Police ('AFP') provided witness protection to Australians.²⁰⁰ The Australian Royal Commission in 1983 emphasised the importance of empowering lower-level players to assist in the fight

¹⁹³ H. Suresh, *New Law Needed for Witness Protection*, *Combat Law*, Vol. 4, Issue 1, April-May 2005.

¹⁹⁴ JO Finckenauer, *La Cosa Nostra in the United States*, 12 June 2007, www.ncjrs.gov/pdffiles1/nij/218555.pdf.

¹⁹⁵ Raneta Lawson Mack, *Lying, cheating and stealing at government expense: Striking a balance between the public interest and the interests of the public in the witness protection program*, *Arizona State Law Journal* 24 (1992), 1429–59, and 1431.

¹⁹⁶ Douglas Kash, *Hiding in plain sight: The witness security program is a critical weapon in the war on crime*, *FBI Law Enforcement Bulletin* 73(5) (2004), 25-32, 27.

¹⁹⁷ Respondent Mr. D's response to the Questionnaire, 25th March 2023.

¹⁹⁸ *Ibid*

¹⁹⁹ *Ibid*

²⁰⁰ Clifton S 'The Law on Witness Protection in Kenya: Whistle-blower's refuge or just pipe dream?' (2020) 90.

against organised crime, and those lower-level players should be offered incentives.²⁰¹ This approach is different from the USA, where only witnesses in ‘extremely important’ cases may be offered protection. However, in the Australian context, there was no uniform approach to the protection afforded to witnesses. During the 1980s, it was the responsibility of each police force to arrange witness protection for its jurisdiction, and approaches varied, with some police forces requiring 24 hour protection, while others preferred the relocation of witnesses under new identities.²⁰² The level of protection and therefore the safety of a witness thus depended on the jurisdiction under which they fell.

An investigation into witness protection in Australia was undertaken by the Parliamentary Joint Committee on the National Crime Authority in 1988.²⁰³ The literature does not indicate what occasioned this investigation, but it is the government that initiates all inquiries and reviews into witness protection programs.²⁰⁴ As previously discussed, witness intimidation is a major problem as it deprives investigators and prosecutors of vital evidence and Australia is not an exception. Despite Australia's recognition of witnesses' importance in its judicial system, there are few scholarly works on this subject; however, whistle-blower protection literature appears to be common.

For the purpose of protecting witnesses in criminal proceedings, the Australian Parliament enacted the Witness Protection Act (‘WPA’), of 1991.²⁰⁵ According to section 3(1) of the WPA, 1991, a witness is someone who has offered or will offer testimony for the Crown in proceedings before various authorities and is in need of state protection or assistance.²⁰⁶ This definition alone gives the impression that witness protection may be available to anyone who is at risk of harm. Furthermore, section 3A of the Act establishes the Victorian Witness Protection Programme (‘VWPP’), wherein the Chief Commissioner of Police is empowered to protect witnesses and their families.²⁰⁷ Protection may include providing a new identity to the witness, relocating the witness to another location, and providing new housing and

²⁰¹ Jayasankar K ‘Right of Witness Protection: A Comparative Overview’ (2012) 75.

²⁰² Jayasankar (2012) 75.

²⁰³ Australian Federal Police ‘Witness Protection’ (2012) 2, available at <https://www.afp.gov.au/sites/default/files/PDF/Reports/witness-protection-annual-report-2011-12.pdf> (accessed 18 March 2022).

²⁰⁴ Neil K.P ‘A critical examination of witness protection in Australia’ (2014) 84.

²⁰⁵ Rahangdale P ‘Witness Protection: A Comparative Analysis of Indian and Australian Legislation’ (2019) 146.

²⁰⁶ Witness Protection Act 15 of 1991, Section 3(1).

²⁰⁷ Witness Protection Act 15 of 1991, Section 3A.

transportation facilities to him or his family.²⁰⁸ Section 3B of the Act further empowers the Chief Commissioner of Police to decide whether or not a witness will be protected under the VWPP.

Subsequent to the Witness Protection Act, 1991, the Witness Protection Act 1994 ('WPA') was drafted in response to the recommendation of the Parliamentary Joint Committee on the National Crime Authority that the Australian Federal Police ('AFP') perform an expanded national witness protection role.²⁰⁹ Prior to the implementation of the Australian Government's Witness Protection Act in 1994, the AFP and state police provided witness protection, including 24-hour protection, routine police attention, relocation, and identity changes for witnesses, but there was no uniform approach to the level and type of protection that witnesses could expect across the different states.²¹⁰

Witness Protection Act 1994 ('WPA') established the National Witness Protection Program ('NWPP').²¹¹ Foreign witnesses may be eligible for inclusion in the NWPP, but they may have to live outside their country of origin while awaiting trial or afterward.²¹² This is a critical feature because foreign nationals are sometimes involved in or are witnesses to organized crime. It is thus encouraging that Australian legislation expressly recognizes this. Foreign nationals would otherwise be extremely vulnerable and may be reluctant to testify against powerful perpetrators.

According to the WPA, the Commissioner of the AFP is responsible for maintaining the NWPP²¹³ and is further authorised to expel and put witnesses under the NWPP, and the Act further required that a registry of current or former NWPP participants must be created.²¹⁴ It is common for NWPP participants to be accepted into the programme, because they have previously testified in investigations into organised crime, drugs, or corruption.²¹⁵ To be admitted to the programme, the witness needs to reveal a great deal about him/herself. Among the information included are his outstanding legal obligations, criminal history, financial liability, and asset information.²¹⁶ This detail are considered when deciding whether

²⁰⁸ Rahangdale (2019) 146.

²⁰⁹ Australian Federal Police 'witness Annual Report 2011-12' (2012) 6.

²¹⁰ Clifton (2020) 91.

²¹¹ Shirali, A.M 'A Critical Study of Impact of Hostile Witness on Administration of Criminal Justice System In India- With Special Reference to the State of GOA' (2020) 74.

²¹² Australian Federal Police 'witness Annual Report 2011-12' (2012) 6.

²¹³ Australian Federal Police (2012) 6.

²¹⁴ Dhondge P 'Australia's Witness Protection Law: Analytical Analysis' (2020) 99.

²¹⁵ Australian Federal Police 'witness Annual Report 2018-19' (2019) 196.

²¹⁶ Chhatwani N 'Witness protection in india' (2020) 8.

to include a witness in the NWPP.²¹⁷ The commissioner is solely responsible for determining if a witness will be included in the programme.²¹⁸ It is also the responsibility of the police to use the Witness Protection Act 1991 primarily to protect a person. For example, putting someone under the witness protection program for the purpose of obtaining suppression orders would undermine the purpose of the scheme and, would breach the state's duty to protect.²¹⁹

The Federal government in Australia has state and territory governments in the driving seat for many aspects of law making, including those related to law and order. Due to the constitutional division of law-making power in Australia, the Commonwealth along with the states and territories established nine separate witness protection programmes.²²⁰ The Crime and Misconduct Commission administers the witness protection programme in Queensland, Australia, which also investigates and protects public sector integrity.²²¹ It has been submitted that it is typical that the, legislation-based Witness Protection Programmes have comprehensive management guidelines.²²² While witness protection schemes in Australia are generally consistent, they are not always managed the same way. The State Police in Victoria, South Australia, and Western Australia provide witness protection, with the Chief Commissioners acting as the 'approved authority' for witness protection.²²³ A witness protection programme in Queensland, on the other hand, is governed by the chairperson of the Crime and Misconduct Commission. It should be noted, however, that these officers are normally police officers trained in witness protection.²²⁴

Due to the division of power mandated by the Australian Constitution, witness protection has become increasingly problematic across different jurisdictions, contributing to both a lack of

²¹⁷ Australian Federal Police 'witness Annual Report 2018-19' (2019) 196.

²¹⁸ Chhatwani (2020) 8.

²¹⁹ Victoria State Government 'Review of the Witness Protection Act 1991' (2016) 9, available at https://files.justice.vic.gov.au/2021-06/review_of_witness_protection_act_1991.pdf (accessed 20 July 2022).

²²⁰ Monterosso S 'Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?' (2022), available at <https://link.springer.com/content/pdf/10.1007/s10609-022-09438-4.pdf> (accessed 13 July 2022).

²²¹ Dandurand (2010) 15.

²²² Dandurand (2010) 38-39.

²²³ Dandurand (2010) 37.

²²⁴ Dandurand (2010) 37.

consistency and vulnerabilities in domestic witness protection as a result.²²⁵ As a consequence of the diverse witness protection legislation enacted by the Commonwealth and states and territories, there are inconsistencies between these jurisdictions as it pertains to witness protection programming and legislation.²²⁶ As a result of the lack of uniformity, the witness protection regime in Australia is uneven and vulnerable.²²⁷

On the contrary, according to the AFP Annual report of 2011-12, although there has been some intimidation attempted within the precincts of the court in the past, no instances of direct physical assault were reported against NWPP participants during the period of reporting.²²⁸ Furthermore, according to the AFP Annual report of 2017-18 report, a single avoidable incident was recorded, but no one was injured.²²⁹

One of the key lessons that Ethiopia has witness protection law, proclamation number 669/2010, but it has no comprehensive guidelines aimed to address all of the administrative challenges Witness Coordination Unit of Federal Attorney General has been facing. The Office is located in the premise of Attorney General and it has no branch offices in FDRE regional states. Therefore, the presence of dedicated bureau of witness protection and its presence in every region in Australia and the presence of detailed guidelines are among the best practices and lessons Ethiopia shall learn from Australian. It is also clear from the preceding discussion that it is critical to ensure that witness protection laws are consistently applied to avoid discouraging witnesses from testifying.

2.4.3 South African Witness Protection

South Africa is regarded as the continent's pioneer in witness protection and, of all African countries, has the most developed national level mechanism for protecting witnesses. The South African Office for Witness Protection (OWP)²³⁰ is an independent, covert body tasked with fulfilling the functions of witness protection.²³¹ Its enabling legislation emanated from recommendations made at the Truth and Reconciliation Commission following the end of apartheid.

²²⁵ Monterosso S 'Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?' (2022), available at <https://link.springer.com/content/pdf/10.1007/s10609-022-09438-4.pdf> (accessed 13 July 2022).

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Australian Federal Police (2012) 4.

²²⁹ Australian Federal Police 'witness Annual Report 2017-18' (2018) 38.

²³⁰ The OWP was established in terms of the Witness Protection Act 112 of 1998.

²³¹ C Mahony, *supra note*, 62

Before 1992, South Africa did not have any witness protection programme.²³² However, the Criminal Procedure Act made provision for witnesses to be placed in ‘protective custody’.²³³ Following 1992, a few different programmes were established to ensure that witnesses were protected in particular circumstances and where they were associated with specific investigations or Commissions of Inquiry.²³⁴ The national witness protection programme was established in 1996 by the Department of Justice under the national crime prevention strategy. The Witness Protection Act 1998, which came into effect on 31 March 2000, provided the legal framework,²³⁵ and the programme received operational and administrative support from the South African Police Service (SAPS) in the nine South African provinces. This was the foundation of the current WPU and most of the operational staff employed in 1996 still work in the programme. State and prosecution interests appear to have usurped those of the South African citizenry in the act's construction, despite its relatively progressive nature.

The 1998 legislation creates an Office for the Protection of Witnesses under the authority of the minister of justice and constitutional development, reporting to the director-general of justice.²³⁶ However, due to cost constraints the office did not begin operations as an independent entity. Instead, in 2001 the office was renamed the Witness Protection Unit and relocated to the National Prosecuting Authority (NPA). The unit now reports to the national director of the NPA via a deputy director. Its new structure is illegal under the Witness Protection Act, which requires the director to report to the minister of justice and to function according to ministerial direction.²³⁷

South Africa's witness protection unit ('WPU') has led the way with regard to witness protection in Africa.²³⁸ In 1998, South Africa became the first African country to introduce a

²³² Irish J, Magadhla W, Qhobosheane K & Newham G ‘Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa’ (2000), available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.511.7528&rep=rep1&type=pdf> (accessed 20 April 2021).

²³³ Irish, Magadhla, Qhobosheane & Newham (2000), available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.511.7528&rep=rep1&type=pdf> (accessed 20 April 2021).

²³⁴ Irish, Magadhla, Qhobosheane & Newham (2000), available at <http://www.csvr.org.za/docs/policing/testifyingwithoutfear.pdf> (accessed 16 December 2020)

²³⁵ Witness Protection Act 1998 (Act 112 of 1998), Cape Town: Government Gazette 19523.

²³⁶ Ibid, sections 2–3.

²³⁷ Ibid, section 3(2).

²³⁸ Mahony C ‘The justice sector afterthought: Witness protection in Africa’ (2010) 95.

comprehensive witness protection law.²³⁹ The witness protection programme was established as a responsive plan of action by the government to support witnesses and victims of crime and organised crimes.²⁴⁰ South Africa remains the continent's standard-setter in witness protection with a formal witness protection programme. In addition, South Africa provides mentorship and training to fellow African countries that wish to set up protection programmes.²⁴¹ Mahony opines that witnesses of crime in South Africa are often threatened by the increase in organised crime and gang groupings trends.²⁴² Realistically, their safety may be threatened by some of the most powerful and sophisticated criminal networks and gangs.

In 1998, *South Africa enacted the Witness Protection Act 112 of 1998 ('WPA')*.⁹⁸ It provides measures to protect witnesses and provides the application process and factors to be considered in deciding whether or not a witness should be placed under protection. South Africa's witness protection programmes have come a long way, from holding witnesses in similar conditions as remand detainees to providing support services, to cater for psychological and physical needs of witnesses. These services extend to approve daily visits from doctors, legal practitioners and visitors, and safe accommodation at a secret location.²⁴³

In terms of section 7 of the WPA, a witness who is concerned about his safety or that of his family members can apply for witness protection.²⁴⁴ Witness Protection is voluntary as a witness cannot be compelled to join or apply to a programme.²⁴⁵ A witness who feels threatened must report his/her fears to the investigating officer (detective) in the case in which he/she is testifying, the station commander or anyone who is in charge at any police station, if he/she is in prison, then he/she must report to any person in charge of the prison or

²³⁹ Njeri J 'Witness protection: the missing cornerstone in Africa's criminal justice systems' (2014), available at <https://issafrika.org/iss-today/witness-protection-the-missing-cornerstone-in-africascriminal-justice-systems> (accessed 15 November 2021).

²⁴⁰ Mphaphuli L 'Experiences and Challenges of Witnesses in The Witness Protection Programme In South Africa: Guidelines For Coordinated Service Delivery Developed From A Social Work Perspective' (2020) 63.

²⁴¹ Ibid (2020) 64

²⁴² Ibid

²⁴³ Doorewaard C & Minnaar A 'Witness protection: A "hit-or-miss" situation' (2017) 34, available at https://journals.coza.ezproxy.uwc.ac.za/docserver/fulltext/servamus_v110_n3_a10.pdf?Expires=1608415532&id=id&accname=58219&checksum=A14FB55BD7C2EC8A4DBAF4220E55B5EA (accessed 20 December 2020).

²⁴⁴ Witness Protection Act, Section 7.

²⁴⁵ 'Getting Witness Protection' (2019), available at <https://www.westerncape.gov.za/service/gettingwitness-protection> (accessed 20 December 2020).

a registered social worker at the prison, or the public prosecutor in the case in which he/she is providing evidence or any member of the Witness Protection Unit.²⁴⁶

Generally the experience in South Africa reveals that a centralized, single witness protection agency in a Government ministry (for example the Ministry of Justice) can offer a greater guarantee of effective witness protection and help prevent failures resulting from incompetence or corruption. Such a centrally organized and administered agency should have its own budget, adequate funding, a central secure database, including data on the witnesses participating in protection programmes nationwide, and safe houses. It is also advisable to set up a specialized police unit responsible for carrying out the protection measures, because the use of normal police units on an ad hoc basis can compromise the integrity of the programme and prevent it from accumulating the necessary expertise. Finally The South African Office for Witness Protection is an independent, covert body tasked with fulfilling the functions of witness protection.

The South African witness protection system has several limitations. The Witness Protection Unit (WPU) is not autonomous in accordance with both international best practice and the Witness Protection Act.²⁴⁷ There is a risk of inefficiency, considering that despite a dramatic budget increase, the number of protective personnel handled by the WPU has decreased due to inefficient management, confidentiality related problems and related reasons.²⁴⁸ Focusing on high value accused might explain greater capacity requirements to secure the few who are gravely threatened. Most disconcerting is a lack of psychosocial management and the fact that WPU objectivity is being compromised due to the location of the unit within the NPA.²⁴⁹ This shows that the unit is reliant on information provided by applicants and the prosecution.²⁵⁰

Here it has to be noted that Ethiopia can draw good lessons from South African Witness Protection interventions. This is especially true in the areas of establishing dedicated and neutral Witness Protection Unites and allocating sufficient budget. Institutionalizing effective management system and maintaining administration independence to Witness Protection Office are key things to Ethiopia in order to improve witness protection system learning from the weaknesses of South African Witness Protection Programme.

²⁴⁶ Witness Protection Act, Section 7.

²⁴⁷ Ibid

²⁴⁸ Supra Note 58, p. 89.

²⁴⁹ Ibid

²⁵⁰ Ibid

2.4.4 Kenyan Practice

Kenya followed South Africa's example and revised its Witness Protection Act of 2006, then again in 2010, thereby adopting witness protection legislation that establishes an independent agency tasked with protecting witnesses.²⁵¹ The Witness Protection Act 2006 came into force in September 2008, with the unit commissioned on 3 March 2009, its terms of reference and functions delegated by regulations. The unit composed its initial regulations itself. The regulatory and legislative amendments have been compiled with assistance from the UNODC.

