Developing a Legal and Institutional Framework for Witness Protection in Nigeria: Reflections from International Perspectives

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ABSTRACT

'Witness protection' has been introduced in the criminal justice systems of several states worldwide as a recognised tool for facilitating the cooperation of witnesses and ensuring that concerns about their safety are not ignored. Although not a new phenomenon, witness protection praxis continues to evolve and remains largely undeveloped in many states. In Nigeria, the relevance of witness protection as a critical aspect of criminal justice administration is increasingly becoming evident.

As an area of enquiry, scholarly literature on witness protection is descriptive, locally focused, and lacking in conceptual clarification. Recent developments in Nigeria highlight the need for the clarification of legal and conceptual issues within the existing legal framework for protecting witnesses. Using the Nigerian case study, this thesis illustrates the obscurities inherent in the concept of witness protection. These are highlighted around five critical areas: the definition of witness protection; the scope of beneficiaries requiring protection; the nature of crimes necessitating protection; the nature of protective measures; and the administrative control of witness protection.

The thesis explores the concept of witness protection, which is still at an early developmental stage in Nigeria. In the absence of a clear legal jurisprudence, the thesis pieces together the practice of witness protection in Nigeria and embarks on a conceptual and legal clarification of issues important to developing a witness protection framework. To achieve this, the thesis draws from international debates, legal developments and institutional practices from other jurisdictions as a basis for improving Nigerian efforts in witness protection and for making normative proposals to that effect. The thesis utilises two distinct perspectives: the criminal justice and the human rights perspectives as heuristic tools for analysing the concept of witness protection and to separate the disparate influences that shape how it is construed.

A combination of desktop research by way of doctrinal research and empirical research was adopted. In pursuit of a more detailed understanding of contemporary developments relating to witness protection in Nigeria, field research was undertaken. This comprised qualitative research using semi-structured interviews of a specifically selected sample of criminal justice experts and practitioners with knowledge about witness protection in Nigeria. The semi-structured interviews justify the assumptions that there is a need to examine and clarify the scope of witness protection and what it depicts.

The thesis finds that the concept and practice of witness protection evolved within specific parameters and its definitions are determined within these limits. It advances the existing witness protection conversations by offering an analytical basis for discussing witness protection and proposes organising principles for delineating the scope of witness protection. The clarifications made in the analysis within this thesis are utilised in making normative proposals and policy recommendations for developing a legal framework for witness protection in Nigeria. The thesis recommends a formal witness protection framework, through the enactment of comprehensive witness protection legislation that clearly defines the objectives of witness protection, the scope of beneficiaries, the scope of crimes necessitating protection, the type of protective measures and guidelines for assigning these measures, clear eligibility criteria and which establishes an independent witness protection agency to administer witness protection in Nigeria.

DEDICATION

- To God Almighty, my ever-present help in time of need.

- To my parents, Ogochukwuka Augustine Ofuani and Felicia Ngozi Ofuani, for your unfailing love and consistent support.

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ABBREVIATIONS

ACJA	Administration of Criminal Justice Act
AG	Attorney General
AU	African Union
CFRN	Constitution of the Federal Republic of Nigeria
COE	Council of Europe
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EFCC	Economic and Financial Crimes Commission
EU	European Union
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICPC	Independent Corrupt Practices Commission
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of former Yugoslavia
LFN	Laws of the Federation of Nigeria
NAPTIP	National Agency for the Prohibition of Trafficking in Persons
NBA	Nigerian Bar Association
NHRC	National Human Rights Commission
OHCHR	Office of the High Commissioner of Human Rights
OWP	Office of Witness Protection
RCMP	Royal Canadian Mounted Police
RCT	Rational Choice Theory
RPE	Rules of Procedure and Evidence

SOCPA	Serious Organised Crime and Police Act
TPAA	Terrorism (Prevention) (Amendment) Act
TRC	Truth and Reconciliation Commission
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNHRC	United Nations Human Rights Commission
UNODC	United Nations Office on Drugs and Crime
UNCTOC	United Nations Convention on Transnational Organised Crime
US	United States of America
VAPPA	Violence Against Persons Prohibition Act
VWU	Victim Witness Unit
WITSEC	Witness Security Programme
WPP	Witness Protection Programme

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CHAPTER ONE

INTRODUCTION

1.1. Background to the Study

Witnesses are perceived as the cornerstone of a successful criminal justice system[1] and Nigeria is no exception. Prosecutors depend on the evidence of reliable witnesses whose testimonies are accepted as truthful and accurate[2] to prove their cases. Witness testimonies are of high evidentiary value to prosecutors, in the absence of sufficient physical evidence[3] or other direct evidence,[4] and particularly where they conclusively prove the defendant's involvement in the crimes being prosecuted.[5] Unfortunately, credible witnesses may be unwilling to testify in criminal prosecutions because they fear possible reprisals, threats or actual intimidation by the defendants.[6] The reluctance of witnesses to testify because of perceived or actual intimidation may hinder the availability of critical evidence required to successfully prosecute offenders.

To encourage the cooperation of witnesses and ensure that concerns about their safety are not ignored, witness protection systems have been introduced in the criminal justice systems of several states worldwide. The formal protection of witnesses started in the United States of America (USA) as a legally endorsed programme in the 1960s for dismantling Italian American organised crime particularly the Mafia code of 'omerta',[7] which kept members of the Mafia from testifying about their criminal activities. Security was thus provided for witnesses in exchange for

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[1] R. Jeffrey Harris 'Whither the Witness the Federal Government's Special Duty of Protection in Criminal Proceedings after Piechowicz v. United States' (1991) 76 *Cornell L. Rev.* 1285.
[2] Karen Kramer 'Witness protection as a key tool in addressing serious and organised crime' 4, available at *http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf,* accessed 21 January 2013.
[3] Felfoldi Eninko 'The rising importance on the protection of witnesses in the European Union (2006) 77 *Revue international de droit penal,* 314, available at *http://www.cairn.info/revue-internationale-de-droit-penal-2006-1-page-313.htm,* accessed 28 May 2015.
[4] 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-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa.html,* accessed 16 May 2015.
[5] Uyo Salifu 'Fighting Boko Haram: Why Nigeria needs a cohesive witness protection programme' *Institute for Security Studies* 5 May 2015, available at *http://www.issafrica.org/iss-today/fighting-boko-haram-why-nigeria-needs-a-cohesive-witness-protection-programme,* accessed 6 May 2015.
[6] See generally 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* (1996) 1, available at *https://www.ncjrs.gov/pdffiles/163067.pdf,* accessed 10 January 2012.
[7] *United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' (2008) 7, available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf,* accessed 20 December 2011.

their testimonies. Witness protection provided an 'important testimonial incentive to individuals with knowledge of criminal conduct of interest to the government.'[8] Within that context, witness protection was considered as an essential strategy against organised crime.[9] Over time, witness protection became recognised in other jurisdictions, such as Australia, Canada, Germany, Italy, the UK, Brazil, Colombia, the Philippines, Kenya and South Africa. Although witness protection is not a new phenomenon, it remains largely undeveloped in many states. Scholarly research on witness protection focuses on the practice in the mentioned states and the American system became the model adopted in developing their own witness protection frameworks.[10] Witness protection is considered necessary to combat impunity[11] resulting from the unsuccessful investigation and prosecution of crimes caused by witness intimidation.

In Nigeria, stories abound of witnesses whose lives are threatened or are killed while cooperating with law enforcement authorities.[12] The unwillingness and absence of witnesses to testify in criminal investigations is believed to be responsible for the unsuccessful prosecution of several high-profile crimes in Nigeria.[13] The susceptibility of witnesses to harm in the absence of protective measures has lowered public confidence in fighting crime.[14] Those engaged in these criminal acts have taken undue advantage of the lapses in the criminal justice system and continue

[8] Nicholas Fyfe & James Sheptycki 'Facilitating witness co-operation in organised crime cases: an international review' *Home Office Online Report* 27/5 2005, 3, available at *http://www.researchgate.net/profile/Nicholas_Fyfe/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4.pdf*, accessed 9 April 2015.

[9] *UNODC* 'Good Practices' op cit note 7 at 22.

[10] Nicholas Fyfe & James Sheptycki 'International trends in the facilitation of witness co-operation in organized crime cases' (2006) 3 (3) *European Journal of Criminology,* 321.

[11] 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 67, p 18, available at *http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf*, accessed 5 May 2015.

[12] Kunle Shobo 'Witness Protection: Hoodlums beat and stabbed LAWMA official for Reporting their crime' *Blackbox Nigeria* 3 February 2016, available at *http://www.elombah.com/index.php/reports/5292-nnamdi-kanu-court-rejects-witness-protection-request*, accessed 25 February 2016.

[13] High profile politicians such as Late Bola Ige (then Attorney General of the Federation) Anthony Olufunsho Williams (a governorship aspirant of Lagos state) and Dr Ayodele Daramola (governorship aspirant in Ekiti State) amongst others have been assassinated and their murders remain unsolved. Suspects believed to be responsible for these murders have been set free for lack of direct evidence. See *Amnesty International* 'Nigeria: Impunity for Political Violence in the run-up to the 2007 elections' *AL Index: AFR 44/004/2007* (April 2007), available at *https://www.amnesty.org/download/Documents/60000/afr440042007en.pdf*, accessed 16 May 2015.

[14] John Chuks Azu 'Nigeria: Witness Protection - Enter Masked Witnesses' *Daily Trust* 28 May 2013, available at *http://allafrica.com/stories/201305290066.html*, accessed 25 March 2015.

to perpetrate these acts with impunity. This has contributed to the general scepticism of Nigerians towards cooperating with investigators and prosecutors.[15]

The upsurge in the investigation and prosecution of incessant acts of terrorism and economic and financial crimes has brought witness intimidation issues and the attendant witness protection concerns to the attention of criminal justice stakeholders in Nigeria. Specifically, the anti-corruption agenda of the Nigerian government has resulted in the prosecution of several high-profile individuals, mostly former government officials, for corruption and other economic and financial crimes. These prosecutions have witnessed a significant reliance on the testimonies of witnesses testifying on behalf of the prosecution.[16] However, in some instances, investigators and prosecutors have reported the mysterious deaths of their witnesses. This has instilled fear in other prospective witnesses who refuse to cooperate further.[17] Witness protection has thus gained more prominence and is the subject of discussion in professional and academic forums,[18] and forms the basis of judicial interpretation in the Nigerian courts.

Although witness protection issues have become prominent in recent years and its importance as a critical aspect of criminal justice administration in Nigeria is emerging, yet, witness protection practice in Nigeria is ad hoc. Ongoing reforms of criminal justice administration in Nigeria are aimed at ensuring 'that the system of administration of criminal justice in Nigeria promotes the efficient management of criminal justice institutions, the protection of society from crime and the protection of the rights and interests of the suspect, the defendant and the victim.'[19] These reforms can strengthen the existing legal framework for witness protection in Nigeria, as a significant aspect of the overall reform of the criminal justice system.

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[15] See country survey available at *http://www.afrobarometer-online-analysis.com/aj/AJBrowserAB.jsp*, accessed 29 June 2015.

[16] 'Dasukigate: How we laundered money for Metuh- Witnesses' available at *http://efccnigeria.org/efcc/index.php/news/1657-dasukigate-how-we-laundered-money-for-metuh-witnesses,* accessed 25 February 2016. See also 'Lamido: EFCC produces two more witnesses' available at *http://efccnigeria.org/efcc/index.php/news/1599-lamido-efcc-presents-two-more-witnesses*, accessed 25 February 2016.

[17] Ikechukwu Nnochiri 'Our witnesses are afraid to testify against Nyako, son EFCC tells court' *Vanguard* July 13 2015, available at *http://www.vanguardngr.com/2015/07/our-witnesses-are-afraid-to-testify-against-nyako-son-efcc-tells-court/*, accessed 25 February 2016.

[18] For example, the NIALS Specialized Training Course on Security and Public Prosecutions held at the Nigerian Institute of Advanced Legal Studies, University of Lagos Campus, December 2014.

[19] Administration of Criminal Justice Act 2015; s 1.

1.2. Statement of the Research Problem(s)

The upsurge in the investigation and prosecution of terrorism related offences and economic and financial crimes in recent years and the need to develop a more formal witness protection framework have been brought to the fore in Nigeria. Although there are semblances of witness protection within the text of several legislative provisions in Nigeria, the existing legal framework is inadequate, thereby creating an ad hoc system with no defined conceptual and legal basis for witness protection. Since witness protection is still in its infancy in Nigeria, there is no clear definitional scope for it. For example, reform attempts at witness protection in Nigeria have inspired different legislative bills: The Witness Protection Programme Bill 2008, the Witness Protection Bill 2012, the Witness Protection Bill 2015, and the Public Interest Disclosure and Witness Protection Programme Bill 2017. Between these bills are far reaching differences in terms of the scope of witness protection. The empirical component of this research, in chapter eight, confirms that criminal justice experts and practitioners in Nigeria use the term witness protection in a generic way and have different notions of what it means. 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.

These legal and conceptual discrepancies are further highlighted in the cases of *FRN v Nnamdi Kanu & 3 Others*[20] (*Nnamdi Kanu* case) and *FRN v Sambo Dasuki*[21] (*Dasuki* case). Within these cases, criminal justice experts in Nigeria engaged in deliberations, which show that within the existing legal framework, it is unclear: what the concept of witness protection means; who qualifies for witness protection; the scope of crimes necessitating protection; and the constitutionality or otherwise of certain protective measures. In the *Nnamdi Kanu* case, for instance, a preliminary objection by the defendants questioned the applicability of witness protection to investigators, the prosecution witnesses in this case. Also, they challenged the suitability of witness protection for treason and other crimes not expressly specified within the existing Nigerian legal framework for witness protection. These objections are summarised through the question: is witness protection applicable for every witness or for every type of crime?

[20] Charge NO FHC/ABJ/CR/383/2015.
[21] Charge No FHC/ABJ/CR/319/2015.

There is yet no conclusive judicial decision regarding these issues. These issues are analysed in chapter two of this thesis.

Although there is a considerable body of literature on witness protection, they are usually from the perspective of comparative reviews of witness protection practices within specific national systems[22] or international criminal tribunals.[23] Dandurand observes that studies of witness protection engage in 'comparative reviews of existing programs and measures that have been undertaken, usually as a basis for further policy development.'[24] At best, these studies are often confined to comparing existing programmes and legislation. Academic debates on witness protection are generally limited to the implications of protective measures on the rights of a defendant to a fair hearing.[25] 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 problematised. There is also a dearth of in-depth conceptual analysis of what witness protection means.

More so, there is no specific international instrument focused exclusively on witness protection and, by implication, no established international legal framework for witness protection. In the absence of an established framework, there are discrepancies about the precise meaning of witness protection, thereby subjecting it to diverse interpretations. For example, there is the tendency to conflate witness protection with similar concepts such as whistle-blower's protection, victim protection, and informant protection within academic literature. This was also discovered among respondents participating in the empirical component of this research discussed in chapter eight. Accordingly, current witness protection deliberations in Nigeria illustrate the inconsistencies

[22] *UNODC* Good Practices op cit note 7 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/81f81a91-0ad6-40ff-8310-3a1a45ce9869/review_of_witness_protection_act_1991.pdf*, accessed 29 March 2017.
[23] See 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.
[24] Yvon Dandurand 'Protecting Witnesses and Collaborators of Justice in Terrorism Cases' Paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Volume 3: Terrorism Prosecutions (2008) 25, available at *https://www.ufv.ca/media/assets/centre-for-indo-candian-studies/Air+India+2.pdf*, accessed 23 March 2017.
[25] These issues are elaborated on in chapter six of the thesis. See 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* 521-537. Monroe Leigh 'Witness Anonymity is inconsistent with Due Process' (1997) 91 (1) *The American Journal of International Law*, 80-83.

in defining witness protection and how this shapes the way a witness protection framework is construed.

Since there are indications of policy discussions about establishing a formal witness protection framework in Nigeria, it is necessary to consciously investigate the legal and conceptual issues underlying the concept. This research explores international debates, legal and policy developments and institutional practices relating to the concept of witness protection with the view to determining Nigeria's efforts in developing a legal framework for witness protection and the prospects of developing such a framework.

1.3. What is Being Researched?

The research investigates how the concept of witness protection should be construed and how the disparate global perspectives and developments should resolve the legal and conceptual issues in developing a witness protection framework for Nigeria. Accordingly, the research unpacks the concept of witness protection and provides an analytical basis useful for making normative proposals for Nigeria in resolving the legal issues within its existing legal framework and practice of witness protection.

1.4. Research Methods

Over time, the study of law has moved from the traditional doctrinal approach towards a more contextual and interdisciplinary approach.[26] This allows researchers to view legal issues from a multidisciplinary perspective rather than from a purely legal perspective. [27] In line with this trend, this research adopts a socio-legal research method. Socio-legal research is concerned with giving law a social context.[28] The nature of the concept of witness protection traverses the field of law and social sciences. Consequently, it is examined by focusing on its relationship as a legal issue to wider questions of a social nature.[29] This required the analysis of data from interdisciplinary fields such as criminal law, criminal justice, criminology, human rights and international law.

This research adopts a combination of desktop research by way of doctrinal research and empirical research comprising qualitative research. The doctrinal research involves a descriptive

[26] Fiona Cownie, *Legal Academics: Culture and Identities* (2004) 197.
[27] Brian Z. Tamanaha *Realistic Socio-Legal Theory – Pragmatism and a Social Theory of Law* (1997) 2.
[28] Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 *Socio Legal Studies* 131, available at *http://www.uk.sagepub.com/cross/files/Chapter10-Article2.pdf*, accessed 3 May 2018.
[29] David N Schiff 'Socio-Legal Theory: Social Structure and Law' (1976) 39 *The Modern Law Review* 287.

analysis of primary and secondary sources, including international instruments about witness protection; national legislations and policy documents on witness protection and criminal law and procedure; case law; books and monographs; United Nations documents; journal articles; commissioned papers and reports; conference papers; dissertations; newspapers and other online sources.

The dearth of literature on witness protection in Nigeria and the absence of empirical studies about the practice of witness protection in Nigeria prompted the need for exploratory enquiry. This comprised qualitative research using semi-structured interviews of a small sample of criminal justice experts and practitioners with knowledge about witness protection in Nigeria. The qualitative methodology was necessary to complement information obtained from the doctrinal analysis of existing literature about witness protection in Nigeria. The empirical component of this research is further elaborated and incorporated in chapter eight of this research.

1.4.1. The Conceptual Framework for Discussing Witness Protection

The conceptual framework reflects the structure adopted in this research which 'best explains the natural progression of the phenomenon to be studied.'[30] It presents an integrated way of discussing the issue under study.[31] An important research strategy adopted in this research was to utilise two distinct and broad paradigms for analysing the concept of witness protection. These are: the criminal justice perspective and the human rights perspective.[32] These paradigms are distinctions drawn from the recurring perspectives used in witness protection literature to justify the basis for witness protection. Although broadly categorised, these paradigms are useful heuristic tools for analysing witness protection and separating the disparate influences and narratives that have come to shape discussions on witness protection.

While human rights perspectives suggest that protection is a right available to every witness in a criminal proceeding, the criminal justice paradigm reflects practices and literature that justify witness protection as part of criminal justice reform (s). I have included within the criminal justice perspective, a securitization discourse as advanced by the Copenhagen School, which will be highlighted at certain points throughout the thesis. This is because securitization is more relevant

[30] Dickson Adom, Emad Kamil Hussein & Joe Adu Agyem 'Theoretical and Conceptual Framework: Mandatory Ingredients of a Quality Research' (2018) 7(1) *International Journal of Scientific Research* 439.
[31] Ibid.
[32] These perspectives are introduced and developed in chapter three of this thesis.

within some aspects of the concept of witness protection while less relevant in some other respects. The securitization discourse helps highlight the security imperatives for buttressing a criminal justice approach to witness protection.

The argument of this research is that these two paradigms 'represents an integrated way'[33] of solving the problem of how witness protection is construed; and this determines exactly how the legal and conceptual issues underlying the concept of witness protection can be resolved.

1.4.2. The Comparative Element of the Thesis

In drawing from the existing debates within legal developments, this research focuses on jurisdictions such as the US, Australia and Canada whose witness protection practices are advanced and dominant within the literature. However, at different stages of the research, other states such as South Africa, Kenya, Brazil, Mexico, and Columbia are highlighted to reflect emerging established trends and to capture the exceptions to these trends. This is apparent in chapter five where the types of crimes requiring protection are deduced from a historical evolution of the concept. In chapter seven, the South African and Kenyan systems serve as the basis for discussing institutional challenges in administering witness protection. They are significant because they represent the African developments which share similar socio-economic, socio-cultural and socio-political realities with the Nigerian case study. To provide some logic to the broad choice of states highlighted in this research, their developments will be discussed along criminal justice and human rights paradigms.

1.5. Significance of the Research

This research is an investigation into international debates, legal developments and institutional practices relating to witness protection, with the aim of evaluating Nigerian efforts in developing a legal framework for witness protection and making normative proposals to that effect. The research extends the descriptive engagements within the existing literature by identifying and clarifying the inconsistencies underlying the concept of witness protection using the Nigerian case study. The synthesis of global practices presented in this thesis provides an analytical framework that elucidates the concept of witness protection and provides conceptual and legal clarifications of its critical elements useful for resolving the underlying issues in the Nigerian developments of

[33] Sitwala Imenda 'Is There a Conceptual Difference between Theoretical and Conceptual Frameworks?' (2014) 38 (2) *Journal of Social Science* 189.

witness protection. To achieve this, the research utilises two distinct perspectives: the criminal justice approach and the human rights approach, developed as heuristic tools for analysing the concept of witness protection.

1.6. Limitations of the Research

Since the historical developments of the concept of witness protection evolved from developed countries, scholarly literature is extensively examined from the perspectives of those jurisdictions. Witness protection is still emerging in the criminal justice systems of several developing states and is a relatively new phenomenon in Africa, where it has only been formalised in South Africa and Kenya. This influences the way conversations about witness protection are advanced within academic literature and, as Mahony observes, results in making assumptions such as the existence of 'a functioning state security and justice sector and the availability of capacity of developing states to fund expensive protective measures.'[34] Consequently, some recommendations within the literature are unrealistic within the criminal justice systems of developing states such as Nigeria where both state and society are different and where contextual realities justify adopting a pragmatic approach in developing a framework for witness protection in Nigeria. However, within the literature, there are no clear indications of any disparities in the rationale for instituting witness protection along developing and developed country lines.

Secondly, while witness protection is a concept that cuts across different jurisdictions and found within different kinds of criminal justice systems, this research is largely limited to the practice of witness protection within the context of adversarial systems. Although the United Nations Office on Drugs and Crime (UNODC) notes that witness protection is becoming increasingly important within inquisitorial systems,[35] this research accentuates its importance within adversarial justice systems. This is because witnesses are far more central to the adversarial system and witness intimidation issues are compounded by the requirement of direct oral evidence and open confrontation of witnesses in criminal trials,[36] typical of adversarial systems. This

[34] Chris Mahony *The Justice Sector Afterthought: Witness Protection in Africa*, (2010) 12 available at *http://www.issafrica.org/pubs/Books/WitnessProt4.pdf*, accessed 10 January 2012.
[35] UNODC good practices op cit note 7 at 22-23.
[36] Louise Ellison 'The protection of vulnerable witnesses in court: an Anglo-Dutch comparison' (1999) 3 *International Journal of Evidence and Proof* 30. See also Babak A. Rastgoufard 'Pay Attention to that Green Curtain: Anonymity and the Courts' (2003) 53 *Case W Res. Law Review* 1009-1040.

distinction between adversarial and inquisitorial systems is also relevant to this research because of its usefulness to Nigeria which operates an adversarial system.

Apart from national criminal justice systems, witness protection also gained prominence at the international level within the proceedings of the international criminal courts and ad hoc tribunals. Within the framework of international criminal law, there is a collection of courts which are broadly classified as international criminal tribunals, at The Hague, Yugoslavia and Rwanda and hybrid tribunals in Sierra Leone, Cambodia, Lebanon and East Timor. This research limits its discussions to the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[37] The choice of these courts is justified on the basis that they are the only purely international law tribunals since the Nuremberg trials, whereas the others are hybrids tied to specific jurisdictions. This research does not engage in an extensive analysis of the international criminal law practice, but merely limits discussions to specific distinctions between practice that has crystallised within national criminal law systems and how it shapes the development of the concept. Accordingly, reference to international criminal law practices of witness protection is utilised to elucidate aspects that articulate the necessity for conceptual clarification and contributes to the overall arguments of this research.

Finally, the empirical component of this research is limited in terms of the number of participants to the study. As such, the qualitative research undertaken is best described as exploratory. This is primarily because of the challenges of negotiating access with the government institutions; the unwillingness of some identified participants to participate in the research work; and the principal aim of the research that set out to examine the practice of witness protection in Nigeria which is still emerging in practice.

1.7. Overview of Chapters

This thesis is structured into nine chapters. This preliminary chapter introduces the background of the research, provides a rationale for embarking on the research and the significance of the

[37] Both the ICTY and ICTR have been replaced by the Mechanism of the International Criminal Tribunals by a resolution of the UN Security Council. See *http://www.irmct.org/en/about*, accessed 15 October 2018.

research. This chapter also explains the methods adopted in the research and clarifies the scope and limitations of the thesis.

Chapter Two is titled *The Legal Framework for Witness Protection in Nigeria.* It introduces the Nigerian case study. Specifically, it provides an overview and the evolution of the existing legal framework for witness protection in Nigeria and highlights its inadequacies. This chapter lays a foundation for consideration in subsequent chapters of the aspects of witness protection that require legal and conceptual clarification.

Chapter Three, titled *Analysing the Concept of Witness Protection,* progresses from the discussions in chapter two and tackles the first conceptual issue that requires 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 inter-related concepts such as victim protection and whistle-blower's protection affects how the concept of witness protection is construed. The chapter contrives the criminal justice perspectives and the human rights perspectives as heuristic tools from which discussions of witness protection can ensue.

Chapter Four is titled *Determining the Class of Witnesses to be Protected.* The central question posed is: *Who is a witness for witness protection purposes?* Using the heuristic tools developed in chapter three, arguments are proffered to justify that since witness protection evolved within specific circumstances, so also are witnesses to be defined within specific parameters.

Chapter Five is titled *Crimes Requiring Protection*. It has two aims. First, it provides a historical evolution of the practice of witness protection and how that shapes the way crimes requiring witness protection are construed. Within this objective, the chapter examines the extent to which human rights driven arguments affect the scope of crime. Also, it considers the relevance of 'securitization' as a central aspect of the criminal justice perspective for delimiting the scope of crimes. Its second aim is to underscore specific underlying characteristics, which reflect the scope of crimes.

Chapter Six is titled *Types of Protective Measures for Witnesses.* Its objective is to assess the type of protective measures available to protect witnesses. In this chapter, arguments are proffered to justify the inclusion of long-term protective measures in Nigeria. Furthermore, it discusses the

implications of protective measures on the rights and interests of the witnesses, the defendant as well as the society.