One of the key provisions of the Witness Protection Act 2006 provides for anonymity and criminalises disclosure of witness identity or location.²⁵² Another critical provision granted the attorney-general 'sole responsibility' for decisions on admission.²⁵³ However, the Witness Protection (Amendment) Bill 2010 that was recently passed by parliament removes the programme from the office of the attorney-general, creating a witness protection agency.²⁵⁴ The amendments also: confer the attorney-general's powers in terms of the 2006 act to the witness protection agency's director, give the director admission responsibility, and create a witness protection advisory board to approve the unit's budget and advise on the exercise of agency power.²⁵⁵ The board would comprise the ministers of justice and finance, the director-general of the National Security Intelligence Service, the police commissioner, the prisons commissioner, the director of public prosecutions, and the chairperson of the Kenya National Commission on Human Rights (KNCHR).²⁵⁶ The amendment bill also establishes a compensation fund for victims of crime committed by witnesses while under protection, and a witness protection appeals tribunal comprising a high court judge and two experts who will review grievances relating to non-admission of witnesses and the termination of protection.²⁵⁷ The 2006 act empowers the chief justice to make accompanying in-court rules of procedure

²⁵¹ Njeri (2014), available at <https://issafrica.org/amp/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justicesystems> (accessed 17 December 2020).

²⁵² Republic of Kenya, Witness Protection Act 2006 (Act 16 of 2006), Nairobi: Kenya Gazette 3513, sections 24, 30, <http://www.kenyalaw.org> (accessed 5 February 2009).

²⁵³ Ibid, section 5.

²⁵⁴ Mathenge, House to amend witness act; Republic of Kenya, Witness Protection (Amendment) Bill 2010, 5 February 2010,

<http://www.kenyalaw.org/Downloads/Bills/2010/ THE%20WITNESS%20PROTECTION%20BILL,%202010.pdf> (accessed 12 March 2010).

²⁵⁵ Republic of Kenya, Witness Protection (Amendment) Bill 2010, Sections 7–27, 3P.

²⁵⁶ Ibid, section 3I.

²⁵⁷ Ibid, sections 3I, 3U

and evidence.²⁵⁸ The penal code prescribes a three-year sentence for witness intimidation,²⁵⁹ specifically criminalised for sexual offences by the Sexual Offences Act, which also provides for witness anonymity and other protective measures.²⁶⁰

The current absence of any admission decision review mechanism is of concern. Another concern is the long- and short-term ambiguity of protective provision. The witness protection director cites the regulations as the most instructive operational framework for unit function, despite the importance of a protection mechanism enshrined in law.

Kenya's Witness Protection Agency (WPA)²⁶¹ provides special protection to people with important information who face potential risk or intimidation as a result of cooperating with prosecution and other law-enforcement agencies.²⁶² The functions of the WPA include establishing and maintaining a witness protection programme, determining criteria for admission to and removal from the programme, and determining the type of protection measures to be applied.²⁶³ The agency operates as an independent entity and has an advisory board, which provides general oversight. The WPA has made some concrete steps towards facilitating the implementation of its mandate and objectives.²⁶⁴ For instance, Kenya's Witness Protection (Amendment) Bill (2016) is aimed at aligning the witness protection framework with the Kenyan Constitution, and achieving compliance with other legal instruments and emerging good practices in witness protection worldwide. The WPA has also drafted witness protection rules of court.²⁶⁵ In addition; the agency collaborates internationally and engages with countries such as South Africa and Israel, among others, to promote international good practices.²⁶⁶

Kenya provides similar obstacles but to a varying extent. The current Kenyan disposition towards justice appears to repudiate serious investigation and prosecution of those in the state

²⁵⁸ Republic of Kenya, Witness Protection Act 2006, section 35–36.

²⁵⁹ Republic of Kenya, Kenya Penal Code 1960 (Act 54 of 1960), Nairobi: Kenya Gazette, section 238, chapter 63, <http://www.kenya law.org> (accessed 5 February 2009).

²⁶⁰ Republic of Kenya, Witness Sexual Offences Act 2006 (Act 3 of 2006), and Nairobi: Kenya Gazette, section 31, <http://www.kenyalaw.org> (accessed 05 February 2009).

²⁶¹ The WPA was established under the Witness Protection Act (Cap. 79 Laws of Kenya) and amended by the Witness Protection (Amendment) Act 2 of 2010.

²⁶² Interview with representative of the Kenyan WPA, 29 January 2016.

²⁶³ Ibid

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

sector, particularly the security forces, parliamentarians and their associates. Instruments of political manipulation remain deployed within the justice system, which prevents the prosecution of such personnel. The creation of a donor supported witness protection programme which initially targets crime of a non-politically sensitive nature would establish the protective framework for prosecution of more politically sensitive crimes upon reform of the criminal justice system. It would also allow organised militia groups and criminal syndicates to be more easily confronted through the criminal justice process.

Finally, the practices in the USA, WITSEC paved the way for other countries to implement witness protection programmes. From as early as the 1970s, witness protection programs were available in the United States, but the programs have not reached their full potential. There were no injuries or deaths reported among witnesses during the reporting period in the United States, Australia, South Africa and Kenya. However, no witness protection programme is perfect, nor a hundred per cent effective. Despite the unique challenges that every country faces, Ethiopia can certainly benefit from the experience of these other countries.

2.5 The Scope of the Right to Confrontation and Protection Witness

The right to a fair trial is the linchpin of the criminal justice system. The general right to a ‘fair trial’ is enshrined in the UDHR,²⁶⁷ and the regional human rights conventions,²⁶⁸ as well as in humanitarian law instruments. A fair balance between rights means a full respect to the rights of the accused and due regard for the protection of witnesses. According to Alemu Meheretu & Awol Alemayehu, the scope and nature of the right to confrontation²⁶⁹ has been subject to debate with some treating it narrowly while others conceiving it broadly. However, there seems a general consensus that the right to confrontation is part of the right to a fair trial and is not a single right as such; rather it comprises of “a bundle of related but separate rights.”²⁷⁰ Albeit with variations among the list of such underlying rights, the right to

²⁶⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III) preamble, U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html> [hereinafter Universal Declaration].

²⁶⁸ American Convention of Human Rights, (1978) 1144 UNTS 123, Article 8; ECHR (1955), 213 UNTS 221, Article 6; African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev.5, Article 7; Convention on the Rights of the Child, GA Res. 44/25, Article 40, para.2

²⁶⁹ Alemu Meheretu & Awol Alemayehu ‘The Ethiopian Law on the Right to Confrontation’ *Bahir Dar University Journal of Law* Vol.9, No.2 (June 2019)

²⁷⁰ Ian Dennis, The Right to Confront Witnesses: Meanings, Myth and Human Rights, *Criminal Law Review*, Issue 4, (2010) p.270; Christine Holst, The Confrontation Clause and pre-trial hearings: A due process solution, *University of Illinois Law Review*, Vol.2010(2010), p.1601; Christine C. Goodman, Confrontation’s Convolutions, *Loyola University Chicago Law Journal*, Vol.47 (2016), p.819..

confrontation is generally believed to have the following three main components:²⁷¹ (a) the accused right to be tried in person, (b) the accused right to require witnesses testifying against him to appear in person while giving their testimony, and (c) the accused right to cross-examine adverse witnesses. In this sense, although many use them interchangeably, the right to confrontation is broader than the right to cross-examine adverse witnesses.²⁷²

Dean Wigmore's definition, this right of accused persons to examine witnesses testifying against them or the right to the opportunity of cross-examination is the right of confrontation.²⁷³ He noted that the right of confrontation is the right to the opportunity of cross-examination and also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanour on the stand.²⁷⁴ If the accused cross-examined his opponent's witness by confronting face to face, the eye contact and body language of the accused may make to him to testify truthfully. But, if the witness is anonymous and confrontation to him is prohibited eye contact and body language is not possible and there will not be effective cross-examination. Thus, the right of confrontation guarantees the opportunity for effective cross-examination. But this could not do without disclosing the witness to the defendant.

Witness protection has been a key concern of the international criminal system since the establishment of international criminal tribunals in the decade before the ICC.²⁷⁵ The ICTY and ICTR have incorporated in their statutes an explicit call for the protection of victims and witnesses, alongside respect for the rights of the accused. Therefore, protection should be made without jeopardizing the right of accuser/defender.²⁷⁶ In the UNCAC, protection measures are mandatory for crimes covered by the convention, but only when appropriate, necessary, without prejudice to the rights of the accused/defendant and within the means of the state.²⁷⁷ As a result, the obligation to provide effective protection is limited to specific

²⁷¹ *Ibid* (Ian Dennis) (Adding, among others the right to public trial and the right to know ones accuser to the list of the rights); *Ibid* (Christine C. Goodman).

²⁷² Ian Dennis, *Supra* note 248, p.260.

²⁷³ Robert B. McKay, 'The Right of Confrontation', *Washington University Law Review*, volume/issue 2(1959), p.123

²⁷⁴ *Ibid*, pp.123-124

²⁷⁵ Witness Anonymity at the International Criminal Court: Due Process for Defendants, Witnesses or Both? *The Denning Law Journal* (2011), Vol. 23, Pp 29-46.

²⁷⁶ UNODC Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime (2008), [http:// www .unodc. org/documents /organizedcrime/ Witness-protection-manual-Feb08.pdf](http://www.unodc.org/documents/organizedcrime/Witness-protection-manual-Feb08.pdf)

²⁷⁷ *Ibid*

cases or specified conditions and officials have some discretion in assessing the level of threat and decide on protective measures accordingly.

To sum up, the right to confrontation is not without qualifications. Although the extent of restrictions vary across procedural systems, the following represent the most common restrictions on the right²⁷⁸: (1) Where witnesses are not available at trial due to valid grounds; (2) with a view to protect witnesses, including protection of anonymity and; (3) with a view to protect vulnerable victims and witness from retraumatization. Such limitations are grounded on the value of protecting legitimate interests. For instance, if we consider the last restriction, it is established that cross examination of vulnerable witnesses and victims such as child or mentally handicapped witnesses may mislead or confuse them to yield in undesirable results.²⁷⁹ This calls for measures tailored to their needs,²⁸⁰ such as protection of anonymity, regulating the nature of questions put to them, and questioning through intermediaries. Anonymity, as a protective measure, pretends to protect witnesses withholding their identities from the accused and his/her counsellor. As a consequence, two rights are in confrontation; the right of the victims to protection and the right of the accused to confrontation. The central question is whether anonymity can be granted as protective measure for witnesses without violates the right of the accused. It is the interest of justice to protect witness in order to prosecute the individuals allegedly responsible for the most serious crimes of international concern as genocide, crimes against humanity and war crimes. Procedural equality, adversarial process and disclosure of evidence, thus the ‘equality of arms’ (égalité des armes) requires a fair balance between the parties. The right to have an adversarial trial means ‘the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.’²⁸¹

2.5.1 Balancing between the Right to Confrontation and Protection of Witness

Protective and support measures for victims and witnesses participating in proceedings must be balanced with the rights of the accused to a fair trial. For example, granting full anonymity

²⁷⁸ See Stefan Trechsel, *Human Rights in Criminal Proceedings*, (Oxford: Oxford University Press, 2005), p.312.

²⁷⁹ Phoebe Powden et al, Balancing Fairness to Victims, Society and Defendants in the Cross examination of Vulnerable Witnesses: An impossible Triangulation?’, *Melbourne University Law Review*, Vol.37. (2014),p.539; Adrian Keane, Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re Professionalism *International Journal of Evidence and Proof* Vol.16, (2012), p.176–80; Schwikkard, “The Abused Child: A few Rules of Evidence Considered” *Acta Juridica* (1996), p.155.

²⁸⁰ See for example UN *Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime*, ESC

²⁸¹ Lubanga (ICC-01/04-01/06), Décision relative au système définitif de divulgation et à l’établissement d’un échéancier, Annexe I, Analyse de la décisions relative au système définitif de divulgation, 15, May 2006, para. 97

to victims and witnesses is a particular issue. There is a general principle that a conviction cannot be based solely or to a decisive extent on testimony of an anonymous witness, and the defendant must be able to put questions to an anonymous witness during testimony.²⁸²

In order to make a fair balance to the rights of the accused and the witness, it is important to adhere to the highest standards of international criminal justice, particularly to the fair trial rights provided in the human rights treaties such as ICCPR and ECHR.²⁸³ The balance of rights has to be interpreted carefully as long as there is no general privilege to protect fundamental human rights of the witness.²⁸⁴ While the right to a fair trial should be guaranteed, war criminals would never be tried before the international tribunals such as (ICTY, ICTR, ICC) and before national courts if it was not for the witnesses to testify.

The human rights jurisprudence recognises the protection of the confidentiality of victims and witnesses. The ICTs Statutes²⁸⁵ states that the accused shall be entitled to a fair and public hearing subject to Article 22 (the protection of victims and witnesses, including in camera proceedings and protection of the victim's identity). The limitation to a fair and public hearing has been interpreted by the defence in the Tadic case as an exception which is not relevant. In the perception of the ICCPR and the ECHR, the protection of victims and witnesses is not sufficient to set aside the right of the accused to a fair and public hearing.²⁸⁶

Within the human right's perspective, the protection of victims and witnesses is an acceptable reason to limit the accused's right to a public trial and grant anonymity when:

1. *There is a real fear for the safety of the witness and his or her family*
2. *The testimony of the witness is very important for the Prosecutor's case and have to be guarantee to the maximum protection*

²⁸² Commonwealth Secretariat, Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice Process, Meeting of Commonwealth Law Ministers and Senior Officials, Provisional Agenda Item 4(d), LMM(11)(14 July 2011 (hereinafter "Victim/Witness Best Practices Guide"), available at http://www.thecommonwealth.org/document/181889/34293/35232/238332/clmm_2011.htm.

²⁸³ Beqiri, R. Witness Protection in International Criminal Court, *Lund University Publications*, 2011, (Master Thesis JAMM04 2011 Sweden) (available online at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=2167029&fileId=2171585>), p.34.

²⁸⁴ Chile Eboe-Osuji, *Protecting humanity : essays in international law and policy in honour of Navanethem Pillay*, article of Segun Jegede "The right to a fair trial in International Criminal Law" Martinus Nijhoff, 2010, p. 547.

²⁸⁵ ICTY and ICTY Article 21 and 22

²⁸⁶ See Tadic Case, Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor, 10 August 2005. <http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm>.

3. *The lack of an effective or non-existence witness protection programme should be considered to grant anonymity.*

Moreover, the granting of protective measures has to be interpreted on the bases of the provisions of the Statute and Rules within the context of each case and situation. Therefore, just as the ICCPR and ECHR provide for the limitation of the right to a public trial to protect public morals, the Statute authorizes limits to the right to a public trial to protect victims and witnesses.

The Rome Statute and the Human Rights documents tend to balance the interests of the victims and witnesses with the rights of the accused without the affirmative duty to do so. Article 14 (1) of the ICCPR and Article 6 (1) of the ECHR²⁸⁷ state that everyone is entitled to a fair and public hearing. Nevertheless, both articles provide that the press and public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice. In all the cases it has to be the absence of certain public hearings is justified.²⁸⁸

The Court has also held that the right to publicity may not necessarily be violated if both parties to a proceeding consent to it being held in camera. (*Le Compte, Van Leuven and De Meyere v. Belgium*, decision of 23 June 1981, Series A no. 43, para. 59.) In general, the Commission and the Court consider whether one of the specific conditions listed on Article 6 (1) prevails before accepting that a given in camera proceeding has not been conducted in violation of that article. In a similar vein, this Trial Chamber must determine if one of the specific interests it has an obligation to consider, such as the protection of victims and witnesses, mandates a limitation on public access to information.

In general various international legal instruments, international jurisprudence and practices of world classics states have shown the existence of many types of witness protection methods effectively required for the purposes of successfully witness protection programmes. The methods are multifaceted which are some of protection methods such as personal security guard by police are easy to apply while some of them such as changing one's own personality and changing domicile of a person is very cost and difficulty to apply in developing countries like Ethiopia. Having this in our mind, the next chapter is invested for the Ethiopian perspective.

²⁸⁷ *Axen v. Federal Republic of Germany*, ECtHR, decision of 8 December 1983, Series A, No. 72.

²⁸⁸ *Ibid* p. 28

CHAPTER THREE

Witness Protection: Ethiopia Legal Framework

3.1 Introduction

This chapter address on the concept of witness protection within the context of Ethiopia and examined the existing legal framework for protecting witnesses. Here, the inadequacies in the legal framework comprising legislative provisions and jurisprudence cases were highlighted. Specifically, the CCI's Decision Cases, FHC Decided cases and FHC Cessation cases identified the legal and conceptual discrepancies regarding: the definition of witnesses as beneficiaries of protection; ascertaining the nature and type of crimes necessitating protection and determining the constitutionality or otherwise of procedural protective measures. Finally, the paper will introduce that Ethiopian laws have failed to put guidance on how to balance between protection of witness and accused right to confrontation.

3.2 FDRE Constitutionality Provisions

The objective of this thesis is to investigate and analyse the constitutionality of protection of witness 'and its impact on the relative interests of the accused rights to confrontation in Ethiopia. The FDRE constitution is the 'supreme law of the land'²⁸⁹ from which all laws in Ethiopia draw their legitimacy. The constitution of FDRE does not recognize with the concept of protection of witness. Therefore this provision FDRE constitution is helpful in debates concerning the constitutionality of existing witness protective measures in Ethiopia, particularly in balancing the need to protect witnesses against the accused rights to confrontation to a fair trial.

However the FDRE constitution, includes the right of accused persons for the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defense, and to obtain the attendance of and examination of witnesses on their behalf before the court, to confrontation, cross-examination, prepare a defense and fair trial are some of them.²⁹⁰ Thus the right of accused persons to cross-examination a witness testifying against them and confrontation is recognized by the FDRE constitution. This right FDRE constitution does not provide an exception to this right and it does not put any limitation to this right whether in specific or

²⁸⁹ FDRE Constitution, *supra note*, 16, Art 9(1)

²⁹⁰ *Ibid*, article20(4)

general limitation clauses. If the constitution wants an exception it would have stipulated an exception in a clear way like the right to a public trial. The right to a public trial is stipulated under article 20/1 of the FDRE constitution and the right to full access to any evidence presented against them, to examine witnesses testifying against them is stipulated under sub-article 4 of the same article. But this sub-article did not stipulate any specific limitation and the constitution do not have a general limitation clause. So the intention of the constitution-makers is clear that they intentionally and purposely leave from stipulating any limitation or exception to the applicability of this right.

3.3 Statutory Provisions under Various Legislations

In addition to FDRE constitution, Ethiopia enacted and draft various statutory legislation: Though they lack explicit provisions for a witness protection scheme. And some provisions of existing and proposed legislation offer some peripheral protection through witness confidentiality and witness support provisions. Consequently, the Parliament of FDRE has enacted several proclamations aimed to protect witnesses of the organized and complex crimes. Existing laws include: Ethics and Anti-Corruption Commission Establishment Proclamation No.235/2001, Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/ 2005, Anti-Terrorism Proclamation No.652/2009, Prevention and Suppression of Money Laundering and the Financing of Terrorism Proclamation No.780/2013, Revised Federal Ethics and Anti-Corruption Commission Establishment (Amendment) Proclamation No.883/2015, A Proclamation to Provide for the Crimes of Corruption, Proclamation No.882/2015: A Proclamation to Amend The Revised Anti-Corruption Special Procedure And Rules Of Evidence Proclamation, and the proclamation of whistleblowers and witness protection proclamation No.699/2010 are major laws enacted with aim to deter organized and complex crimes and to protect witnesses testifying against perpetrators of such crimes. Each of these laws specifically states the objectives behind their promulgation. For instance, the legal ground behind enacting whistleblowers and witness protection proclamation is to create conducive situations in order to ensure the safety and security of the public. This can be done by having criminal offenders brought to justice and sustain the right penalty, and to provide protection for witnesses and whistleblowers of criminal offences play a significant role for the prevention of crime by uncovering crimes that may cause serious threat to the public.²⁹¹

²⁹¹ WWP Proclamation, No. 699/2010, *supra notes* 8.

Therefore, the enactment, operationalization and institutionalization of the aforementioned proclamations, including witness and whistleblowers protection proclamation, puts law enforcement agencies and actors involved in criminal justice system in Ethiopia in a better situation to maintain security and safety of public by bringing offenders to justice and in the meantime providing the necessary protection to witnesses who testify against the perpetrators and cooperate to the justice system as well.

3.3.1 Criminal Procedure Code of Ethiopia

The criminal procedure code of Ethiopia does not give direct recognition to protection of witness. Other piecemeal rules include a provision in the Criminal Procedure Code that requires judges to deny bail if the suspect is likely to interfere with witnesses or tamper with the evidence.²⁹² Once again, the concern here is not the witness's security rather the preservation and integrity of his/her testimonial evidence. If the safety of the witness is protected as a result of the denial of bail, it is incidental. If there is any specific rule on the subject, it is only Article 444 of the Criminal Code which makes it a crime to assault, suppresses or harms "any person who gives information or evidence to justice authorities or is a witness in criminal cases".²⁹³

3.3.2 The Ethiopian Criminal Justice Policy

Ethiopia has introduced a new criminal justice policy in September 2011 with an aim to rectifying the age old problems of the criminal justice system and to introduce new legal thinking, practice and procedures in the Ethiopian criminal justice system.²⁹⁴ Creating a procedure for the use of witness protection program so as to provide fair and sustainable solution for crimes is part of the new legal thinking and practices given due attention under the newly enacted Ethiopian criminal justice policy.²⁹⁵ In addition, Ethiopian criminal justice policy introduced non-disclosure of criminal evidence for the protection of witness from reprisal or danger on security of witnesses. And the policy has given direction for its implementation, by stipulating that provisions protecting witness shall be added in laws like criminal procedure code and other related one. According to the policy, most of the time witnesses refuse to testify even though they know commission of a crime and who committed it; due to fear of reprisal or threat of intimidation. Thus, protecting witness is the must work

²⁹² ECPC *supra note*, 15, (1961), Art 67(c).

²⁹³ Criminal Code of Ethiopia (2005), Art 444.

²⁹⁴ Criminal Justice Policy of the Federal Democratic Republic of Ethiopia, 2011, Ministry of Justice, Addis Ababa, preamble (Translation mine).

²⁹⁵ Ibid

to be carried out. Under 3.19 of CJP, most of the time criminal justice fails due to lack of witness. This happens in most cases as witness refrain from testifying because of threat from offenders. So, if they are protected obviously justice would be served. In some cases the victims even fail to bring their cases to court as they face intimidation and threat from offenders or their relatives. To make sure victims bring their cases to justice overcoming fear of threat, the policy extended protection to victims of a crime. In order to have effective criminal prosecution especially for heinous crimes, there is a need to protect witnesses who testify against such criminals. Taking protection measure starts at the time of crime investigation; continues during proceeding and may extend after conviction. The policy has given direction for its implementation, by stipulating that provisions protecting witness shall be added in laws like criminal procedure code and other related one. Nowadays, Ethiopia has law that governs witness and whistle-blower protection.

3.3.3 Ethics and Anti-Corruption Commission Establishment Proc No. 235/2001

The Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 235/2001 was the first proclamation came to being with the idea of witness protection. The Proclamation put duty on the Commission to provide physical and job security protection to witnesses and whistle blowers.²⁹⁶ This proclamation simply made protecting witness and whistle-blower duty of Federal Ethics and Anti-corruption Commission without listing procedures for protection and kinds of protection measures that may be taken. Because of that, protection under this proclamation could be judged incomprehensive to guarantee the protection of witness and whistle-blower.

3.3.4 Revised Anti-Corruption Special Procedure and Rules of Evidence Proc No.434/2005

The amendment proclamation No. 434/2005 added witness protection and made reprisal against them illegal.²⁹⁷ Under Art 38 (2) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proc, No. 434/2005, also allows for non-disclosure of witnesses' identity to accused persons and public prosecutor may apply to court keep identity of witness in secret during preparatory hearing and if court authorizes, the identity of witness will be kept secret. This could serve as a means of witness protection; however, nothing is said as to how long the witness identity could be kept undisclosed or whether it could extend to normal

²⁹⁶ Federal Ethics and Anti-Corruption Commission Proclamation No.235/2001, Art. 7(16).

²⁹⁷ Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/ 2005, Art.53 (1).

hearing. Therefore, protection under this proclamation could be judged as not comprehensive enough to protect witnesses.

3.3.5 Anti-Terrorism Proclamation No. 652/2009

Anti-Terrorism Proc, No. 652/2009 also provides strict rules which prohibit disclosing/mentioning the name of the witnesses in any order, judgment or records related to the case.²⁹⁸ The first paragraph of the proclamation introduced the effectiveness criminal proceeding : WHEREAS, the right of the people to live in peace, freedom and security has to be protected, at all times, from the threat of terrorism; In addition to the Witness Protection Proclamation, we should add the Anti-terrorism law which authorizes the removal of witness information from court records (including the publication and dissemination of such information)²⁹⁹ and the admissibility of intelligence report involving terror (even if such report does not mention the source or method of information gathering)³⁰⁰ and hearsay evidence,³⁰¹ digital or electronic evidence,³⁰² evidence gathered through surveillance, information obtained through interception by foreign law enforcement bodies,³⁰³ a written confession and voice and video recording.³⁰⁴ The law does not provide guidance on how to weigh the probative value of these evidences and whether they are sufficient to make a case against the suspect.

3.3.6 Prevention and Suppression of Money Laundering and the Financing of Terrorism Proc, No. 780/2013

Art 20 of Prevention and Suppression of Money Laundering and the Financing of Terrorism Proclamation introduced that. Protection of Witnesses Where a court hearing a case of money laundering or financing of terrorism, on its own motion or on an application made by the public prosecutor or by the witness, is satisfied that the life of such witness is in danger, it may take the necessary measures to enable the withholding of the name and identity of the witness. The measures it takes may, in particular, include:1/ holding of the proceedings at a place to be decided by the court; 2/ avoiding of the mention of the names and addresses of the witnesses in its orders, judgments and in the records of the case; 3/ issuing of any directions

²⁹⁸ Anti-Terrorism Proclamation, 2009, *Federal Negarit Gazzeta*, Proc. No. 652, 15th year, no.57, Art. 32 [hereinafter cited as 'Anti-Terrorism Proclamation No.652/2009']

²⁹⁹ Anti-Terrorism Proclamation No. 652/2009, Art 32(1)(b).

³⁰⁰ Ibid, Art 23(1)

³⁰¹ Ibid, Art 23(2)

³⁰² Ibid, Art 23(3)

³⁰³ Ibid, Art 23(4)

³⁰⁴ Ibid, Art 23(5)

for securing that the identities and addresses of the witnesses are not disclosed; and 4/ ordering that all or any of the proceedings pending before the court shall not be published or disseminated in any manner.

3.3.7 Revised Federal Ethics and Anti-Corruption Commission Establishment (Amendment) Proc, No. 883/2015

The newly adopted FEACC Proclamation further includes provisions on plea bargaining and withdrawal of cases and charges.³⁰⁵ Protection of Witnesses and Whistle-blowers of Criminal Offences Proclamation No. 699/2010, the FEACC and Evidence Proclamations contain relevant provisions protecting witnesses and whistle-blowers. In practice, FEACC can apply for protective measures to be provided by the police, which have the necessary manpower. However, physical protections are rarely afforded in criminal cases due to the required coordination and the fact that retaliation is rarely detected or reported. Victims are expected to file reports to receive protection as whistle-blowers or to participate as witnesses in proceedings. Any person who believes he or she is the subject of a reprisal action as a result of having testified or reported may apply to the judiciary to have the measure suspended or reversed. However, it is noted that the existing protections do not extend to persons who report corruption in the private sector.

3.3.8 Prevention and Suppression of Terrorism Crimes Proc No. 1176/2020

Pursuant to, Article 16/1 of the Prevention and Suppression of Terrorism Crimes Proc, No. 1176/2020 also allows for withholding and non-disclosure of the names and identities of the witness.³⁰⁶ 1) Where the life, wellbeing of property of any person or his family is endangered for being a witness or whistle-blower of terrorist crimes, he shall be given protection in accordance with the Protection of Witnesses and Whistle-blowers of Criminal Offences Proc, No.699/2010. Art 12 Crimes Committed Against Whistle-blowers and Witnesses 1/ Whosoever interferes to prevent a person who may be whistle-blower or witness or who has evidence of crime provided under this proclamation from giving information or evidence to justice authorities or being a witness in an investigation or judicial proceeding by using sabotage, violence, threat or by extending undue advantage, by inducements or getting involved in any other way against such person or a person who has close relationship with him shall be punished with rigorous imprisonment from three years to seven years. 2/

³⁰⁵ Revised Federal Ethics and Anti-Corruption Commission Establishment (Amendment) Proclamation No. 883/2015 Protection of witnesses and reporting persons (arts. 32 and 33).

³⁰⁶ Proclamation No. 1176/2020, *supra note*, 17 Art 16.

Whosoever assaults, threats, suppresses or harms any person or a person who has close relationship with such person, who gave information or evidence to justice authorities or appeared as witness in an investigation or judicial proceeding of crime provided for in this Proclamation shall be punishable with rigorous imprisonment from three years to seven years.

3.3.9 Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proc No.1178/2020

Where the life or property of any person or his family is endangered for being a witness or whistle-blower of an offence stipulated under this proclamation³⁰⁷, protection shall be given in accordance with the protection of Witnesses and Whistle-blowers of Criminal Offences Proclamation No.699/2010. Article 14 proclamation deal that Offence Against Whistle Blowers or Witnesses 1/ Whosoever interferes to prevent a person who may be whistle-blower or witness or who has evidence of crime provided under this Proclamation from giving information or evidence to justice authorities or being a witness in an investigation or judicial proceeding by using sabotage, violence, threat or by extending undue advantage, by inducements or getting involved in any other way against such person or a person who has close relationship with him shall be punished with rigorous imprisonment from three years to seven years. 2/ Whosoever assaults, threats, or causes harms to any person or a person who has close relationship with such person, for the fact he gave information or evidence to justice authorities or appeared as witness in an investigation or judicial proceeding of crime provided for in this Proclamation shall be punishable with rigorous imprisonment from three years to seven years.

3.4 Protection of Witnesses and Whistle-blowers of Criminal Offences, Proc, No.699/2010

Nowadays, Ethiopia has witness and whistle-blowers protection Proc, No. 699/2010 states that protected persons (witnesses, whistle-blowers and their families who have entered into protection agreement with attorney general) will be protected by concealing their identity and ownership, change of identity, concealing their identity until the trial process starts and

³⁰⁷ Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No.1178/2020 Pursuant to Art 25 of the proclamation.

witness testifies.³⁰⁸ In the history of the states it is the only law that provides a comprehensive coverage on witness safety measures and programs.

Paragraph 3 of the preamble proclamation, the main objective of this proclamation is to create conducive environment for witness and whistleblowers in bring criminal offenders to justice. And to protect witnesses and whistle-blowers of criminal offense from direct or indirect danger, intimidation, threat and attack they may face as a consequence thereof and thereby to ensure their safety. Article 4 of this proclamation listed the types of protection measures. Among those measures not to disclose the identity of a witness until the trial process begins and the witness testifies is one of them.³⁰⁹ The other measure is hearing testimony behind the screen or by disguising identity.³¹⁰ This legislation applies to all crimes punishable with rigorous imprisonment for ten years or more (regardless of the minimum prison term threshold) or with capital punishment.³¹¹ The Proclamation puts preconditions before anonymity is granted. The conditions are, first, the offence must be such that it cannot be proved by a means other than the testimony of the witness or information from the whistle-blower requiring protection and, second, there is reason to believe that a threat of serious danger exists to the life, physical security, freedom or property of the witness or his family. Protection measures that could be applied to protected person or families are listed in the proclamation. The majors are: physical protection of person and property, relocation, concealing identity and change of identity. There are more measures that could be taken in protecting a person.³¹²

The proclamation is applicable to witness who wishes to give testimony or whistle-blower who gives information on suspect punishable with ten or more year's rigorous imprisonment or with death. The proclamation put two grounds under which witness is protected. One is where offence may not be revealed without the testimony of the witness or whistle-blower's information. The other is existence of serious danger to the life, physical security, freedom or property of the witness or whistle-blower or their respective family. The proclamation serves as both substantive and procedural law. In the 1st and 2nd part, issues like who could be protected? What kinds of protection measure may be taken? Criteria used to determine

³⁰⁸ WWP Proclamation, No. 699/2010, *supra notes*, 8

³⁰⁹ *Ibid*, article 4/1/h/

³¹⁰ *Ibid*, article 4/1/j/

³¹¹ *Ibid*, Art 3(1)

³¹² *Ibid*, Art. 4

necessary protection measures are broadly dealt. In this regard, the proclamation has established legal framework even though its protection is not quite broad.

Therefore, all though statutory provisions and the current witness protection proclamation and rules provided above are aimed at protecting witnesses who would be putted in an overwhelmingly intimidating position and to encourage daring witnesses who would help on finding the truth; the rules made it very difficult for the defendant party and his lawyer who, in normal course of things, would have a chance to get the name of the witness to study the credibility of the witness or even the capacity of the witness to stand in the witness box. One could also have the audacity to argue that witness protection rules which conceal the identity of the witness at all times or those rules which orders concealing the identity of the witness until the start of the trial process or giving of testimony would seriously narrow the defendant's right to prepare defence or argument which would help to discredit credibility of the witness, reliability of his testimony or the very capacity of the witness of the witness to testify.

3.5 Ethiopia Jurisprudence on Witness Protection

Legislative protection is not an end by itself, unless it has to be reinforced by judicial application in case where there is balancing between the two competing interests of protection of witness and accused right to confrontation. The study after briefly touching on court practice in general in relation to the dealing with the issues of protection of witness and relating interest of accused right to confrontation, this thesis provides a summary of select decided cases by the CCI's Decision Cases, the FHC and cessation cases by the FHC cases and analyses them to identify their implications on the issue. Though those above proclamations stated those types of protection measures different practitioners, professionals, accused persons, and academicians claim that this type of measure is the non- disclosure of witnesses' identities and in effect, it is unconstitutional and violates the fundamental rights of the criminal defendants. To the worst of all, it is shown also in the practice in interpreting and applying those provisions in a very wide sense by devoting the principle of criminal law should be interpreted narrowly.

3.5.1 The Jurisprudence of the Council of Constitutional Inquiry

According to Tadesse Melaku: *The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview*.³¹³ The FHC Lideta Division also submitted a case to the CCI for constitutional interpretation. But the CCI gives a decision that non-disclosure of witnesses' identity is constitutional and it does not violate the rights of the accused person to cross-examine a witness testifying against him. The witnesses of the public prosecutor should be also protected from the danger which comes from the accused persons or his relatives. The issue arises, however, regarding the legal and constitutional legitimacy of the witness protection for the criminal accused before the time of trial or at the time of trial by different proclamations and the practices such as by decisions of the courts and different government organs. Due to this fact, the writer believed to analyse and studied this issue thoroughly.

3.5.1.1 CCI's Decision in the Case of Mehadi Aley and others

The case of Mehadi Aley and others involves a constitutional complaint by three persons accused of committing terror offences.³¹⁴ During the hearing, they objected to the withholding of names and addresses of witnesses based on Art 32 of Proclamation 652/2009 which bestows power upon judges to allow anonymous applications. The defense argued that the failure to disclose witness identity by the prosecutor violated Art 20(4) of the Constitution. The defense also mentioned the absence of limit to the confrontation provision under the Constitution and demanded the advance disclosure of state witnesses so that they could prepare for the trial. They argued that their prior knowledge of the witnesses was crucial for the preparation of the defense and, ultimately, the fairness of the trial and the search for the truth. Consequently, the court referred the issue to the CCI for a constitutional ruling on the validity of Art 32(b) and Art 4 (1)(h)(j) of Proclamations 652/2009 and 699/2010, respectively.

After considering the petition, the CCI reasoned that: what can be understood from this provision [i.e. Art 20(4)] is that it affirms the right of accused persons to cross-examination but the defense has no right for the disclosure of names and addresses of witnesses. Nor does the Constitution impose the duty on the prosecution to disclose such information. This is categorically expressed in the Constitution.