Chapter Seven is titled *The Institutional Framework for Witness Protection: Challenges and Prospects.* It identifies the police-based structure, the prosecutor-based structure and the establishment of an independent witness protection agency as appropriate models for administering witness protection. The chapter argues that these administrative models are influenced by criminal justice versus human rights ideas of witness protection. Also, it sets out characteristics underlying witness protection representing both criminal justice and human rights perspectives. Finally, it examines the challenges and prospects of developing a witness protection framework.

Chapter Eight titled *Witness Protection in Nigeria: Perspectives of Criminal Justice Experts and Practitioners* elaborates the Nigerian case study. It discusses the empirical component of the research, describes the methodology adopted and the challenges encountered during the empirical study. Also, it incorporates the findings obtained from the research using the research questions as themes for discussing the findings.

Chapter Nine sets out the findings of the thesis based on the previous chapters. It provides a summary of the recommendations for developing a witness protection framework in Nigeria and highlights the contribution of the thesis and the conclusion.

CHAPTER TWO

THE LEGAL FRAMEWORK FOR WITNESS PROTECTION IN NIGERIA

2.1. Introduction

This chapter provides an overview of the existing legal framework for witness protection in Nigeria. The description is based on an analysis of the primary and secondary sources of legal developments of witness protection in Nigeria, comprising legislation, case law, journal articles and other online sources. The extent of analysis is determined by the fact that, in Nigeria, witness protection is still at an early stage of development. The aim of the chapter is to introduce the Nigerian case study, which is further elaborated in chapter eight, by discussing the legal framework for witness protection in Nigeria and to highlight the inadequacies within the existing framework. This overview provides a foundation for further consideration in subsequent chapters on specific aspects of witness protection that require legal and conceptual clarification. Specifically, formulations to the inadequacies and legal issues underscored in this chapter determine how the concept of witness protection and its underlying principles are construed.

2.1.1. Setting the Scene

In Nigeria, witness intimidation is not a new phenomenon, and it is believed that people who cooperate with law enforcement authorities do so at their own risk.[1] In fact, stories abound of witnesses who have been harmed or killed while cooperating with law enforcement agencies leading to the inconclusive investigation and prosecution of some high-profile crimes. In recent times, Nigeria has been besieged by acts of insurgency and terrorism perpetrated by Boko Haram, a militant Islamic sect. The sect engages in all forms of crimes, including rape, kidnapping, bombing and murder, resulting in the death of thousands of Nigerians and the displacement of others from their homes. Like other criminal groups, Boko Haram engages in witness intimidation to prevent witnesses from cooperating with investigators and prosecutors. For example, it is reported that in March 2015, the sect released a video titled 'Harvest of Spies', which shows the beheading of two men who were allegedly cooperating with security agencies to capture members

[1] See for example Ikechukwu Nnochiri 'Our witnesses are afraid to testify against Nyako, son EFCC tells court' *Vanguard,* July 13, 2015, available at *http://www.vanguardngr.com/2015/07/our-witnesses-are-afraid-to-testify-against-nyako-son-efcc-tells-court/*, accessed 25 February 2016.

of the sect.[2] As a result, witnesses, including suspected members of the Boko Haram sect detained by security agencies in Nigeria, have demanded witness protection from security agencies before testifying against members of the sect.[3]

As indicated in chapter one,[4] the prosecution of several high-profile individuals, mostly former government officials complicit in economic and financial crimes, as part of government's anti-corruption agenda, has exposed the reluctance of witnesses to testify on behalf of the prosecution. By their nature, these crimes involve influential individuals or criminal groups with the capacity to intimidate or carry out reprisal attacks on witnesses testifying against them. Where protection is not provided for witnesses in these prosecutions, they refuse to testify in court.[5] Following the upsurge in the investigation and prosecution of terrorism and economic and financial crimes, witness protection issues gained more prominence in Nigeria. Attempts to investigate and prosecute these crimes and the ensuing intimidation of witnesses cooperating with law enforcement authorities brought witness protection concerns to the fore.[6]

More evident in these prosecutions is the absence of an established witness protection framework, particularly the absence of a comprehensive witness protection legislation as part of the criminal laws of Nigeria. For example, in 2014, the need to formalise witness protection in Nigeria was discussed as part of the deliberations in the annual conference of the Nigerian Bar Association in response to the increasing demand by witnesses testifying in the prosecution of terrorism cases.[7] Nevertheless, in the absence of such comprehensive witness protection legislation, law enforcement authorities in Nigeria, particularly prosecutors, rely on the text of existing criminal laws with references to certain protective measures, as the basis for protecting witnesses.

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[2] See Uyo Salifu 'Fighting Boko Haram: why Nigeria needs a cohesive witness protection programme' Institute for Security Studies 5 May 2015, available at *http://www.issafrica.org/iss-today/fighting-boko-haram-why-nigeria-needs-a-cohesive-witness-protection-programme*, accessed 6 May 2015.

[3] 'Boko Haram: Suspects demand full protection, pledge cooperation with security agencies' *Sunday Tribune* 26 February 2012, available at *http://beegeagle.wordpress.com/2012/02/26/boko-haram-suspects-demand-full-witness-protection-peldge-cooperation-with-security-agencies/*, accessed 25 January 2013.

[4] See chapter 1; 1.1.

[5] Salifu op cit note 2.

[6] See 'Prosecuting Terrorism Offences and Crimes Against Humanity; Nigeria v Rest of the World' Law Officers' Session, 27th August 2014, at the 2014 Nigerian Bar Association Conference held at Owerri, Imo State from August 25th- 29th.

[7] Ibid.

Recent case laws in Nigeria and a desk top review of existing scholarly literature on witness protection reveal the inadequacies of these laws. This chapter thus examines, by way of contextualisation, the existing legal framework of witness protection in Nigeria and its inadequacies. Using the existing legal framework in Nigeria, this chapter examines legal issues requiring conceptual clarification on the core essentials of the concept of witness protection.

2.2. Existing Witness Protection Legislation and Policy Documents in Nigeria

There is no comprehensive witness protection legislation in Nigeria. However, pockets of witness protection provisions are found within some laws. These laws, though not enacted specifically for witness protection purposes, contain provisions that further the aims of witness protection by protecting individuals exposed to harm while participating in criminal investigations or prosecutions. This section examines these legislative provisions and the extent of protection provided therein.

2.2.1. The Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended)[8]

The Nigerian constitution is the '*grundnorm*' from which all laws in Nigeria draw their legitimacy. Although not expressly stated, the constitution provides a basis for witness protection in Nigeria. It provides factors that may justify the need to protect persons participating in criminal proceedings. The Federal High Court of Nigeria in the case of *FRN v Nnamdi Kanu & 3 others*[9] (*Nnamdi Kanu* case) reasoned that the proviso to section 36(4) of the CFRN validates witness protection objectives in Nigeria.[10] The proviso states that:

> (a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;
>
> (b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a commissioner of the government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence

[8] Cap C 23 LFN 2010.
[9] Charge No FHC/ABJ/CR/383/2015.
[10] See Ruling, *Nnamdi Kanu case* ibid, 13 December 2016, p 2.

relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

In Nigeria, this constitutional provision is a persuasive source for witness protection to the extent that it empowers the courts to adopt protective measures in the interest of justice.[11] This is because protecting witnesses may be the only way to ensure the full course of justice. In addition, this provision is helpful in debates concerning the constitutionality of existing protective measures in Nigeria, particularly in balancing the need to protect witnesses against the rights of defendants to a fair hearing.[12] The constitution does not specify guidelines to direct the court in balancing witness protection objectives with the constitutional rights of defendants. These issues are further elaborated in subsequent paragraphs of this chapter.[13]

2.2.2. The Corrupt Practices and Other Related Offences (ICPC) Act 2000[14]

This Act was enacted to prohibit and prescribe punishment for corruption and related offences and to establish an anti-corruption Commission (the ICPC).[15] Section 64 of the Act provides for the protection of persons who provide information to the Commission about an offence under the Act, committed or likely to be committed by any person. Also included is the protection of the information provided by such informants. The ICPC Act was enacted in 2000 as part of government's anti-corruption strategies in response to corruption.[16] The inclusion of protective measures in this Act was necessitated by government's attempt to ensure that its anti-crime strategies were more effective.[17]

While the Act provides for the protection of informants, it fails to specify the methods of protecting them. Furthermore, since the Act is administered specifically by the ICPC, the powers of the ICPC is limited in scope as it applies only to the investigation and prosecution of corruption and other related offences as defined in the Act.[18] The provisions of this Act are therefore not applicable to the prosecution of other crimes.

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[11] Ibid.
[12] See *Nnamdi Kanu* case supra note 9.
[13] See 2.4 discussing witness protection case law in Nigeria.
[14] Act No 5 of 2000.
[15] See section 3.
[16] Sharon Ogiri-Okpe, 'Criminal Justice Response to Corruption: The Nigeria Case' The 14th UNAFEI/UNCAC Training Programme Participants' Papers, 179 available at *http://www.unafei.or.jp/english/pdf/RS_No86/No86_22PA_Ogiri-Okpe.pdf*, accessed 9 April 2018.
[17] Ibid.
[18] See sections 1 and 2.

2.2.3. The Economic and Financial Crimes Commission (Establishment) (EFCC) Act 2004 [19]

The history of post-independent Nigeria is immersed in pervasive issues of corruption usually attributed to its long military rule. Over the years Nigeria attained the status of being one of the most corrupt nations in the world. This status had negative effects on Nigeria's reputation and direct foreign investment, which decreased significantly.[20] Widespread corruption is recognized as having adverse effects on the political and economic systems of nations plagued by it. It undermines social stability, erodes public trust and inhibits national growth and development.[21] Unchecked, corruption in Nigeria created more vicious cycles of corruption, poverty, increased crime rates and weak institutions.[22] The frequency and magnitude of economic and financial crimes such as advanced fee fraud, money laundering, and embezzlement of public funds in Nigeria, led to the enactment of the EFCC Act in 2002 and again in 2004.[23]

The EFCC Act is part of the several interventions of government over the years aimed at curbing corruption in Nigeria. The EFCC has prosecuted high level corruption cases involving high profile individuals. These include former governors, senators, administrators of government institutions, and other government officials. During these prosecutions, the EFCC is often confronted with the problem of unwilling witnesses afraid to testify because of possible reprisal attacks.[24] The EFCC Act makes provisions for the protection of informants who offer information useful for investigating and prosecuting crimes under the Act.[25] The 2004 Act reflects the continuous efforts of the Nigerian government to tackle large scale corruption and also Nigeria's obligations under the United Nations Convention against Corruption (UNCAC) and United Nations Convention against Transnational Organised Crime (UNCTOC)[26] to broaden the scope of corrupt practices to include money laundering particularly within the public sector.[27]

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[19] Act No. 1 of 2004 CAP E 1 LFN 2010. The Act repeals the EFCC Act, No 5 of 2002.
[20] Available at the official website of the EFCC at *https://efccnigeria.org/efcc/about-efcc*, accessed 9 April 2018.
[21] Ogiri-Okpe, op cit note 16 at 178.
[22] Igbinovia, Patrick Edobor and Edobor-Igbinovia, Blessing. *The Economic and Financial Crimes Commission in Nigeria: An Appraisal* (2014: Oxford: African Books Collective) available at *https://muse.jhu.edu/*, accessed 9 April 2018.
[23] EFCC website op cit note 19.
[24] Nnochiri op cit note 1.
[25] See section 39.
[26] The relevance of these conventions is further elaborated in chapters three and five.
[27] Sherrif Folarin 'Corruption, Politics and Governance in Nigeria' 3-4, available at *https://eprints.covenantuniversity.edu.ng/3249/1/Folarin%202.pdf*, accessed 9 April 2018.

Like the ICPC Act, the EFCC Act is limited in scope and applies only to the offences listed within the Act and administered by the EFCC; that is economic and financial crimes.[28] Although the Act, in section 39, provides for the protection of the identity of informants, it fails to specify the types and methods of achieving such protection.

2.2.4. The Trafficking in Persons (Prohibition) Enforcement and Administration (NAPTIP) Act 2015 [29]

Generally, human trafficking is recognised as a global challenge and is one of the criminal means adopted by criminal networks to perpetrate crime, particularly organised crime.[30] The magnitude of organised crime and specifically the growing phenomenon of human trafficking influenced the adoption of the UNCTOC and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime.[31] Although recognised as a global challenge, human trafficking is also a specific challenge in Nigeria, because a significant number of people trafficked in Africa to other regions of the world are from Nigeria.[32] Accordingly, the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) was established in 2003 as part of government's response to the problem of human trafficking in fulfilment of its international obligation under the UNCTOC and its Protocol.[33]

Although the principal legislation was enacted in 2003, it went through an amendment in 2005 and again in 2015. According to an official statement of the NAPTIP, the subsequent amendment in 2015 aimed at bringing the objectives of the Act to align with current trends in combatting trafficking in persons, particularly their protection.[34] According to section 1 (b), a primary objective of the NAPTIP Act is to protect the victims of human trafficking by prohibiting,

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[28] See sections 1, 6 and 7.
[29] Act No 4 of 2015. The Act repeals the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 (as amended 2005).
[30] Danish Immigration Service 'Protection of victims of trafficking in Nigeria' Report from Danish Immigration Service's fact-finding mission to Lagos, Benin City and Abuja, Nigeria, 9-26 September 2007, Copenhagen (April 2008) 5, available at *https://www.nyidanmark.dk/nr/rdonlyres/bad16bf3-a7c8-4d62-8334-dc5717591314/0/nigeriatrafficking2007finalpdf.pdf*, accessed 12 April 2018.
[31] United Nations Convention against Transnational Organized Crime and the Protocols thereto, General Assembly resolution 55/25 of 15 November 2000.
[32] Danish Immigration Service op cit note 30.
[33] Official website of the NAPTIP available at *https://www.naptip.gov.ng/?page_id=112*, accessed 9 April 2018.
[34] Ibid.

preventing and prosecuting human trafficking and other related offences in Nigeria.[35] The US Department of State notes that Nigeria has made significant efforts in investigating and prosecuting traffickers particularly under the 2015 Act.[36]

The victims of human trafficking in Nigeria are reluctant to testify against their traffickers who are part of criminal networks making them notoriously difficult to prosecute.[37] Sections 46 and 47 of the Act provide for the protection of informants and witnesses with useful information to aid the investigation and prosecution of offences under the NAPTIP Act. By sections 45(4) and 47(2), the protective measures to be adopted include video link, use of pseudonyms, non-disclosure of the identity of witnesses, non- publication of proceedings and the exclusion of the public during proceedings. Other forms of protective measures set out in sections 5(m) (i), 61 and 64, include counselling, legal assistance and the rehabilitation of trafficked persons in shelters.

The NAPTIP Act advances the scope of protection under the ICPC and EFCC Acts, as it stipulates the type of protection available to witnesses. These protective measures are primarily procedural measures adopted during criminal proceedings in courts and assistance measures aimed at the psychological protection of victims of human trafficking. The Act omits other forms of physical security which provide for long-term protection. Pearson notes that such procedural protective measures are inadequate for protecting witnesses of serious crimes such as human trafficking.[38]

Regardless of the elaborate protective measures specified under the NAPTIP Act, it is limited in scope and applies only to the investigation and prosecution of human trafficking. Witnesses and informants of other crimes are unable to benefit from the provisions of this legislation.

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[35] See section 1(a).
[36] U.S Department of State 'Nigeria: Office to monitor and combat trafficking in persons, 2017, trafficking in persons report, available at *https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271255.htm*, accessed 9 April 2018.
[37] Geir Skogseth 'Report: Trafficking in Women-Fact-Finding Trip to Nigeria (Abuja, Lagos and Benin City)' 12-26 March 2006, 7 available at *https://landinfo.no/asset/224/1/224_1.pdf*, accessed 9 April 2018. Four respondents reaffirm that the issue of witness intimidation is significant to the successful prosecution or otherwise of traffickers.
[38] Elaine Pearson 'The need for effective witness protection in the prosecution of traffickers: a human rights framework for witness protection' presented at the First Pan-African Regional Conference on Trafficking in Persons Abuja, Nigeria 19-23 February 2001, available at *http://old.antislavery.org/archive/other/witnessprotection.pdf*, accessed 4 May 2015.

2.2.5. Terrorism (Prevention) (Amendment) Act (TPAA) 2013 [39]

As indicated earlier,[40] witness protection in Nigeria gained prominence within the context of terrorism prosecutions, particularly of members of Boko Haram. The threat constituted by the sect necessitated counter terrorism policies, including legislation.[41] Like other criminal groups, the sect engages in acts of intimidation to prevent witnesses from cooperating with law enforcement authorities investigating their crimes.[42] Informants are targeted and killed by members of the sect to instil fear and to prevent further cooperation.[43] Witness intimidation was criminalised by sections 23 and 24 of the Act to curtail the effects of intimidation for cooperating with law enforcement authorities. In addition to criminalising witness intimidation, the Act in sections 33 and 34(1) recognises the need to protect informants and witnesses cooperating in terrorism investigations or prosecutions.

To achieve such protection, the Act states that the court, of its own volition, or on a motion by the Attorney General or a relevant law enforcement or security agency, may adopt measures such as anonymity and confidentiality measures, which protect the identity and address of the witness,[44] use of pseudonyms, camera proceedings, and the undisclosed location of the proceedings,[45] where it is satisfied that the life of the witness is in danger. The Act stipulates that factors such as public interest, public safety and national security are pre-requisites for adopting these protective measures.[46] The court in the *Nnamdi Kanu* case interpreted these factors as necessary considerations in deciding to grant protective measures to witnesses testifying in terrorism cases. These factors are necessary considerations in balancing the aims of witness protection against objections raised by the defendant about the constitutionality or otherwise of

[39] The Act amends the Terrorism (Prevention) Act No 10, 2011 and makes provision for extra-territorial application of the Act and strengthens terrorist financing offences.
[40] See chapter 1: 1.1 & 1.2. See also chapter 2: 2.1.1
[41] C E Attah 'Boko Haram and sexual terrorism: The conspiracy of silence of the Nigerian anti-terrorism laws' (2016) 16 *African Human Rights Law Journal* 385-406.
[42] See Salifu op cit note 2.
[43] Chatham House 'Nigeria's Interminable Insurgency? Addressing the Boko Haram Crisis' Research Paper, The Royal Institute of International Affairs, September 2014, 15, available at *https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140901BokoHaramPerousedeMontclos_0.pdf*, accessed 18 March 2018.
[44] Section 34 (1).
[45] Ibid, (2) (a-d).
[46] Ibid, (3) (4).

certain protective measures stipulated under the TPAA. These issues are further elaborated in subsequent paragraphs.[47]

Although, the TPAA specifies the methods of protection and factors to be considered for adopting these measures, like the NAPTIP Act, these measures are inadequate. This is because they are limited to procedural protective measures which are adopted only during the criminal proceedings in court. The TPAA, like the NAPTIP Act, excludes long term protective measures. These issues are further elaborated in chapter six. In addition, the scope of application under the TPAA is crime specific and protection applies only to terrorism investigations and prosecutions and is not applicable to other crimes.

2.2.6. The Administration of Criminal Justice Act (ACJA) 2015

In 2015, the criminal justice system of Nigeria underwent a series of reforms that culminated in the enactment of several statutes including the ACJA 2015. Extant criminal procedure laws at the time were obsolete and 'had lost its capacity to respond quickly to the needs of society.'[48] Akinseye-George notes that the ACJA 'responds to Nigeria's dire need for a new legislation that could transform the criminal justice system to reflect the true intents of the constitution and the demands of a democratic society…and improve the efficiency of criminal justice administration.'[49] The ACJA thus builds upon the existing criminal justice framework in Nigeria and fills the gaps observed in the laws.[50] One of such innovations is section 232 (1) of the Act, providing for witness protection.

Section 232 empowers the courts to where necessary, adopt measures to protect witnesses testifying in the prosecution of sexual offences, terrorism, economic and financial crimes and trafficking in persons and any other offence for which an Act permits the use of protective measures.[51] The methods of protection include the use of pseudonyms, video link evidence, screens or masks, or any other measure which the court considers appropriate in the circumstances.[52]

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[47] See section 2.4; 2.4.1 and 2.4.2.
[48] Yemi Akinseye-George 'An Overview of the Changes and Application of the Administration of Criminal Justice Act 2015' in Adedeji Adekunle, et al (eds) *Issues on Criminal Justice Administration in Nigeria* (2016) 1.
[49] Ibid at 1-2.
[50] Ibid at 2-3.
[51] See sections 231 and section 232 (4).
[52] See section 232 (2) and (3).

In addition to the explicit protective measures included in section 232, the Act accommodates other measures which facilitate the objectives of witness protection. For example, section 251 of the Act entitles state witnesses to payments of expenses. The payment required is that which is 'reasonable and sufficient' to compensate the witness for the expenses incurred in attending the court.[53] Furthermore, section 260 provides that the court may exclude certain persons from proceedings while taking the evidence of a child or young person. The ACJA by this section protects the interest of child witnesses or young persons, testifying in 'relation to an offence against or any conduct contrary to decency or morality.' These sections enforce witness assistance and confidentiality measures recognised within witness protection practices and is further elaborated in chapter six.

The ACJA improved and harmonised the witness protection requirements under the ICPC, EFCC, NAPTIP and TPAA Acts, respectively. For example, it extends the scope of crimes by including sexual offences[54] and an *omnibus provision* in section 232 (4) (e) which implies an application of protection to witnesses testifying in the prosecution of all crimes in Nigeria. Like these Acts, the protective measures in sections 232 (2) and (3) of the ACJA are procedural and limited to protection during the criminal proceedings. The ACJA omits long term protective measures required post-trial. This is further elaborated in chapter six. These long-term measures are necessary for the nature of the crimes covered by the ACJA.[55] Commenting on the inadequacies of the protective measures under the ACJA, one respondent participating in the empirical component of this research noted that,

> [as] a matter of fact, the witness protection programme bill and victims support bill that were presented to the National Assembly in 2007 were all incorporated into the ACJA. So, the National Assembly had to approve it and said those parts of the bill that had to do with witness protection and victims' remedy should be included. That is why when you look at the ACJA, it has provisions for witness protection and has provisions for victims' compensation…In trying to incorporate these bills into the ACJA, the original content of the witness protection bill which dealt with identity change and relocation was lost.

[53] See sections 252-254.
[54] See section 231.
[55] See Pearson op cit note 38.

This respondent acknowledges that the protective measures under the ACJA are inadequate to effectively cater for the protective needs of the witnesses testifying in prosecutions involving the scope of crimes highlighted within.

Although the Act in section 232 (4) (a)- (d) identifies the scope of crimes that require protection: sexual offences, trafficking in persons, terrorism and economic and financial crimes, section 232 (4) (e) makes an *omnibus provision,* which creates uncertainties as to the exact nature of crimes for which witness protection is applicable; crimes of a specific nature or to all forms of crime regardless of the nature of the crime? Section 232 (4) (e) provides that protective measures shall apply to 'any other offence in respect of which an Act of the National Assembly permits the use of such protective measures or as the judge may consider appropriate in the circumstances.' In the *Nnamdi Kanu* and the *Dasuki* cases, the defendants objected to the application of protective measures to crimes not mentioned in the ACJA and questioned the inclusion of treason and arms trafficking as crimes envisaged by section 232 of the Act. The court in these cases did not comment on the application of witness protection to these cases.[56] It is unclear how the scope of crimes to be accommodated within the *omnibus clause* in section 232 (4) (e) of the ACJA should be determined. Also, within the existing case law, it remains unsettled as to how this should be determined. This is further elaborated in subsequent sections of this chapter.[57]

2.2.7. The Violence Against Persons (Prohibition) Act (VAPPA) 2015

This Act was enacted to 'eliminate violence in public life, to prohibit all forms of violence against persons, to provide maximum protection and effective remedies for victims and the punishment of offenders.[58] The VAPPA penalises acts of violence broadly defined in section 46 to include physical, sexual, psychological, verbal or economic harm which occurs in private or public life, in peace time and in conflict situations. It generally seeks to protect vulnerable groups in Nigeria such as women, children, persons living under extreme poverty, persons with disability, the sick, elderly, ethnic and religious minority groups, refugees, internally displaced persons, migrants and persons in detention.[59]

[56] This is elaborated in section 2.4 of this chapter.
[57] Ibid.
[58] See the aims and objectives of the Act as specified in the long title of the law.
[59] See section 46.

The Act was part of the criminal justice reforms introduced in 2015.[60] Omidoyin notes that the Act was necessitated to curb the rising trend of violence in Nigeria especially domestic violence.[61] The VAPPA was thus part of government's attempt to combat the growing incidence of gender-based violence, spousal battery and domestic violence which had become 'endemic in Nigerian homes.'[62] The Act specifically prohibits intimidation defined to mean the uttering or conveying of a threat or causing any person to receive a threat, which induces fear, anxiety or discomfort,[63] and acts which frustrate the investigation and investigation of offenders under the Act by prescribing a term of imprisonment and the payment of fines.[64]

The Act provides for the protection of victims of crimes listed under this Act. These include protection orders,[65] access to medical, psychological, social and legal assistance, rehabilitation and reintegration programmes and other forms of assistance provided to the victims through government agencies,[66] arresting the suspect who has committed acts of violence against the victims[67] and prohibits the publication of information which reveals the identity of the parties during trial.[68]

Although the VAPPA specifies the type of protective measures, like the NAPTIP Act and TPAA, these measures are limited to assistance measures, procedural measures and pre-trial measures. It excludes long term protection. Also, it is limited in scope as these measures are only available to victims of crimes of violence such as rape, female circumcision or genital mutilation, domestic violence, spousal battery, harmful widowhood practices, harmful traditional practices, stalking, attack with harmful substance, incest, indecent exposure, political violence and violence by state actors.[69] Also, by section 44 of this Act, the NAPTIP is empowered to administer these protective measures.

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[60] See subheading 2.2.6.
[61] Taiye Joshua Omidoyin 'Violence Against Persons (Prohibition) Act 2015: A positive Step to the Eradication of Domestic Violence in Nigeria' 2018 (9) 1 *NAUJILJ* 39.
[62] Adedeji Adekunle and Awele Ikobi-Anyali 'The Administration of Criminal Justice Act 2015 and the Treatment of Victims of Gender Based Violence' in Adedeji Adekunle, *et al* (eds) *Issues on Criminal Justice Administration in Nigeria* (2016) 223; 227.
[63] See section 18 (1) & 46.
[64] See section 7.
[65] See section 28.
[66] See sections 32 (1) (a-d) & 38 (1) (a-c).
[67] See section 32 (2).
[68] See section 39 (1).
[69] See sections 1 -26.

2.2.8. Witness Protection Policy Documents

Apart from the legislative provisions, policy documents such as the Code of Conduct for Prosecutors (2013);[70] Prosecutors Guidelines;[71] National Policy on Prosecution (2014);[72] and the Practice Direction for the Administration of Criminal Justice Act 2015,[73] in different ways seek to ensure compliance with witness protection objectives in Nigeria. For instance, they elaborate on the factors that determine national security and public interest necessary for adopting protective measures which may affect the rights of the defendant.[74] These policy documents seek to guide prosecutors and the courts on the importance of witness protection and in ensuring that these measures are adopted in the interest of justice. There is however no information on how these policy documents have impacted on the protection of witnesses in practice.