³¹³ Tadesse Melaku (LLB, LLM); Assistant Professor at Hawassa University, College of Law and Governance, School of Law I thank the anonymous reviewers for their comments and suggestions. Email: <tadesseello@gmail.com.

³¹⁴ *Mehadi Aley and others*, File No. 2356/2009 (Council of Constitutional Inquiry, *Hamle* 29, 2009 E.C.)

The Council, in an apparent attempt to establish the intent of the framers of the Constitution, noted that the reason for not including a requirement for disclosure in the Constitution is that it would pose danger to the safety of witnesses rather than ensuring the fairness of the trial. This conclusion is rather unwarranted and expansive in view of the fact that constitutions do not deal with such detailed matters. In the end, the CCI did not find inconsistency between the Constitution and the proclamations.³¹⁵ Consequently, it ruled the proclamations were constitutionally valid.

Contrary to this, Lusty, while commenting on the US case law, noted that the right of an accused to know the true identity of his or her accusers lies at the heart of the right of confrontation.³¹⁶ Again, in *Barnard v Williams*, a New Zealand judge held, [t]he name could well lead to a line of inquiry that will throw doubt on or even destroy the value of testimony... to suppress identity is to change the character of the proceedings and ignore what I believe is a basic principle³¹⁷ in a court trial. Examples of judicial decisions from other jurisdictions are not of course directly applicable to our legal system. Yet, we can make reference to a principle (that is also recognized under our Constitution) which is in tandem with such rulings upheld by courts of other countries.

The CCI should have clearly spelled out the absence of any constitutional limit to face-to-face examination. It would make sense if it tried to justify the contested laws based on pragmatic considerations using teleological reasoning. The Council rather offered a remote and unwarranted opinion to conclude that the Constitution anticipated the withholding of witness identity. Furthermore, the CCI has failed to properly articulate the importance of the fundamental human right to cross-examination, and the reasoning fails to appreciate the significance of fundamental rights. In *Mehadi Aley and others*, the CCI has not properly scrutinized the existence of specific factual and legal grounds justifying the suppression of identity of state witnesses. The decision was also reached without balancing the constitutionally guaranteed human right of the defense to cross-examination. Moreover, the CCI has indeed failed to give sufficient reasoning to support the holding.

³¹⁵ The same conclusion was reached by the House of Federation in the case of *Merera Gudina* who also challenged the constitutionality of withholding names of prosecution witnesses. ታምሩ ጽጌ “ዶ/ር መረራ ጉዲና የእምነት ክህደት ቃላቸውን ሰጡ፤ ስለምስክሮች ጥበቃ የወጣው አዋጅ ከሕገመንግሥቱ ጋር አይጋጭም ተባለ” (ሪፖርተር ቅጽ 23 ቁ. 1823) ገጽ 32።

³¹⁶ David Lusty (2002), *supra note*, 14 pp. p. 380

³¹⁷ *Ibid*, p. 397

3.5.2 Jurisprudence of the Federal High Court Decided Cases

FHC Decision in case of Federal Prosecutor vs. Gurmessa Ayano et al The Federal Prosecutor accused of Gurmessa Ayano and others accused of incitement, planning, preparation, conspiracy and attempt to commit a terrorist act in alleged pursuit of the Oromo Liberation Front (OLF) “s objectives which took place in different parts of Oromia regional state”.³¹⁸ The defendants are accused of masterminding the latest Oromia protests.³¹⁹

According to prosecutor, the reason behind withholding the name and address of witness is that they are living in the same area with the defendants and their families. The defendants object the requests of prosecutor through raised withholding witnesses ‘inconsistence with constitutional right to access to all evidences and the right to cross-examine witness presented against them. The court reject objection of defendants and accept the requests of prosecutor without appropriate assessments on the existence of real danger on the witnesses ‘security.³²⁰ Nevertheless, it is not sufficient to show that the witness is put at risk of interference resulting from witness living the same area with defendants and their families, unless prosecutor should be establishes the likelihood of interference resulted from living the same area.³²¹ Therefore, the author argues that this court ruling is in favour of withholding the identity of prosecution witnesses, but it failed the properly balance between the rights to cross-examine against protecting witnesses. The ruling is likely to have a negative effect on fair trial and can adversely affect the fundamental rights of accused persons in this case.

3.5.3 The Jurisprudence of the Federal High Court Cessation Cases

Following the assassination of a prominent Ethiopian Singer, Hachalu Hundessa, On 21 September, federal prosecutors charged opposition Oromo Federalist Congress leader Jawar Mohammed, Bekele Gerba, and 24 Others with crimes including training a terrorist group in Egypt with the intention of toppling the government by force, attacking Amhara people and Orthodox Christian Church officials, as well as killing a police officer in the aftermath of the 29 June killing of singer Hachalu Hundessa.³²² Ten separate sets of charges are brought at the

³¹⁸ *Federal prosecutor vs Gurmessa Ayano Weyessa eta l*, [2015] FHC 178365 (unpublished)

³¹⁹ Ibid

³²⁰ Ibid

³²¹ *Prosecutor vs. Karadzic*, ICTY (TC) Case No.: IT-95-5/18-PT decision on prosecution motion for delay disclosure 5 June 2009.

³²² <https://www.bbbc.com/news/world-africa-53238206>

FHC against the defendants under the Criminal Code,³²³ anti-terrorism,³²⁴ firearms,³²⁵ and telecoms proclamations.³²⁶ According to the Attorney General, the violence that erupted following the news of the assassination of Hachalu Hundessa, 167 individuals lost their lives, more than 360 individual's sustained bodily injury, and an estimated 4.6 billion Ethiopian Birr worth of properties are destroyed.³²⁷ Consequently, there are several irregularities in regard to the *judicial issues pertaining to witness protection*. The crux of legal issues raised focus, on the interpretation of witness protection objectives within the existing legislation. Some of the issues raised in these cases remain unsettled by the courts and require more contexts to guide the courts and policy reformers regarding how witness protection in Ethiopia can be developed. This is attributed to the insufficiency of relevant knowledge and skills among policy makers, law enforcement agencies,³²⁸ and the judiciary. These cases are examined below.

3.5.3.1 Federal Prosecutor V. Jawar Siraj Mohammed et al

The cases between Federal Public Prosecutor V. Jawar Siraj Mohammed 24 defendant's et al³²⁹ cases are discussed in this analysis because they reflect contentious witness protection issues requiring judicial clarification in Ethiopia. Federal prosecutor charge Jawar Mohammed and 24 other people have been charged with terrorism related offence, telecom fraud and other criminal activities, the office of Attorney General's announced Saturday. Witness protection is a recent and rare phenomenon in Ethiopia, case law on witness protection in the country is still developing. So far, the judicial issues pertaining to witness protection in Ethiopia have emerged from preliminary objections in organized form of crime terrorism. This case involves the interpretation of the witness protection provisions under the witness and whistle-blowers protection Proc. No. 699/2010.

³²³ *The first charge* relates to initiating ethnic- and religion-based conflict and violent revolution by using social and mainstream media, thereby violating Articles 32(1)(a) and (b), 35, 38 and 240(1)(a), (b) and (2) (3) of the Criminal Code.

³²⁴ *Under the third charge*, which includes the training of rebels in Egypt, Jawar is accused of planning to advance his political agenda by terrorizing the population and pressuring the government, violating Article 6(2) of the 2020 Prevention and Suppression of Terrorism Crimes Proclamation.

³²⁵ *The fifth charge* is brought against Jawar for violating Article 4(1) and 22(3) of the 2020 Firearms Administration and Control Proclamation.

³²⁶ Under the fourth charge, Jawar is accused of violating Article 32(1)(a) of the Criminal Code and Article 9(1)(a) of the 2012 Telecom Fraud Offence Proclamation.

³²⁷ Fana Broadcasting Corporate, <https://www.fanabc.com/english/federal-oromia-attorneybring-criminal-charges-against-5-728-individuals/> (accessed on 18 Oct. 2020)

³²⁸ Jemima Njeri Kariri 'Witness protection; the missing cornerstone in Africa's criminal justice system' *Institute for Security Studies* September 2014, available at <http://www.issafrika.org/iss-today/witness-protection-the-missingcornerstone-in-africans-criminal-justice-systems>, accessed 6 May 2015.

³²⁹ *Federal Public Prosecutor V. Jawar Siraj Mohammed et al 24 defendants*, (Federal High Court, Lideta Division, 19th Criminal Bench, 03/13/2012 E.C, File No.260215), (unpublished).

The prosecution in relying on the provisions of the witness and whistle-blowers protection Proc, No. 699/2010 requested the court to grant protective measures to its witnesses. The prosecution noted that because of the nature of the case and the status of the defendant, who, apart from being a second main chief of Oromo Federalist Congress and those political party have several supporters, wielded a lot of influence and the potential to threaten the safety of the prosecution witnesses in the absence of protective measures and protection of witness avoid the consequent (result) of several frustration.

Although defense attorneys of Jawar Mohammed et al asked the court to have access to and give their opinion on the application of the prosecutor to hold a preliminary inquiry, the court has denied their request and opened the preliminary inquiry file. The defense attorney even went to apply, on August 9, 2020, for the removal of the judge³³⁰ from the bench since he has denied their right to be heard. But, their application was overruled.

Besides the need for the preliminary inquiry, the procedure in which the witness testimony hearing will be held was also contentious under both of the preliminary inquiry files. Access to evidence adduced against a suspect is of the main manifestations of a fair trial. Article 20 Para 4 of the FDRE Constitution gave an accused person "...the right to full access to any evidence presented against them, to examine witnesses testifying against them..." The AComHPR under its principle developed with regard to fair trial underlines; "Nothing in these Guidelines shall permit the use of anonymous witnesses where the judge and the defense are unaware of the witnesses' identity at trial."³³¹

On the Jawar Mohammed et al preliminary inquiry hearing, on August 4, 2020, the suspects asked for the name of witnesses and issues that the witnesses will testify on. However, the court asserting that it is not mandatory in case of the preliminary inquiry had denied their request. Furthermore, the prosecutor asked 5 of its witnesses to be heard in closed court since their security is at stake, citing Proc, No.699/2010 as justification.³³² The defense attorneys objected to the claim that there is no need to hide the identity of the witnesses since; the witnesses have never asked for protection, that there is another option to keep their security

³³⁰ Judges could be removed for a beach as per Article 27 of Proclamation No. 25/1996, Federal Courts Proclamation, (February 1996), per Article 27, judges could be removed if his has family relationship with the parties, if he was/is tutor or advocate of the parties, if previously participate in the case, if he has dispute with parties or if there is "sufficient reason...to conclude that injustice may be done"

³³¹ Para M(1)(e) of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples' Right (hereafter, Para 3(i), AComHPR Principle on Fair Trial)

³³² WWP Proclamation, No. 699/2010, *supra note*, 8.

and that there is other evidence to prove the facts in which these witnesses could provide in the course of their testimonies. The court overruled the objections of the suspects.

3.5.3.2 Federal Public Prosecutor V. Eskender Nega Fanta et al

In the case of Federal Public Prosecutor V. Eskender Nega Fanta 23 defendant's et al³³³ cases are discussed in this analysis because they reflect contentious witness protection issues requiring judicial clarification in Ethiopia. Under Eskender Nega et al case, however, although the court denied their request to access the pleading that the prosecutor presented to initiate the preliminary inquiry, they had the opportunity to present their written pleading opposing the need for preliminary inquiry, in which the court has rejected.

On Eskender Nega et al preliminary inquiry, after the prosecutor told the court that it wanted to present 4 of the witnesses without disclosing their identity and 3 of the witnesses in a closed trial for the reason of their security, oral argument has taken place on August 6, 2020. The defense team of Eskender Nega et al asserted that hiding the identity of witnesses from them could infringe their right to defense; hence they should get a list of witnesses before their testimony is heard. The defense team further extended their argument that protection is not the request of the prosecutor, that there is no evidence on the fact that the witnesses have asked for security protection, that the court should investigate if there is a real security threat before its ruling and that if there is a threat, there are different means of protecting witnesses without infringing the right of the suspects per Proc, No.699/2010. Eskender Nega has personally told the Court that the crime he is being suspected of is related to the crime of genocide, hence the hearing should be open for the public, and identities of witnesses should be known. The court, however, accepted the argument of the prosecutor and adjourned the trial for August 14, 2020, to hold the witnesses' hearing.

Four of the witnesses testified without being known by the court and the suspects and the other three in closed courts. The suspects have told the court that they don't want to be part of a hearing where they couldn't defend themselves and had terminated their service contract with the defense attorneys for the preliminary inquiry phase hearing; hence witnesses have been heard without the suspects being represented by lawyer.

³³³ *Federal Public Prosecutor V. Eskider Nega Fanta et al 23 defendants*, Federal High Court, Lideta, Division, 19th Criminal Bench, 05/13/2012 E.C), File No.260175) (unpublished).

3.6 Scope of Right to Confrontation and Witness Protection in Ethiopia

As mentioned above, accused rights to confrontation are competing interests that need to protect at the time of protection of witness identity in criminal proceeding. The rights of witnesses and that of the accused person are linked so inextricably that a complete understanding of one of these rights is impossible without a close examination of stipulations regulating the other. The right to confrontation, also known as the right to cross examination is a fundamental principle in many legal systems, including Ethiopia. It generally refers to the right of defendant in a criminal trial to confront and question adverse witnesses. This right allows the defendants or their legal representative to challenge the credibility, accuracy, and truthfulness of witnesses by asking them questions directly. On the other hand, witness protection programs aim to ensure the safety and well-being of witnesses, especially those who may be at risk due to their involvement in criminal cases. Witness protection measures can include providing physical protection, changing identities, relocating witnesses and or keeping their identities confidential.

At domestic level the right to confrontation is generally recognized and protected under the FDRE constitution and the CPC. Both FDRE constitution³³⁴ and the ICCPR³³⁵ recognize the right of accused confronted by the prosecutor's witnesses. Article 144 of the Cr. Pr. C. authorizes putting in evidence depositions taken during preliminary inquiry where the witness is unavailable during the trial stage of criminal proceeding for reasons specified thereunder. As noted, the OAG has expressed its intention to make use of this provision, if and when the need arises, in its argument for preliminary inquiry. The application of Article 144 would mean that the accused will not be able to access such witness at trial triggering the question of its compatibility with the right of accused to confrontation. However the need to balance between the competing public interests of an accused's right to a fair trial and the protection from harm of witnesses are critical to the debate on witness protection. And it's important to note that the Ethiopian legal system is subject to change, and specific laws and regulations may have been updated.

³³⁴ FDRE Constitution, *supra note*, 16, Article 20(4)

³³⁵ Article 14(3)(e) of ICCPR, in part, provides "in the determination of any criminal charge against him [the accused], the accused has the right "to examine, or have examined, the witness against him."

3.6.1 Balancing the Right to Confrontation with the Protection of Witness

As mentioned earliest, it is not an easy task to find a compromising solution which could strike a balance between the two competition interests (the protection of witness vis-a-vis. respecting interests of the accused right to confrontation). The research discussed the unbalance between the giving absolute rights of FDRE constitution to the defendants to get full access to any evidence presented against her/him by prosecutor including the right to know or access the identity of the witness and the proclamation, i.e. proclamation No. 669/2010, which deals with witness protection which stretched up to the concealment of the identity of the witness.³³⁶ He come up with the conclusion that it is necessary to strike a fair balance between the competing interest, i.e. the right to fair trial of the defendant and anonymity of the witness which is a paradox between the constitution and the proclamation of witness protection. The power of granting or rejecting the applicability of witness anonymity must be given to the court by taking over from the prosecutor.³³⁷

Even though the FDRE Constitution does not provide an exception for this right but the Ethiopian lawmaker adopts a law that allows for non-disclosure of a witness until trial and anonymous witness. Among the laws which allow for non-disclosure of witnesses identity, whether up to trial date or anonymous witness, the Anti-Terrorism Proc No.652/2009, Prevention and Suppression of Terrorism Crimes Proc, No.1176/2020, the protection of Witness and Whistle-blowers of Criminal Offence Proc, No.699/2010, and the Revised Anti-Corruption Special Procedure and Rules of Evidence Proc, No.434/2005 are some of them. Those laws are adopted because witnesses have also the right to be protected from any harm by the mere fact of being called as a witness. But those proclamations are against the constitution and other international human rights covenants ratified by Ethiopia because they limit the constitutional right to confrontation, fair trial, and cross-examination.

While in Ethiopian context witness protection law 699/2010 cases other than special agreement with minors, in all case granting power of anonymity is given to Ministry of Justice/now Attorney General/. The law permits to Attorney General both granting power of anonymity and taking specific measure that required by the witnesses. This law makes Ethiopian court become impotent regarding adoption of clear balancing mechanism for competing interests. Therefore, empowering the court is one of the potential solutions for the

³³⁶Michael Tilahun, *supra note*, 28, P. 12-15.

³³⁷ WWP Proclamation, No. 699/2010, *supra note*, 8.

problem on grant or reject application of witness could be one way of balancing the interests. Therefore with the current legal framework of Ethiopia it is difficult to balance the two rights and find an acceptable equilibrium that satisfies both parties. However, it is not an impossible riddle to find a relatively amicable ways to harmonize the two interests.

CHAPTER FOUR

Critical Analysis on the Friction between Witness Protection and the Accused Right to Confrontation

4.1 Introduction

This brief is a critical finding of research analysis and evaluations using analytical and logical reasoning of the summary questioner's via interview, document review are conducted. Methodologically the research employed legislatives, jurisprudence and criminal justice offices perceptions analysis. The former was considered important to identify the nature and scope of the witness protection in the Ethiopian legal system, while the latter was used to examine the relevant factors behind accused right to confrontation vis-à-vis witness protection in Ethiopia cases. The field research was undertaken using semi structured interviews with a total number of 12 participants comprising individuals with first-hand information about witness protection in Ethiopia. In addition, flexible and open ended questions are employed because it provides no restrictions on the content or manner of the reply. Then the brief is mainly intended to show the challenges and limitation in Ethiopia's witness protection and relating interest of accused right to confrontation legislation and highlights the contribution of the thesis.

4.2 Critical Analysis in the Legislatives, Jurisprudence and Practitioners

This thesis aims at finding out the loopholes in the existing laws and criminal justice institution of Ethiopia on witness protection. Also, Ethiopian laws have failed to put guidance on how to resolve the conflicting rights of the accused right to confrontation and the protection of the witness. Rather they broaden the gap by allowing withholding and protection of witnesses' identity at the stake of the accused persons for the right fair trial, cross-examinations, and confrontation provided by the FDRE constitution. In addition to those laws, the jurisprudence of CCI decision, FHC decision and perception of legal practitioners' response of different federal criminal justice offices concerning the application of protection of witness is analysed.

4.3 Critical Analysis and Discussions in Legal Lacuna

As a result, from above discussion the key features of current protection of witnesses and whistle-blowers of criminal offences Proc, No.699/2010; a system of protection for witnesses has been established. A directorate under the OAG has been established for the provision of

protection for witnesses and whistle-blowers of criminal offences in collaboration with relevant local and international stakeholders. Witnesses and whistle-blowers in grand corruption cases have been granted immunity against criminal prosecution for their lesser degree participation in the crime. Moreover, efforts have been made to conceal the identities of witnesses and whistle-blowers in serious criminal cases so that their safety and security will not be jeopardized due to their testimonies. Works have also been done to relocate and provide witnesses and whistle-blowers with safe houses in serious criminal cases.

The research disclosed, the existing witness and whistle-blowers protection proclamation mentions about ‘witness protection’ but it does not clearly define what ‘witness’, what ‘witness protection’ and ‘whistleblower protection’ means. Pursuant to art 2(1) and (2) of Proc Ethiopia’s “witness and whistle-blower” law is inaccurately titled; it provides witness and whistle-blower protections in confusion however, in some practice show protection rendered only to witnesses who supply information in investigations or prosecutions of major crimes. It does not apply to whistle-blowers, or to people who provide information that does not lead to major investigations or prosecutions. In this regard, the inclusion of “whistle-blowers” in the title is misleading. Therefore, there is frequently confusion on the differences between being whistle-blower and witness so whistle-blower protection so it is worth looking at these issues more closely.

The same proclamation states about witness protection but it is has a shortcoming on the scope of protections. According to art 3 (1) of Proc, No.699/2010 that it guarantees protection to witness who cooperate to give testimony and information on a suspect punishable with rigorous imprisonment for ten or more years. Here it mentions that protection is provided to those potential eligible witnesses or whistleblowers who or whose family is under serious threat and there is no way to obtain their testimony or information without providing the protection. Here the gap found in article 3(1) is that it impliedly excludes those witness or whistleblowers for a punishable serious crime with less than 10 years rigorous imprisonment although they may be under serious threat. The stance of the author of this study is that all serious criminal cases shall entail protection to witnesses as far as such potential witness is confirmed as being under threat which requires protection. It can also be noted from the wordings of article 3(2) of the same proclamation that relocation, protection and protection measures will be applicable to eligible potential witnesses. Article 4 of the same proclamation discusses about types of protection measures. Such protection measures are presumably provided for eligible potential witnesses who live in Ethiopia or relocated to another

jurisdiction from Ethiopia. However, it is silent on the scope of protection measures to witnesses who already reside abroad and/or their relatives. In addition, the protection measures given to persons mentioned under article 3 (2) are not sufficient and there is legal lacuna here too. For instance, these types of witnesses may also face death due to retaliatory measures of perpetrators or their accomplices but they are not eligible to get damages mentioned under article 4 (1) (r) of the proclamation. These requires gap filling provisions to maintain equality of treatment and fairness to witnesses who face similar threat and risks as a result of their cooperation to serve as eyes and ears of justice.

Also there is no strong institutional structure at federal as well as at region level to put the law into practice. The witness protection coordinated unit at Attorney General has not been organized to effectively play the expected role. There is totally no witness protection unit at all regions of the federation to provide the necessary support and protection to witnesses at risk. It is clear that the enactment of the law, i.e, witness and whistle blowers Proc, No. 699/2010, by itself can never address the challenges of witness protection without proper organizational structure from the federal up to the regional level and it is against the principle of federalism. It requires enactment of subordinate legislations such as regulation and directives to fill the gap between the law and the practice, and also to fill the legal lacuna as well. Moreover, drafting and operationalizing guidelines and comprehensive implementation plans is very important to bring meaningful positive change.

Various additional proclamations contain only minor provisions related to witness protection. Moreover, the 2011 CJP of Ethiopia (herein after Criminal Justice Policy) has introduced broad exceptions in which the prosecution evidence shall not be disclosed to the accused.³³⁸ The policy also demands the upcoming criminal procedure code, the draft of which is underway for many years, to emulate this.

Accordingly, protection of witnesses and reporting persons (arts. 32 and 33): The protection of witnesses and Whistle-blowers of Criminal Offences Proc, No. 699/2010, the FEACC and Evidence Proclamations contain relevant provisions protecting witnesses and whistle-blowers. In practice, FEACC can apply for protective measures to be provided by the police, which have the necessary manpower. However, physical protections are rarely afforded in criminal cases due to the required coordination and the fact that retaliation is rarely detected

³³⁸ የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ (ከዚህ በኋላ የወንጀልፍትህ ፖሊሲ ይባላል) 2011ዓ/ም አንቀጽ 4(5) (2-3)::

or reported. Victims are expected to file reports to receive protection as whistle-blowers or to participate as witnesses in proceedings. Any person who believes he or she is the subject of a reprisal action as a result of having testified or reported may apply to the judiciary to have the measure suspended or reversed. However, it is noted that the existing protections do not extend to persons who report corruption in the private sector.

As mentioned above, the laws on the concepts of witness and whistle-blower protection in Ethiopia are fragmented in some existing legislations including the Criminal Procedure Code, Ethics and Anti-Corruption Commission Establishment Proc, No.235/2001, Revised Anti-Corruption Special Procedure and Rules of Evidence Proc, No.434/ 2005, Anti-Terrorism Proc, No.652/2009, Prevention and Suppression of Money Laundering and the Financing of Terrorism Proc, No.780/2013, Revised Federal Ethics and Anti-Corruption Commission Establishment (Amendment) Proc, No.883/2015, A Proclamation to Provide for the Crimes of Corruption, Proc No. 882/2015: A Proclamation to Amend The Revised Anti-Corruption Special Procedure And Rules Of Evidence Proclamation. This shows us there is no single law in Ethiopia that provides for a uniform scheme of protection of witness from intimidation and threat of organized crime. Although there are some provisions in these laws that allow the government to protect witness safety and security, they are not comprehensive to deal with the effective process of witness protection program. Therefore, those laws do not include a consolidated witness protection measures and witness assistance programs. And also the disclosed forms and degrees of protecting measures does not consistent with provisions of constitution and does not give any space to build single and strong institutional structure for effective and uniform witness protection program. To sum up there is no regulation, directive, guideline and rules to effectively support administrative and structural engagements for effective implementation of the proclamation. This highlights the existence of practical challenges of huge legal lacuna in Ethiopian criminal justice system.³³⁹

Critical discussions on constitutionality provisions: As stated above, the both FDRE constitution and criminal procedure code has no limitation clause on protection of witness as well as balancing competing interest on ground of protection of confidentiality of techniques of further criminal investigation.³⁴⁰ Under Art 20(4) of the FDRE Constitution, accused persons are entitled to have full access to any evidence presented against them, to examine

³³⁹ Interview with ‘‘E’’ Prosecutor in Federal OAG, Addis Ababa, 20, March, 2023.

³⁴⁰ FDRE Constitution, *supra note*, 16, Art 20(4)

witnesses testifying against them. The 1961CPC recognizes the same right in Art 136. However, the code differs from the constitution with respect to the scope of the right. The code limits its scope to show to the court what is erroneous, doubtful or untrue in the answers given in examination-in chief³⁴¹ (emphasis mine). In this regard, the constitution is progressive in the sense that it stipulates a broader right to accused persons to have full access to any evidence presented against them, to examine witnesses testifying against them (emphasis mine). Put another way, full access to any evidence seems to imply that the personality and credibility of the witness are also the subject of examination by the other side; the testifier and the testimony are inseparable. Furthermore, the reading of the foreign academic literature and foreign case law clearly reveals that the right of confrontation extends far beyond the testimony given in the courtroom). Confrontation offers the accused with the opportunity to discredit the witness's trustworthiness as well.

As mentioned above, in Ethiopia, the FDRE constitution (herein after the constitution)³⁴² and the 1961 Criminal Procedure Code (herein after CPC)³⁴³ recognize elements of the right to confrontation. On the other hand, the Protection of Witnesses and Whistle-blowers of Criminal Offences Proclamation [herein after Witnesses protection proclamation] limits the right to confrontation.³⁴⁴ The extent to which the above legal frameworks protect the accused right to confrontation in criminal litigation remains unexplored. The FDRE constitution unconditionally entitles the accused to have access to evidence produced against him and to cross-examine adverse witnesses. Nonetheless, the Witness Protection Proclamation limits the right by extending several protection measures to witnesses, including withholding their identity.³⁴⁵ Although this approach may be justified for practical considerations, its constitutionality is open to challenge, as the constitution accommodates no exception to the right.

However, accordingly the rights and freedoms found in the Third Chapter of the Constitution are to be interpreted in light of the international human rights ratified or adopted by Ethiopia's a position concerning protection of witnesses'. And cumulatively the FDRE constitution is the 'supreme law of the land'³⁴⁶ from which all laws in Ethiopia draw their legitimacy. However there is no any provision of the constitution that provides a basis for

³⁴¹ ECPC *supra note*, 15, Art 137(3).

³⁴² FDRE Constitution, *supra note*, 16, Art.20 (4), (Herein after the FDRE Constitution).

³⁴³ ECPC *supra note*, 15, Articles 127 (1), 124(1), 125, and 137. (Here in after CPC).

³⁴⁴ WWP Proclamation, No. 699/2010, *supra notes*, 8, Article 4.

³⁴⁵ *Ibid*, Article 4, para.1 (h)-(k).

³⁴⁶ FDRE Constitution, *supra note*, 16 Art 9(1)

witness protection in Ethiopia context. As signatory member state for international human right treaties of ICCPR and UDHR, Ethiopia, indirectly abides by the rights enshrined in this covenant. Besides, the constitution of Ethiopia provides that ‘accused persons the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defence and to obtain the attendance of and examination of witness on their behalf before the court’.³⁴⁷ (Emphasis added).

The right to examine one’s accusers is universally reflected in regional and multilateral treaties.³⁴⁸ There are many human rights relating to the rights of accused persons, in relation to the disclosure obligation of the public prosecutor. But, since the scope of the paper is to deal with international treaties ratified or adopted by Ethiopia, the UDHR and the ICCPR are the prominent ones at the international level adopted and ratified by Ethiopia. In this paper, UDHR and ICCPR are analysed as a baseline for the constitutionality of protection witness to accused persons due to the fact that they are adopted and ratified by Ethiopia and pursuant to article 13/2/ of the FDRE Constitution the right to confrontation and cross-examination stipulated under article 20/4/ of the constitution are to be interpreted in line with those treaties.³⁴⁹

The art 14 of the ICCPR requires that in every phase of the trial process the parties should be considered procedurally equal and thus be placed in an equal position to advance their respective cases.³⁵⁰ Pursuant to article 14/3/e/of the ICCPR, accused persons have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This has been concretely interpreted to mean that the prosecution must inform the defense of the witnesses it intends to call at trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare his/her defense.³⁵¹ This covenant granted the right to protection of witness’ identities and confrontation and there is no limitation to it.

³⁴⁷ Ibid, Art. 20 (4)

³⁴⁸ Kweku Vanderpuye, ‘Traditions in Conflict: The Internationalization of Confrontation’, *Cornell International Law Journal* Vol. 43, (2010), p.515.

³⁴⁹ FDRE Constitution, *supra note*, 16, FDRE Constitution, Art.13 (2).

³⁵⁰ See *Ofner and Hopfinger v. Austria*, 1963 Y.B. Eur. Conv. H.R. 680, 696 (Eur. Comm’n on H.R.);Cited in Kweku Vanderpuye, “Traditions in Conflict: The Internationalization of Confrontation”, *Cornell International Law Journal* Vol. 43(2010), p.539.

³⁵¹ Lawyers Committee for Human Rights, ‘What Is a Fair Trial? A Basic Guide to Legal Standards and Practice’ March 2000, p.18.

Thus, this convention did not allow for protection of witnesses' identity to the criminal defendant.

The need to balance between right to confrontation and witness protection: Even though, the FDRE constitution granted to the accused person the right to confront the witness testifying against them, according to article 16/1/ of the Prevention and Suppression of Terrorism Crimes Proclamation allows for withholding and non-disclosure of the identities and addresses of the witnesses.³⁵² This protection of witnesses' identities minimizes the opportunity to cross-examination and confrontation against those witnesses.

However as incorporated and lesson drawn from jurisdiction of best practices and international jurisprudence, in order to balance these two competing interests, in ICTY Tadic case outlined five stringent requirements to non-disclosure of witnesses to defence. These conditions for anonymity are; first, there must be real fear for the safety of the witness or his or her family; second, "the testimony of the particular witness must be important to the Prosecution's case".³⁵³ Third, the Chamber "must be satisfied that there is no prima facie evidence that the witness is untrustworthy; fourth, there must not be other protective measure other than granting anonymity of witness; fifth, measures taken must be "strictly necessary".³⁵⁴ In addition to these requirements, there is other means to uphold disclosure rule i.e. delayed disclosure mechanism, that the prosecutor can temporarily keep the names and identity of witness until the point in time as determined by a trial chamber mostly sometime before the commencement of the trial.³⁵⁵ Once the danger passes, the prosecutor must inform the defense that the relevant portion of the file should be available for inspection. Therefore, empowering the court is one of the potential solutions for the problem on grant or reject application of witness could be one way of balancing the interests

Therefore, these all statutory provisions provides witnesses security that is aimed at protecting witnesses who would be put in an overwhelmingly intimidating position and to encourage witnesses who would help on finding the truth. But, the rules made it very difficult for the defendant and his lawyer who in normal course of things, would have a chance to get the name of the witness to study the credibility of the witness or even the capacity of the witness. However, there is a tension between witness anonymity and the right to disclosure

³⁵² WWP Proclamation, No. 699/2010, *supra notes*, 8

³⁵³ Joanna Pozen, Justice obscured: the non-disclosure of witnesses 'identities in ICTR trials'[2005-2006] *ILP* Vol. 38:281

³⁵⁴ *Ibid*

³⁵⁵ *Ibid*

and cross-examination. This also addressed the existence of practical challenges of huge legal lacuna in Ethiopian criminal justice system.³⁵⁶

4.4 Witness Protection in the Realm of Ethiopian Jurisprudence

This section is dedicated to the result of the case study and its substantiated analysis with the relevant conceptual and legal frameworks discussed above. The discussion typically focuses on the witness protection in the federal justice institution and challenges that hindered witness protection. Thus, some points about the case study area and its selection; describing the practical state of witness protection and analysis of the practical challenges that reinforced the legal and institutional gaps and hindered protection of witness anonymity as well as competing interests in Ethiopia have been addressed.

As discussed above, the current Ethiopian jurisprudence challenges: within the existing legislative framework, Ethiopian jurisprudence also lacks clarity in interpretation on meaning, scope of beneficiaries and point of dichotomy between witnesses and whistle-blowers protection. Also, the discussions in chapter two illustrated that the literature identifies a broad category of persons who are likely beneficiaries of protection. More so, the CCI's Decision in case of Mehadi Aley and others involves a constitutional complaint by three persons accused of committing terror offences³⁵⁷ and FHC cessation case between Federal Public Prosecutor V. Jawar Siraj Mohammed 24 defendant's et al³⁵⁸ cases presented the courts with an opportunity to clarify the scope of beneficiaries that require witness protection in Ethiopia. However, there is no judicial clarification about the definition, scope of beneficiaries and no accurately set-out the difference between witnesses and whistle-blowers protection for the purpose of witness protection in Ethiopia.

Challenges on the scope of crime requiring protection: The scope of crimes requiring protection in Ethiopia is not clearly defined. This witness protection legislation applies to all crimes punishable with rigorous imprisonment for ten years or more (regardless of the minimum prison term threshold) or with capital punishment.³⁵⁹ Here the gap found in article 3(1) is that it impliedly excludes those witnesses or whistleblowers for a punishable serious crime with less than 10 years rigorous imprisonment although they may be under serious threat. The stance of the author of this study is that all serious criminal cases shall entail

³⁵⁶ Interview with "F" Prosecutor in Federal OAG, Addis Ababa, 20, March, 2023.

³⁵⁷ *Mehadi Aley and others*, File No. 2356/2009, Super note, 314

³⁵⁸ *Federal Public Prosecutor V. Jawar Siraj Mohammed*, super note 329.

³⁵⁹ *Ibid*, Art 3(1).

protection to witnesses as far as such potential witness is confirmed as being under threat which requires protection. It can also be noted from the wordings of article 3(2) of the same proclamation that relocation, protection and protection measures will be applicable to eligible potential witnesses. Also, from the CCI's Decision in case of Mehadi Aley and others involves a constitutional complaint by three persons accused of committing terror offences³⁶⁰ and in the case cessation of Federal Public Prosecutor V. Eskinder Nega Fanta 23 defendant's et al³⁶¹ cases, it is unclear whether protective measures are applicable to crimes only mentioned within existing legislation. However, practice to the Council of Europe, witness protection legislation should specify the crimes for which protection is offered.³⁶²

Witness protection measures and the need to balance accused right to confrontation: As mentioned in chapter three, Ethiopian, protective measures are limited to ad-hoc protective measures, adopted during the criminal proceedings, in practice of terrorism cases court almost always accept the application of prosecutor to withholding the name of witnesses to accused without assessment of existence of real danger on the witnesses 'security'.³⁶³ And also the court could not impose prosecutor to take other protective measure other than anonymity of witnesses,³⁶⁴ such as police measure to enhance physical security that include prevention of threatening situation, intimidations, property damage or simply fear of reprisal.³⁶⁵ However, federal courts most of the time have not been amicable solutions in the protection of competing interests.³⁶⁶

Even though, protection of witness is noble means of fair trial, protection may result witnesses security endanger, if disclosure is prejudice on-going investigation and national security/interests. The Ethiopian criminal justice system introduced measure that adopted protecting witness, concealing identity of the witnesses that would pose a serious threat witnesses; however, art 4(1) of the witness protection proclamation provides detail measures and programs applicable severally or jointly including the following; physical protection of person, residence and property of witness; relocation at the expense of the state, change of

³⁶⁰ *Mehadi Aley and others*, File No. 2356/2009, *Super note* 314

³⁶¹ *Federal Public Prosecutor V. Eskider Nega*, *supra note*, 333

³⁶² Council of Europe, Committee of Ministers Recommendation 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, Explanatory Report, para 41 p 8, available at www.legislationline.org/documents/id/8998, accessed 23 March 2013.