2.3. Nigeria's Witness Protection Obligation under International Law

Although there is no universal instrument on witness protection, the UNCTOC and the UNCAC, are perceived as the most universal attempts at establishing witness protection standards in international law.[75] Nigeria is a signatory to these conventions and has domesticated them in accordance with its international obligations.[76] Folarin is of the view that Nigeria's obligations under the UNCAC and the UNCTOC has in some way influenced the recognition of witness protection in Nigeria.[77] This is discernible with regards to the EFCC Act for example. As indicated earlier[78] the amendment of the EFCC Act in 2004 reflects Nigeria's obligations under these international instruments in tackling economic and financial crimes. This may also be true of the NAPTIP Act because the NAPTIP was established in fulfilment of government's obligation under the human trafficking protocol of the UNCTOC to tackle the issues of human trafficking in Nigeria and globally.[79]

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[70] Developed by the Body of Attorneys-General in Nigeria.
[71] Guidelines Issued by the Attorney General of the Federation and Minister of Justice on 12th September 2013. It is applicable to prosecutors of a Federal Offence and any Prosecution at a Federal Court or High Court of the FCT.
[72] Compiled by the Body of Attorneys General in Nigeria.
[73] Issued by the Chief Judge of the Federal Capital Territory (FCT) (2017).
[74] Para 14.1 and 14.1.1 of the Prosecutors Guidelines. See also para 15.2.2.
[75] Chapter 5 examines the circumstances which necessitated these conventions.
[76]See Nigeria's ratification status at *https://www.unodc.org/unodc/en/treaties/CAC/signatories.html* and *https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html*.
[77] Folarin op cit note 27.
[78] 2.2.3
[79] Official website of the NAPTIP available at *https://www.naptip.gov.ng/?page_id=112*, accessed 9 April 2018.

It is therefore implied that the witness protection strategies included in the UNCTOC for example, as a means of facilitating the cooperation of witnesses with law enforcement authorities influenced its inclusion within the EFFC Act and NAPTIP Act. Otherwise, there is no universal witness protection instrument that confers an obligation on Nigeria under international law to protect witnesses against intimidation. Reference to witness protection developments under international law are further highlighted in chapters three and five.

2.4. Case Law on Witness Protection in Nigeria

Since witness protection in Nigeria is still emerging, case law on witness protection in the country is still developing. So far, the judicial issues pertaining to witness protection in Nigeria have emerged from preliminary objections in terrorism, treason and economic and financial crimes prosecutions. The *Dasuki* and *Nnamdi Kanu* cases are discussed in this analysis because they reflect contentious witness protection issues requiring judicial clarification in Nigeria.[80] 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 context to guide the courts and policy reformers regarding how witness protection in Nigeria can be developed. This is attributed to the insufficiency of relevant knowledge and skills among policy makers, law enforcement agencies,[81] and the judiciary. These cases are examined below.

2.4.1. FRN v Sambo Dasuki [82]

This case involves the interpretation of the witness protection provisions under the ACJA. In this case, the defendant, a former military personnel and former aide de camp of the President of Nigeria, was charged for illegal and unlawful possession of firearms and ammunition.[83] The prosecution in relying on the provisions of section 232 of the ACJA, requested the court to grant

[80] The Oguwuche, Nazeef and Karibu cases highlighted in this section have merely contributed significantly to the prominence of witness protection discourse in Nigeria as they are evidence of the necessity of adopting protective measures when prosecuting certain types of offences such as terrorism. In the Dasuki and Nnamdi Kanu cases, a large proportion of these cases focused on objecting to different issues underlying the concept of witness protection.
[81] Jemima Njeri Kariri 'Witness protection; the missing cornerstone in Africa's criminal justice system' *Institute for Security Studies* September 2014, available at *http://www.issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems,* accessed 6 May 2015.
[82] Charge No FHC/ABJ/CR/319/2015.
[83] See also 'Court Grants FG's Application for Protection of Witnesses in Dasuki's Trial, This Day June 16 2017, available at *https://www.thisdaylive.com/index.php/2017/06/16/court-grants-fgs-application-for-protection-of-witnesses-in-dasukis-trial/,* accessed 18 March 2018.

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 former National Security Adviser to the former President, was also a former military officer, a former aide de camp (ADC) and a crown prince of the Sokoto Caliphate,[84] wielded a lot of influence and the potential to threaten the safety of the prosecution witnesses in the absence of protective measures.

The defence objected to this request for protection claiming that witness protection does not apply to investigators[85] who in this case were staff of the Department of State Services (DSS). The defence argued that the ACJA did not envisage protection for investigators or other members of the security agencies in Nigeria, but rather contemplated that the witness protection provisions apply to ordinary witnesses. Secondly, the defence objected to the applicability of protective measures to charges of illegal and unlawful possession of firearms and ammunition, which it argued is excluded from the scope of crimes expressly listed in section 232 (4) of the ACJA. According to the defence, since these crimes were excluded from the ACJA, witness protection is not applicable under those circumstances.[86] Despite these objections, the court granted that protective measures be assigned to the witnesses. The court did not comment on the application of witness protection to investigators who were testifying on behalf of the prosecution. In addition, the court, in interpreting the extent of protection under the ACJA, missed the opportunity to consider the possibility of including crimes of illegal and unlawful possession of firearms and ammunition within the omnibus provisions of section 232 (4) (e), particularly in the absence of an express Act of the National Assembly to that effect.

Furthermore, the prosecution requested for the trial to be conducted in secret by providing special cover for witnesses, use of private witness rooms and the use of face masks.[87] The prosecution stressed that section 232(1) of the ACJA permitted the witnesses to be shielded or masked. He argued further that shielding the witnesses would not prevent the defence from cross-examining them as they would be visible to the defence.[88] The defence counsel however objected

[84] Ibid.
[85] See 'Court Grants FG's Application op cit note 83.
[86] See 'Arms deal: Court grants FG's request for witness protection' Nigeria News Network, June 15 2017, available at *http://www.rscsl.org/Documents/WVS%20Best%20Practices.pdf,* accessed 18 March 2018.
[87] 'Sambo Dasuki Objects to Secret Trial as FG Files Fresh Charges' 26 December 2015, available at *http://newswirengr.com/2015/10/26/sambo-dasuki-objects-to-secret-trial-as-fg-files-fresh-charges/,* accessed 18 March 2018.
[88] 'Dasuki: Court grant FG's application to shield witnesses' *The Guardian* 15 June 2017, available at *https://guardian.ng/news/dasuki-court-grants-fgs-application-to-shield-witnesses/,* accessed 18 March 2018.

to the use of protective measures during this trial on grounds that the case is harmless and one that does not warrant a secret trial.[89] They argued that the protective measures requested were in breach of the defendant's right to a fair hearing especially the right to cross examine the witnesses. It was argued that in criminal proceedings, the right of the defence to confront the witnesses testifying against the accused person is fundamental and that the anonymity of the prosecution's witnesses, if granted, deprives the accused person of conducting background checks on the witnesses.[90]

In its ruling, the court reasoned that the protective orders requested by the prosecution were in order since section 232 (4) (c) of the ACJA provides for the use of screens in cases involving financial and economic crimes.[91] The court thus granted protection for the prosecution witnesses.[92] The court permitted them to testify behind a screen that would be provided by the court. The court added, however, that they would not be shielded from the defence lawyers in the court throughout the trial. Consequently, the court ordered that the screen be used in a way that it would not shield the witnesses from being seen by him, the defendant and members of the prosecution and defence teams. The protective measures were only to shield the witnesses from the public.[93]

Regarding the scope of crimes requiring protection, it is relevant to note that the court was careful in its award of protective measures by linking its award to charges involving money laundering and not the charges regarding illegal possession of firearms, which was not expressly listed in the ACJA. Witness protection was justified by focusing on charges of economic and financial crimes, listed in the scope of crimes under the ACJA.[94]

2.4.2. FRN v Nnamdi Kanu & 3 Others (Nnamdi Kanu Case)[95]

This case involves the prosecution of the defendants on a charge of treason and treasonable felony against Nigeria. The defendants are recognised political activists pushing for the reconstruction of Nigeria and the creation of an independent State of Biafra from Nigeria. Like the *Dasuki case*, the defence raised a preliminary objection to the application of protective measures under the TPAA

[89] 'Sambo Dasuki Objects' note 87.
[90] Ibid.
[91] Ibid.
[92] Court Grants FG's Application for Protection of Witnesses op cit note 83. See also Ade Adesomoju 'Dasuki: Court Grants Protection for FG Witnesses' *Punch* 15 June 2017, available at *https://punchng.com/dasuki-court-grants-protection-for-fgs-witnesses/*, accessed 18 March 2018.
[93] Ibid.
[94] Ibid.
[95] *Supra* note 9.

to prosecution witnesses who were investigators and members of the security services.[96] The defendants argued that the TPAA did not intend for protective measures to be adopted to protect investigators. They reasoned that witness protection envisages a situation where protection is available to persons who are unable to protect themselves and are vulnerable, compared to the defendants. To them, the prosecution's witnesses, in this case, had the necessary means to protect themselves from the defendants and did not require additional protection from the court.

The prosecution alternatively argued that the witnesses, who are security operatives, are resident within the area of dominance of the defendants and have expressed concerns about their safety.[97] They argued that the duties of the prosecution witnesses involved carrying out covert operations for the security of Nigeria and will have their cover blown if made to testify publicly and without any protection, hence endangering the public security of the country.[98] Despite these arguments, the court did not comment on issues regarding the definition of beneficiaries of protection under the existing legislative framework. Accordingly, there is yet no judicial interpretation regarding the scope or interpretation of beneficiaries of witness protection in Nigeria.

Apart from the objection to the applicability of protective measures to investigators, the defence also objected to its relevance to charges of treason and treasonable felony.[99] They petitioned the court to drop the protective measures, which it had earlier granted on behalf of the prosecution's witnesses, claiming that the protective measures adopted were granted on terrorism charges under the TPAA, which had been previously filed against the defendants. Accordingly, since the courts had quashed the charges of terrorism against the defendants, they urged the court to strike out the orders for protection also. A significant objection to witness protection was that the charges of treason and treasonable felony filed against the defendants do not constitute an offence within the existing legislative framework for witness protection in Nigeria.[100] The defence argued that the validity of the protective measures, which had been previously ordered by the court,

[96] Counter Affidavit in opposition of the Motion on Notice brought by the 1st defendant dated 21 March 2017, Para 4 (c).
[97] Ibid.
[98] Ibid Para 4 (f).
[99] 3rd Defendant /Respondent Counter Affidavit to the Complainant/Applicant's Motion on Notice dated 11 November 2016, para 3 (w), p 4.
[100] *Nnamdi Kalu* case op cit (n 9), 3rd Defendant /Respondent Counter Affidavit to the Complainant/Applicant's Motion on Notice dated 11 November 2016, para 3 (w), p 4.

was linked to the fact that both the TPAA and the ACJA recognised the necessity for adopting protection for witnesses testifying in terrorism cases.

Since the case is still ongoing, it is unclear now how the court intends to respond to the objections about the applicability of protective measures to the treason charges, and by implication, for the prosecution of offences not expressly provided within the existing legislative framework. This research makes normative proposals that may guide the courts in arriving at a decision.

Linked to the objection about the applicability of protection in treason prosecutions were objections about the constitutionality of the protective measures requested by the prosecution. The prosecution had earlier sought protective orders to allow its witnesses to give evidence behind screens, to ensure that their identity would not be disclosed on the records of proceedings, which are accessible to the public, and that the witnesses be addressed with pseudonyms.[101] The court, while the terrorism charges against the defendants subsisted, granted these orders and permitted the witnesses to testify behind a screen and allowed pseudonyms in place of their names.[102] Once the terrorism charges had been dropped, the defence challenged the constitutionality of these measures and asked the court to review its earlier decision.[103]

The defence sought an order of the court directing all prosecution witnesses to testify in open court without being shielded from the public.[104] They argued that the defendants are constitutionally entitled to a fair trial and fair hearing in open court and any trial, which allowed witnesses to be shielded from the public, will not promote the spirit of a fair hearing.[105] They argued further that the safety of the witnesses is of priority in terrorism cases and not for treason.[106] It was their submission also that since the terrorism charges, which formed the fulcrum upon which witness protection was granted had been reversed, such protection orders should be nullified as well.[107]

[101] See para 1-3 of the Ruling, 13 December 2016.
[102] The Court made an order on the 13th day of December 2016, on the protection of prosecution witnesses who are security operatives, pursuant to section 232 of the ACJA and section 34 of the Terrorism (Prevention) (Amendment) Act, 2013.
[103] Ibid.
[104] See Paragraph 2 and 3 of the Motion on Notice *Nnamdi Kanu* case supra note 9.
[105] Ibid, para 7-9.
[106] See Written address in support of the Motion on Notice *Nnamdi Kanu* case supra note 9.
[107] Ibid, para 3.10.

In rebuttal, the prosecution established that the defendants are leaders of the Indigenous People of Biafra (IPOB), and undoubtedly command large followership throughout Nigeria who may be aggrieved by this trial and cause harm to prosecution witnesses.[108] In addition, they argued that the current charges of treason against the defendants border on national security and justified protection in accordance with the provision of section 34 (4) (a) of the 1999 Constitution.[109]

The court in its ruling noted:

> It is a fundamental constitutional requirement of criminal trials that they should be conducted in open court mainly to ensure fair hearing. However, it is not strange that sometimes the cases are of such a nature that the security of the victims and/or witnesses needs to be protected by concealing their identities as provided by the proviso of section 34(4) (a) of the 1999 Constitution and section 232 of the ACJA.[110]

The court nonetheless rejected the prosecution's application for protective measures, which required the witnesses to wear face masks while testifying. Alternatively, the court granted that all prosecution witnesses should have access to a non-public route to and from the court premises and court room as well as the use of a private witness room.[111] The court noted that the essence of that order was to shield witnesses from undue exposure to the public in the interest of their safety. The court noted further that the use of screens merely shields witnesses from public glare, but such witnesses can be viewed by counsel, the defendant and the presiding judge.[112] While the court in this case permitted confidentiality measures, the court rejected measures that provided for the anonymity of witnesses. [113]

The refusal of the court to permit the use of masks in the *Nnamdi Kanu* case contradicts its previous decision in *FRN v Karibu Umar*[114] where the court in a prosecution for terrorism allowed witnesses to use masks and pseudonyms and excluded the public from court. Here, the court interpreted section 34 of the TPAA as allowing the identity of the witness to be protected from the

[108] Op cit (n 96) Para 4 (a).
[109] Ibid, Para 4 (b).
[110] See Ruling, *Nnamdi Kanu* case, 13 December 2016, p 2.
[111] Order No 3 dated 12 February 2016.
[112] See *Nnamdi Kanu* case, Ruling 7th March 2016, p 5.
[113] See 'Court rejects Protection for witnesses against Biafra leader Nnamdi Kanu' *TV360 Nigeria,* available at *http://www.tv360nigeria.com/court-rejects-protection-for-witnesses-against-biafra-leader-nnamdi-kanu,* accessed on 25 February 2016.
[114] Charge No FHC/ABJ/CR/38/13.

defendant as well as the public.[115] It is unclear from the court's rulings why masks were rejected in one case and not the other. Chiedozie believes that the nature of the cases guided the court in arriving at its decisions. Accordingly, in granting the protective measures that excluded the use of masks, the court implied that such measures were only available for witnesses in terrorism proceedings.[116] It is uncertain, since the use of masks granted in the *Karibu* case involving terrorism were also rejected in *FRN v Aminu Ogwuche*[117] for terrorism on the grounds that excluding the public from trial and the use of masks contradicts the constitutional rights of the defendant to a fair hearing.[118]

In the *Ogwuche* case, the prosecution requested for witness protection because 'the nature of the trial is sensitive and there was need to ensure that witnesses are protected and unexposed to harm.'[119] The prosecution requested that their witnesses be shielded using masks.[120] The defence however objected to the constitutionality of these protective measures. They argued that 'by seeking to limit counsel's appearance for the accused persons to only the lead counsel, was an unwarranted infringement to the constitutional rights of the accused persons to their rights to a counsel of their choice.'[121] Although the court granted protective measures, such as the use of aliases and trial in camera for security reasons,[122] the court rejected the prosecution's request for masks, because it contravened the rights of the defendant to a fair hearing.[123]

A similar decision was reached in the case of *FRN v Mohammed Yunus Nazeef*.[124] In this case, which also involved the prosecution of members of the Boko Haram sect for terrorism related offences, the key witness for the prosecution refused to testify because the court refused to allow

[115] Ihuoma Chiedozie 'B'Haram: witness refuse to testify in open court' *Punch* 4 April 2014, available at *http://www.punchng.com/news/bharam-witness-refuses-to-testify-in-open-court/* accessed 6 May 2015.
[116] Ibid. See also 'Court rejects Protection op cit (n 113).
[117] Salifu op cit note 2.
[118] Chiedozie op cit note 115.
[119] Ibid. See also 'Nyanya Bombings: Court okays secret trial of Ogwuche, others' 12 May 2015, available at *https://factnewsonline.com/news/1771-Nyanya-Bombings-Court-okays-secret-trial-of-Ogwucheothers*, accessed 23 July 2016.
[120] 'Nyanya Bombing: Witnesses to Testify in Masks' *Channels Television* 11 May 2015, available at *https://www.channelstv.com/2015/05/11/nyanya-bombing-witnesses-to-testify-in-masks/*, accessed 25 February 2017.
[121] Ibid.
[122] Ibid.
[123] Chiedozie op cit note 115.
[124] Ikechukwu Nnochiri 'Nigeria: Boko Haram -Court Declines Secret Trial of Kogi Varsity Lecturer' *Vanguard* 4 April 2014 available at *https://allafrica.com/stories/201404040295.html*, accessed 24 February 2016.

the use of masks while testifying during the trail.[125] Apart from refusing to allow masks, the court also refused to exclude the public from the court. The court reasoned that, 'it would not be in the interest of justice to bar members of the public from witnessing the trial of the accused person.'[126] From these cases, it appears that the procedural protective measures are inconsistently applied by the Federal High Court, which had jurisdiction in all these trials. For example while the court permitted measures that restricted the public in the *Dasuki* and *Nnamdi Kanu* cases, and also refused to grant measures that shielded the identity of the witness from the defendant, alternatively, in the *Ogwuche* and *Nazeef* cases, the court seems to find measures that restrict the public from a criminal trial as unconstitutional and against the defendant's right to a fair trial. Whereas in the *Umar* case, protective measures which excluded the defence and the public was permitted.

2.5. Issues for Consideration

The preceding discussions about the existing legislative provisions and case law on witness protection highlight the inadequacies of the current legal framework of witness protection in Nigeria. Apart from the inadequacies within the existing legal framework, attempts to enact witness protection legislation, also reveal some inconsistencies in the way witness protection is conceptualised in Nigeria. These inadequacies are however evident within specific aspects.

2.5.1. Definition of Witness Protection in Nigeria

As indicated earlier, there is no comprehensive witness protection legislation. However, reform attempts at witness protection in Nigeria have inspired different legislative bills: The Witness Protection Programme Bill 2008, the Witness Protection Bill 2012, the Witness Protection Bill 2015 and the Public Interest Disclosure and Witness Protection Programme Bill 2017. Between these bills are differences in terms of the scope of witness protection: that is the way witness protection is defined. For example, while the purpose of the 2008 bill 'is to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters'[127] and the 2012 seeks to 'ensure that due administration of justice in criminal and related proceedings is not prejudiced by the unwillingness of witnesses to give evidence for fear of violence, serious injury, death or for such other reasons

[125] Salifu op cit note 2.
[126] Nnochiri 'Nigeria: Boko Haram -Court Declines Secret Trial op cit note 124.
[127] Section 3.

as may be prescribed by regulations made under this Act…',[128] the 2017 bill, which is currently in parliament, appears to be more consistent with whistle-blower's protection.

Joshua notes that the content of the 2017 bill, is a combination of the Corruption and Other Financial Offences (Special Criminal Provisions) Bill consistent with principles of whistle-blowers protection and the 2015 witness protection programme bill.[129] The content of the 2017 bill consists of provisions that extend beyond the scope of witness protection. This conclusion is deduced from the fact that a significant portion of the bill reflects the 2016 Whistle-blowing Policy of the Federal Ministry of Finance, developed as part of government's anti-corruption strategies.[130] The Whistle-blowing Policy establishes a whistleblowing programme which is designed to 'encourage anyone with information about the violation of financial regulations, mismanagement of public funds and assets, financial malpractice, fraud and theft to report it.'[131] The policy allows informants who report corrupt practices to earn financial rewards.[132] Olarinde and Yebisi, while commenting on this policy, affirm that 'it aims at setting the framework for the recovery of stolen public funds … as a means to fight financial crimes and corruption.'[133] It appears that the intention of the 2017 bill is more focused on whistle-blower's protection than on witness protection captured in the 2008 and 2012 bills respectively, which represents distinct spheres in the criminal justice system. Chapter three further examines the organising principles for distinguishing between these concepts.

2.5.2. Beneficiaries of Protection

Generally, legislation on witness protection includes a section that defines witnesses.[134] Within the existing laws in Nigeria, there is no definition of a witness. However, legislation acknowledges that protection should be provided for informants and witnesses cooperating with law enforcement

[128] Section 1
[129] See Abigael Joshua 'Anti-Graft: How Safe are Whistle Blowers' The Tide July 10, 2017 available at *http://www.thetidenewsonline.com/2017/07/10/anti-graft-how-safe-are-whistle-blowers/,* accessed 18 March, 2018.
[130] Federal Ministry of Finance- Whistle Blowing Frequently Asked Questions (FAQ), para 12, available at *http://whistle.finance.gov.ng/_catalogs/masterpage/MOFWhistle/assets/FMF%20WHISTLEBLOWING%20FREQUENTLY%20ASKED%20QUESTIONS.pdf,* accessed 29 September 2018.
[131] Ibid, para 1.
[132] Ibid, para 12.
[133] E. Smaranda Olarinde and Ebenezer T Yebisi 'Imperative of a Statutory Framework for the Protection Whistle-blowers in Nigeria' (2018) 5(5) *Advances in Social Sciences Research Journal* 513.
[134] See section 1 (1) Witness Protection Act 112 of 1998 South Africa; section 3 Witness Protection Programme Act S.C 1996 Canada; section 3 Witness Protection Act 1994 Australia.

authorities.[135] The *Dasuki and Nnamdi Kanu* cases, however, raise the question about whether investigators testifying on behalf of the prosecution, in their official capacity, qualify as beneficiaries of protection.

Within the existing literature, a variety of words are used to depict witnesses: eyewitnesses, victims, informants, insider witnesses, justice collaborators, whistle-blowers, official witnesses and expert witnesses. Is it acceptable practice to conclude then that all persons cooperating in a criminal investigation or prosecution require witness protection or are there specific indicators to guide states in arriving at their own restrictive definitions of witnesses? Chapter four explores global practices to construe a proper meaning of witnesses within the context of witness protection.

2.5.3. Scope of Crimes Requiring Protection

According to the Council of Europe, witness protection legislation should specify the crimes for which protection is offered.[136] Thus far, the scope of crimes requiring protection in Nigeria is not clearly defined. Within the ICPC, EFCC, TPAA, VAPPA and the NAPTIP Acts, witness protection applies restrictively to specific crimes. These provisions can only be used for prosecutions where the defendants are charged under those Acts.[137] Also within the ACJA, although section 232 (4) (a)- (d) specifies the scope of crimes, the *omnibus provision* in section 232 (4) (e) creates uncertainties as to the exact nature of crimes for which witness protection is applicable.[138] Also, from the *Dasuki* and *Nnamdi Kanu* cases, it is unclear whether protective measures are applicable to crimes only mentioned within existing legislation. That is, is witness protection applicable to witnesses of all crimes or to specific crimes? How are these crimes determined? These issues are explored in chapter five.

2.5.4 Choice of Protective Measures

The Law Commission of India has acknowledged that a wide range of protective measures are used by states in facilitating witness protection.[139] As discussed earlier, within the existing

[135] See for example sections 39 EFCC Act and 33 and 34 (1) of the TPAA.
[136] 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.
[137] See the discussion in 2.2.2 – 2.2.5; 2.2.7 of this chapter.
[138] See the discussion in 2.2.6 of this chapter.
[139] See *Law Commission of India* 'Consultation Paper on Witness Identity Protection and Witness Protection Programmes' August 2004, available at

legislation in Nigeria, except for the NAPTIP Act and VAPPA, which provides for shelters, rehabilitation and counselling for victims of trafficking and violence respectively, protective measures are limited to procedural protective measures, adopted during the criminal proceedings. More so, the shelters aim to serve as a means for providing rehabilitation for victims to cater for their psychological needs. These shelters and other forms of psychological protection are limited to victims of crimes in these Acts and not available to witnesses testifying in other criminal trials. The existing laws do not provide for long-term protective measures and other forms of physical security and exclude psychological protection,

Apart from 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,[140] 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 Nigeria. It is acknowledged that the inconsistencies arise because, within the existing legal framework in Nigeria, there are no stipulations or guidelines for determining how procedural 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 issues form the crux of the discussion in chapter six.

2.5.5. Institutional and Administrative Structure for Witness Protection

As accentuated in preceding sections, there is no comprehensive witness protection legislation in Nigeria. Thus far, witness protection is inferred from different legislative provisions which refer to certain protective measures. These laws are administered by different law enforcement institutions with powers limited by the scope of the specific legislation. Consequently, there is no distinct institutional framework through which witness protection objectives are administered in Nigeria.

As indicated in the introductory paragraph, since witness protection needs became more evident in the administration of criminal justice in Nigeria, there have been three legislative

http://lawcommissionofindia.nic.in/Consultation%20paper%20on%20witness%20identity%20Protection%20and%20witness%20protection%20programmes.pdf, accessed 10 January 2012.

[140] See section 2.4.2

attempts to enact comprehensive witness protection legislation. There have been significant disparities in the content of these bills. For example, while the 2008 bill conferred the responsibility to administer witness protection on the Minister of Justice, the 2012 and 2017 bills,[141] respectively, propose the establishment of a new witness protection agency with the powers to administer witness protection in Nigeria. Within existing literature, there are three broad systems for administering witness protection objectives: police-based structures, prosecutor-based structures or the creation of an independent witness protection agency.[142] Chapter seven thus explores witness protection practices to consider how the institutional framework for Nigeria may be shaped bearing in mind the significance of socio-economic and socio-political considerations.

2.6. Conclusion

In Nigeria, witness protection needs have evolved and there is no definite formal framework. The existing legal framework comprise pockets of witness protection provisions scattered in different criminal laws. In terms of case law, as an emerging practice in Nigeria, witness protection issues have thus far formed part of preliminary objections and not substantive issues. This has affected the depth of judicial jurisprudence on witness protection in Nigeria. They, however, create a basis for interrogating issues central to the conceptualization of witness protection. From the legal issues raised, it remains unclear to whom witness protection applies; what type of crimes are included and why those crimes are included; the scope of protective measures and the constitutionality or otherwise of procedural protective measures; and the administrative control of witness protection.