³⁶³ Statement by Respondent 'C', Judge in FHC, Lideta Criminal Division Addis Ababa, 27 April 2023.

³⁶⁴ *Ibid*

³⁶⁵ UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, (2008) p.4.

³⁶⁶ Tadesse Melaku, *supra note*, 313.

identity, provision of self-defense weapon, immunity from prosecution for an offence for which he provide information, free medical service in public health institution, counselling and opportunity for employment and education, covering cost of living case of loss of capacity to work as a result reprisal. Most of these programs may not affect the right of the defense to fair trial. However, there are other provisions of the proclamation that restrict disclosure right; includes changing identity of witness, the prohibition against the accused to contact the witness, taking testimony in camera and behind screen and providing evidence via electronic devices.³⁶⁷ In the face of such measures, it would be difficult, or even impossible to expose contradictions or the motive of witness to falsely incriminate the suspect, lies and prejudices or his prior criminal record for perjury, misrepresentation or forgery thereby significantly reducing the chances of the defense to refute the charges against him.

Thus, the need for safeguards against such risks, and disclosure contributes toward fair trial thereby serving as one of the prevention schemes against of unwarranted convictions. There is need of the legal and practical amicable solution to solve the possibility of procedural unfairness against the defendant who is denied of adequate facilities (evidences presented against and in favor) to prepare his/her defence and competing interests. It wouldn't be very hard to imagine the fate of ill-prepared defence for the allegation and evidence presented by the public prosecutor who has strong power and resource as compared to the defendant.

The scope of protection of witness and the accused right to confrontation is lately becoming one of the common points debate circled by various arguments and even a genuine concern for courts and council of constitutional inquiry.³⁶⁸ In order to have a better understanding of the exact point where the two ideas, concealing witness identity and fair trial, it would be sound to examine the ideas separately.

Beside the inadequacy of the existing protective measures, these measures raise constitutional issues, which strike at the rights of a defendant to fair hearing. As indicated earlier, within the existing case law, attempts by the courts to balance the interests of the state to prosecute and protect witnesses on one hand, and the rights of the defendant to a fair hearing have been inconsistent and produced conflicting decisions in the case law and the current practice in Ethiopia. It is acknowledged that the inconsistencies arise because, within the existing legal framework in Ethiopia, there are no stipulations or guidelines for determining how procedural

³⁶⁷ WWP Proclamation, No. 699/2010, *supra notes*, 8, art 4.

³⁶⁸ Interview with 'L', Director in FSC public defender's office, Addis Ababa, 21, March, 2023.

protective measures are assigned or the factors considered for applying a specific protective measure for specific witnesses, thus necessitating the need to identify how such conflicting rights and interests have been resolved in practice. These requires gap filling provisions to maintain equality of treatment and fairness to witnesses who face similar threat and risks as a result of their cooperation to serve as eyes and ears of justice and ensure to balance with accused constitutional right to confrontation that used effective criminal justice system. As far as the practical realities on ground is concerned, there is lack regulation, directives, guidelines and systems in place to provide appropriate protection to eligible potential witnesses who require protection.

4.5 Practical Challenges in Practitioners and Experts Perception

The researcher of this study has purposely distributed questionnaires to 12 participants and got 11 fully filled questionnaires with the necessary responses. Hence, the following are the major challenges identified by the respondents from federal justice offices (Lideta FHC, Federal OAG and FSC Public Defenders Office). These challenges highlighted by the respondents of the questionnaire includes:³⁶⁹ Lack of strong institutional cooperation and collaboration from the federal up to the grass root (woreda) level to provide the necessary support and protection to witnesses at risk; Lack of legal provision clarity on the meaning and scope of witness protection; The challenges of how to balance the rights of accused and witness' right; Lack of strong awareness among the actors of criminal justice administration system on the significance of strong witness protection system to maintain the rule of law and protect the rights of witnesses; The challenges of politicizing cases pertaining to organized criminal matters which need witnesses worth protecting; Lack of organized referral system to mitigate risks when potential witnesses suffer attacks by perpetrators and/or their accomplices; Poor infrastructure, information and records management system to conduct follow up and support to witnesses living in remote areas; Human (staff) and financial resource limitation to provide effective witness protection programme, and Low leadership commitment to allocate sufficient resource for strong and effective witness protection programme.

As stated by respondent 'A', 'B' and 'C' observed, there are lacks of a clear legal, procedural, and institutional framework that needed to provide the certainty and predictability necessary to ensure that all parties are aware of the protection measures available before agreeing to

³⁶⁹ Summary of questionnaire response of multiple respondents, judges, prosecutors and public defenders from FHC Lideta criminal Division, Federal OAG and FSC Public Defenders Office, Addis Ababa, 27th March 2023.

testify or cooperate with a criminal investigation.³⁷⁰ Also as respondent of ‘E’, ‘F’, ‘G’ and ‘H’ protecting witnesses in the absence of consolidated legislation falls short of providing a comprehensive backbone for implementation. Analysts note that it would be more prudent to establish a single independent witness protection unit with a designated budget and resources, instead of running two similar institutions.³⁷¹

Another respondent observed there are many challenges to the successful implementation of the witness protection program in Ethiopia. It is the first and most important issue with regard to the anonymity of the witnesses and the balancing of the accused rights to confrontation. Balancing the rights of accused persons and the need to protect victims and witnesses.³⁷² This arises in a situation where the witnesses testify anonymously. The accused may deem that their right to confront their accuser has been compromised especially since most organised crimes are indictable and carry hefty jail terms.³⁷³ *Also respondent* set-out a challenge of how to balance accused right to confrontation and witness protection in the current practice of our country. It is apparent that the rights of both an accused person and the rights of a witness shall not be jeopardized. An accused person has a right to fair trial. He has to be in a position for his voices to be heard properly. Moreover, he has the right to get legal assistance and represented by a lawyer of his own choice and the right to get defense witnesses at government expense if it is proven that an accused has no means to cover for per diem and logistic facilities of his defense witnesses and this opens a door for miscarriage of justice.³⁷⁴

Lack of structure and independence of the protection mechanism: Although Ethiopia promulgated a witness protection law in 2010, resource and logistical challenges are cited for its poor implementation.³⁷⁵ Protection and safety measures have not been provided for witnesses in organized and serious crime trials. As stated by OAG prosecutors respondents offices does not have specific funding dedicated witness safety and protection and only limited efforts have been made using scarce resources.³⁷⁶ Ethiopia also faces funding constraints in its ability to develop the capacity of witness protection staff and the potential of

³⁷⁰ Interview with ‘A’, ‘B’ and ‘C’ a judge in FHC Lideta Criminal Division, March 30, 2023.

³⁷¹ Interview with Judge ‘E’, ‘F’, ‘G’ and ‘H’ Prosecutors in Federal OAG, Addis Ababa, 20, March, 2023.

³⁷² Interview with ‘K’ and ‘J’ Public Defenders, in FSC Public Defender’s Office, Addis Ababa, 21, March, 2023.

³⁷³ Ibid

³⁷⁴ Interview with ‘A’, ‘B’ and ‘C’, *supra note*, 370, Addis Ababa, 20, March, 2023.

³⁷⁵ WWP Proclamation, No. 699/2010, *supra notes*, 8,

³⁷⁶ Interview with ‘E’, ‘F’, ‘G’ and ‘H’, *supra note*, 371.

the witness and victim protection unit. From other respondent of FHC, in Ethiopia there is no independent institution, which is established by law, with mandate to protect witness identity and relocation of witness. Even, those laws which somehow related to protection of witness and whistle-blower are found dispersed in different legislations does not mandate single institution to protection of witness anonymity. Rather they mandate different institutions in unclear and scattered manner. This means there is no single institution which works on gathering intelligence for identifying, tracing, secure life of witness, victim, families and their property as well as managing it until it is returned to rightful life. In addition there is no clearly mandated institution to cooperate internationally to relocate and protect witness identity in foreign countries.³⁷⁷

As one respondent observed, *the absence of institutional capacity including lack of trained personnel and infrastructure is another challenge. It was recognised that witness protection requires trained personnel, as well as infrastructure, such as safe houses, vehicles and other equipment. 'Currently there are no safe houses and we must build them and employ and train personnel. This is only possible where resources are available. Government may be unwilling to invest in these directions.'*³⁷⁸ Another respondent revealed that there are no adequate witness protection experts at all levels. For instance, the witness and whistle-blower law enforcement, follow-up and supervision team leader has specialization in Biology.³⁷⁹ The same is true that members of the team are graduates of first degree in different disciplines some of which are irrelevant for witness protection issue.³⁸⁰ Including, the team leader none of them have graduated in law. Without legal expert in the team it is difficult to imagine that they are competent and capable of enforcing witness protection laws.

Corruption challenge in the administration and justice: According to respondent observed, the most important challenge is corruption in the administration and justice. Although the argument seems complicated and trite, no witness protection program can work with corrupt officials. When a person is given a false identity and transferred to another and the authorized authority is bribed and sells the information, the whole process is interrupted. Therefore,

³⁷⁷ Statement by Respondent 'B', Judge in FHC Lideta Criminal Division, Addis Ababa, 27 March, 2023.

³⁷⁸ Summary of questionnaire response of multiple respondents, *supra note* 369.

³⁷⁹ Interview with 'E' Prosecutor in Federal OAG, Addis Ababa, 20, March, 2023.

³⁸⁰ *Ibid*

corruption and political pressure remain a major problem in adjusting the situation of a hostile witness.³⁸¹

The nature and scale of the threat to witnesses: According to Federal Public Defender respondent ‘K’ and ‘J’ a witness protection programme is extremely expensive in terms of operations, recruitment and capacity building. Like the adage goes that ‘Justice is expensive’, in order to secure witnesses as a key component of criminal justice the tax payer must bear the burden.³⁸²

Also respondent ‘I’ Lengthy trial processes contributes to witness unavailability. In fact, some organized and complex crime cases decided by the FHC were adjourned up to 34 times³⁸³ while others took as long as seven years to conclude.³⁸⁴ Court hearings are often adjourned over and over again for various reasons, such as the non-appearance of judges, the non-appearance of the accused, or because of the last-minute adjournment of trials due to judges’ case overload. When a proceeding is adjourned, a witness that has travelled to Addis Ababa from a remote Ethiopian village must return home, promising that he or she will appear at the next hearing. *As a FSC Public Defender noted*, the majority of such witnesses rarely come back to testify.³⁸⁵ They change their minds because coming back to testify is considered risky and too costly. Adjournments also create opportunities for members of serious and organized trafficking syndicates to forcefully persuade witnesses not to testify against them.

Awareness problem as challenges: According to the data gathered via interview the main cause for absence witness protection for witness safety and security is awareness problem. The public has no awareness that accused and when their supporter’s wrongdoers are criminally liable and law enforcing agencies has no adequate awareness about the existing legal framework, protection of witness not jeopardize accused right to confrontation and on scope of crime requiring protection and extent of protection required. This hindered both report based and self-initiated investigation of organized crime by federal public defender.³⁸⁶

³⁸¹ Interview with ‘H’ Prosecutor in Federal OAG, Addis Ababa, 20, March, 2023.

³⁸² Interview with ‘K’ and ‘J’ Public Defenders, FSC public defender’s office, Addis Ababa, 21, March, 20

³⁸³ Ibid

³⁸⁴ Interview with ‘I’, Public Defender, FSC public defender’s office, Addis Ababa, 21, March, 2023.

³⁸⁵ Ibid

³⁸⁶ Statement by Respondents ‘I’, ‘J’, ‘K’ and ‘L’, all are Public Defender’s, FSC Public defender’s office, Addis Ababa, 27, March, 2023

According to one of interviewee from federal supreme court public defenders, “in fact, there are laws like witness and whistle-blower but they are beyond police and ordinary prosecutor expertise and owing to absence of strong jurisprudence in this area there is a believe that they need to establish independent witness protection program.”³⁸⁷ And as interviewee Mr’s’ added, “Usually the societies’ claim in case of witness security harm goes to the capacity and unwillingness of administrative authority, not only to justice institutions.”³⁸⁸ Based on summary respondent and view of some interviewees from Lideta FHC there is even awareness gap as to the existence of witness protection provisions and the way to enforce it. According to respondent ‘B’ “... usually we institute organized and complex case, and not separated from other ordinary types of crimes. Even if there is a highly organized crime likes money laundry cases I think we will views without any distinction from other crimes, in my view.”³⁸⁹ Further, the presiding judge of FHC added that, “...the assistance and witness protection provisions are not enforceable yet, this is because we have to give similar status with less organized crime.”³⁹⁰

The result of interview data collected from Lideta FHC responded that, “to tell you the truth I know there are witness protection proclamation and various witness anonymity provisions targeted to protect the witness but I have no enough knowledge about protection of witness security employed without jeopardized accused rights to confrontation.”³⁹¹ Though awareness creation on protection of witness issue in general is one of powers and duties of justice administrative agencies,³⁹² the prosecutors is not working in collaboration with court and other pillars justice institutions on witness protection issue.

Thus, all the above confirms the existence of awareness gap on witness protection and the governing legal framework in Ethiopia. Other studies and the one conducted by Melaku. T also confirmed this gap. Literatures attribute the reasons behind low status of witness protection to weakness of legislator to make the issue on political agenda and law enforcing institutions for its grossly inadequate enforcement performances. In our country the problems are associated to various factors. Based on the data gathered the following are some of the factors for low awareness as well as absence of balancing with accused rights of competing interests in Ethiopia.

³⁸⁷ Ibid

³⁸⁸ Ibid

³⁸⁹ Statement by Respondent ‘B’, Judge in FHC Lideta Criminal Division, Addis Ababa, 27 March, 2023.

³⁹⁰ Statement by Respondent ‘A’, Judge in FHC Lideta Criminal Division, Addis Ababa, 27 March, 2023.

³⁹¹ Statement by Respondent ‘C’, Judge at the FHC Lideta Criminal Division, Addis Ababa, 27 March, 2023.

³⁹² Ibid

Absence of cooperation and incoordination: As discussed somewhere above, realizing witness anonymity protection is an area that requires strong institutional linkage and international cooperation. The need examine the extent to which a programme is able to procure cooperation from state and non-state institutions locally and internationally. However, practically and legally there is no established linkage and cooperation between the OAG, court and public defenders.³⁹³ Further, there is no comprehensive witness protection a proclamation provides about institutional linkage and cooperation with office attorney general and the judiciary. Moreover, all most all of the *interviewee responded* that practically in Ethiopia there is no coordination and cooperation between the criminal justice organs and the international cooperation,³⁹⁴ yet one of informant from Federal OAG said that, “currently there is a good beginning as the office of federal witness protection has started to engage and consult us on the process of drafting directives and standards.”³⁹⁵ Therefore, absence of institutional coordination and cooperation is one of the challenges against witness security protection specifically in the cases of the need to relocate and protecting witness identity.

To sum up, the field data revealed that despite the existence of serious witness threat and intimidation in the case study area there is no protection for the right of witness. The factors that hindered the gross of organized and complex crimes are challenges of awareness on witness protection and balancing accused right to confrontation among officials and the public; weakness of political commitment; lack of specialization witness protection program and specialized unit on witness protection; weakness of state capacity; institutional incoordination and lack of cooperation both at national and international practices and fund and financial limitations.

4.6 Challenges and Limitations in Laws and Practices

Interviews, with judges; ‘A’, ‘B’ and ‘C’ lack of efficacy and efficiency of the justice system or institution as a whole: Even the laws enacting by legislatures; thus challenges inherent in using local or short security forces and state institutions for providing protection are also faced by domestic protection programmes. Were local security forces to withdraw cooperation due to fear of their own prosecution, political interference or other reasons, protective capacity would very quickly be diminished. The problem posed by witnesses providing evidence which incriminates those with control over the very mechanism

³⁹³ Summary of questionnaire response of multiple respondents, *supra note*, 369.

³⁹⁴ Interview with ‘G’ Prosecutor, in Federal OAG, Addis Ababa, 20, March, 2023.

³⁹⁵ Ibid

established to protect them, is comparatively new to best practices. This element is goes to the heart of state legitimacy. A critical indication of state competence is its ability to prevent witnesses at all stages of a dispute resolution process from being harmed, or threatened with harm. Witness protection is generally dependent on what the state can offer in this regard.³⁹⁶ According to experts, among cases of national witness protection, prominent themes relate to the politics and drivers that come into play in the creation of a protection programme, as well as capacity problems and the novel nature of the threat to Ethiopian witnesses, including threats from the state or elements connected to it.³⁹⁷

Again, different legal practitioners mention the existence of huge gap between the law and practice as well as the objective behind promulgation of some specialized proclamations. For instance, the response to the questionnaires respondents that include judges, prosecutors and public defenders underscore that most of the time the law enforcement agencies use the laws as one of the “tools to stifle dissident.”³⁹⁸ They substantiate their positions by saying that Proc, No.652/2009, herein after called Anti-Terrorism Proclamation, was used as a tool to put heavy yoke of the Ethiopian People’s Revolutionary Democratic Front (EPRDF) regime under the leadership of former Prime Minister late Meles Zenawi and to maintain EPRDF political ideological philosophy so that all of those who oppose violation of their group rights face the fate of accusation, detention and criminalization.³⁹⁹ Furthermore, they said that the whim to stifle the dissident came as a result of EPRDF’s, which was created, controlled and manipulated by Tigray People’s Liberation Front (TPLF), power mongering daydream and its negligence to protect laws enacted by the legislature the member of which are almost all of EPRDF’s members. In addition, the respondent to the questionnaires stated that citizens were detained, criminalized and sentenced from rigorous imprisonment up to death sentence due to fabricated witness testimonies, blacklisted as members of *political parties and/or freedom fighter rebel groups*⁴⁰⁰ that used to fight against the regime’s violation of fundamental human rights and civil and political rights recognized under international legal instruments accepted and adopted by Ethiopia. The participants of the questionnaires mentioned that “witnesses

³⁹⁶ Interview with, ‘A’, ‘B’ and ‘C’, *supra note*, 380, Addis Ababa, March 30, 2023.

³⁹⁷ Interview with ‘F’, Prosecutor in Federal OAG, Addis Ababa, 20, March, 2023.

³⁹⁸ Interview with ‘A’, ‘B’ and ‘C’ Judge in the FHC Lideta Criminal Division, March 30, 2023.

³⁹⁹ Statement by Respondent ‘F’, Prosecutors in Federal OAG, Addis Ababa, 27, March, 2023.

⁴⁰⁰ The rebel groups such as Oromo Liberation Front (OLF), Ogaden National Liberation Front (ONLF) and Patriots Ginbot 7 were listed as terrorist organizations by the then legislature controlled by EPRDF. Later under the leadership of Prime Minister Abiy Ahimed (PhD), these organizations were deleted from the listed of terrorist organization in 2017 as part of the political reform process aimed to widen the civil and political atmosphere for all actors’ voices to be heard fairly.

were threatened to that they could face imprisonment if they do not testify against alleged accused persons who, in fact, were innocent people struggled for prevalence of the rule of law and justice.” “Oromo ethnic group members were given the name of Oromo Liberation Front (OLF) tag to accuse them as terrorists when they oppose EPRDF officials land grabbing and corruption practices and struggled for fair and equitable political representation, free and fair election and ethical political leadership.” “Agnuak ethnic group members Gambela region were extra-judicially killings, their lands had been grabbed and given to TPLF members and their allies in the name of investment; they suffered fabricated accusation and rigorous detention sentencing due to the sole reason that they opposed extrajudicial killing by security forces, illegal arrest to silent their struggle, torture and inhuman treatment during investigation, fabricated accusation and orchestrated testimony of witnesses who testified due to threat targeted by government security agencies.” Now a day the same features of all African states Ethiopia not exception, previous ruling party members were accused as members of TPLF group member terrorists due to the fact that they claimed Wolkait, which they believe is part of Tigray regional state as opposed to Prosperity Party of government.” “On the other hands, real perpetrators were left an accused and miscarriage of justice happened.” “Citizens of foreign countries were illegally abducted and detained” in the name of a ‘king appropriate measures to maintain law and order.’”⁴⁰¹ These show that the laws were used to side-line and discriminate citizens on the basis of their political ideology, their authority in government offices, and their identity and to stifle citizens when they demand real justice.

To windup, Ethiopian challenge is complicated by poor capacity and integrity in the justice sector,⁴⁰² as well as by lower living standards.⁴⁰³ These issues commonly cause justice inefficiencies which impede both witness protection and competing interests of accused right to confrontation. Therefore, it is proposed that a separate political forum be established to ensure the protection of witnesses at all stages of the trial.

⁴⁰¹ Statement by Respondent ‘A’, Judge in FHC Lideta Criminal Division, Addis Ababa, 27, March, 2023.

⁴⁰² Statement by Respondent ‘H’ Prosecutor in Federal OAG, Addis Ababa, 27, March, 2023.

⁴⁰³ Ibid

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter is the final one that is dedicated to conclusion and recommendations based on the preceding chapters' discussions and findings.

5.2 Conclusions

This thesis seeks to address the frictions between protecting the rights to confrontation and protecting the physical and psychological wellbeing of witnesses in Ethiopia. As lesson drawn from world classic states to set-out, Ethiopian challenge is complicated by poor capacity and integrity in the justice sector, as well as by lower living standards. These issues commonly cause justice inefficiencies which impede both witness protection and the rights of the accused. While the latter are critical to the integrity of the criminal justice process, witness protection is often the essential component of the successful prosecution of organised crime. Witness protection's importance is tied to Ethiopian government' growing willingness to address the phenomena of organised crime.

As view of the discussions as made above, it is clear that there are no sufficient and effective provisions of existing laws and jurisprudence practices regarding protection to the witness and balancing competing interests of accused right to confrontation in Ethiopia. However, glean from international standards and world best practices disclosed that, the successful witness protection program, requires strong and comprehensive policy, legal framework and well-funded institutions as well as the agreements of foreign countries or NGO which might cooperate to detect, trace and locate where the witness intimidation are very serious and strong for their life is relocated. But as examined in chapter three and four of this paper Ethiopia does not have a permanent and special witness protecting policy, laws and witness protection program which deal about protecting witness identity and security at all stages trial in the manner that does not jeopardizing accused right to confrontation.

The research also mentioned, the FDRE constitution absolutely guarantees the accused the right to cross examines adverse witnesses, the witness protection proclamation prescribes circumstances under which witnesses can give their testimony anonymously in which case such protection measures may apply: hearing testimony behind screen or by disguising the identity of the prosecution witnesses or producing evidence by electronic devices or any other

methods. However, it is difficult to align such protection measures with the constitution, as it accommodates no exceptions for anonymous witnesses. Even accepting the restrictions justified as a matter of necessity, the conditions to invoke the protections fall short of striking a proper balance between the rights of the accused and that of victims and witnesses. This is so in senses: there is no adequate protection for the defendant as a counterbalancing measure is left unprotected.

Various statutory provisions do not set-out comprehensive witness protection policy, for instance the Ethiopian CJP does not deal about protection of witness identity properly and its entirety. It doesn't deal about protecting witness in mechanism that cooperating with state and non-state (NGO) institutions locally and internationally. It does not indicate, as expected from policy, the establishment of strong and independent autonomous from political manipulation justice institution. So, one may conclude that Ethiopia lacks effective witness protection policy.

In addition, to witness and whistleblowers protection Proc, No.699/2010; the laws on the concepts of witness and whistle-blower protection in Ethiopia are fragmented in above existing legislations and they are major laws enacted with aim to deter organized and corruption crimes and to protect witnesses testifying against perpetrators of such crimes. This shows us there is no single comprehensive law in Ethiopia that provides for a uniform and permanent scheme for the protection of witness from intimidation and threat of organized crime. Although there are some provisions in these laws that allow the government to protect witness safety and security, they are not comprehensive to deal with the effective process of witness protection program. Those laws as well as jurisprudence practice do not include the definition of what 'witness', what 'witness protection' and 'whistleblower' means. However, the inclusion of "whistle-blowers" in the title is misleading the effectiveness both in laws and practices. Also do not includes crime requiring witness protection; types of protection measures and implement ad-hoc forms of witness protection measures, degrees of protecting measures not consistent with principles of FDRE constitution and does not build single and strong institution for effective and uniform witness protection program. In addition they do not give much attention to limits scope of witness protection measures and balancing with respecting interests of accused right to confrontation and also they do not deal about need to coordination between several actors or stakeholders (all persons along the justice chain including police, courts, prosecutors, community members and witnesses) intervening at various stages of the life cycle of a criminal case and international cooperation sufficiently.

Owing to the above indispensable factors the practical state of witness protection in offices of federal justice institution is manifested by the unbalance reality on protection of witness security and the rights to confrontation up to finalization of the data collection for this study, late March 2023. The empirical data analysed above revealed that the legal and institutional gaps have been reinforced by practical challenges that includes lack of awareness about witness protection in cases of organized, terrorist, corruption crime and other serious crime and the relevant legal framework; lack of efficacy and efficiencies of the justice system or institution as a whole; lack of specialized personnel and specialized administrative unit on witness protection; weakness of jurisprudence in practice; institutional incoordination and lack of cooperation; and financial challenges.

This thesis windup, that the scope of witness protection measures shall be consistent with the accused constitutional right to confrontations: i.e it is fairness to suspects and defendants and protective measures should be consistent with the rights of the accused, including the right to confrontation in accordance with international standards. Ethiopian government will have considered it important to balance witness anonymity and the rights to confrontation which is one fundamental elements of a fair hearing or trial. For example, state permit: cross-examination of witnesses; the presence of the defence lawyer at all stages of the process and allow the witness an accompanying supportive person during the trial; and disclosure of relevant information to the accused's counsel. As mentioned, in chapter two the balance of rights has to be interpreted carefully for the interest of justice, both the accused's right to confrontation and other competing interest should have to be safeguarded. A fair trial has two objectives in view, i.e. first, it must be fair to the accused and secondly, it must also be fair to prosecution or the victims. Thus, it is of utmost importance that in a criminal trial rights and interests should be balanced. Finally, it is also proven in this thesis that is insufficient of existing laws and absence of autonomous institution causes a lot of sufferings to the whole criminal justice system and increases the crimes and sufferings of witnesses as well as alarmingly. Under the circumstances, the author recommends that an urgent need for amending a comprehensive and consolidate witness protection programs law providing the rights, privileges and protections with proper and effective protective measures should be stipulated as suggestions for improvement part for witnesses and victims and where necessary their family members to empower them to give their best evidence in the most secured environment possible so that justice is done and crime decreases.

5.3 Recommendations

In the light of above discussion the author strongly recommends the necessity to amend comprehensive law with sufficient protective measures and programs and other initiatives relating to the protection of witnesses which are as follows:

5.3.1 Recommendation to the Legislature

Enacting single and comprehensive witness protection law: To solve the current challenges of not having single and comprehensive witness protection law the government must enact single and comprehensive law which allow for uniform scheme as well as provide all witness protection measures at all stages of proceeding. Hence, the legislative body of the government should amend the Proc, No. 699/2010 in light of what ‘witness protection’ mean, avoid the overlapping concept between whistle-blower and witness protection, scope of beneficiaries, scope of application and balancing with accused right to confrontation. Since protection of witness is crucial in maintaining justice, within its economic capacity, the government has to allocate necessary budget for the witness protection program. This could be done by allocating annually fixed amount of money for witness protection; or the organ to which this work is entrusted to may allocate necessary budget for the effective protection. Ethiopian government should have duty prove efficacy and efficiency of the justice system or institution as a whole: This element is goes to the heart of state legitimacy and a critical indication of state competence is its ability to prevent witnesses at all stages of a dispute resolution process from being harmed, or threatened with harm. Encourage justice sector reform. This would allow more sensitive cases to be admitted in the future, without fear of delay or other impediment to protection stemming from the criminal justice process. Because any protection mechanism should be instigated as part of wider justice sector reform already underway by the justice sector development programme.

5.3.2 Recommendations to Law Enforcement Agencies

Therefore law enforcement agencies of Ethiopia have responsibility to follow effective and efficient methods to improve the witness protection programmes and play active legal as well as administrative roles to improve the witness protection systems in Ethiopia. Therefore, the law enforcement agencies are recommended as follows.

Establishing independent institution with sufficient and effective mandate to protect witness collaborate with justice institution: Having a comprehensive witness protection law does not by itself enough and guarantees the all forms of witness assistance and protection and

respecting interest of accused right to confrontation from organized, terrorist, corruption and serious crime. The law needs to be implemented properly so that it can achieve the intended result. Therefore, an institution responsible for the implementation of the law must be established. In general, it is important to have independent and permanent institution mandated to work on witness protection program.

The attorney general shall establish strong and active witness protection office and support the regional counterpart Bureaus with empowered staffs dedicated to put the law into practice. As key player in legislative review and presenting laws for amendment by the legislature, attorney general shall contribute for clear definition of what “witness protection”, the scope of witness protection, filling legal lacuna on definition, scope of application, fair treatment of all witnesses for serious crimes and set-out the means to give solutions on friction between the right to confrontation and witness protection. A protection mechanism should be directed at cases of local organised crime, terrorism, corruption and other serious and special vulnerable crime and begin operations by focusing on cases devoid of political sensitivity. Attorney general shall also enact regulation, directives and guidelines for effective implementation of the witness and whistle protection proclamation. Law enforcement agencies shall take the best and world classic practice of USA, Australia, South Africa and Kenya in relation to witness protection as good lesson, and consider these best practices in their operational law enforcement interventions. Create the means to foster the basis for cooperation among international, regional and NGO with government justice machineries.

5.3.3 Recommendation to Court

Delivering the judicial activities in an impartial manner is instrumental to gain public trust and demonstrate impartiality of the judiciary. Therefore, courts are recommended as follows: When police and/or public prosecutor present application for protection identity of witnesses, courts shall play their impartial role. The courts shall take the best practices of the practice of above jurisdiction judiciary in relation to witness protection as good lesson, and consider in their law interpretation to improve Ethiopian jurisprudence; There is a need to have courtroom procedural guideline to make courtroom protection effective while maintaining the right of the accused and how the right could be limited in balancing the constitutionality rights of accused right to confrontation interest; Consider it as a general rule that anonymity affects the balance between the rights of the accused and the rights of the victims.

5.4.5 Recommendations to Public Defenders Office

In all circumstances and at all times, federal Supreme Court public defender's office have an obligation not to jeopardize the life, safety, freedom and well-being of victims, witnesses and other cooperating persons. The best protection public defender's office should provide to cooperating persons is to be aware of the potential risks of harm and to exercise good judgment, caution and sensitivity in all their interactions.

5.3.4 Recommendations to Witnesses and Victims

It is apparent that witnesses are the final beneficiaries of the witness protection programmes. Victims are part of the witnesses who serve as 'eyes and ears of justice'. They are part of those witnesses eligible to be beneficiaries of the witness protection programmes. However, the witness protection programme can never be effective and sustainable without the contribution of witnesses. Therefore, Witnesses shall: Provide reliable information to law enforcement agencies and all stakeholders who are on-board to support them and maintain their safeguard; Cooperate with all actors including law enforcement agencies throughout the witness protection scheme timeframe; and Take their own measures not to be exposed to risky environments and follow the professional advices during and after the witness protection programme timeframe.

So, establishing by law an independent and special institution with clear mandate of protecting witness in the ways that does not jeopardized the accused constitutional rights to confrontation is necessary to have effective criminal justice result.

Bibliography

I. Books, Journal Article, and Other Reports

1. Alemu M, & AWOL A, 'The Ethiopian Law on the Right to Confrontation' *Bahir Dar University Journal of Law* Vol.9, No.2 (June 2019).
2. Asa R. 'Case Analysis- The Protection of the Interests of Witnesses- The ICTY in Comparison to the Future ICC' (1999) 12 *Leiden Journal of International Law*, 466.
3. Australian Federal Police 'witness Annual Report 2011-12' (2012) 6.
4. Bryan A. Garner (ed) *Black's Law Dictionary*, (17th ed, West Group & St. Paul 1999) 1596
5. Chhatwani N 'Witness protection in india' (2020) 8
6. Clifton S 'The Law on Witness Protection in Kenya: Whistle-blower's refuge or just pipe dream?'(2020) 90.
7. Dandurand, Y; Kristin F. A review of selected witness protection programs. Public Safety Canada, 2012.
8. David L, Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trial, (2002) 24 *Sydney Law Review*) 377, accessed Jan 17,2022
9. Demleitner, NV. "Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?." *The American Journal of Comparative Law* 46, no. suppl_1 (1998): 641-664.
10. Dhondge P 'Australia's Witness Protection Law: Analytical Analysis' (2020) 99.
11. Doak, J, and Rebecca Huxley-Binns. "Anonymous witnesses in England and Wales: charting a course from Strasbourg?." *The Journal of Criminal Law* 73, no. 6 (2009): 508-529
12. Douglas K, Hiding in plain sight: The witness security program is a critical weapon in the war on crime, *FBI Law Enforcement Bulletin* 73(5) (2004), 25-32, 27.
13. Earley, P. and Shur, G. *WITSEC: Inside the Federal Witness Protection Program*, Bantam Books, February 2002:359:5.
14. Gert V, *Protecting witnesses of serious crime: Training manual for law enforcement and judiciary*, Brussels: Council of Europe Publishing, September 2006, 204.
15. Goran S. 'The ICTR and the Protection of Witnesses' 3 *Journal of International Criminal Justice* (2005) 962- 966.
16. Jayasankar K 'Right of Witness Protection: A Comparative Overview' (2012) 75.
17. Joanna P, Justice obscured: the non-disclosure of witnesses 'identities in ICTR trials'[2005-2006] *ILP* Vol. 38:281

18. Khalil, A. (2010). *Research Methodology in the Science of Law*, Birzeit University.
19. Kumar, M. "Secret Witness, Secret Information and Secret Evidence: Australia's Response to Terrorism". *Miss. LJ* 80 (2010): 1371
20. Liz C, 'Organized Crime and National Security: *A Dubious Connection*' (2014) 17 (2) *New Criminal Law Review: In International and Interdisciplinary Journal* 222.
21. Mahony C, *The justice sector afterthought: Witness protection in Africa* (2010) Pretoria: Institute for Security Studies.
22. Marie T, *A Best Practice Guide for Whistleblowing Legislation* (Berlin, Transparency International, 2018).
23. Michael T, *The Two Competing Interests: Equality of Arms vis-à-vis Anonymity of Witness; The Case of Ethiopia* available at: www.abbyssinialaw.com accessed at April 28, 2019
24. Mikiyas B, centre for advancement of right and democracy, pre-proceeding of post death of Hachalu Hundessa detention: legal analysis of selected cases October 2020.
25. Mohammad Gholasi and MoosaAkefiGhaziani, *Witness Protection in terms of a Fair Trial in Criminal Matters*, *Journal of Novel Applied Sciences*, 2014, P. 1048.
26. Montanino, F. "Protecting the federal witness: burying past life and biography." *American Behavioural Scientist* 27, no. 4 (1984): 501-528.
27. Monroe L. 'Witness Anonymity is inconsistent with Due Process' (1997) 91 (1) *The American Journal of International Law*, 80.
28. Mphaphuli L 'Experiences and Challenges of Witnesses in The Witness Protection Programme In South Africa: Guidelines For Coordinated Service Delivery Developed From A Social Work Perspective' (2020) 63
29. Neil K.P 'A critical examination of witness protection in Australia' (2014) 84.
30. Nicholas C 'Implied External Limitations on the Right to Cross-Examine Prosecution Witnesses: The Tension between a Means Test and a Balancing Test in the Appraisal of Anonymity Requests (2010) 11 *Melbourne Journal of International Law* 3.
31. Patricia M, Wald 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal (2002) 5 *Yale Human Rights & Development Law Journal* 217-238; See also Groan Sluiter 'The ICTR and the Protection of Witnesses' (2005) 3 *Journal of International Criminal Justice* 965.
32. Rahangdale P 'Witness Protection: A Comparative Analysis of Indian and Australian Legislation' (2019) 146.