In subsequent chapters, this research proceeds to explore global practices in existing literature to pull out these different legal and conceptual issues, to make proposals for how these issues should be resolved and developed in Nigeria. In chapter eight, the discussion returns to the practice in Nigeria to examine how these issues unfold.

[141] The 2017 bill is discussed in chapter 8.
[142] *United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' (2008) 43-7 available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf*, accessed 20 December 2011.

CHAPTER THREE

ANALYSING THE CONCEPT OF WITNESS PROTECTION

3.1. Introduction

This chapter examines the first conceptual issue in this thesis: *'what is witness protection'?* It argues that the concept of witness protection requires conceptual clarification in determining its scope. Witness protection is an evolving area of law and practice and there is inconsistency about its precise meaning among criminal justice stakeholders in Nigeria. Apart from Nigeria, witness protection practice remains largely undeveloped in several states. There is no specific international instrument focused exclusively on witness protection, neither is there a universal definition of witness protection. Accordingly, definitions of witness protection have developed from individual practices of states. Within this background, the concept of witness protection is characterised by ambiguity about its precise meaning, thereby subjecting it to diverse interpretations.

One such ambiguity is the tendency to conflate witness protection with related concepts such as whistle-blower's protection, victim protection and informant protection.[1] This chapter confirms their critical differences as they denote distinct spheres within the criminal justice system. The proclivity of conflating these concepts and the implications of this in determining the scope of witness protection is overlooked within existing academic literature. A specific objective of this chapter is to identify the organising principles for delineating the scope of witness protection. That is, it identifies its main attributes, characteristics and the purpose of witness protection within the criminal justice system. The chapter advances the existing conversations on witness protection by introducing an analytical basis for discussing witness protection, an area of enquiry which this thesis notes is amorphous.

Specifically, this chapter draws from the existing literature and adopts two distinct perspectives: the criminal justice perspectives and human rights perspectives as useful exploratory tools to separate the disparate influences that have come to shape the discussions on witness protection. These distinctions are utilised in subsequent chapters as an integrated way of conceptualising the concept of witness protection.

[1] Criminal justice experts in Nigeria define witness protection to include victim protection, whistleblower's protection. This is further discussed in chapter eight.

3.2. The Nature of Witness Protection

The significance of the concept of witness protection within adversarial criminal justice systems cannot be disputed. This is because, within adversarial systems, the basic principle of a fair trial entitles defendants in criminal proceedings to face their accusers and cross examine witnesses in court.[2] These requirements however expose the witnesses, particularly those whose identities are known, and makes them vulnerable to intimidation or threats of or actual reprisals. The argument made here is that witness exposures are not as problematic within inquisitorial criminal justice systems. This is because, within inquisitorial systems, the trial is structured as an inquiry rather than a party contest.[3] The trial has a different function as it is not a forum for oral argument but for the evaluation of written evidence presented before the court. In such trials, therefore, the written statements of witnesses largely replace their oral evidence in court.[4] This explains the prevalence of witness protection within adversarial criminal justice systems as most discussions on witness protection emanate from these jurisdictions and its relevance to this thesis because of its usefulness to Nigeria which operates an adversarial system.

The relevance of witness protection within adversarial systems is undisputable because the difficulties encountered by witnesses stem directly from the nature of adversarial systems. Nevertheless, Fyfe and Sheptycki acknowledge that witness protection is increasingly being recognised within inquisitorial systems in Europe.[5] The literature is however unclear about the reason(s) for this recognition. A possible explanation according to Ellison is that 'no system is an embodiment of either model.'[6] The recognition of witness protection can however be ascribed to its utility in criminal prosecutions and its relevance to the overarching essence of criminal law.

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

[2] This right to cross examine witness is recognised in several international human rights instruments. In Nigeria, this is a constitutional right to guarantee the rights of the defendant to a fair hearing. See section 36(4) and (6) (d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C 23, Laws of the Federation of Nigeria (LFN) 2010.
[3] Louise Ellison 'The protection of vulnerable witnesses in court: an Anglo-Dutch comparison' (1999) 3 *International Journal of Evidence and Proof* 38.
[4] Ibid.
[5] See Nicholas Fyfe & James Sheptycki 'International trends in the facilitation of witness co-operation in organized crime cases' (2006) 3 (3) *European Journal of Criminology* 319-355.
[6] Ellison op cit note 3.

> 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.[7]

Since the safety of, or risk to witnesses is compounded by the exposure of witnesses testifying openly in court, the element of open confrontation during criminal prosecution is identified as a crucial factor in defining witness protection.

Witness protection is limited to removing or countering risks that witnesses are exposed to for cooperating with law enforcement authorities. Historically, witness protection was criticised as favouring criminals, as it was perceived as an incentive given to criminals, known as justice collaborators.[8] This explanation is necessary given that the rejection of rewards in this context contrasts significantly with its acceptance within whistle-blower's and informant protection, for instance. Although witness protection is often criticised,[9] it is generally accepted as valuable and essential to the overall administration of criminal justice.[10]

3.3. Conceptual Clarification of Terms

Generally, literature on witness protection overlooks the need to define witness protection and how it differs from other interrelated concepts. Dandurand and Farr,[11] Mahony[12] and Irish et al[13]

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[7] 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-8310-3a1a45ce9869/review_of_witness_protection_act_1991.pdf*, accessed 29 March 2017.

[8] Yvon Dandurand and Kristin Farr 'A review of selected witness protection programmes' Prepared for Research and National Coordination, Organised Crime Division, Law Enforcement and Policy Branch, Public Safety Canada (2010) 5, available at *http://www.publications.gc.ca/collections/collection_2011/sp-ps/PS4-96-2010-eng.pdf*, accessed 17 January 2013. See also Ridson N Slate 'The Federal witness protection program: Its evolution and continuing growing pains' (1997) *16 Criminal Justice Ethics* 22-8.

[9] Criticisms against witness protection include the legal and ethical issues associated with some controversial aspects of protecting witnesses. These criticisms are highlighted where relevant in the subsequent chapters.

[10] It is reported for example that the US Witness Security Program (WITSEC), since its inception in 1971, has successfully protected over 8,000 witnesses and almost 10,000 of their family members, and obtained an overall conviction rate of 89 % because of protected witnesses' testimonies. See Slate op cit note 8 at 20. See also Ronald K Noble 3rd International Witness Protection Symposium: Witness Protection/Security a Key Partner in the Judicial Process Lyon, (France) 30 October 2008 Opening Speech by INTERPOL Secretary General, available at *https://www.interpol.int/content/download/5731/.../2/.../SGUSMarshals20081030.pdf*, accessed 12 May 2015.

[11] Dandurand and Farr op cit note 8 at 7.

[12] See Chris Mahony *The Justice Sector Afterthought: Witness Protection in Africa*, (2010) 96, available at *http://www.issafrica.org/pubs/Books/WitnessProt4.pdf*, accessed 10 January 2012.

[13] Jenny Irish, Wilson Magadhla, Kevin Qhobosheane and Gareth Newham 'Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme Programme in South Africa' Research report written for the Centre for the Study of Violence and Reconciliation (October 2000) available at *http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf*, accessed 1 August 2017.

acknowledge that witness protection differs from whistle-blower's protection and informant protection, respectively. Similarly, the United Nations Office on Drugs and Crime (UNODC) clarifies that witness protection should not be mistaken for victim protection.[14] However, these authors do not provide adequate explanation of the implication(s) of conflating these concepts. Current witness protection practices in Nigeria draw attention to the consequences of lack of clarity in defining witness protection and how this affects underlying issues such as those raised in the *Nnamdi Kanu* and *Dasuki* cases discussed in chapter two. This section identifies distinct characteristics of these inter-related terms.

3.3.1. What is Witness Protection?

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.[15] 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.[16] 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.[17]

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.'[18] The UNODC is not alone in its construct of witness protection as a

[14] UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism* (2011) 54, available at *http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf*, accessed 7 February 2017.
[15] 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_GGSeminar_all.pdf*, accessed 9 May 2013.
[16] 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/wp-content/uploads/2015/10/Witness-protection-and-Transitional-Justice-in-Zimbabwe.pdf*, accessed 13 April 2017.
[17] 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.
[18] *United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' (2008) 5, available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf*, accessed 20 December 2011.

programme as this approach is also adopted by the Council of Europe (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 proceedings.'[19] The United Nations Human Rights Office of the High Commissioner (OHCHR), however, admits that definitions of witness protection as a programme is usually within the context of serious organised crimes and terrorism.[20] This restrictive definition is influenced by the historical contexts within which the concept of witness protection evolved. Witness protection programmes played a useful role in organised crime prosecutions in the sense that prosecutors found it an effective way of facilitating the cooperation of witnesses testifying in these prosecutions. This is a subject to which discussion returns in chapters five and six.

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. These issues are further elaborated in subsequent paragraphs of this chapter and in chapter six. 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. The preceding sections provide a basis for this definition.

3.3.2. Victim Protection

Literature on victim protection encompasses a wide range of issues. Its inclusion in this chapter is limited to highlighting the differences between witness protection and victim protection. Victim protection developed within the purview of victimology; which is the scientific study of victims

[19] Council of Europe, *Procedural Protective Measures for Witnesses: Training Manual for Law Enforcement Agencies and the Judiciary* (2006) 30.
[20] 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.

and victimization and their relationship with other actors within the criminal justice sector.[21] Victimology primarily deals with the process of criminal victimization, its consequences and how the criminal justice system accommodates victims. It is concerned with the re-emergence of the victim as an essential component of the criminal justice system, who at the time were considered as 'forgotten players' in the criminal justice system.[22] This is because for several years, criminal justice administration focused on the rights of the defendant.

Victimology resulted in the recognition of formal rights for victims of crime to receive financial compensation and support services from the state.[23] A significant development from such victim movements was the strengthening of immediate and direct support and protection for the victim of crime.[24] Accordingly, international recognition of victim protection evolved within the recommendations of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[25] which primarily recommends the adoption of measures at national levels to improve access to justice and fair treatment, restitution, compensation, protection and assistance of victims of crime and abuse of power.[26]

Victim protection refers to a set of rights and guarantees that 'aim at preventing any further harm or intimidation on the victim's side either because of a subsequent crime (repeat victimisation) or inappropriate criminal proceedings (secondary victimisation).'[27] It focuses on 'the need to prevent victimisation, protect and assist victims and to treat them with compassion and respect for their dignity.'[28] This usually focuses on enhancing victim participation in the criminal process. With the advancement of victimology as an area of enquiry and victim

[21] Ezzat A Fattah 'Victimology: Past, Present and Future' (2000) 33 (1) *Criminologie* 17-46. See also Claire Ferguson and Brent E Turvey 'Victimology: A Brief History with an Introduction to Forensic Victimology' Chapter 1, 3, available at *https://booksite.elsevier.com/samplechapters/9780123740892/Sample_Chapters/02~Chapter_1.pdf*, accessed 14 May 2018.
[22] Ibid, 4-11.
[23] 'Chapter 2: Growth and Development of Victimology, Victim Justice, Victim Compensation and Support Services' 22, available at *http://shodhganga.inflibnet.ac.in/bitstream/10603/190615/11/11_chapter%202.pdf*, accessed 6 February, 2019.
[24] Ibid.
[25] General Assembly A/RES/40/34 29 November 1985, 96th plenary meeting.
[26] Ibid, para 4, 8, 12 and 14.
[27] Centre for European Policy Studies (CEPS) 'Local and Regional Good Practices on Victims' Rights' European Union (2011) 20, available at *https://cor.europa.eu/en/documentation/studies/Documents/local-regional-good-practices-victims.pdf*, accessed 14 May 2018.
[28] United Nations Office on Drugs and Crime *Cross-Cutting Issues Victims and Witnesses: Criminal Justice Assessment Toolkit* (2006) 1, available at *https://www.un.org/ruleoflaw/files/3_Victims_Witnesses.pdf*, accessed 14 May 2018.

movements over the years, several states, such as the US, Canada and Britain, developed initiatives to reaffirm the rights of victims to participate in criminal proceedings and to be protected from any form of intimidation.[29] These initiatives, provide special assistance to victims of crimes, particularly in sexual offences or family violence.[30] The UNODC notes that in these circumstances, fear occurs where there is a close relationship between the victim and the offender, such as in domestic violence.[31]

Writings on victim protection establish that it focuses on specific groups with vulnerable qualities such as age (old persons and children), gender (women), the mentally defective, minorities, immigrants etc.[32] Another significant characteristic is the focus on victims of specific crimes, such as violence against women, sexual assault, and human trafficking.[33] Johnson et al note, for example, that in the US, the institutional response to domestic violence stirred law reforms to recognise the need for victim protection.[34] The writings of Fyfe and Mackay confirm that this is a similar practice in the UK. Their writing reveal that, the prevalence of intimidation against victims of sexual crimes, saw the establishment of special units within several police forces, aimed at protecting these victims.[35] In Nigeria, these developments are like the objectives within the VAPPA which seeks to protect vulnerable persons from gender based crimes such as domestic violence and other forms of physical, psychological and sexual violence.[36]

Generally, issues concerning access to justice for victims particularly their access to information and social support,[37] forms the focus of victim protection, which is not prioritised

[29] Fattah op cit note 21 at 32.
[30] Ibid 37. These programmes were designed to notify victims of critical dates in their cases and to create separate waiting areas for victims.
[31] UNODC *Cross-Cutting Issues* op cit note 28 at 14.
[32] See generally See Robin Elliot *Vulnerable and Intimidated Witnesses: A Review of the Literature* Home Office Research and Statistics Directorate (1998) 106-08. See also Jenny McEwan 'In defence of vulnerable witnesses: The Youth Justice and Criminal Evidence Act *1999'* (2000) 4 *Int'l J. Evidence & Proof* 1-29.
[33] UNODC *Cross-Cutting Issues* op cit note 28 at 6. See also See Hussein Sadruddin, Natalia Walter, Jose Hidalgo 'Human Trafficking in the United States: Expanding Victim Protection beyond Prosecution Witnesses (2005) 16 (2) *Stanford Law & Policy Review* 379-416; see also Elaine Pearson 'Half-Hearted Protection: What Does Victim Protection Really Mean for Victims of Trafficking in Europe? (2002) 10 (1) *Gender and Development* 56-59.
[34] John M Johnson, Yvonne Luna and Judy Stein 'Victim Protection Orders and the Stake in Conformity Thesis' (2003) 18 (6) *Journal of Family Violence* 317.
[35] See Nicholas R Fyfe & Heather McKay 'Desperately seeking safety- witnesses' experience of intimidation, protection and relocation' (2000) 40 *Brit. J. of Criminology* 678. See also Nicholas R Fyfe & Heather Mckay 'Police Protection of Intimidated Witnesses: A study of the Strathclyde Police Witness Protection Programme' (2000) 10 *Policing and Society* 277-299.
[36] See Chapter 2: 2.2.7.
[37] Fattah op cit note 21 at 37.

under witness protection. In fact, victimology sought to advance the rights of victims of crimes beyond their limited role as prosecution witnesses, which had no recourse to their personal needs or interests.[38] In their study, Sadruddin et al emphasise that although law enforcement authorities often equate victims with witnesses, they are not the same.[39] The definition of victims in the UN Declaration of Basic Principles 1985 as 'any person who individually or collectively suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights'[40] further draws a distinction between the objectives of victim protection and witness protection. In explaining this, the UNODC expresses the view that most victims do not encounter a prosecutor because their victimisation does not lead to the actual prosecution of the offender.[41] That is, not all victims contribute to the production of incriminating evidence,[42] which is a fundamental requirement within witness protection discourse. The essence of this clarification is to underscore that the absence of a testimonial element within the structure of victim protection is crucial within witness protection. The significance of this key element as a decisive feature, which differentiates witness protection from victim protection is overlooked in existing literature.

Victim protection thus recognises the overall needs of victims regardless of their actual cooperation during a criminal trial as prosecution witnesses. In Kenya, the Victim Protection Act emphasises victims protection through support services, reparations and compensation from the offender.[43] The Act also draws a distinction between the type of protection given to victims who are complainants and those who choose not to participate in the proceedings.[44] This aligns with the opinion of criminal law experts in Nigeria, that the focus of victim protection is to provide

[38] Santosh Aghav 'Chapter II: Conceptual Developments: Victim, Victimization and Victimology' 20, available at *http://shodhganga.inflibnet.ac.in/bitstream/10603/192360/6/chapter%202.pdf*, accessed 6 February 2019.
[39] See Sadruddin et al op cit note 33 at 395.
[40] See Article 1 op cit note 26.
[41] UNODC *Cross-Cutting Issues* op cit note 28 at 9.
[42] UNODC, *The Criminal Justice Response to* op cit note 14 at 54.
[43] See section 3 Victim Protection Act No. 17 of 201, available at *http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/VictimProtectionAct17of2014.pdf*, accessed 12 September 2019.
[44] See section 13-15.

support for victims who are not necessarily witnesses in a criminal proceeding[45] and which informs the primary objectives of the NAPTIP Act and VAPPA.[46]

In terms of the degree of protection, within the context of victim protection, Johnson et al[47] express the view that, merely arresting the offender, has a significant deterrent effect, which stalls further acts of intimidation by such offenders. The argument developed here is that this fact also raises a crucial feature that distinguishes witness protection from victim protection, in the sense that witness protection emphasises the realisation of intimidation usually within a group context and that merely arresting the perpetrator is not enough. This is an issue further considered in chapter five.

3.3.3. Informant Protection

Within public international law, article 26 of the United Nations Convention on Transnational Organised Crimes (UNCTOC)[48] is relied on as the premise for protecting informants. Informant protection is recognised as a measure to enhance cooperation with law enforcement authorities. Faber notes that, 'law enforcement agencies have frequently found the use of informants beneficial, and in some cases, even essential, in successfully pursuing criminal investigations and prosecutions.'[49] Informants make available information useful for investigative and evidentiary purposes on matters concerning the identity, nature, composition, structure, location or activities of criminal groups.[50] Information provided by informants are helpful in determining the priorities given to investigating particular cases.[51] Also, informants strengthen the operations of law enforcement through their close associations with criminal targets and provide security operatives access to locations, which are ordinarily inaccessible to them.[52]

The past criminal records of informants and their involvement with crime differentiates informants from mere informers, who have no criminal records.[53] Also, their criminal history

[45] See the discussions in chapter 8: 8.3.1. Here the experts draw a distinction between the objectives of witness protection and victim protection.
[46] See section 1(a) NAPTIP Act and section 38 (1) VAPPA.
[47] Johnson et al op cit note 34 at 318.
[48] General Assembly resolution 55/25, annex I.
[49] Bernard J Farber 'Public Protection: Informants' (2009) (5) *AELE Monthly Law Journal* 101, available at *http://www.aele.org/law/2009all05/2009-05MLJ101.pdf*, accessed 14 May 2018.
[50] See Article 26 (1) (a) (i) UNTOC.
[51] J. Mitchell Miller 'Becoming an Informant' (2011) 28 (2) *Justice Quarterly* 204.
[52] Ibid.
[53] Ibid, 205-06.

makes it easy for law enforcement authorities to recruit them as informants who are able to infiltrate criminal groups, or introduce undercover agents to suspects as their allies.[54] Alternatively, informants may choose to give up their criminal associates and assist law enforcement as part of plea bargain arrangements.[55] Informants are often allowed to engage in crimes, usually as a means of establishing their credibility with the target of investigation or for obtaining evidence for use in an eventual prosecution.[56] This is not expected of ordinary witnesses. As Grabosky expressly notes, 'informants are usually not your typical upstanding citizens.'[57]

Informant protection finds its relevance in transnational criminal groups or within the context of organised crime and serious offences,[58] such as corruption and drug-related criminal investigations and prosecutions.[59] Furthermore, it is useful within the context of gang-related investigations.[60] Inside information by informants often thwarts planned criminal activities.[61] It should however be emphasised that there is often an overlap between the status of a person as an informant and as a witness. The argument developed here is that a distinction is drawn between the roles of informants at the investigative stage and their role during proceedings in court. It appears that the role of informants is limited to the investigative stage and does not extend to prosecution. During criminal proceedings, they are transformed from their function as mere informants to witnesses who testify openly in court. The crux of this argument is developed in chapter four.

The frequency of informant protection is undetermined because informants are only revealed when they testify in court.[62] Informant protection is thus limited to the non-disclosure of the informant's identity; made known only to the investigator or law enforcement agency using

[54] Peter N Grabosky 'Prosecutors, Informants and the Integrity of the Criminal Justice System' (1992) 4(1) *Current Issues in Criminal Justice*, 48.
[55] Ibid.
[56] Ibid, 50.
[57] Ibid, 54.
[58] Ibid, 62.
[59] Ibid, 49. See also Miller op cit note 51 at 203.
[60] Farber op cit note 49 at 103.
[61] Jeffery S Neuschatz, Deah S Lawson, Jessica K Swanner, Christian A Meissner and Joseph S Neuschatz 'The Effects of Accomplice Witness and Jailhouse Informants on Jury Decision Making' (2008) 32 *Law Human Behaviour*, 138. See also 'Protection and Treatment of Victims, Witnesses and Offenders- Tool 5.14 Seeking the Collaboration of offenders' available at *https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-14.pdf*, accessed 14 May 2018.
[62] Ibid.

them.[63] Furthermore, remuneration plays a significant role within this framework because informants are usually remunerated for their role as informants.[64] The US Department of Justice clarifies that informant protection commitments are ad hoc or done on an individual basis because the terms of their protection are through verbal promises made by investigators to protect them from harm.[65] The implication of this conclusion within the practice of witness protection in Nigeria is elaborated in chapter eight. Like victim protection, the absence of a testimonial element differentiates informant protection from witness protection.

3.3.4 Whistle-blower's Protection[66]

The international recognition of whistle-blower's protection is found in the United Nations Convention against Corruption (UNCAC).[67] It developed significantly within the context of corruption cases.[68] The Organization for Economic Cooperation and Development (OECD) defines whistle-blower's protection as the 'legal protection from discrimination or disciplinary action for employees who disclose to competent authorities in good faith and on reasonable grounds wrongdoing of whatever kind in the context of their workplace.'[69] Within scholarly literature, whistle-blower's protection finds its relevance within the workplace, particularly public-sector institutions.[70] Whistle-blowers, acting as informants within the workplace, are central to detecting wrongdoing and illegal activities perpetrated by their employers.[71] These non-criminal

[63] Miller op cit note 51.
[64] See Grabosky op cit note 54.
[65] In the United States however, the Department of Justice has guidelines regarding the use of confidential informants. See 'Department of Justice Guidelines Regarding the Use of Confidential Informants' January 8, 2001 available at *https://www.aclu.org/other/department-justice-guidelines-regarding-use-confidential-informants*, accessed 18 May 2018.
[66] Literature on whistle-blowers protection is enormous. Its inclusion in this chapter is limited to distinguishing it from witness protection.
[67] See articles 33 and 37 General Assembly resolution 58/4 of 31 October 2003.
[68] See UNODC Good Practices op cit note 18 at 22. See also Marie Chene 'Good Practice in Witness Protection Legislation' *Transparency International* 29 November 2012, 2, available at *https://www.transparency.org/files/content/corruptionqas/Helpdesk_good_practice_in_witness_protection_legislation.pdf*, accessed 14 May 2018. See also Grabosky op cit note 54 at 49.
[69] OECD 'Committing to Effective Whistle-blower Protection' 1 available at *https://www.oecd.org/corruption/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf*, accessed 14 May 2018. See also Marcia P Miceli et al 'Can Laws Protect Whistle-Blowers?' (1999) 26 (1) *Work and Occupations* 131.
[70] Ibid. See also Gene A Brewer and Sally Coleman Selden 'Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic' (1998) J- Part 8 (3) 413-439; Colin Grant 'Whistle Blowers: Saint of Secular Culture' (2002) 39 *Journal of Business Ethics* 391-399.
[71] Ethan D Wohl 'Confidential Informants in Private Litigation: Balancing Interests in Anonymity and Disclosure' (2007) 12 (3) *Fordham Journal of Corporate and Financial Law*, 553.

informants, who are mostly employees, are deterred from providing information about such misconducts because of threats of retaliation, often of an economic nature.[72] Whistle-blower's protection emphasises the employer-employee relationship as the source of intimidation. This is typically different from a regular witness who is not necessarily an employee of the offender.

Within the academic literature, there is consensus that whistle-blower's protection operates on the premise that crimes, particularly corruption and fraud, are likely to occur in the workplace and that employees have knowledge of such crimes but are unable to speak up because of the possibility of reprisals. Consequently, whistle-blower's protection aims at protecting employees who report such crimes, from retaliation, particularly economic victimisation.[73] Also, whistle-blower's protection prevents crimes that are unlikely to be detected externally, and have the potential of inflicting wide-spread harm.[74] It is thus integral for 'safeguarding public interest… and promoting a culture of accountability and integrity in both public and private institutions and encourages the reporting of misconduct, fraud and corruption.'[75] According to Kramer, the key elements of whistle-blowing include an act of disclosure, by a person with privileged access to data or information of an organization either public or private about corrupt, illegal, fraudulent or harmful activity under the control of that organization.[76] The disclosure is made to an internal entity or to external entities, such as regulatory bodies, ombudsmen, anti-corruption entities, law enforcement agencies or the media with the purpose of evaluating the threat so that it can be removed, stopped or reduced.[77]

Moreover, whistle-blower's protection envisages the exposure of corrupt practices and misconduct in public institutions by individuals who are not employees. In this instance, members of the public, while transacting with these institutions, are exposed to information concerning wrongdoing. Alexander however notes that these situations constitute economic crimes and may come within the purview of witness protection where the illicit activities are those of a powerful

[72] Ibid, 555, 557.
[73] Ibid.
[74] Ibid.
[75] OECD op cit note 69 at 2.
[76] Karen Kramer '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*, Resource Material Series No. 86 UNAFEI, Tokyo Japan, March 2012, 17, available at *http://www.unafei.or.jp/english/pdf/RS_No86/No86_00All.pdf*, accessed 21 January 2013.
[77] Ibid.

criminal or a terrorist organization.[78] Accordingly, whistle-blower's protection is insufficient because of the level of risk associated to such disclosures within those circumstances. Regardless of this definition, I argue that this explanation diminishes the scope of witness protection, which envisages testifying against criminal acts not limited to corruption within public institutions.