33. Raneta L. Mack, 'The Federal Witness Protection Program Revisited and Compared: Reshaping an Old Weapon to Meet New Challenges in the Global Crime Fighting Effort, (2014) 21 *University of Miami International and Comparative Review* at 206
34. Reaves, Brian A., and Timothy C. Hart. *Federal law enforcement officers*, 2008. Biblio Gov, 2012
35. Robert B. McKay, 'The Right of Confrontation', *Washington University Law Review*', volume/issue 2(1959), p.123
36. Rodrigo L, 'Mexico's Federal Organized Crime Act' (2003) 11 *United States-Mexico Law Journal* 135.
37. Sarah summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, (Oxford: Hart Publishing, 2007).
38. Shirali, A.M 'A Critical Study of Impact of Hostile Witness on Administration of Criminal Justice System In India- With Special Reference to the State of GOA' (2020) 74.
39. Stefan Trechsel, *Human Rights in Criminal Proceedings*, (Oxford: Oxford University Press, 2005), p.312.
40. Steven W. Kayuni and Edister J. 'Failing witnesses in serious and organised crimes: policy perspectives for witness protective measures in Malawi' (2015) 41 (3) *Commonwealth Law Bulletin* 425.
41. Sylvia N. 'Witnesses before the International Criminal Court' (2009) 8 *The Law and Practice of International Courts and Tribunals*, 450.
42. Teddlie, C. & Yu, F. (2007). *Mixed Methods Sampling: A Typology with Examples*.
43. Transitional Justice Unit, *The Need for Witness Protection and Transitional Justice in Zimbabwe*, Zimbabwe Human Rights NGO Forum (September 2015).
44. Trotter, A. "Witness intimidation in international trials: Balancing the need for protection against the rights of the accused." *Geo. Wash. Int'l L. Rev.* 44 (2012): 521.
45. United Nations Human Rights Office of the High Commissioner, *The Protection of Victims and Witnesses: A Compilation of Conference Reports and Consultations in Uganda* (2010) 11
46. Wilson K, Kibet N. and Wokabi M. 'Challenges Facing Criminal Justice System in Relation to Witness Protection in Kenya' (2015) 20 (10) *IOSR Journal of Humanities and Social Science* 94.

47. *Witness Anonymity at the International Criminal Court: Due Process for Defendants, Witnesses or Both?* The Denning Law Journal (2011), Vol. 23, P 29-46.
48. Witness Protection Act 1998 (Act 112 of 1998), Cape Town: Government Gazette 19523.

II. International Legal Instruments

A. Laws: Binding and Non-Binding International Laws

1. COE, 'Procedural Protective Measures for Witnesses' (Training Manual for Law Enforcement Agencies and the Judiciary 2006) 30
2. Commission of the European Communities. (2007). *Commission working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice*. Brussels. p. 2
3. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power General Assembly resolution 40/34, annex.
4. Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex).
5. Protocol to the African Charter on the establishment of an African Court of Human and Peoples' Rights, OAU Doc. OAU/LEG/AFCHPR/PROT (III), entered into force 25 January 2004, Article 10(3).
6. Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Strasbourg: Council of Europe, 2005.
7. Rome statute of ICC, arts 57 (3) (c), 64(2), 64(6) (e) and 68,' *Rules of Procedure and Evidence*' (r 87-88) of 17 July 1998 entered into force on 1 July 2002.
8. Rules of Procedure and Evidence, r 34, s 4(22): recommend protective measures for victims and witnesses and providing counselling and support for them, in particular in cases of rape and sexual assault 955 of 8 November 1994
9. Santiago Guidelines on witness and victim protection, June 2008.
10. Statute of the International Tribunal for Rwanda, 33 I.L.M. 1598 (1994); and adopted by the United Nations Security Council on 8 November 1994, UN Doc. S/Res/955, Article 21.
11. Statute of the Special Court for Sierra Leone, established pursuant to United Nations Security Council resolution 1315 of 16 January 2002, UN Doc. S/Res/1315 (2000), Article 16(4).

12. The WPA was established under the Witness Protection Act (Cap. 79 Laws of Kenya) and amended by the Witness Protection (Amendment) Act 2 of 2010.
13. UNGA; 'Extra Judicial, Summary or Arbitrary Execution- Note by the Secretary General Sixty-third Session Item 67 (b) of the provisional agenda*', A/63/313 20 August 2008 para 32 p 13.
14. UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, (2008)
15. UNODC *Good Practices*, p.45. Countries in this category include, Australia, Austria, Canada, Hong Kong Special Administrative Region of China, New Zealand, Norway, Slovakia, and the United Kingdom
16. United Nations Convention against Transnational Organised Crime, adopted by General Assembly resolution 55/25, 15 November 2000, article 26.
17. United Nations Convention against Corruption (General Assembly resolution 58/4, annex).
18. Webb P 'The United Nations Convention Against Corruption: Global achievement or missed opportunity' (2005) 191.

B. International Cases

1. *Axen v. Federal Republic of Germany*, ECtHR, decision of 8 December 1983, Series A, No. 72.
2. *Prosecutor v. Tadic*, (1995) ICTY Case No. IT-94-1), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, p 27.
3. *Prosecutor vs. Karadzic*, ICTY (TC) Case No: IT-95-5/18-PT decision on prosecution motion for delay disclosure 5 June 2009.

III. Ethiopian Legal Instruments

A. Laws

1. Constitution of the Federal Democratic Republic of Ethiopia, Proc, No. 1/1995,
2. Criminal Code of the Federal Democratic Republic of Ethiopia, Proc. No. 414/2004,
3. Criminal Procedure Code of the Empire of Ethiopia, Negarit Gazeta Extraordinary Issue No.1 of 1961,
4. Ethiopian Revised Anti- Corruption Special Procedure and Rules of Evidence, Proclamation No.434/2005.
5. Ethiopian Witness and whistle-blowers protection proc. No. 699/2010

6. Federal Democratic Republic of Ethiopia Anti- Terrorism Proc, No.652/2009;
7. Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proc, No.1176/2020, Art 14 (2) and (3).
8. Proclamation for the establishment of the Federal Ethics and Anti-corruption Commission Proc No. 1236/2021.
9. የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊስ (ከዚህ በኋላ የወንጀልፍትህ ፖሊስ ይባላል) 2011ዓ/ም አንቀጽ 4(5) (2-3)::

B. National cases

1. *Federal Public Prosecutor V. Eskider Nega Fanta et al 23 defendants*, Federal High Court, Lideta, Division, 19th Criminal Bench, 05/13/2012 E.C), File No.260175) (unpublished).
2. *Federal prosecutor V. Gurmessa Ayano Weyessa eta l*, [2015] FHC.178365 (unpublished).
3. *Federal Public Prosecutor V. Jawar Siraj Mohammed et al 24 defendants*, (Federal High Court, Lideta Division, 19th Criminal Bench, 03/13/2012 E.C, File No.260215), (unpublished).
4. *Federal prosecutors vs. Mehdi Ali eta l*, [2016] FDRE CCI, File No.2356/09, Hamle 29, 2009 E.C.)E.C

IV. Internet Sources

1. Andre Standing ‘Transnational Organized Crime and the Palermo Convention: A Reality Check’, International Peace Institute, December 2010, 2 available at www.cpahq.org/CPAHQ/CMDownload.aspx?ContentKey 6fdc7034- b0e5, accessed 28 August 2017.
2. Art 83 Chile’s Constitution of 1980 (rev 2015) provides for the protection of victims and witnesses and empowers an autonomous body to adopt measures to protect them. Available at <https://www.constituteproject.org/constitution/Chile 2015.pdf?lang=en>, accessed 6 July 2017.
3. Article 250 of Colombia’s Constitution of 1991 (rev 2013) provides for the protection of victims and witnesses. Available at <https://www.constituteproject.org/constitution/Colombia, 2013.pdf? lang=en>, accessed 6 July 2017.

4. Australian Federal Police ‘Witness Protection’ (2012) 2, available at <https://www.afp.gov.au/sites/default/files/PDF/Reports/witness-protection-annual-report-2011-12.pdf> (accessed 18 March 2022).
5. Beqiri, R. Witness Protection in International Criminal Court, *Lund University Publications*, 2011, (Master Thesis JAMM04 2011 Sweden) (available online at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=2167029&fileId=2171585>), p.34.
6. Commonwealth Secretariat, Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice Process, Meeting of Commonwealth Law Ministers and Senior Officials, Provisional Agenda Item 4(d), LMM(11)(14 July 2011 (hereinafter “Victim/Witness Best Practices Guide”), available at <http://www.thecommonwealth.org/document/181889/34293/35232/238332/clmm2011.htm>.
7. Doorewaard C & Minnaar A ‘Witness protection: A “hit-or-miss” situation’ (2017) 34, available at https://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/servamus_v110_n3_a10.pdf?Expires=1608415532&id=id&accname=58219&checksum=A14FB55BD7C2EC8A4DBAF4220E55B5EA (accessed 20 December 2020).
8. Fana Broadcasting Corporate, <https://www.fanabc.com/english/federal-oromia-attorneybring-criminal-charges-against-5-728-individuals/> (accessed on 18 Oct. 2020)
9. Fyfe N & Sheptycki J ‘Facilitating witness co-operation in organised crime cases: an international review’, available at https://www.researchgate.net/profile/Nicholas_Fyfe/2/publication/237321650_Facilitating_witness_cooperation_in_organised_crime_cases_an_international_review/links/54897002cf268d28f0a04e4/Facilitating_witness_cooperation_in_organised_crime_cases_an_international_review.pdf (accessed 13 February 2022).
10. ‘Getting Witness Protection’ (2019), available at <https://www.westerncape.gov.za/service/gettingwitnessprotection> (accessed 20 December 2020).
11. Institute of Security Studies ‘How can Africa keep witnesses safer? 2 September 2016, available at <https://oldsite.issafrica.org/iss-today/how-can-africa-keep-witnesses-safer>, accessed 1 August 2017

12. Irish J, Magadhla W, Qhobosheane K & Newham G ‘Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa’ (2000), available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.511.7528&rep=rep1&type=pdf> (accessed 20 April 2021).
13. Jaggi R ‘Witness Protection’ (2020), available at https://heinonline.org/HOL/Page?handle=hein.journals/supami18&div=81&sent=1&casa_token=&collection=journals (accessed 12 July 2022).
14. JO Finckenauer, La Cosa Nostra in the United States, 12 June 2007, www.ncjrs.gov/pdffiles1/nij/218555.pdf.
15. J Njeri, Witness protection: The missing cornerstone in Africa’s criminal justice systems, 1 September 2014, www.issafrica.org/iss-today/witness-protection-the-missingcornerstone-in-africas-criminal-justice-systems.
16. Kramer, K ‘Protection of witnesses and whistle-blowers: How to encourage people to come forward to provide testimony and important information’ 149th International Training Course Visiting Experts Paper, available at http://www.unafei.or.jp/english/pdf/No86/No86_07VE_Kramer.pdf, accessed 21 January 2013.
17. Laurent Gbagbo case: ICC judge apologises after witnesses named, BBC News, 8 February 2016, www.bbc.com/news/worldafrica-35526267.
18. Mathenge, House to amend witness act; Republic of Kenya, Witness Protection (Amendment) Bill 2010, 5 February 2010, <http://www.kenyalaw.org/Downloads/Bills/2010/THE%20WITNESS%20PROTECTION%20BILL,%202010.pdf> (accessed 12 March 2010).
19. Monterosso S ‘Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?’ (2022), available at <https://link.springer.com/content/pdf/10.1007/s10609-022-09438-4.pdf> (accessed 13 July 2022).
20. Republic of Kenya, Kenya Penal Code 1960 (Act 54 of 1960), Nairobi: Kenya Gazette, section 238, chapter 63, <http://www.kenya law.org> (accessed 5 February 2009).
21. Peter Finn & Kerry Murphy Healey ‘Preventing gang and drug related witness intimidation’ U.S. Department of Justice- Office of Justice Programmes National Institute of Justice: Issues and Practices November 1996, 60, available at <https://www.ncjrs.gov/pdffiles/163067.pdf>, accessed 10 January 2012.

22. Public Safety Canada, Witness protection programs in selected countries, research brief no. 43, and www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rgnzd-crm-brf-43/rgnzd-crm-brf-43-eng.pdf.
23. Republic of Kenya, Witness Protection Act 2006 (Act 16 of 2006), Nairobi: Kenya Gazette 3513, sections 24, 30, <http://www.kenyalaw.org> (accessed 5 February 2009).
24. Rome Statute of the International Criminal Court, 1 July 2002, www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.
25. Tadic Case, Motion Requesting Protective Measures for Victims and Witnesses filed by the Prosecutor, 10 August 2005. <http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm>.
26. UNODC, ‘*Good practices for the protection of witnesses in criminal proceedings involving organised crime*, (2008)(<www.unodc.org/documents/organizedcrime/Witness-protection-manual-Feb08>), accessed Jan. 5, 2022.
27. US Code, Section 3521. Although the foundation for the Witness Security Program was authorized by the *Organized Crime Control Act of 1970*, the program was established under Part F of Chapter XII of Public Law 98-473, enacting provisions under this section, may be cited as the ‘*Witness Security Reform Act of 1984*.’ http://www.oas.org/juridico/english/draft_model_report accessed at 23/04/2017
28. Victoria State Government ‘Review of the Witness Protection Act 1991’ (2016) 9, available at https://files.justice.vic.gov.au/2021-06/review_of_witness_protection_act_1991.pdf (accessed 20 July 2022).
29. Walter Kemp and Shaw Malcom ‘From the Margins to the Mainstream: Towards an Integrated Multilateral Response to Organized Crime’ New York: International Peace Institute (September 2014) 3, available at http://www.globalinitiative.net/download/general/global/1409_margins_to_mainstream_toc.pdf, accessed 25 June 2015.

Appendix I

Annex 1. Respondents Guide Questions

Close Ended Questionnaire for Federal Justice Institution' Respondents

Hawassa University School of Graduate Studies

Dear respondent, _____

This questionnaire is prepared to collect data for the research to be conducted titled: *Witness Protection under Ethiopian Law: Jurisprudence, Constitutionality and the Right to Confrontation*. The research conducted is as a partial fulfilment of the requirements for the Degree of Masters of Criminal Justice at Hawassa University. This is, therefore, to request that you provide appropriate and genuine data to the best of your knowledge for each question listed below. I would like to assure you that the information obtained will only be used for the purpose of the research. Finally, I would like to express my gratitude in advance for your cooperation.

A. General Questions (12 Respondents: from Federal Justice Institution)

1. Do you think that of the Witnesses and Whistle-blowers Protection of Criminal Offences Proc, No. 699/2010, disclosure is sufficient to achieve the fairness of the proceeding and the corner stone of criminal justice system?
2. In your opinion what are the likely challenges that may arise in developing a framework for witness protection in Ethiopia? How can these challenges be managed?
3. Can you please tell me whether and how socio-cultural, economic and political factors may affect witness protection in Ethiopia?
4. In your opinion would you say that there has been a general lack of interest by government on issues concerning witness protection in Ethiopia? Why or Why not?
5. In your opinion what are the prospects for developing a coordinated and institutional framework for witness protection in Ethiopia?

B. Specific Questions

I. Interview Questions to Judges (Respondents: A, B, C and D)

1. What of witness protection programs is in place in Ethiopia or in a current jurisprudence of Federal High Court?
2. If also, what of witness protection program is the effective for criminal justice of Ethiopia? Why or why not?

3. There have been instances where the courts have refused applications for protective measures on constitutional grounds. Can you please share your views on these issues?
4. In your opinion do you think that the judiciary/courts have a role to play in developing a framework for witness protection in Ethiopia? Please explain.
5. What are the strengths and weaknesses in the existing legal frame works that seek to protect witnesses?
6. How can balance between the legal rules ensuring protection of witnesses and the accused rights of confrontation on- criminal proceeding?

II. Interview Questions to Public Prosecutor (Respondents: E, F, G and H)

1. How do you assess the role of the Prosecutor and Investigator in upholding the need to balance the two competing interests: protection of witness with the right to confrontation?
2. In what circumstances accused/defendant can have a fair trial when evidence against him is presented by a witness whose identity remains unknown to the accused/defendant?
3. In case of organised criminal offence proceeding are there where the witness is intimidated and harmed?
 - a. If so, scope of intimidation and harm against witness?
 - b. If so, have led to case dismissals or acquittals?
 - c. If so, what is the impact of non-disclosure of witness protection measures on the effectiveness of criminal justice system?

III. Interview Questions to FSC Public Defenders (Respondents: I, J, K and L)

1. Why witness protection programs are important for the prosecution of organized crime?
2. What is the impact of witness protection is against accused right to confrontation?
3. How the court balance disclosure right of accused and argument of prosecutor claim non-disclosure for the protection of competing interests such as witnesses protection, national security and protection of on-going investigation techniques in practice?
4. What would usually be sufficient to show that a witness may be in danger or at risk if that witness's identity is directly disclosed to the public? Would not usually be sufficient to show that the witness may also be in danger or at risk if that witness's identity is disclosed only to the accused and the defence team? Where obligations are also imposed upon the accused and the defence team in relation to further disclosure by them?

Thank you for your responses!!!