It is important to stress that the nature of intimidation envisaged within the context of whistle-blower's protection is restricted in most instances to employment reprisals, such as harassment at work, demotion or intimidation, whereas the level of threat against a witness in organised crime is likely to be much higher.[79] Like criminal informants, whistle-blowers are not likely to testify at trial. Consequently, anonymity is the primary focus of whistle-blower's protection.[80] In addition, whistle-blower's protection encourages monetary rewards or compensation for whistle-blowers and stipulates penalties for retaliation against whistle-blowers.[81] This is also a practice recognised in Nigeria where the existing whistle-blowing policy of the Federal Ministry of Finance provides financial rewards for whistle-blowers.[82]

3.4. The Relevance of Witness Intimidation

Witness intimidation is an essential issue that underlies witness protection as well as the other interrelated concepts discussed above. There is significant research on witness intimidation and the most notable research in recent times is that of Finn and Healey[83] and Fyfe and Mckay.[84] Although studies undertaken by these authors[85] generally investigate the nature of witness intimidation within specific communities in the United Kingdom and the United States, they

[78] Richard Alexander 'The Role of Whistleblowers in the Fight against Economic Crime' available at *https://eprints.soas.ac.uk/89/1/JFC_-_Dec_2004.pdf*, accessed 19 September 2018.
[79] Chene op cit note 68.
[80] Wohl op cit note 71 at 553; 585.
[81] OECD op cit note 69 at 3.
[82] See Federal Ministry of Finance- Whistle Blowing Frequently Asked Questions (FAQ) available at *http://whistle.finance.gov.ng/_catalogs/masterpage/MOFWhistle/assets/FMF%20WHISTLEBLOWING%20FREQUENTLY%20ASKED%20QUESTIONS.pdf*, accessed 29 September 2018.
[83] 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, 2, available at *https://www.ncjrs.gov/pdffiles/163067.pdf*, accessed 10 January 2012.
[84] Fyfe & Mckay 'Desperately Seeking Safety op cit note 35 at 675.
[85] Their work also builds upon existing literature on witness intimidation. They compile their work in a manner that enables future researchers to identify key issues in witness intimidation and witness security.

provide a holistic discussion on witness intimidation and there is significant dependence on these studies by others who have also written about witness intimidation.[86]

Witness intimidation is defined as the threat to harm someone, or acts done to harm them, including physical and financial harm[87] and acts and threats to a third party, such as the relation of a witness, with the purpose of deterring the witness from giving evidence in court.[88] A report of the Victoria Police Department emphasises that witness intimidation seeks to influence the witnesses to silence them or to dissuade their co-operation with police by not reporting crimes or being absent when testimony is required.[89] In the absence of intimidation, there is no need to protect witnesses.[90]

Although it is generally accepted that fear is not the only reason witnesses may refuse to testify,[91] there is consensus by authors such as Finn and Healey,[92] Fyfe and Mckay[93] and Hadley,[94] that the fear of possible reprisals, threats or actual physical violence by criminals are primarily responsible for the unwillingness of witnesses to cooperate with law enforcement. These acts of intimidation may be executed personally by the defendant or by their friends or criminal associates,

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[86] See for example Jonathan Hadley *Witness Intimidation and Protection Practices: A Front-Line View from Helsinki, Consideration of Finnish Police Law, and Review of Research in the UK* POLIISIAMMATTIKORKEAKOULUN TIEDOTTEITA 54 (2006) available at *https://www.theseus.fi/bitstream/handle/10024/86795/witness%20intimidation_tiedotteita54.pdf?sequence=1*, accessed 24 March 2017; see also Office of Police Integrity, *Review of the Victoria Police Witness Protection Program* Report of the Director, Victoria Police Integrity (July 2005, Victorian Government) 3 available at *http://www.ibac.vic.gov.au/docs/default-source/reviews/opi/review-of-the-victoria-police-witness-protection-program---july-2005.pdf?sfvrsn=8*, accessed 18 April 2017. See also Illinois Criminal Justice Information Authority, *An Evaluation of the Illinois State Police Gang Crime Witness Protection Program* Research and Analysis Unit Illinois Criminal Justice Information Authority (1997) available at *http://www.popcenter.org/problems/witness_intimidation/PDFs/Bauer_etal_1997.pdf*, accessed 10 January 2012.

[87] Financial harm has relevance within a victim and whistle-blower protection framework.

[88] Home Office, (1998) *Speaking up for Justice: Report of the Inter-Departmental Working Group on the treatment of Vulnerable or intimidated Witnesses in the Criminal Justice System,* London: Home Office 25 cited in Fyfe and Mckay Desperately Seeking Safety op cit note 35 at 676.

[89] Op cit note 83 at 7.

[90] Ibid.

[91] Other social and cultural issues such as distrust in the police and other law enforcement agents, allegiance to persons of same race irrespective of criminal history, immigration issues particularly where witnesses to a crime may be illegal immigrants. See generally Finn & Healey op cit note 83 at 4. See Rommel Baligod 'Update on the Implementation of the Witness Protection Security and Benefit Program (WPSBP)' 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, 50 available at *http://unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_all.pdf*, accessed 9 May 2013.

[92] Finn & Healey op cit note 83.

[93] Fyfe & Mckay 'Desperately Seeking Safety op cit note 31 at 675.

[94] See for example Hadley op cit note 86.

usually with the defendant's knowledge.[95] This affects the viability of including the defendant's witnesses as beneficiaries of protection. This is further elaborated in chapter four. By nature, witness intimidation usually occurs before trial or during the trial. However, the intimidation of the witness does not necessarily stop at the end of the prosecution.[96]

From the discussions in the preceding section, clearly, the existence of intimidation necessitates some form of protection for individuals exposed to threats. The level of threat experienced by the different beneficiaries of protection is an indication of their distinct relevance within the criminal justice system. That is, the level of threat existing within these concepts differs significantly. Ascertaining the level of threat is important because it helps to identify the types of crimes which trigger protection within these distinct spheres. For example, the UNODC, Pearson and Hussein et al, underscore the relevance of victim protection in crimes such as human trafficking, domestic violence, sexual assaults and violence against women.[97] Here, the emphasis is on the vulnerability arising from age and gender. Also, whistle-blower's protection arises within the context of the workplace, usually between an employee and their employers and is limited to reporting wrongdoing and misconducts in the workplace.[98]

On the other hand, within the context of witness protection, intimidation focuses on factors such as the status and the capacity of the defendant to retaliate against a witness and the nature of the crime.[99] It emphasises the gravity of intimidation within an organised crime context involving serious crimes or gang-related activities.[100] This is confirmed by the definition of witness protection proffered by the COE, which emphasises witness protection for the highest threat

[95] Teresa M Garvey *Witness Intimidation: Meeting the Challenge* AEquitas The Prosecutors' Resource on Violence against Women, a project of the Pennsylvania Coalition against Rape (2013) 7, available at *http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf*, accessed on 3 May 2017. See also, Kerry Murphy Healey 'Victim and witness intimidation: New developments and emerging responses' US *Department of Justice- Office of Justice Programmes National Institute of Justice: Research in Action* October 1995 4, available at *https://www.ncjrs.gov/pdffiles/witintim.pdf*, accessed 10 January 2012.

[96] *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 23 p 4, available at *www.legislationline.org/documents/id/8998*, accessed 23 March 2013.

[97] UNODC *Cross-Cutting Issues* op cit note 28 at 6. See also Sadruddin et al op cit note 33; see also Pearson op cit note 33 at 56-9.

[98] OECD op cit note 69. See also Miceli et al op cit note 69.

[99] According to their report four factors that increase the chance that a witness will be intimidated include the following: if the initial crime was violent; the defendant has a personal connection to the witness; the defendant lives near the witness; and the witness is especially vulnerable for example, he or she is elderly or a recent or illegal immigrant. Finn & Healey op cit note 83 at 2; 8.

[100] Fyfe & McKay Making it safe op cit note 35 at 2.

levels.[101] That is, the risk of intimidation is more prevalent in specific types of crime than others.[102] Within this context, it is acknowledged that witnesses are usually members of the criminal group, cooperating with law enforcement authorities as justice collaborators.[103] This opinion informs the choice of the scope and nature of crimes requiring protection discussed in chapter five.

Another clear distinction is that within the context of witness protection, the level of threat is magnified by the element of open confrontation. While the beneficiaries of victim protection, whistle-blower's protection and informant protection do not need to testify in open court, since non-disclosure of their identity is central to the nature of protection provided to them, within the context of witness protection, the production of incriminating evidence in open court is key. This supports the relevance of witness protection within adversarial systems. In such instances, the motivation for protection is limited to ensuring that the evidence against the offender is preserved. This also agrees with the opinion of the COE, that the significance of the witness testimony during criminal proceedings is a crucial aspect of witness protection.[104]

3.5. Justification(s) for Witness Protection

This section highlights the different justifications for witness protection. In so doing, it broadly draws attention to the developments of and trends within witness protection practices. Specifically, it accentuates how these justifications 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.

3.5.1. Constitutional Requirements

Witness protection in states such as Colombia[105] and Chile[106] is rooted in their constitutions. 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. In Nigeria, participants in the field of research propose that

[101] See section 3.3.1.
[102] Elliot op cit note 32 at 117.
[103] Finn and Healey op cit note 83 at 2; 8.
[104] See section 3.3.1
[105] See 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.
[106] 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.

certain constitutional provisions indirectly justify the basis for witness protection.[107] The UNODC notes however that constitutional obligations to protect witnesses are not widely recognised or accepted in practice.[108]

3.5.2. International Obligations

Although there is no universal instrument for witness protection, the concept has received some reference within the text of international conventions. These conventions require states to adopt protective measures to protect witnesses from intimidation arising from their decisions to cooperate with law enforcement. The most widely acknowledged international convention on witness protection are the United Nations Convention against Transnational Organised Crime (UNCTOC) and the United Nations Convention against Corruption (UNCAC).[109] Others include the Rome Statute,[110] the Statute of the International Criminal Tribunal for Former Yugoslavia[111] and the Statute of the International Criminal Tribunal for Rwanda,[112] both represented within the Mechanism of the International Criminal Tribunals. These international instruments underscore the duty of states to protect, as they create obligations that State Parties are bound to fulfil under international law.[113]

Within the regional level, there are different agreements that recognise the need to protect victims and witnesses from the consequences of intimidation during judicial proceedings. Within the auspices of the African Union (AU), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003[114] as well as the African Union Model Law on Universal Jurisdiction over International Crimes,[115] require member states in the African Union to adopt

[107] This is elaborated in chapter 8. See also discussions in chapter 2; 2.2.1.
[108] See UNODC Good Practices op cit note 18 at 11.
[109] See Articles 24-26 UNCTOC; Article 32 UNCAC. These conventions have been widely ratified by several State Parties including Nigeria. Another international instrument is the Bangkok Declaration on Synergies and Responses Paragraph, 13 and 17 that recognises the need to implement measures intended to provide adequate assistance and protections to victim and witnesses. So too, the Strategic Alliances in Crime Prevention and Criminal Justice (General Assembly resolution 60/177, annex), adopted by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Member States recognized the importance of giving special attention to the need to protect witnesses and victims of crime and terrorism.
[110] See article 68 (1).
[111] See article 22.
[112] See article 21.
[113] See generally Article 26 and 27 of the Vienna Convention on the Law of Treaties (concluded at Vienna on 23 May 1969).
[114] Available at *http://www.achpr.org/instruments/principles-guidelines-right-fair-trial*/accessed 4 May 2017.
[115] Executive Council Decision EX.CL/DEC.708 (XXI) available at *http://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf* accessed 4 May 2017.

witness protection measures,[116] which also guarantee the rights of victims and witnesses to a fair trial.[117] It is important to note, however, that these instruments are only of persuasive value as they are soft law and aim to influence the attitude of African states regarding the importance of adopting and implementing witness protection measures within their territories.

Absolute reliance on international obligations as a rationale for witness protection is illusory and, as Mahony notes, 'international law places superficial obligations upon states to protect witnesses. These obligations when ratified are paid scant attention by states, particularly in Africa.'[118] This is because there is nothing within the literature to suggest that within global practice, states feel obligated to protect witnesses or that a corresponding right to such protection is recognised. Where states have enacted witness protection legislation, they protect witnesses subject to stated eligibility considerations. In fact, Slate indicates that in the US for example, the courts are reluctant to enforce any right to witness protection for individuals cooperating with law enforcement authorities.[119] The decision to protect is considered discretionary and not obligatory.

3.5.3. Human Rights Justifications

There is no express international human rights treaty for witness protection. International human rights institution such as the United Nations Human Rights Council (UNHRC) and the UN Office of the Human Commissioner of Human Rights (OHCHR)[120] rely on general international human rights instruments[121] as the basis for a human right to witness protection. These international human rights instruments do not expressly provide for a universal right to protection for witnesses or victims participating in a criminal proceeding. However, given the recognition of the role of victims/witnesses in criminal proceedings overtime, these human rights institutions justify the

[116] See Article 7 of the African Union Model Law on Universal Jurisdiction over International Crimes.
[117] See Para 2 (d) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. See also paragraph F (2) dealing with public hearing.
[118] Mahony op cit note 12 at 171.
[119] See generally Slate op cit note 8.
[120] See also Human Rights Council, Fifteenth session; Agenda items 2 and 3-Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development July 2010, 5 available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/151/73/PDF/G1015173.pdf?OpenElement*, accessed May 2015. See also OHCHR conference compilation op cit note 20. See also Art 6 (d) Declaration of Basic Principles of Justice.
[121] Most notably amongst them is the International Convention on Civil and Political Rights, Convention on the Elimination of Discrimination against Women and Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

right to witness protection by relying on other express human rights, such as the right to fair trial, the right to life, and human dignity.[122]

The UNHRC argues that 'the demand for justice under the rule of law is met through prosecutions with associated witness protection programmes.'[123] The Commission links the efficient investigation and prosecution of crime facilitated through witness protection to the enjoyment of other rights.[124] Accordingly, norms relating to the provision of an effective remedy as stipulated in Article 2 of the ICCPR require effective investigation and punishment of offenders and provide a basis for witness protection.[125] The absence of such protection is considered as a violation of the 'victim's rights to an effective remedy.'[126] Witness protection is therefore proposed by the UNHRC as a derived human right and a pre-requisite for enjoying other rights, such as the right to security, right to truth and the right to justice.[127] Since acts of intimidation can likely result in death, intimidation strikes at the core of the right to life.[128] Witness protection is thereby understood in terms of a right available to persons offering any form of cooperation to law enforcement authorities.[129]

There are, however, two international human rights treaties that expressly provide for the protection of victims in specific circumstances. First, by article 13 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation because of his complaint or any evidence given.[130]

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[122] See HRC 15th Session op cit note 120.
[123] 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 19 p 6, available at h*ttp://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf,* accessed 5 May 2015.
[124] Ibid, para 32 p 9.
[125] Ibid, para 34 p 10.
[126] Ibid, para 34 p 10.
[127] See HRC 15th Session op cit note 120.
[128] Ibid.
[129] OHCHR Compilation op cit note 20 at 2.
[130] Article 13 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Also, the International Convention for the Protection of all Persons from Enforced Disappearance[131] provides that

> Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.[132]

These conventions however indicate that the threats necessitating protection arise from prosecution involving acts of torture or enforced disappearance, which can only be committed by state organs, agents of the state or anyone acting with the support or authorization of the state.[133] This means that such a trial is against the state (official) and witnesses testify against the state. Technically, this provision specifies for the protection of victims of torture or enforced disappearances and witnesses testifying on behalf of the victims.

The UNHRC has explained that the human right to witness protection is expressly available in prosecutions involving gross human rights violations and not for all types of crimes. [134] It affirms that,

> In the specific context of trials for human rights violations, witness protection needs to be understood differently. First, witnesses to human rights violations are frequently victims of the crimes to which they testify, rather than co-perpetrators or former associates of the accused perpetrators. Secondly, human rights crimes are perpetrated by State actors or individuals associated with State or State-like powers…In some cases, individuals who subsequently occupy State positions, such as rebel leaders or their associates, are alleged perpetrators. They are individuals who are or have been in a position of power and can exert considerable influence. As such, the witnesses testifying against them are particularly vulnerable.[135]

The OHCHR, however, notes that such a human right to protection should extend to victims and witnesses in prosecutions involving all types of crimes on the basis that 'there is an existing duty

[131] UN General Assembly Resolution Adopted 20 December 2006, available at *https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx*, accessed 12 September, 2019.
[132] Article 18 (2).
[133] See Article 1 of the Torture Convention and Article 2 of the Enforced Disappearance Convention respectively.
[134] See HRC 12th Session op cit (n 123) para 41 p 12. See also HRC 15th Session (n 120) para 67 p 19. See also David Kauzlarich, Rick A Matthews and William J Miller 'Toward a Victimology of State Crime' (2001) 10 *Critical Criminology* 175.
[135] Ibid.

of care on the state to protect its citizens. This same duty applies to threatened or intimidated persons such as witnesses …'[136]

As will be elaborated in chapter five, although human rights motivations are of little significance within the historical antecedents of many states, it has significantly developed within the practice of international criminal tribunals. This is because the nature of prosecutions within these tribunals focuses on victims of specific crimes and the aim of prosecutions within this mandate focuses on the psychological needs of victims. Human rights justifications remain significant to the discourse on witness protection.

3.5.4. Criminal Justice Justifications

Witness protection has developed significantly as part of criminal justice reform strategies of several states. Law reform is described as a 'process of adapting law to meet changing social needs. The change is intended to make the content of the law or the way that the law operates in practice fairer, more accessible and better adapted to solving human problems.'[137] Witness protection mechanisms developed principally as government's response to curb the inherent challenges in the criminal justice system arising from witness intimidation and to improve its overall administration.[138] According to Dogarel, these reforms were essential to combat specific crimes of interest to government.[139] Nigeria has towed this line and has also introduced witness protection provisions in its newly enacted Administration of Criminal Justice Act (ACJA) 2015. A more elaborate analysis of the historical evolution of witness protection within global practice is discussed in chapter five.

New crime threats and the incidence of intimidation arising therefrom, which necessitated criminal justice reforms, have significant implications for the nature of crime requiring witness protection. For example, Kramer[140] and Eninko[141] note that the impact of organized crime and

[136] OHCHR compilation report op cit note 20 at 55.
[137] Marcia Neave, 'The Ethics of Law Reform' Victoria Law Reform Commission 11 August 2004, available at *http://www.lawreform.vic.gov.au/publications-and-media/speeches/ethics-law-reform,* accessed 13 2017.
[138] See *UNODC* Good Practices op cit note 18 at 9-15.
[139] Adrian C Dogărel 'The Institutional Framework for Witness Protection' (2012) V (1) *Journal of Criminal Investigation* 146.
[140] Karen Kramer 'Witness protection as a key tool in addressing serious and organised crime' 11 available at *http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf, a*ccessed 21 January 2013.
[141] Felfoldi Eninko 'The rising importance on the protection of witnesses in the European Union (2006) 77 *Revue international de droit penal* 313 available at *http://www.cairn.info/revue-internationale-de-droit-penal-2006-1-page-313.htm,* accessed 28 May 2015.

terrorism generally led states to introduce witness protection programmes. The inability of prosecutors to successfully prosecute these crimes, resulting from intimidation, was a significant motivation. According to Acconcia et al 'the diffusion of organised crime forced governments to reform their legal and judicial systems to strengthen deterrence and investigation agencies.'[142] This has also influenced the Nigerian practice where witness protection evolved within the context of criminal law reforms, which increasingly included witness protection in legislation to cater for incidences of intimidation arising from investigating and prosecuting crime.

3.6. Debates Underlying the Concept of Witness Protection

The objective of this section is to highlight the underlying debates that comprise the disparate influences and narratives, which shape discussions on witness protection and are crucial when determining the scope of witness protection. From the broad justifications identified above, human rights perspectives and criminal justice perspectives are utilised as heuristic tools to sort out the predominant debates within the literature into different perspectives. I have included, within the criminal justice perspectives, a securitization aspect which underscores the utility of witness protection within the context of crimes that threaten the security of the state. That is, it brings into the analysis, the security imperatives that justify the essence of witness protection. These distinctions developed here provides an analytical basis and organising principle for exploring the concept of witness protection and its underlying legal and conceptual issues examined in subsequent chapters and for developing the overall argument of this thesis.

As indicated earlier, the concept of witness protection has developed primarily from the need to reform criminal laws to meet the changing needs of criminal justice administration. This perspective is deduced from the writings of authors such as the UNODC, COE, Dandurand and Farr, Fyfe and Sheptycki, and Kramer.[143] Within this perspective, witness protection is generally considered as an essential strategy against 'organised crime and other serious crimes.'[144] This perspective favours a state-centric focus to protection. That is, witness protection is essential to meeting the needs of the state and enhancing its prosecutorial interests. Here, this thesis argues

[142] Antonio Acconcia, Giovanni Immordinoz, Salvatore Piccolox, and Patrick Rey 'Accomplice-Witnesses and Organized Crime: Theory and Evidence from Italy' (2014) *Scandinavian Journal of Economics*, 2.
[143] See for example the *UNODC* Good Practices op cit note 18.
[144] Ibid, 22.

that 'securitization'[145] propels the need to adopt witness protection as an essential element of criminal justice administration.

'Securitization' according to the Copenhagen School, is the reference to a specific speech act of framing an issue as an 'existential threat,' which requires extraordinary measures beyond the routines and norms of everyday politics.[146] Transforming certain concerns to security issues portrays them as posing an existential threat to a designated referent object,[147] in this instance, the state. The process of securitization entails that an 'actor' claims that the existence of an object is threatened and if not adequately addressed, the referent object will be destroyed.[148] The actor is thus empowered to deal with an issue that threatens survival and requires priority of action and urgency as it deems appropriate.[149]

Emmers explains that adopting a language of security 'injects urgency into an issue and puts it at the top of the agenda.'[150] In this regard, witness protection is required for crimes, considered as security threats to the integrity of the state, arising specifically from witness intimidation challenges. The state thus securitizes the existence of a threat caused by unchecked witness intimidation which threatens its legitimacy to adequately investigate crime and punish offenders.[151] This element however constitutes the primary criticism of the theory of securitization advanced by the Copenhagen School. According to critics, this construction promotes a state centric approach to security without much thought to individuals.[152] When applied within the context of witness protection, the idea is that witness protection should be more about the individuals and not the interest of the state. This criticism shares similar ideas with human rights perspectives of witness protection.

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[145] Securitization is a theory developed by the Copenhagen school of thought on security. See Holger Stritzel 'Towards a Theory of Securitization: Copenhagen and Beyond' (2007) 13 (3) *EJIR* 358.
[146] Ibid.
[147] Barry Buzan, Ole Waver, Jaap de Wilde *Security: A New Framework for Analysis* (1998).
[148] Robin E Walker and Annette Seegers 'Securitisation: The Case of Post-9/11 United States Africa Policy' (2012) 40 (2) *Scientia Militaria, South African Journal of Military Studies* 24.
[149] Stritzel op cit note 145 at 360.
[150] Ralf Emmers 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003), 16 (3) *The Pacific Review*,425.
[151] Stritzel op cit note 145 at 360.
[152] Rita Floyd 'Human Security and the Copenhagen School's Securitization Approach: Conceptualizing Human Security as a Securitizing Move' (2007) 5 *Human Security Journal* 40.

Securitization however acknowledges that in practice the state is more concerned with issues of security and in most instances, has the capabilities to ensure that securitization happens.[153] Securitization is thus espoused in this thesis to explore the motives that propel witness protection within criminal justice paradigms. The relevance of securitization within witness protection discussions is elaborated in chapter five. Furthermore, this thesis emphasises that criminal justice constructs of witness protection endorse a narrow construction of witness protection, which advance a criterion that limits the scope of beneficiaries of protection, wherein the significance of the witness testimony is a major determinant for protection. In addition, criminal justice developments of witness protection favour its application to a limited scope of crimes, characterised by the difficulty to investigate with primary investigative techniques[154] and the highest threat level.

Alternatively, the human rights perspective for witness protection is an emerging jurisprudence that proposes witness protection as a duty of the state to protect all persons without discrimination.[155] Accordingly, it focuses on witness protection as a duty of states in accordance with their international obligations to protect all those who participate in justice processes as victims or witnesses, especially in prosecutions for human rights violations.[156] Although developed from the context of gross human rights violation prosecutions, the human rights arguments seek to extend the right to witness protection to all persons participating in a criminal proceeding and who face the possibility of intimidation or harm.[157]

The argument is that 'any system of protection should have the ability to encompass all persons who are facing potential risk of intimidation arising from their cooperation in the various processes in combatting impunity.'[158] It specifically challenges the requirement of eligibility considerations as a pre-requisite for protection. Consequently, the human rights perspectives favours witness protection as a concept with direct impact on the fundamental rights to life, dignity of person and security, failing which amounts to a violation of the witness's right[159] of which the

[153] Ibid, 41.
[154] Clive Harfield 'Paradigms, Pathologies and Practicalities-Policing Organised Crime in England and Wales' (2008) 2 (1) *Policing* (2008) 63-7
[155] HRC 15th session op cit note 120 para 3, p 4.
[156] Ibid. See also HRC 12th session op cit note 123 para 67, p 18.
[157] Ibid.
[158] OHCHR Compilation report op cit note 20 at 2.
[159] HRC 15th session op cit note 120 para 3, p 4.

interests of the witness are priority. Witness protection is thus justified on the basis that all persons testifying in a criminal proceeding have a right to be protected[160] once they are exposed to any kind of harm.

The human rights perspectives query the limited application of witness protection to a specific group of witnesses, such as those involved in serious crimes like organized crime and terrorism.[161] The argument advanced by human rights proponents is that witness protection should not be limited to organised crime cases but to all types of crimes. This opinion has significant implications in resolving the legal issues in the *Nnamdi Kanu* case, which questions the applicability of witness protection to crimes not expressly stipulated within witness protection legislation in Nigeria. The viability of this argument is examined in chapter five.

Notwithstanding the different views advanced within both perspectives, there is consensus that witness protection is linked to the existence of harm or risk which a witness is exposed to for cooperating with law enforcement authorities. The point of divergence is the effect of risk assessments and its implications on decisions to protect. This translates to a narrow versus broad conceptualization of witness protection. While the criminal justice perspectives tend to limit witness protection to witnesses of serious crimes and to the significance of the witness' testimony in a criminal prosecution, human rights perspectives advocate for a broader scope, which applies to all crimes and all witnesses, regardless of their status, the emphasis being on the existence of *any* harm.

Within the context of the conceptual issue of determining how witness protection is defined, criminal justice perspectives underscore the significance of separating witness protection from other inter-related concepts, limited to protecting witnesses of crime, testifying during a criminal prosecution and who are exposed to severe levels of threat. On the other hand, within human rights perspectives witness protection is conflated with other inter-related concepts as this argument accommodates every person participating in the criminal justice system, such as victims, informants and whistle-blowers. In this instance, the accentuating factors are limited to the existence of intimidation, regardless of the nature of such threat.

[160] OHCHR Conference Compilation op cit note 20 at 51.
[161] Ibid 2.

Despite these considerations proffered by human rights proponents, there must be limits when contextualising witness protection as it has evolved within specific circumstances. Dandurand and Farr acknowledge that the logic behind witness protection 'is based primarily on the desire to facilitate the cooperation of witnesses in order to secure criminal convictions rather than on the premise that the state has an obligation to protect all witnesses or that witnesses have a right to be protected.'[162] So, witness protection and its underlying principles have to be contextualised and understood against specific forms of state security concerns. A clear distinction must therefore be drawn between witness protection and these inter- related terms, which in practice are distinct spheres of the criminal justice system.

3.7. Conclusion

In this chapter, witness protection as a concept requiring clarification is brought to the fore. In arriving at a definition, this chapter examined the concept of witness protection by exploring the underlying principles that give significance to it. It was emphasised in this chapter that witness protection should not be conflated with other inter-related concepts such as victim protection, informant protection and whistle-blowers' protection, which are distinct spheres within the criminal justice system. The chapter notes that these concepts, though similar, since they all involve the adoption of strategies used to enhance cooperation with law enforcement authorities and to prevent or minimise the risk of harm, differ in the extent of harm sought to be protected and this requires adopting different strategies. The distinctions drawn are necessary in determining the scope of beneficiaries or the type of crimes requiring protection discussed in chapters four and five respectively.

A significant element highlighted in distinguishing witness protection from other inter-related concepts discussed in this chapter is the requirement of open confrontation. Accordingly, there is a difference between mere participation in criminal proceedings, on one hand, and simply providing incriminating evidence on the other hand. Intimidation within the confines of witness protection is more attached to witnesses providing incriminating evidence in court; a factor not required in the other concepts. It is therefore proposed that witness protection should reflect a definition that connotes a restricted application to persons not only cooperating during

[162] Dandurand & Farr op cit note 8 at 17.

investigation but must emphasise their cooperation during prosecution. This reduces the likelihood of conflating witness protection with other concepts.

Furthermore, the criminal justice perspectives and human rights perspectives are used in this chapter as beneficial exploratory tools for analysing the concept of witness protection and determining how it is construed. These are drawn from the different influences that have shaped the evolution of witness protection. This chapter sets the stage for exploring how definitions of witness protection along the lines of human rights versus criminal justice perspectives affect significant aspects of the concept of witness, such as determining the beneficiaries of protection and the scope of crimes necessitating witness protections. The analysis in this chapter contributes to an objective of the thesis which is to ascertain the scope of witness protection and provide conceptual and legal clarification for underlying issues as highlighted in the *Nnamdi Kanu* and *Dasuki* cases discussed in chapter two. These are examined in the subsequent chapters.

CHAPTER FOUR

DETERMINING THE CLASSES OF WITNESSES TO BE PROTECTED

4. 1. Introduction

The central question posed in this chapter is *who is a witness for the purpose(s) of protection*? The question is necessary given the legal objections by the defendants in the *Nnamdi Kanu and Dasuki* cases, querying the inclusion of investigators as beneficiaries of witness protection.[1] The word witness refers to an eyewitness or a victim of crime.[2] It may also mean an informant or an undercover investigator who assists in identifying the perpetrators of crime [3] or expert witnesses.[4] These literal definitions of witness encompass a wide range of persons. Why then is there an objection to the inclusion of investigators within the definition of witnesses requiring protection?

Witness protection legislation usually stipulates that protection should be provided for witnesses.[5] These provisions give a general requirement and do not specifically define the intended beneficiaries. Within the existing legal framework in Nigeria, a witness is not defined, but reference is made to the protection of informants and witnesses cooperating with law enforcement.[6] In ascertaining the beneficiaries of protection, the question may be framed as such: Is it acceptable practice to infer that all persons cooperating with law enforcement authorities require protection under a witness protection framework or are there specific indicators to guide policy formulators in arriving at their own restrictive definitions of witnesses?

Using the heuristic tools (criminal justice and human rights perspectives) developed in chapter three, this chapter explores the literature to ascertain the basis for defining witnesses. While the criminal justice approach justifies definite criteria in delimiting the beneficiaries of witness

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[1] See chapter 2: 2.4.
[2] OSEC 'Review of the Criminal Justice System in Kosovo: The protection of witnesses in the criminal justice system, the administration of justice in minor offences courts, Juveniles in criminal proceedings' (2006) Organization for Security and Co-operation in Europe Mission in Kosovo 8, available at *http://www.osce.org/kosovo/23307?download=true*, accessed 11 March 2017.
[3] Council of Europe, *Procedural Protective Measures for Witnesses: Training Manual for Law Enforcement Agencies and the Judiciary* (2006) 20.
[4] Transitional Justice Unit, *The Need for Witness Protection and Transitional Justice in Zimbabwe*, Zimbabwe Human Rights NGO Forum (September 2015) 6, available at *http://www.hrforumzim.org/wp-content/uploads/2015/10/Witness-protection-and-Transitional-Justice-in-Zimbabwe.pdf*, accessed 13 April 2017.
[5] See section 1 (1) Witness Protection Act 112 of 1998 South Africa; Section 3 Witness Protection Programme Act S.C 1996 Canada; Section 3 Witness Protection Act 1994 Australia.
[6] See for example sections 39 EFCC Act and 33 and 34 (1) of the TPAA.

protection, the human rights perspectives consider that witness protection is a right available to all citizens and therefore applicable to everyone participating in a criminal proceeding. This chapter thus provides a broad versus a narrow conceptualization of witnesses along the criminal justice and human rights perspectives respectively. It is argued in this chapter, that just like the concept of witness protection evolved within specific circumstances, so also are witnesses, the objects of protection, defined within identified parameters. This chapter also contributes to the existing discussions by considering the status of the defendant's witnesses within a witness protection framework.

4.2. Who is a Witness?

Although international legal instruments such as the United Nations Convention against Transnational Organised Crime (UNCTOC) and United Nations Convention against Corruption (UNCAC)[7] provide for the protection of witnesses, the word witness is not defined.[8] The *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.[9] According to the Council of Europe (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.[10]

The above definitions provide a literal interpretation of what witnesses mean. Ngane extends these definitions by classifying witnesses based on the roles they play in criminal proceedings. Accordingly, witnesses are classified into two groups: crime-based witnesses and expert

[7] See articles 24 and 32 respectively.
[8] See 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.
[9] Black's Law Dictionary, 9th Edition.
[10] *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.

witnesses.[11] Crime-based witnesses are persons who testify according to what they have seen, heard, felt or who have been victims of a crime.[12] From Ngane's definition, these are primary witnesses with first-hand knowledge about the details of a crime. On the other hand, expert witnesses are persons who assist the court with facts to understand or determine an issue because of some specialised knowledge, skill or training.[13] They are considered secondary witnesses with derivative information about the facts of a crime.

These definitions by the *Black's* Law Dictionary, the COE and Ngane, 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, and which this thesis argued in chapter three is central to the concept of witness protection.

Alternatively, Kramer defines a witness as any person with information about matters relating to the investigation or prosecution of offences and who the state has an interest in protecting if needed.[14] Dandurand goes further to link the definition of witnesses with the element of witness intimidation arising from the witness's testimony. To him, a witness is any person offered some form of protection against intimidation or retaliation.[15] Kramer and Dandurand's definitions introduce two significant elements into the meaning of witnesses. These are the presence of intimidation as a direct consequence of the testimony and the interest of the state in the testimony of the witnesses. These elements included in these definitions reflect the eligibility criteria for protecting witnesses within witness protection legislation. These are further discussed

[11] Sylvia Ntube Ngane 'Witnesses before the International Criminal Court' (2009) 8 *The Law and Practice of International Courts and Tribunals* 432.
[12] Ibid.
[13] Ibid.
[14] Karen Kramer '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*, Resource Material Series No. 86 UNAFEI, Tokyo Japan, March 2012, 17, available at *http://www.unafei.or.jp/english/pdf/RS_No86/No86_00All.pdf*, accessed 21 January 2013.
[15] Yvon Dandurand 'Protecting Witnesses and Collaborators of Justice in Terrorism Cases' Paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Volume 3: Terrorism Prosecutions (2008) 22-3 available at *https://www.ufv.ca/media/assets/centre-for-indo-candian-studies/Air+India+2.pdf*, accessed 23 March 2017.

below.[16] 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.[17] This definition aligns with Ngane's categorization of crime-based witnesses, as primary witnesses.

It is important to note that, within the practice of the international criminal tribunals and some national jurisdictions, a witness includes family members.[18] This is because an individual may be exposed to harm or intimidation directly or indirectly, such as when family members are the target of intimidation.[19] If harm were to occur to a family member, the witness will also be reluctant to testify and this has the same effect as where the witness is personally intimidated.

4.3. The Role of Eligibility Criteria in Defining Witnesses [20]

A reflection on the definitions by the UNODC, Kramer and Dandurand discussed above shows that certain characteristics are central in defining witnesses, within the context of witness protection. Of significance to this analysis is that these characteristics reflect the eligibility criteria specified within witness protection legislation in different national systems[21] and replicated within the international criminal tribunals.[22] These eligibility criteria constitute the factors considered by

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[16] See section 4.4.

[17] *United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' (2008) 19;22 available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf*, accessed 20 December 2011.

[18] See Art 2 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power A/RES/40/34 November 1985, 96th plenary meeting. See also See section 1 (1) Witness Protection Act 112 of 1998 South Africa; section 3 Witness Protection Programme Act S.C 1996 Canada; section 3 Witness Protection Act 1994 Australia. Family members have been defined to include father, mother, spouse and children. See *The Prosecutor v Pauline Nyiramasuhuko and Arsne Shalom Ntahobali* Case No. *ICTR-97-21-T* Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and Their Family Members 20 March 2001, para 7 (12), available at *http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Nyira/decisions/200301.html*, accessed 29 May 2017.

[19] See Peter Finn and Kerry Murphy Healey *Preventing gang and drug related witness intimidation* U.S. Department of Justice- Office of Justice Programmes National Institute of Justice November 1996, 19 available at *https://www.ncjrs.gov/pdffiles/163067.pdf*, accessed 10 January 2012.

[20]Although eligibility considerations are mostly linked to admission into a witness protection programme, this research argues that it is nonetheless useful for assigning other protective mechanisms. It will be further explained in chapter 6 on the nature of protective mechanism.

[21] See section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) Witness Protection Act 1994; section 7 Witness Protection Programme Act 1996; Section 10 Witness Protection Act 1998; Section 6 Witness Protection Act 2010; Section 82 (4) Serious Organised Crime and Police Act (Chapter 15) 2005; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.

[22] *The Prosecutor v. Germain Katanga* No: ICC-01/04-01/07 7 March 2014 Judgment pursuant to article 74 of the Statute para 85 p 44, available at *https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF*, accessed 25 May 2017; *The Prosecutor v Sylvestre Gacumbitsi* Case No ICTR-2001-64-T, Decision on Defence Motion for Protective Measures for Defence Witnesses Articles 14, 19 and 21 of the Statute and Rules 69 and 75 of the Rules of Procedure

law enforcement authorities in deciding to protect witnesses. Most of these factors are intertwined and underscore that witness protection evolved within specified parameters and should be construed as such. These factors include:

a. The nature/seriousness of the crime;

b. The value/significance of witness testimony;

c. Risk and threat assessment;

d. Suitability.[23]

These factors primarily reflect criminal justice influences on the concept of witness protection and the subsequent discussions incorporate human rights objections to the emphasis on these criteria in determining the class of witnesses for protection. In Nigeria, there are no definite eligibility criteria within the existing legal framework. Similar factors listed above are recognised by criminal justice experts in Nigeria, as the conditions that have influenced the basis for protecting witnesses in Nigeria. The discussion returns to these factors in chapter eight.[24]

4.3.1. The Nature of the Crime

This criterion highlights a very significant aspect of the concept of witness protection. The crux of this criterion is that it focuses on witnesses testifying in criminal prosecutions involving the most serious crimes.[25] These usually are crimes with high incidences of intimidation which law enforcement authorities are unable to successfully investigate or prosecute without providing protection for the witness(es). This criterion underscores that witnesses within the context of witness protection are defined by specific crimes. This factor forms the scope of discussions in

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and Evidence, Decision of 25 August 2003, para 1 and 3, p 2, available at *http://www.worldcourts.com/ictr/eng/decisions/2003.08.25_Prosecutor_v_Gacumbitsi.pdf*, accessed 12 September 2017; *The Prosecutor v Zejnil Delalic & Ors*, Decision on the motion to allow witnesses K, L and M to give their testimony by means of video-link conference, 28 May 1997, para 2, available at *http://www.icty.org/x/cases/mucic/tdec/en/70528vl2.htm*, accessed 12 September 2017.

[23] See section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) Witness Protection Act 1994; section 7 Witness Protection Programme Act 1996; Section 10 Witness Protection Act 1998; Section 6 Witness Protection Act 2010; Section 82 (4) Serious Organised Crime and Police Act (Chapter 15) 2005; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.

[24] See chapter 8; 8.3.3.

[25] Nicholas Fyfe & James Sheptycki 'Facilitating witness co-operation in organised crime cases: an international review' *Home Office Online Report* 27/5 (2005) 5, available at *http://www.researchgate.net/profile/Nicholas_Fyfe/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4.pdf*, accessed 9 April 2015. See also UNODC *Good Practices* op cit note 17 at 8.

chapter five. The point to be made here is that the severity of the crime being prosecuted is a condition precedent for deciding to protect witnesses.

4.3.2. The Value/ Significance of Witness Testimony[26]

The crux of this requirement is that it focuses on individuals with the most vital information.[27] It emphasises the importance of the witness's testimony and whether the information provided by them is obtainable from alternative sources.[28] Thus, to qualify for protection, it is essential that the witness's testimony is credible and essential.[29] In explaining this criterion, the COE notes that the case before the court must be remarkably significant, that the witness's testimony is very crucial to the success of the prosecution, and that there is no alternative means of proving the case.[30] Discussions in chapter three showed that witness protection was necessitated by the government's interest in ensuring the successful investigation and prosecution of specific crimes.[31] By this, this criterion is justified because the evidential value of the witness's testimony is such that it constitutes an injustice to proceed without the testimony of that particular witness.[32] In most instances such a witness may as well be the only link between the crime and the perpetrator of the crime.

Dandurand notes however, that this criterion is the subject of criticism. According to him, it is criticised because it excludes people who, though they assist law enforcement authorities, are exempted from protection because little or no value is attached to their testimony.[33] This reflects human rights arguments, which emphasise that witness protection is a right available to any person

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[26] See section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) (d)Witness Protection Act 1994; section 7 (c) (d) Witness Protection Programme Act 1996; Section 10 (1) (c)Witness Protection Act 1998; section 6 (b) Witness Protection Act 2010; section 82 (4) (d) Serious Organised Crime and Police Act (Chapter 15) 2005; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.

[27] Fyfe & Sheptycki 'Facilitating witness co-operation' op cit note 25. Accordingly, within the practice of witness protection in the US, for a witness to qualify for the WITSEC, the case in question must be extremely significant and there must be no alternative way of securing the witness's physical safety. See also UNODC *Good Practices* op cit note 17 at 8.

[28] 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* 210.

[29] Ibid.

[30] COE Recommendation 9 op cit note 10 para 13.

[31] Chapter 3: 3.5.4

[32] *The Prosecutor v. Dusko Tadic aka "Dule"* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses 10 August 1995 para 63, available at *http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm*, accessed 29 May 2017.

[33] Dandurand op cit note 15 at 35.

offering any form of cooperation to law enforcement authorities.[34] The emphasis is that the likelihood of intimidation arising from cooperating with law enforcement should be the primary focus in determining the beneficiaries of protection.

On the contrary, it should be stressed that, although a wide range of people may have information of benefit to law enforcement authorities, such information can be obtained without requiring them to testify in court. This argument is made on the basis that the element of open confrontation in court makes witnesses more susceptible to intimidation. Where there are alternative means of obtaining the same information, any testimony by that witness provides additional evidence rather than as the only means of proof. This clarification is significant as it eliminates witnesses such as expert witnesses whose evidence for instance is secondary and whose evidence can be obtained from several persons with the same specialised knowledge.

4.3.3. Requirement of Risk and Threat Assessment[35]

This requirement accentuates the significance of witness intimidation to the concept of witness protection. It reflects the definition by Dandurand, which links the definition of witness to the element of intimidation resulting from the witness's cooperation,[36] especially from their willingness to testify on behalf of the state (prosecution).[37] Again this criterion narrows the scope of witnesses and emphasises the significance of protection to governmental interests and queries the inclusion of the defendant's witness as a beneficiary of witness protection.[38]

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[34] See also Human Rights Council, fifteenth session; Agenda items 2 and 3-Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development July 2010, 5 available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/151/73/PDF/G1015173.pdf?OpenElement*, accessed 15 May 2015. See also 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) 51, available at *http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf*, accessed 7 February 2017.

[35] See section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) (f)Witness Protection Act 1994; section 7 (a)Witness Protection Programme Act 1996; Section 10 (1) (a)Witness Protection Act 1998; section 6 (c) Witness Protection Act 2010; section 82 (4) (a) Serious Organised Crime and Police Act (Chapter 15) 2005; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.

[36] Dandurand op cit note 15 at 22-3.

[37] Anne Katharina Zimmermann 'Securing Protection and Cooperation of Witnesses and Whistle-blowers: An Overview of the Law as it stands in Germany' 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 26, available at *http://unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_all.pdf*, accessed 9 May 2013.

[38] This is discussed further subsequently in paragraph 4.5.

According to the UNODC, this requirement prescribes that the threat against the witness must be serious and must be directed against the witness's life or wellbeing.[39] This however includes any threat against the witness personally or to their family/close relatives. It is generally recognised within the literature on witness intimidation that where witnesses cannot be personally intimidated, members of their families are a means of stopping them from cooperating.[40] Threat assessments require a competent authority to evaluate the nature of the threat and the prospect of the danger the witness is exposed to for cooperating on behalf of the prosecution.[41] The essence of the threat assessment is to provide an objective verification that there is real fear for the safety of the witness or their family, as the subjective expression of fear by the witness is not sufficient.[42] Dandurand and Farr,[43] as well as Kramer,[44] are of the view that threat assessments assist law enforcement to determine the status of the defendant, especially their ability to actualise their threats.

Vincent observes that the process of arriving at the decision is criticised on claims that law enforcement authorities favour protection only if the state places significant value on the prosecution of the case in issue.[45] This criticism forms the crux of the position of the United Nations Human Rights Council (UNHRC) on witness protection best practices.[46] The criticisms against the dependence on threat assessments are based on the assumptions that there are no independent assessments to checkmate the state's decision to protect witnesses. The evaluation processes are believed to give priority to the state's interest, dictated by the value of the prosecution

[39] UNODC Good Practices op cit note 17 at 6.
[40] Nicholas R Fyfe & Heather McKay 'Desperately seeking safety- witnesses' experience of intimidation, protection and relocation' (2000) 40 *Brit. J. of Criminology* 678.
[41] COE Rec 9 op cit note 10 para 23 p 5.
[42] *The Prosecutor v Jean Uwinkindi* Case No ICTR-01-75-PT Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (Pursuant to Article 21 of the Statute, Rules 54,69,73 and 75 of the Rules of Procedure and Evidence) 21 June 2011 para 7 p 4, available at *https://www.legal-tools.org/doc/ff9e04/pdf/*, accessed 29 May 2017. See Tadic case op cit note 32 para 62.
[43] Dandurand & Farr op cit note 15 at 34.
[44] Kramer Protection of whistle-blowers op cit note 14 at 23.
[45] Frank Vincent 'Review of the Witness Protection Act 1991' Victoria State Government (March 2016) 4, available at *http://assets.justice.vic.gov.au/justice/resources/81f81a91-0ad6-40ff-8310-3a1a45ce9869/review_of_witness_protection_act_1991.pdf*, accessed 29 March 2017.
[46] HRC 15th session op cit note 34 para 3, p 4. See also 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, available at *http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf*, accessed 5 May 2015.

being pursued; that is, a specific category of offences of benefit to the state.[47] Regardless of the legitimacy of these concerns, there is more evidence within the literature to show that preference is given to the use of witness protection within specific contexts, such as for tackling crimes with the highest threat levels and to enhance prosecutorial interests, in accordance with criminal justice perceptions of witness protection.[48]

While human rights proponents imply the existence of a duty on the state to protect the life of every member of society within the social contract, Rich emphasises that it is impracticable to protect everyone.[49] Specifically, protecting everyone who falls within the literal definition of witness may overstretch the capacity of the state and affect the functionality of the process. Such that, providing protection for a few persons rather than everyone may be justified based on the need to protect persons engaged in socially benefitting activities, such as assisting law enforcement,[50] and those exposed to the highest threat levels.

The risk to the witnesses specifically arises from exposing the witnesses in court in the context of adversarial criminal trials. Hence, where individuals cooperate, and do not need to testify in court, the identity of the witness remains unknown. This requirement thus eliminates a wide range of persons and is crucial in determining the scope of witness protection and distinguishing it from other inter-related concepts. In addition, the point was made in chapter three that where witnesses fear no harm or threat of harm for their cooperation with law enforcement authorities, there is no need for their protection.[51]

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[47] Ibid.
[48] See generally discussions in chapter 3: 3.5.4 and 3.6. See also UNODC Good Practices op cit note 17 at 22.
[49] Michael L. Rich 'Brass Rings and Red-Headed Stepchildren: Protecting Active Criminal Informants' (2012) 61 (5) *American University Law Review*, 1458.
[50] Ibid.
[51] Office of Police Integrity, *Review of the Victoria Police Witness Protection Program* Report of the Director, Victoria Police Integrity (July 2005, Victorian Government) 7, available *at http://www.ibac.vic.gov.au/docs/default-source/reviews/opi/review-of-the-victoria-police-witness-protection-program---july-2005.pdf?sfvrsn=8*, accessed 18 April 2017.

4.3.4. The Issue of Suitability[52]

The requirement of suitability strikes at the reliability and credibility of the witness's testimony. It highlights factors that consider the criminal history of the witness.[53] The issue of credibility usually qualifies the requirement of the significance of the witness's testimony in the sense that a person, though a witness of value, may be denied protection if they make false statements in order to gain an advantage in terms of protection that may otherwise not be provided.[54] Suitability strikes at the core of witnesses identified as justice collaborators. In this regard, it is expected that precaution should be taken in ascribing value to their testimonies.[55]

The credibility of the witness testimony is particularly considered within the practice of the ICC.[56] For example, in evaluating the oral testimonies of witnesses testifying at the ICC, the Chamber considered the 'imprecision, implausibility or inconsistency bearing in mind the overall context of the case and the specific circumstances of individual witnesses.'[57] Also when the Chamber rejected a part of the witness's testimony, it considered the impact of that rejection on the reliability of the remainder of the testimony.[58] The ICC specifically examines the motives for telling the truth or giving false testimony.[59] The court maintained that there should be no grounds for assuming that the witness is not impartial or has an axe to grind.[60] Suitability also requires the psychological assessment of the witness.[61] This condition plays a significant role in assigning protective measures, such as witness relocation particularly for victim-witnesses and justice collaborators. The implication of this is further elaborated in chapter six.

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[52] See section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) (a) (b)Witness Protection Act 1994; section 7 (e)Witness Protection Programme Act 1996; Section 10 (1) (b) (e)Witness Protection Act 1998; section 6 (c) Witness Protection Act 2010; section 82 (4) (c) Serious Organised Crime and Police Act (Chapter 15) 2005; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.
[53] Zimmermann op cit note 34 at 26.
[54] Ibid.
[55] Antonio Acconcia, Giovanni Immordinoz, Salvatore Piccolox, and Patrick Rey 'Accomplice-Witnesses and Organized Crime: Theory and Evidence from Italy' (2014) *Scandinavian Journal of Economics* 3.
[56] *The Prosecutor v Katanga* op cit note 22 para 83 p 43.
[57] Ibid at para 83 p 43.
[58] Ibid at para 84.
[59] Ibid at para 85.
[60] *Tadic* case op cit note 32 para 64.
[61] OSEC Review of the Criminal Justice System in Kosovo op cit note 1 at 10.

4.4. Identifying the Categories of Witnesses

An objective of this section is that it engages with the broad group of persons identified within the literal definitions of 'witness' and points out the limits within which their involvement as witnesses within the context of witness protection is taking place. It also brings to light where the analytical consensus lies in categorising these broad classes of witnesses within the criminal justice and human rights dichotomy.

4.4.1. Eyewitnesses

Eyewitnesses, as the name implies, refers to witnesses, who give testimony to facts seen by them, or persons who saw the act, fact or transaction to which they testify.[62] These are witnesses of chance who happen to come upon the commission of a crime.[63] They fall within the category of witnesses who testify according to what they have seen, heard or felt. Eyewitnesses are primary witnesses of crime who observe the crime neither as victims nor as justice collaborators. In this instance they are simply innocent bystanders.

Both the UNCTOC[64] and the UNCAC[65] place obligations on States Parties to take appropriate measures to effectively protect witnesses who participate in criminal proceedings from potential retaliation or intimidation. These provisions, however, reiterate the link between their cooperation with law enforcement and the element of intimidation. As will be elaborated subsequently, although witnesses to organised crimes, terrorism and other serious crimes are usually former offenders (justice collaborators) testifying on behalf of the state, in certain instances, these crimes are witnessed by individuals, who have no link to the suspect(s) against whom they testify. The nature of these crimes, however, elicits fear, resulting in their reluctance to testify and the need to protect them.[66]

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[62] 'Different Kinds of Evidences & Witnesses under the Indian Evidence Act' Legal India 28 July 2012, available at *http://www.legalindia.com/wp-content/themes/nli/images/li-logo.png,* accessed 12 February 2016.
[63] Within the framework of the ICTY, most prosecutions before the tribunal depend on eyewitness testimony. See *Tadic* case op cit note 32 para 23.
[64] Section 24 (1).
[65] Section 32 (1).
[66] COE *Training Manual* op cit note 3 at 21.

Also, the OSEC,[67] Wald,[68] and Ellis,[69] commenting on the practice of the international criminal tribunals, describe witnesses as the 'bloodline' of these tribunals.[70] This description derives from the reliance of these tribunals on the testimony of eyewitnesses because of the inability of the tribunals to get access to other forms of evidence especially documentary evidence to help prove the existence of the crimes for which the defendants are charged.[71] The inclusion of eyewitnesses or innocent by-standers aligns with both human rights and criminal justice perspectives, although the circumstances of their inclusion may differ. For example, while the criminal justice perspectives justify their inclusion subject to the eligibility considerations discussed above, especially the significance of their testimonies, human rights perceptions affirm their inclusion based on their right to protection. Whatever the case, they remain crucial witnesses eligible for protection.

4.4.2. Justice Collaborators[72]

A significant class of witness within witness protection discourse are justice collaborators. They are defined as:

> any person who faces criminal charges or has been convicted of taking part in a criminal association or other criminal organisation of any kind, or in offences of organised crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organisation, or about any offence connected with organised crime or other serious crimes.[73]

Historically, the recognition of justice collaborators in the criminal justice system is traced to the 17th and 18th centuries in Britain.[74] This centred on 'rewards' promised to crown witnesses who

[67] OSEC 'Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing' A report of the Capacity Building and Legacy Implementation Project (January 2010) 4, available at *http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf*, accessed 12 February 2016.
[68] Patricia M. Wald 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal (2002) 5 *Yale Human Rights & Development Law Journal* 219.
[69] Mark S. Ellis 'Achieving Justice before the International War Crimes Tribunal: Challenges for the Defence Counsel' (1997) 7 *Duke Journal of Comparative and International Law* 519.
[70] See also *Tadic* case op cit note 32 para 23.
[71] Ibid.
[72] This class of witness is specifically tied to the history of witness protection. Also described as *pentitis, repentis*, crown witnesses or informants. As indicated in chapter three there is a close relationship between the role of individuals as justice collaborators and their role as informants.
[73] COE, Recommendation 9 op cit note 10. See also Dandurand op cit note 15 at 23.
[74] Peter J P Tak 'Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti' (1997) 5 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 2.

testified against their criminal accomplices and originated from the practice of plea bargaining, which considered the possibility of exempting a criminal/accomplice from punishment or granting them leniency for information provided by them.[75] In recent times, however, there is more acknowledgement of justice collaborators within the literature on witness protection, specifically, the prosecution of a member of the most notorious mafia group, whose testimony was significant in dismantling the mafia structures.[76] By the 1990s, justice collaborators were recognised as the most useful witnesses in combatting organised crime[77] within public international law, and the UNCTOC and UNCAC required State Parties to facilitate their cooperation with law enforcement.[78]

According to a report by the UNODC, justice collaborators are the main beneficiaries of witness protection across several jurisdictions.[79] This status is however linked to the historical antecedents within which they emerged. Authors such as Slate[80] and Courtney[81] confirm for instance, that historically, witness protection was primarily for individuals with a criminal history. This factor was connected to the nature of the crimes being prosecuted. According to them, the nature of these crimes made prosecution difficult without the help of members of the criminal groups which perpetrated these crimes. Mack[82] and Trott[83] define these as mid-level criminals with valuable evidence against higher-ranking members of their criminal groups. This recognition of justice collaborators aligns with criminal justice perspectives, which places significant value on

[75] It considered the possibility of exempting a criminal/accomplice from punishment or granting of leniency when the information provided to the authorities helped to identify the criminals responsible for an offence. See Dandurand op cit note 15 at 38.
[76] Acconcia et al op cit note 55 at 8.
[77] Centre for Study of Democracy, 'Antimafia: The Italian Experience in Fighting Organized Crime' (2011) Policy Brief No. 31, p 2, available at *http://globalinitiative.net/wp-content/uploads/2017/01/csd-antimafia-the-italian-experience-in-fighting-organised-crime.pdf*, accessed 4 April 2017.
[78] See Art 26 (1-3) and Article 37 (1-5) respectively.
[79] UNODC Good practices op cit note 17. See also Victor L Simpson 'Italy secret anti-mob weapon: witness protection' Associated Press October 14, 2012, *available at https://www.usnews.com/news/world/articles/2012/10/14/italys-secret-anti-mob-weapon-witness-protection*, accessed 15 May 2017.
[80] Risdon N Slate 'The Federal witness protection program: Its evolution and continuing growing pains' (1997) *16 Criminal Justice Ethics* 27.
[81] Robert E Courtney 'Insiders as Cooperating Witnesses: Overcoming Fear and Offering Hope' 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, 36, available at *http://unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_all.pdf*, accessed 9 May 2013.
[82] Mack op cit note 28 at 197.
[83] Stephen S Trott 'Words of Warning for Prosecutors Using Criminals as Witnesses' (1995-1996) 47 *Hastings Law Journal* 1390.

the testimony of witnesses. In fact, the eligibility criteria that stresses the significance and value of the witness's testimony as a key consideration evolved from this practice. The reliance on these mid-level criminals was necessitated by the fact that there were hardly any alternative means of obtaining information. Simpson notes that insider knowledge proved more valuable in securing convictions against organised crime[84] and, by depending on them, prosecutors saw the need to provide protection in exchange for their testimony.[85] The existing relationship between justice collaborators and the defendants thus made them more susceptible to reprisal attacks, particularly death.[86]

Their inclusion as beneficiaries of protection has been criticised. A specific criticism, Lawson notes, is that the methods of protecting justice collaborators, such as identity changes, have adverse effects on unsuspecting members of the society with no knowledge of their criminal history.[87] Other criticisms include that the priority on justice collaborators advances only the interest of prosecutors and the justice collaborators, with little concern for societal interests[88] and that the credibility of their testimony is questionable.[89] It is argued for example that justice collaborators have a compelling motive to give harmful testimony against the defendant particularly because of the promise of incentives, such as reduced sentences.[90] Consequently, where the truth is insufficient, they are likely to fabricate evidence.[91] They are to be treated as tainted witnesses[92] whose testimony is received with caution. To mitigate the consequences of their unreliable testimony, the practice in the Philippines, is to ensure that their testimony about

[84] Simpson op cit note79.
[85] Ibid.
[86] Antimafia op cit note 77 at 2.
[87] Raneta J Lawson 'Lying, cheating and stealing at government expense; Striking a balance between the public interest and the interest of the public in the witness protection programme' (1992) 24 *Arizona State Law Journal* 1429-1459.
[88] Slate op cit note 80 at 21-2.
[89] It is important to emphasise that across jurisdictions, criticism regarding the credibility of justice collaborators are similar. See Trott op cit note 83. C Blaine Elliott 'Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches' (2003) 16 *Capital Defence Journal* 1-18; Peter N Grabosky 'Prosecutors, Informants and the Integrity of the Criminal Justice System' (1992) 4(1) *Current Issues in Criminal Justice* 47-63; See Ruth Bettina Birn 'Criminals as Manipulative Witnesses- A Case Study of SS General von dem Bach-Zelewski (2011) 9 *Journal of International Criminal Justice* 441-474.
[90] 'A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution' (1980-1981) 94 (4) *Harvard Law Review* 890.
[91] Ibid.
[92] Finn & Healey op cit note 19 at 4.

material facts is corroborated and that prosecutors depend on their testimony only where necessary.[93]

Regardless of these criticisms, justice collaborators remain significant characters in witness protection discussions and key beneficiaries of protection. This is because, as Courtney rightly notes, society is willing to accept extra-ordinary measures adopted by the state to oppose criminals[94] and combat crime. Trott argues, for instance, that justice collaborators promote due process objectives and are indispensable tools in the prosecutor's task of protecting society from criminals.[95] Accordingly, despite the objections to their protection, the criminal justice system cannot survive without them.[96] This is because, without their cooperation, prosecuting cases involving organised criminal groups will be unsuccessful.[97] These justifications reflect criminal justice perspectives, which perceive witness protection as a strategy for facilitating successful prosecution of crimes, especially those difficult to prosecute because of high possibilities of witness intimidation.

From a human rights perspective, it is suggested that witnesses should be protected in their capacity as citizens entitled to protection and the fact that they have a criminal history does not weaken their case for protection.[98] It is believed that providing protection for justice collaborators encourages them to further the objectives of the criminal justice process rather than resist it.[99] As a result, protection is offered to justice collaborators by prosecutors who are desirous to ensure that obstacles, which would otherwise prevent crucial evidence from getting to the court, are removed.[100]

Apart from the UNCAC and UNCTOC, the witness protection laws in Italy expressly include justice collaborators as beneficiaries of protection.[101] Within the Italian legislation,

[93] See section 10 (b and d) The Witness Protection Security and Benefit Act Republic Act No. 6981, An Act Providing for a Witness Protection, Security and Benefit Program and for other Purposes, available at *http://hrlibrary.umn.edu/research/Philippines/witness-protection-act.html*, accessed 19 May 2017.
[94] Courtney op cit note 81 at 41.
[95] Trott op cit note 83 at 1391.
[96] Ibid at 1390
[97] Ibid.
[98] Office of Police Integrity op cit note 51 at 4.
[99] 'A Prosecutor's Duty' op cit note 90 at 889.
[100] Ibid.
[101] See Law 45/2001 Modification of the discipline of protection and sanctioning of those who collaborate with justice and provisions for the people who testify available at *http://www.camera.it/parlam/leggi/01045l.htm*, accessed 13 June 2018.

although the term 'justice collaborators' is used differently from the word witnesses,[102] they are both identified as beneficiaries of protection within the law. A report by the National Anti-Mafia Prosecutor Italy explains that this distinction is necessary in determining the type of protection available to both categories of witnesses.[103] In Nigeria, prosecutors depend on the testimonies of justice collaborators who were former members of the Boko Haram sect in terrorism prosecutions.[104] There is also some evidence of reliance on justice collaborators within human trafficking prosecutions in Nigeria as explained by respondents of the field work of this thesis.[105] Given the nature of crimes that have necessitated witness protection in Nigeria, insider information provided by justice collaborators in prosecuting these crimes justify their inclusion as beneficiaries of protection.

4.4.3. Victim-Witnesses

Another class of witness identified within the definitions above is the victim-witness. A victim is defined as 'a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law...'[106] According to Wemmers[107] and Morgan,[108] they are primary witnesses of crime within common law systems and their cooperation is pivotal to the functioning of the criminal justice system, since they are responsible for reporting a clear majority of crimes to the police. The inclusion of victim-witnesses is influenced by human rights developments of the concept of witness protection.

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[102] See Article 1 Law 6/2018 Provisions for the protection of witnesses of justice, available at *http://www.gazzettaufficiale.it/eli/id/2018/2/6/18G00022/sg*, accessed 13 June 2018.
[103] See Piero Luigi Vigna 'Fight against terrorism and organized crime to improve security in Europe' Third High-level multilateral meeting of the ministries of the interior 17-18 March 2005, Hotel Sofitel Victoria, Warsaw (Poland) 13, available at *https://www.coe.int/t/dg1/legalcooperation/minint/2005(warsaw)/M-Mint(2005)VignaE.pdf*, accessed 18 September 2019.
[104] 'Boko Haram: Suspects demand full protection, pledge cooperation with security agencies' *Sunday Tribune* 26 February 2012, available *at http://beegeagle.wordpress.com/2012/02/26/boko-haram-suspects-demand-full-witness-protection-peldge-cooperation-with-security-agencies/*, accessed 25 January 2013.
[105] This is elaborated in chapter 8: 8.3.3.
[106] See Article 1 (a) Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings 2001/220/JHA, available at *http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32001F0220*, accessed 22 May 2017. See also Article 1 Declaration of Basic Principles of Justice for Victims.
[107] Jo-Anne Wemmers 'Victims' rights are human rights: The importance of recognizing victims as persons' (2012) 71 DOI: 10.2298/TEM1202071W, available at *http://www.doiserbia.nb.rs/img/doi/1450-6637/2012/1450-66371202071W.pdf*, accessed 11 March 2017.
[108] Anne M. Morgan 'Victim Rights: Criminal Law: Remembering the "Forgotten Person" in the Criminal Justice System' (1987) 70 (3) *Marquette Law Review* 578.

A central argument of this research is that, from inception, this class of witnesses had more relevance within the context of victim protection. Specifically, the objective within the victim rights movement was to ensure that victims had access to justice and had rights not limited to their testimonial value to the prosecution. Within this narrative, the intimidation of victims and the need to guarantee their safety were predominantly within the context of gender-based crimes involving vulnerable persons such as sexual crimes, domestic violence and human trafficking. It is argued that as the field of victim protection evolved to include their protection from organised crime,[109] this expanded the perceptions of witness protection, which had restricted application to justice collaborators. I argue that, since trafficking in persons is usually committed within an organised crime context, its relevance within witness protection became recognised.

The recognition of victim-witnesses within witness protection discussions also gained prominence with the rise in terrorism prosecutions.[110] According to the UNODC, although victim protection provides some measure of security to victims, a different kind of intervention was required to protect victims of terrorism and organised crime[111] particularly those testifying in these prosecutions. A distinction is therefore drawn between victims as persons who suffered harm and their role as witnesses testifying during criminal proceedings in court. In such instances, victim protection mechanisms were inefficient to protect them, and they became increasingly accommodated within witness protection programmes. Within witness protection paradigms, their testimonial value becomes very significant.[112] It is within this context that victims as witnesses are included within witness protection discussions.

More significantly, the protection of victim-witnesses gained more attention within the practice of the international criminal tribunals. According to Moffett, victim-witnesses are key to the evidence management mechanisms of the prosecutor.[113] Safferling notes that this is because,

[109] This is inferred from the inclusion of human trafficking protocol in the UNCTOC.
[110] See generally, UNODC Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework 2015 available at *https://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf*, accessed 11 March 2017.
[111] Ibid. See also UNODC *Cross-Cutting Issues Victims and Witnesses: Criminal Justice Assessment Toolkit* (UN, New York, 2006) 2, available at *https://www.un.org/ruleoflaw/files/3_Victims_Witnesses.pdf*, accessed 14 May 2018.
[112] Ibid.
[113] Luke Moffett 'The Role of Victims in the International Criminal Tribunals of the Second World War' (2012) 12 *International Criminal Law Review* 245-270.

within international criminal tribunals, victims are more willing to participate as witnesses.[114] A report of the UNHRC emphasises that these proceedings emerged within the context of gross human rights violations perpetuated by states.[115] Within this context, victims rather than innocent bystanders or justice collaborators are the primary witnesses.[116] According to Kramer, since gross human rights violations are predominant during wars or post -conflict zones where the rule of law is absent, state institutions lack the capacity to protect victims-witnesses, thereby necessitating their protection within the framework of international criminal tribunals.[117]

The victims of crime, within whatever context, are primary witnesses as their testimony is crucial to the outcome of the criminal proceedings against the perpetrators of crimes, as there may be no alternative evidence available[118] to prove the crime. Crimes such as terrorism and human trafficking for instance are likely to have individuals who directly suffer harm from these crimes and are willing to testify against the perpetrators as envisaged in the NAPTIP Act for instance. The victim-witnesses in these circumstances are the most 'reliable' link between the criminal and the criminal act 'witnessed', and they require protection for their cooperation.

4.4.4 Informants and Witness Protection

This section examines the viability of including informants as beneficiaries of witness protection. Although the literature acknowledges the inclusion of informants within the witness protection practice of countries such as Australia, Austria, Canada, Latvia, the Netherlands, Norway and UK,[119] there is limited proof within the literature to fully justify their inclusion as beneficiaries of witness protection. It is unclear if their inclusion in the literature as beneficiaries of witness protection is within the context of informant protection. As emphasised in chapter three, discussions about witness protection overlook the implications of conflating these inter-related

[114] Christoph Safferling 'The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law?' (2011) 11 *International Criminal Law Review*, 201.
[115] See UNHRC 15th Session op cit note 34 para 42 p 13.
[116] Ibid.
[117] Karen Kramer 'Witness protection as a key tool in addressing serious and organised crime' 11-2, available at *http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf*, accessed 21 January 2013.
[118] OSEC, 'Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges-An analysis of criminal proceedings before the courts of the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District BiH between 2004 and 2014' (June 2015) available at *http://www.osce.org/bih/171906?download=true*, accessed 12 February 2016.
[119] UNODC Good practices op cit note 17 at 22.

concepts. For example, the empirical component of this research reveals the consistent reference to informants by some participants as witnesses requiring protection in Nigeria.[120]

In determining the place of informants as beneficiaries of witness protection, it is important to ascertain their roles within the criminal justice system. It is argued here that informants are not witnesses and are generally protected within the framework of informant protection, which this thesis argued, in chapter three, is conceptually different from witness protection. Also, informants are utilised by investigators to provide intelligence reports to aid surveillance, which helps to apprehend criminals and aid crime prevention. Their role is distinguished from the role of witnesses as they are not called to testify in court and in many instances, it is not necessary to disclose the information provided by them or to reveal their identities.[121] The Committee of Ministers in Europe agrees that informants should be excluded from the scope of witnesses protected under a witness protection framework.[122] This is because the information given by them is useful at the initiation of investigation, but hardly enters into proceedings.[123] In this regard, therefore, it is the requirement of open confrontation in court that eliminates informants, as witness protection centres on persons exposed to risks as a result of cooperating with law enforcement authorities during court proceedings in the presence of the defendant.

It is often the case that the protection of informants, as observed in the legislation of countries like Nigeria, is generally limited to protecting their identity and adopting measures that ensure the non-disclosure of the source of their information.[124] The practice in the US confirms that an informant is only deemed a witness within the Witness Security Programme if also a bona fide witness testifying during criminal proceedings.[125] Where informants are called to testify at trials their identity transforms from mere informants to justice collaborators, whose inclusion as witnesses within the literature on witness protection is widely accepted. Investigators who use informants as sources generally keep their names and identity confidential. In most cases, they are never discovered by those against whom they provide information[126] and are not exposed during

[120] This is elaborated in chapter 8: 8.3.3.
[121] Ibid.
[122] COE Rec 9 op cit note 10 para 21, p 4.
[123] Ibid.
[124] Section 33 and 34 Corrupt Practices and other Related Offences Act, Act No 10, LFN 2010.
[125] Office of the United States Attorneys' Manual 9-21.ooo-Witness Security, United States Department of Justice, available at *https://www.justice.gov/usam/usam-9-21000-witness-security*, accessed 24 August 2017.
[126] UNODC Good practices op cit note 17 at 22. See also OHCHR Conference Compilation op cit note 34 at 6.

trial. This element limits the likelihood of their vulnerability and their exposure to threat and intimidation which is the crux of witness protection.

4.4.5. Whistle-Blowers as Witnesses

Another category of persons included within literature on witness protection are whistle-blowers. The misperception about their inclusion as beneficiaries of witness protection is found in article 33 of the UNCAC, which Dandurand interprets as strictly applicable to whistle-blowers as against all witnesses.[127] He emphasises for instance the relevance of whistle-blowers within the context of reporting wrongdoings within the public sector,[128] while witnesses are not limited to testifying against wrongdoings in public institutions. This inference is confirmed by a report of the Committee of Experts on Public Administration,[129] which explains the implementation of article 33 of the UNCAC to reporting persons within the context of whistleblowing.[130]

As indicated in chapter three, whistle-blowers have different roles from witnesses in the criminal justice system.[131] Like informants, their roles are limited to providing information to competent authorities about wrongful acts going on within the public sector or in some cases the private sector.[132] Such wrongful acts may otherwise have remained unnoticed if the information was not provided by them.[133] There is some consensus among scholars that shows that there is a difference in the role played by witnesses and whistle-blowers in the criminal justice systems. For example, Zimmerman explains that whistle-blowers do not necessarily become witnesses in a

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[127] Yvon Dandurand & Kristin Farr 'A review of selected witness protection programmes' Prepared for Research and National Coordination, Organised Crime Division, Law Enforcement and Policy Branch, Public Safety Canada 2010 7, available at *http://www.publications.gc.ca/collections/collection_2011/sp-ps/PS4-96-2010-eng.pdf*, accessed 17 January 2013.

[128] Ibid.

[129] Committee of Experts on Public Administration 'Whistle-blower protection and the implementation of article 33 of the United Nations Convention against Corruption on the protection of reporting persons' Seventeenth session, 23-27 April 2018, Item 4 (c) of provisional agenda Nature and challenges of misconduct and corruption in the public sector and ways forward, available at *http://workspace.unpan.org/sites/Internet/Documents/CRP%20on%20whistle-blower%20protection%20-%20Von%20Soehnen%20UNODC.docx.pdf*, accessed 18 September 2019.

[130] Ibid p 2.

[131] See chapter 3; para 3.3.3.

[132] Zimmermann op cit note 37 at 29. See also OECD 'Committing to Effective Whistle-blower Protection' 5 available at *https://www.oecd.org/corruption/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf*, accessed 14 May 2018.

[133] Ethan D Wohl 'Confidential Informants in Private Litigation: Balancing Interests in Anonymity and Disclosure' (2007) 12 (3) *Fordham Journal of Corporate and Financial Law*, 555, 557. See also Haruhiko Ukawa 'Introductory Remarks' Securing Protection and Cooperation of Witnesses and Whistleblowers 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, p viii, available at *http://unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_all.pdf*, accessed 9 May 2013.

criminal proceeding.[134] Mahony acknowledges that, while legislation on whistle-blowers seeks to protect persons who bring information about illegal or unethical practice to the attention of the competent authorities, witness protection legislation seeks to protect witnesses only in a criminal proceeding.[135] These support the arguments made in chapter three about the distinct roles of witness protection and whistle-blowers' protection in the criminal justice system.

Although whistle-blowers are susceptible to victimization, the level of risk differs from that anticipated within the context of witness protection. As acknowledged in chapter three, the commonly recognised form of intimidation against whistle-blowers is their exposure to economic retaliation, commonly in the form of 'unfair treatment.'[136] This includes being ostracised by peers and management, demoted or moved to less desirable locations and in extreme cases losing their jobs.[137] These forms of reprisals do not always culminate in the fear of physical reprisal, which is a primary focus of witness protection. However, the absence of the element of open confrontation during the criminal proceedings, which is lacking in whistle-blower's protection, is justification for their exclusion as beneficiaries of witness protection.

4.4.6. Expert and Official Witnesses

Another category of persons who require clarification are expert witnesses and official witnesses. Official witnesses within the criminal justice context include investigators, prosecutors, judges and other court officials who encounter criminals in the discharge of their official duties. In Nigeria, the safety of such persons, particularly within serious offences like terrorism, has been raised.[138] The concerns centre on the risks they are exposed to while discharging their official duties, which may be detrimental to the accused persons who may decide to retaliate against them. In the *Dasuki* and *Nnamdi Kanu* cases, the defendants expressly objected to the inclusion of official witnesses, such as investigators, as beneficiaries of protection. It is within this specific context that the need to clarify the scope of beneficiaries of witness protection is required for Nigeria.

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[134] Zimmermann op cit note 37 at 29.
[135] Chris Mahony *The Justice Sector Afterthought: Witness Protection in Africa,* (2010) 96, available at *http://www.issafrica.org/pubs/Books/WitnessProt4.pdf,* accessed 10 January 2012.
[136] See chapter 3; 3.3.4.
[137] Ibid.
[138] This was raised in the discussion of the presentation of a paper titled 'Prosecuting Terrorism Offences and Crimes against Humanity: Nigeria v the Rest of the World' Law Officer's Session, 27th August 2014, presented at the 2014 Nigerian Bar Association Conference held at Owerri, Imo State, 25th -29th August 2014.

The protection of expert and official witnesses is recognised by article 32 (1) of the UNCAC. According to Chene, although this convention applies within a limited scope, their identity as witnesses is recognised because of the testimonial evidence provided, particularly as experts.[139] This chapter argues that, within the literature, there is scant evidence to support their inclusion as beneficiaries of protection. If at all, they appear relevant in the context of prosecutions at the international criminal tribunals.[140] This is because of the unique nature of prosecutions at these tribunals and the adoption of intermediaries as experts to get evidence from the victims of crime.[141] Specifically, it is doubtful to justify that the evidence provided by them cannot be obtained from other sources. The COE argues that witnesses within the context of witness protection means prosecution witnesses and case law has been interpreted to exclude experts and interpreters.[142] Accordingly, expert witnesses are useful only to the extent that they provide an additional source of scientific opinion[143] to support the already existing evidence provided by primary witnesses, such as justice collaborators, victims or eyewitnesses.

Also, it is difficult to concur that official witnesses are cooperating, in the real sense of the word, as they are part of law enforcement. As it stands, the defendants in the *Nnamdi Kanu* and *Dasuki* cases share the views of the COE. As discussed in chapter two, it is the argument of the defendants that the investigators testifying as prosecution witnesses were simply providing evidence about the circumstances of the defendant's arrests. By the nature of their testimony, they did not provide evidence about facts of the crimes for which the defendants were being prosecuted. This research aligns with this reasoning and affirms that, since the investigators in these cases and official witnesses generally are not crime-based witnesses, they are not witnesses envisaged within the context of witness protection.

[139] Chene op cit note 8.
[140] ICTR Rule 94 of the Rules of Evidence.
[141] IBA, Witnesses before the International Criminal Court An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses July 2013 Supported by the IBAHRI Trust 44 available at *www.ibanet.org/Document/Default.aspx?DocumentUid=9c4f533d-1927-421b*, accessed 13 May 2015.
[142] COE Recommendation 9 op cit note 10 para 21 p 4.
[143] 'Different Kinds of Evidences' op cit note 62.

The UNODC,[144] Chene,[145] and Fyfe and Sheptycki[146] however draw a distinction in the unique role of investigators acting as undercover agents. To them, where investigators are undercover, they are usually involved in investigations involving serious crimes such as drug trafficking and the use of firearms. In such instances, their involvement with criminal elements exposes them to harm and puts them at the risk of danger.[147] Here, they assume the role of informants.[148] Consequently, while they are official witnesses, their identities remain unknown. Chene notes that it is only in exceptional circumstances that they are included in witness protection schemes.[149] Although the basis for exceptional circumstances is unclear, this thesis recognises that this is because they are exposed to danger of testifying at trial. In such instances, they attain the status of eyewitnesses and not ideally official witnesses, because they testify about what they saw or witnessed.

The UNODC also sustains the argument that official witnesses and expert witnesses are not commonly included as beneficiaries of protection. This is because the intimidation or threats to which they are exposed results from performing their official duties[150] and not specifically as witnesses testifying in court proceedings. There is no real evidentiary value given to the information provided by them as they merely assist the court with facts to understand or determine an issue as a result of some specialised knowledge, skill or training.[151] Kramer is of the view that while these groups of persons may indeed be exposed to harm and possible intimidation and reprisal attacks, they do not need to be included within a witness protection framework as measures such as temporary reassignment may be available to them to mitigate against the harm.[152]

4.5. What about the Defendant's Witness(es)?

This section evaluates the prospect of including the defendant's witnesses as beneficiaries of witness protection. The inclusion of the defendant's witness appears justifiable within the literal definition of the word witness, particularly as they are in possession of information relevant to

[144] Fyfe & Sheptycki Facilitating Witness Cooperation op cit note 25 at 9-15.
[145] Chene op cit note 8 at 3.
[146] Fyfe & Sheptycki Facilitating Witness Cooperation op cit note 12 at 9-15.
[147] UNODC Good Practices op cit note 17 at 22.
[148] Grabosky op cit note 85 at 48.
[149] Chene op cit note 8 at 3.
[150] UNODC Good Practices op cit note 17 at 22.
[151] Ngane op cit note 11 at 432.
[152] Kramer Witness protection op cit note 117 at 8.

criminal proceedings irrespective of their status.[153] Also, the inclusion of the defendant's witnesses fits into human rights arguments, which propose that witness protection is a human right and everyone participating in a criminal proceeding has a right to be protected without exception.[154]

As indicated in chapter three, these arguments are proposed on the basis that the obligation of states to protect within international human rights instruments,[155] extends to all citizens, including the defendant's witnesses. This is on the premise that the defendant's witnesses may also be exposed to intimidation and danger[156] like the prosecution's witnesses. Furthermore, it is believed that excluding the defendant's witness from protection hinders the defendant's rights to fair hearing.[157] This is because the safety of all witnesses participating in any criminal trial must take priority over its successful conclusion,[158] which is the primary focus of the prosecution. Regardless of these human rights arguments, there is insufficient data within the literature to justify the inclusion of the defendant's witnesses as beneficiaries of witness protection within national practices. While various studies recognise the inclusion of victim-witnesses, eyewitnesses and justice collaborators[159] and in limited instances official or expert witnesses[160] as beneficiaries of witness protection, there is hardly such mention about the inclusion of the defendant or their witnesses. Specifically, Kankew notes that in Thailand, the definition of a witness does not include a defendant who is a witness.[161]

Within the literature on witness intimidation, there is significant data to support the view that acts of intimidation are usually perpetrated by the defendants or their criminal associates and friends against the witnesses whose testimony may likely establish their culpability.[162] Although the prosecution's witnesses are more susceptible to acts of intimidation, there is undeniably the

[153] See COE Best Practices Survey op cit note 1).
[154] OHCHR Conference Compilation op cit note 34 at 51.
[155] See the provisions of Article 13 Convention against Torture and 18 (2) Convention for the Protection of all Persons from Enforced Disappearance.
[156] OHCHR Conference compilation op cit note 34 at 61.
[157] IBA, Witnesses before the ICC op cit note 141 at 38.
[158] Vincent op cit note 45.
[159] See for example the UNODC good practices and the studies of Dandurand & Farr op cit note 127 and Fyfe & Sheptycki op cit note 25.
[160] See for example article 32 (1) UNCAC and Chene op cit note 8.
[161] 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_GGSeminar_all.pdf*, accessed 9 May 2013.
[162] See chapter 3, para 3.3.

possibility of threat to the defendant's witnesses.[163] However, the practices that highlight the existence of these possibilities are found within the practice of the international criminal tribunals. This inclusion is tied to the nature of these tribunals, where the Victim Witness Units (VWU) established in these courts have the mandate to protect all witnesses appearing before the court. This includes the defendant's witnesses.[164]

Wald observes that in trials before the ICTY for example, the aura of fear and intimidation was not limited only to prosecution witnesses but also prevalent among the defendant's witnesses.[165] Beresford also notes that within the framework of the ICC, the VWU operates for the benefit of all witnesses appearing before the ICC including the defendant's witnesses.[166] For his part, Sluiter reiterates that a particular element of the practice of witness protection before the ICTR is that both the witnesses of the prosecution and the defendants, are in need of protection.[167] This is justified in terms of the principle of equality that exists within the practice of the international criminal tribunals.[168] In the case of The *Prosecutor v Nteziryayo,*[169] in interpreting the provisions of rule 69 (a) of the Rules and Procedure of the ICTR, the Trial Chambers determined that in 'exceptional circumstances, either parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.' Therefore, within the ICTR, the Chambers has successfully provided protection for defendant's witnesses who feared possible reprisals for testifying on behalf of a

[163] Mahony op cit note 135 at 40.
[164] See Article 43 (6) of the Rome Statute, see Rule 34 ICTR REP, Rule 34 ICTY REP
[165] Wald op cit note 68 at 220.
[166] Stuart Beresford 'Child Witnesses and the International Criminal Justice System Does the International Criminal Court Protect the Most Vulnerable?' (2005) 3 *Journal of International Criminal Justice* 735.
[167] Goran Sluiter 'The ICTR and the Protection of Witnesses' 3 *Journal of International Criminal Justice* (2005) 969.
[168] *The Prosecutor v Alphonse Nteziryayo* Decision on the Defence Motion for Protective Measures for Witnesses Articles 14, 19, 20 and 21 of the Statute and Rules 69, 75 and 79 of the Rules Case No. ICTR-97-29-T Trial Chamber II, 18 September 2001 para 21 p 6 available at *http://www.worldcourts.com/ictr/eng/decisions/2001.09.18_Prosecutor_v_Nteziryayo.pdf accessed 29 May 2017*. See also *The Prosecutor v Gacumbitsi* op cit note 22 para 2.
[169] Ibid para 3 p 2.

defendant.[170] Also, in *Prosecutor v Kayisbema and Ruzindana*[171] the defence counsel was able to tender evidence to prove that there had been revenge attacks on persons accused of participating in the acts of genocide.[172]

The inclusion of the defendant's witness in witness protection conversations within international criminal practices is linked to the nature of the crimes prosecuted at that level. These crimes identified as the most egregious crimes, such as crimes against humanity, genocide and war crimes prosecuted at the international criminal tribunals are considerably different from those encountered within national courts. Witness protection practices within national jurisdictions focus on crimes such as terrorism and organised crime and hardly on international crimes as stipulated in the Rome Statute. Mahony explains that the nature of these crimes prosecuted at the international courts aggravate feelings of abhorrence by the larger society and the perpetrators or their supporters face the risk of harm. Consequently, the defendant's witnesses are susceptible to intimidation from state agents, victims' groups and other groups hostile to the defendant.[173] In such instances, the source of intimidation is not necessarily the defendant as in the case of organised crimes and those testifying on behalf of the defendants, are intimidated.[174] The IBA notes that most of the defence witnesses, because of the nature of the cases, are usually members of the military who though testifying on behalf of the defendant fear repercussions from the government.[175]

Despite the recognition of the defendant's witnesses as beneficiaries of protection within the international criminal tribunals, it appears largely impracticable. A report by the IBA highlights the constraints experienced in protecting witnesses generally and the defendant's witnesses specifically within the ICC.[176] Thus according to the IBA,

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[170] Most of the defence witnesses were Hutu by ethnicity and were unwilling to testify openly in favour of the accused or any person charged for crimes falling within the jurisdiction of the Tribunal owing to the fear of being implicated in the genocide which occurred in Rwanda in 1994 and of possible reprisals against the witnesses upon their return to Rwanda after having testified. See Preamble Para 12 *The Prosecutor v Clement Kayisbema and Obed Ruzindana* Case No. Ictr-95-1 T Decision on The Motion for the Protection of Defence Witnesses Trial Chamber II 6 October 1997 p 2 available at *http://www.worldcourts.com/ictr/eng/decisions/1997.10.06_Prosecutor_v_Kayishema.pdf*, accessed 29 May 2017.

[171] Ibid.

[172] Ibid.

[173] Mahony op cit note135 at 40.

[174] Ibid.

[175] IBA op cit note 141 at 38.

[176] Ibid.

> …while challenges of enforcing state cooperation are Court-wide, the logistical limitations inherent to cooperation are aggravated for defence teams who have little means or authority to communicate directly with states. This contrasts with the Registry and OTP who have direct communication channels with states and regularly make official requests from governments. This is especially relevant in cases where the defence requires cooperation from states with inquisitorial-oriented criminal systems, characteristic in most civil law countries where the national authorities may be totally unaccustomed to assisting defence with their investigation as investigative judges normally undertake these activities.[177]

Apart from the non-cooperation by state institutions, the defence witnesses may also face non-cooperation from non-government organisations sponsored by victims' organisations, which advocate for offenders to be brought to justice.[178] The challenges are further aggravated by the absence of a clear organisational structure to perform adequate risk assessments and support needs of the defence witnesses, which are readily available for the prosecution's witnesses.[179] This is generally rooted in the contempt with which the defendant is held and a desire to ensure that defendants do not get protection[180] arising from testimonies about their offences.

It appears that arguments that favour the inclusion of the defence witnesses within the concept of witness protection are more conjectural than realistic. Firstly, this research argues that their absence within national jurisdictions is reflective of the absence of a recognised right of witness protection by national governments. Accordingly, the common perception within global practice is that witness protection is a criminal justice incentive that seeks to protect prosecutorial interests.[181] Secondly, the constraints experienced in protecting the defendant's witnesses within the international criminal tribunals reflect the reluctance to accept their inclusion within the concept of witness protection. This is because requests for witness protection are usually made by the prosecutor to reduce potential threats from the defence.[182] Thirdly, reliance on the practice of

[177] In these instances, the IBA observes that the unwillingness to facilitate the presentation of a defence witness cannot be separated from the 'political' realities of the case whereby some governments may have vested interest in seeing that the defendants are convicted.
[178] Mahony op cit note 135 at 41.
[179] IBA op cit note141 at 29.
[180] Mahony op cit note 135 at 41.
[181] See for instance the UNODC report.
[182] ICC 'Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court' 5, available at *https://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf*, accessed 7 July 2014.

the international criminal tribunals should be limited because the defence witnesses are protected by law, from the mandate of the enabling statutes.[183]

Arguments that favour the inclusion of defendant's witnesses as beneficiaries of protection within the national jurisdictions may be difficult to justify to policy makers. The UNCTOC which represents international law perception of witness protection, emphasises protection for individuals 'cooperating with law enforcement'. This ordinarily eliminates the defendant's witnesses who are in fact not 'cooperating with law enforcement' but with the defendant, except where co-defendants become justice collaborators. The state may be unwilling to allocate its resources on behalf of an entity it wishes to convict. Witness protection is provided by the state on behalf of its witnesses and based on witness management mechanisms, which further the aims and objectives of prosecution. Therefore, it appears unbeneficial to the state to make efforts to protect the defendant's witnesses.

4.6. Conclusion

A specific objective of this chapter was to ascertain if it is acceptable practice to include all persons cooperating with law enforcement authorities or participating in a criminal process within the definitions of witnesses requiring protection. The chapter clarifies the circumstances that permit the inclusion of cooperating persons as beneficiaries of witness protection. It commenced by examining the scope of beneficiaries as proposed by human rights perspectives and criminal justice influences, respectively. While the human rights arguments justify the inclusion of all persons cooperating with law enforcement authorities, definitions from a criminal justice perspective invalidate this claim, by setting certain parameters within which witnesses in the context of witness protection are defined. Although the practices do not exclusively fit into one or the other perspectives, the distinctions drawn in the analysis are useful organising principles for clarifying the definition of witnesses within the context of witness protection.

From the preceding discussions, human rights perspectives arrive at the definition of witnesses from the position of recognising witness protection as a right available to all citizens, especially those exposed to any possibility of harm for participating in the criminal justice system. Human rights perceptions rationalise a literal definition of the word 'witness' which identifies a

[183] See Article 43 (6) of the Rome Statute, see Rule 34 ICTR REP, Rule 34 ICTY REP.

broad scope of persons. Accordingly, within the human rights narrative, a witness within the context of witness protection includes a victim, eyewitness/innocent bystander, justice collaborator, informants, whistle-blowers, the defendant's witness and official and expert witness. On the other hand, the criminal justice perspective requires a definition of witnesses within specific identified parameters, such as that the witness testifies on behalf of the state, the value of the witness' testimony in determining the defendant's participation in the crime in issue, and the severity of the threat to which the witness is exposed. These factors have been used in Australia, Canada and the US, for example in qualifying the beneficiaries of protection.[184] Consequently, criminal justice perspectives propose a narrow scope of witnesses.

There is barely any consensus within the literature to justify a human rights approach in defining witnesses. In fact, any allusion to any right to witness protection is of limited application usually in situations of gross violations of human rights where the witnesses are likely to testify against state organs, thereby resulting in state responsibility to protect from a specific international human rights instrument.[185] There is more consensus within the literature to justify the criminal justice influences in determining beneficiaries. This research aligns with criminal justice indicators and argues that there is need to delimit the definition. In determining the beneficiaries of protection, definitions of witness should include the element of witness intimidation. Also, the role undertaken by the witness during criminal proceedings in court is a significant element. This chapter emphasises that the element of open confrontation in court, as determined in chapter three, is crucial in delimiting the scope of the beneficiaries of witness protection. This by implication excludes victims, informants and whistle-blowers. Thus far, there is uniformity on the acceptance of eyewitnesses, justice collaborators and victim-witnesses as beneficiaries of protection within global practice as evidenced within the literature.[186] This has a lot to do with the fact that they are crime-based witnesses with first-hand knowledge about the details of the crime prosecuted. [187]

Furthermore, this chapter concludes that witness protection does not envisage the defendant's witness within the scope of beneficiaries of protection. This conclusion is justified on the basis that witness protection evolved as a means of protecting witnesses cooperating with the

[184] See section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) Witness Protection Act 1994; section 7 Witness Protection Programme Act 1996.
[185] See UNHRC 15th Session op cit (n 34) para 42 p 13.
[186] See UNODC Good practices op cit note 117.
[187] Ngane op cit note 11.

prosecutions. The UNCTOC and the UNCAC specify that witness protection is for enhancing law enforcement, particularly those at risk for cooperating with law enforcement authorities. There is insufficient evidence to conclude on a practice within national criminal jurisdictions that includes the defendant's witnesses as beneficiaries of protection. Additionally, it is unlikely to sway societal support for a framework that may be perceived as a means of escaping culpability. This implies that definitions of witnesses should proceed from considerations that reflect societal expectations.

This chapter concludes that it is not standard practice to include within witness protection literature, all persons cooperating with law enforcement within the definition of witnesses. It is emphasised that propositions which support a broad scope of witnesses are merely academic and run the risk of being exercises in futility likely to lose the spirit within the concept of witness protection.

CHAPTER FIVE

CRIMES REQUIRING PROTECTION

5.1. Introduction

A fundamental element of witness protection is the existence of crime. The main rationale for witness protection is to shield witnesses from offenders who intimidate them from testifying about the crimes that they witnessed. A primary objective of this thesis is to provide conceptual clarification about the concept of witness protection. Underlying this objective is to determine the nature of crimes that necessitate witness protection. In Nigeria, the existing legal framework expressly stipulates that witness protection is applicable in prosecutions involving sexual offences, human trafficking, terrorism and financial crimes.[1] This has brought into question the appropriateness of adopting protective measures for crimes not expressly stipulated in the law, such as arms trafficking and treason.[2] Apart from the sections which expressly specify the type of crimes, another section of the same law[3] is expressed in a manner that suggests that, witness protection in Nigeria applies to prosecutions involving all types of crimes and is not limited to those expressly stated in the law. This therefore necessitates clarifying the scope of crimes of strategic importance within the context of witness protection generally and specifically within the Nigerian context.

This chapter explores witness protection trends from states with a developed practice of witness protection to ascertain the nature of crimes that have warranted witness protection. Also, reference is made to states with an evolving witness protection practice and this aims to bring global developments to light by highlighting the established trends[4] as well as the emerging trends[5] which have influenced how the crimes requiring protection are construed.

[1] See section 232 (4) (a)-(d) ACJA 2015.
[2] See the Nnamdi Kanu Case and Dasuki Cases discussed in Chapter 2; 2.4.
[3] Section 232 (4) (e) ACJA.
[4] This includes states such as the US, Canada and Australia which have an established practice of witness protection and which are dominant within the academic literature.
[5] This includes states such as Kenya and South Africa that are the only African countries with an established system. However, the development in these states are more recent than the US or Canada for example. The inclusion of witness protection discussions within the Latin American context is relevant as it highlights the evolution of witness protection in states with inadequate criminal justice systems. These states also buttress the arguments made in this chapter that, depending on the priority attached to prosecuting specific crimes, government is willing to invest in witness protection schemes.

To provide some logic to the choice of states used for the analysis in this chapter, the developments are examined from a criminal justice versus human rights perspective. While the criminal justice approach to witness protection envisages that protection is required for specific crimes and proposes a narrow scope of crimes within definite parameters, the human rights influences tend towards a broader scope of crimes, which potentially accommodates witnesses testifying in all criminal prosecutions. The chapter considers the relevance of securitization as a crucial element within the criminal justice developments in defining the nature of crimes. Securitization draws attention to the security imperatives, which justifies the practicality of witness protection within specific contexts.

The argument is made in this chapter that witness protection evolved within specific crime contexts and this supports the relevance of witness protection to crimes of a specific nature and not for all crimes. This chapter however clarifies that the problem is not so much about prescribing specific types of crimes but a matter of identifying specific underlying characteristics, which are indicative of the nature of crimes that require protection. The findings of this chapter provide a basis for resolving the legal questions about the types of crimes requiring witness protection raised in the *Dasuki* and *Nnamdi Kanu* cases discussed in chapter two and for qualifying the scope of crimes envisaged by section 232 (4) (e) of the ACJA.

5.2. Historical Analysis of Witness Protection

This section examines the origins of witness protection in states that have considerably influenced the practice and development of witness protection. Additionally, it highlights the nature of crimes that have necessitated witness protection within public international law and the practice of the international criminal tribunals. This helps provide a suitable narrative of the scope of crimes that have necessitated witness protection over-time. The discussions in this section bring to light the overlaps in certain states where the history shows that both criminal justice and human rights concerns influenced the institution of witness protection.

5.2.1 Criminal Justice Developments of Witness Protection

The discussions here focus on witness protection practices that developed significantly as a criminal reform strategy. A shared history among the states in this section is that witness protection resulted from the inadequacies of the existing system to manage issues of witness intimidation arising from certain crimes of specific interest to the government.

In contemporary times, the impact of organised criminal activities between the late 1950s and 1960s in the US and the inability of the Justice Department to successfully investigate and prosecute Italian-American organised crimes led to the institution of witness protection.[6] A specific challenge was the difficulties in getting witnesses to testify against members of the Mafia. Green explains that the severity of this challenge in the US threatened the safety of the people and the legitimacy of government to control crime.[7] This prompted the establishment of several Commissions of Inquiry to study the problem of organised crime and the eventual enactment of the Organised Crime Control Act in 1970.[8]

A significant objective of this legislation was to reduce the effects of intimidation arising from prosecuting organised crime. Consequently, a witness protection programme (WITSEC) was established to provide security for witnesses testifying against the Mafia.[9] A manual of the US Department of Justice shows that subsequent reforms in the US[10] retained the essence of protection within the prosecution of a specific scope of crimes: organised crimes or other serious offences.[11] It is emphasised here that, in the US, the combined practices of the WITSEC and within the federal states[12] sustain the protection of witnesses testifying in the prosecution within a specific crime

[6] Alan A Block 'The Organized Crime Control Act, 1970: Historical Issues and Public Policy' (Winter, 1980) 2 (2) *The Public Historian*, 41.

[7] Therese Marie Green 'Coverage and Application of the Organised Crime Control Act of 1970: The Anti-Racketeering Statute in Operation' (1976) 53 (2) *Chicago-Kent Law Review* 498. See also Joshua M. Levin 'Organized crime and insulated violence: Federal liability for illegal conducts in the witness protection program (1985) 76 J. *Crim. L. & Criminology* 210.

[8] Ibid.

[9] Nicholas Fyfe & James Sheptycki 'Facilitating witness co-operation in organised crime cases: An international review' *Home Office Online Report* 27/5 2005, 3, available at *http://www.researchgate.net/profile/Nicholas_Fyfe/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4.pdf,* accessed 9 April 2015.

[10] The Organised Crime Control Act was amended by the Witness Security Reform Act of 1984 following several criticisms. See 18 U.S. Code Comprehensive Crime Control Act of 1984, $3521-Witness relocation and protection available at *https://www.law.cornell.edu/uscode/pdf/uscode18/lii_usc_TI_18_PA_II_CH_224_SE_3521.pdf*, accessed 25 August 2017.

[11] Ibid, s 3521 (a) (1). See also Office of the United States Attorneys' Manual 9-21.ooo-Witness Security, United States Department of Justice, available at *https://www.justice.gov/usam/usam-9-21000-witness-security*, accessed 24 August 2017.

[12] Denver Witness Protection Program Implementation Guide, A program of the Denver District Attorney's Office, 2, available at *http://www.denverda.org/Witness_program/Denver%20Witness%20Protection%20Implementation%20Guide-Final.pdf*, accessed 24 August 2017. See also Illinois Criminal Justice Information Authority, *An Evaluation of the Illinois State Police Gang Crime Witness Protection Program* Research and Analysis Unit Illinois Criminal Justice Information Authority (1997) 2, available at *http://www.popcenter.org/problems/witness_intimidation/PDFs/Bauer_etal_1997.pdf*, accessed 10 January 2012.

context: usually Mafia and other types of organised criminal activities perpetrated by drug cartels, motorcycle gangs, prison gangs and violent street gangs.[13]

Like the US, witness protection in Italy was also necessitated because of its history of Mafia violence and the constant murder of witnesses testifying against mob activities.[14] Witness protection focused on Mafia, prosecutions and Italian prosecutors demonstrated its importance in the criminal justice system by the significant successes achieved in investigations and prosecutions against the Mafia which led to the arrests of many mafia bosses.[15] As pioneers of witness protection, Fyfe and Sheptycki describe the American system of witness protection as the model used by other states.[16] For example, in Canada, a witness protection programme was developed in the 1980s as a way to tackle intimidation problems arising from the prosecution of drug smuggling and trafficking.[17] This is also the case in Australia, where the history of witness protection is linked to criminal justice attempts to tackle organised crime across the Australian jurisdictions.[18] As a result of witness intimidation and the reluctance of witnesses to testify against organised criminal groups, law enforcement agencies faced significant barriers in procuring information to prosecute the criminals involved in these cases and to secure convictions as a result of insufficient evidence.[19]

[13] See Manual '9-21.ooo- op cit (n 11).
[14] Levin op cit (n 7) 209-210. Yvon Dandurand & Kirstin Farr 'A review of selected witness protection programmes' Prepared for Research and National Coordination, Organised Crime Division, Law Enforcement and Policy Branch, Public Safety Canada 2010, 32, available at *http://www.publications.gc.ca/collections/collection_2011/sp-ps/PS4-96-2010-eng.pdf*, accessed 17 January 2013.
[15] *EU Standards in Witness Protection and Collaboration with Justice* Gert Vermeulen (ed) (2005) 80.
[16] Nicholas Fyfe & James Sheptycki 'International trends in the facilitation of witness co-operation in organized crime cases' (2006) 3 (3) *European Journal of Criminology* 321.
[17] The witness protection programme was given legislative backing in 1996. The original Act of 1984 has been amended. See the Witness Protection Program Act S.C 1996, c 15, last amended on July 16, 2015. See also Gregory Lacko 'The protection of witnesses' *Department of Justice Canada- The International Cooperation Group* 2004, available at *http://justice.gc.ca/en/ps/inter/protect_witness/WitnessProtection-EN.pdf*, accessed 20 December 2011.
[18] Frank Vincent 'Review of the Witness Protection Act 1991' Victoria State Government (March 2016) 1, available at *http://assets.justice.vic.gov.au/justice/resources/81f81a91-0ad6-40ff-8310-3a1a45ce9869/review_of_witness_protection_act_1991.pdf*, accessed 29 March 2017.
[19] Australian Federal Police, Witness Protection Annual report 2011-2012, Commonwealth of Australia, 2012, available at *https://www.afp.gov.au/sites/default/files/PDF/Reports/witness-protection-annual-report-2011-12.pdf*, accessed 12 July 2017.

A similar history is found in Germany,[20] UK,[21] Mexico,[22] Argentina,[23] Colombia,[24] Brazil,[25] Kenya[26] and South Africa.[27] Although the challenge of Mafia-styled organised crime did not exist in these jurisdictions, organised criminal activities like drug trafficking, kidnapping, human trafficking, arms trafficking, and other serious crimes committed within gang-related circumstances justified witness protection. In the UK, specific attention was given to the problem of witness intimidation arising from gang-related prosecutions especially in the context of sexual violence or murders perpetrated by gang members.[28] This accounts for the inclusion of sexual crimes and domestic violence in witness protection conversations in the UK. Although it was argued in chapter three that these crimes usually formed the basis of victim protection, since the victims were protected as part of everyday policing, it is however doubtful that protection in these circumstances were purely motivated by human rights concerns. This is because the prevalence of these crimes and the difficulty associated in prosecuting them shared semblances with the

[20] Johan Peter Wilhelm Hilger 'Organised Crime/Witness protection in Germany' Resource Material Series No 58, 116th International Training Course Visiting Experts' Papers, Tokyo, Japan, December 2001, 99, available at *http://www.unafei.or.jp/english/pdf/RS_No58/No58_00All.pdf*, accessed 24 March 2015.

[21] Jonathan Hadley *Witness Intimidation and Protection Practices: A Front-Line View from Helsinki, Consideration of Finnish Police Law, and Review of Research in the UK* POLIISIAMMATTIKORKEAKOULUN TIEDOTTEITA (2006) 51 available at *https://www.theseus.fi/bitstream/handle/10024/86795/witness%20intimidation_tiedotteita54.pdf?sequence=1*, accessed 24 March 2017.

[22] Mohr Kindra, "New Standards of Justice: Uncovering Motivations for Mexico's Recent Judicial Reforms amid a Security Crisis" (2009) *Law and Justice in the Americas Working Paper Series* Paper 7, 8, available http://lawdigitalcommons.bc.edu/ljawps/7/, accessed 24 March 2015.

[23] OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, Argentina Phase 2, June 2008, 30, available at *https://www.oecd.org/countries/argentina/40975295.pdf*, accessed 26 August 2017.

[24] See also Immigration and Refugee Board of Canada, 'Responses to Information Requests (RIR)' COL104011.E, 30 March, 2012, 1 available at *https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/COL104011.E.pdf*, accessed 28 August 2017.

[25] Immigration and Refugee Board of Canada 'Brazil: Crime situation, including organized crime; police and state response, including effectiveness; state protection for witnesses and victims of crime (2009-Oct. 2012)' 13 November 2012, available at *http://www.refworld.org/docid/50bf2c812.html*, accessed 26 August 2017.

[26] Odongo Marion Akoth Witness Protection in Kenya, A dissertation submitted in partial fulfilment of the requirement for the award of a Bachelor of Laws Degree in the University of Nairobi, May 2014, 17 available at *erepository.uonbi.ac.ke/bitstream/.../Akoth_Witness%20Protection%20In%20Kenya.pdf*, accessed 23 March 2017.

[27] Irish et al 'Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa' Research report written for the Centre for the Study of Violence and Reconciliation, October 2000 available at *http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf*, accessed 1 August 2017

[28] Jonathan Hadley *Witness Intimidation and Protection Practices: A Front-Line View from Helsinki, Consideration of Finnish Police Law, and Review of Research in the UK* POLIISIAMMATTIKORKEAKOULUN TIEDOTTEITA (2006) 51, available at *https://www.theseus.fi/bitstream/handle/10024/86795/witness%20intimidation_tiedotteita54.pdf?sequence=1*, accessed 24 March 2017.

difficulties existing in organised crime scenarios. This prompted government's interest in tackling the incidences of witness intimidation which had adverse effects on the administration of criminal justice.

Apart from organised crime, the investigation and prosecution of terrorism, has significantly influenced the evolution of witness protection. A report of the UNODC indicates that, in Germany, witness protection developed from the use of justice collaborators in the prosecution of terrorist groups in the early 1970s.[29] More recently in the US, following the 9/11 terrorist attacks, the witness protection practices of the WITSEC show the increasing inclusion of witnesses testifying in terrorism prosecutions.[30] Mack explains that the prosecutorial focus and priority of the US government in prosecuting terrorism cases necessitated the use of protective mechanisms to achieve this objective.[31] Like the US, witness protection in Italy also expanded to include terrorism prosecutions[32] arising from the recent trends on the war against terrorism. Similar reports of a federal inquiry in 2010[33] and 2015[34] confirm that in Canada witness protection is also required in terrorism prosecutions because of the extent of intimidation present.[35] In all these instances, terrorism increasingly became recognised as a crime that required protection because of the

[29] United Nations Office on Drugs and Crime 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' 2008, 24, available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf*, accessed 20 December 2011.
[30] Tarik Abdel-Monem 'Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong' (2003) 40 *American Criminal Law Review* 1243.
[31] 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* 196.
[32] See Felicia Allum & Nicholas Fyfe 'Developments in State Witness Protection Programmes: The Italian Experience in an International Comparative Perspective' (2008) 2 (1) *Policing*, 92. See also Dante Figueroa 'Italy: New Law on the Protection of Judicial Witnesses Enters into Force' April 4, 2018, available at *http://www.loc.gov/law/foreign-news/article/italy-new-law-on-the-protection-of-judicial-witnesses-enters-into-force/*, accessed 13 June 2018.
[33] The Inquiry into the investigation of the Bombing of Air India Flight 182 was established to make findings and recommendations with respect to a broad range of issues including witness protection in the prosecution of terrorism cases. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 [Air India Commission], Air India Flight 182: A Canadian Tragedy, Volume one: An Overview The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecution, June 2010, 41, available at *http://publications.gc.ca/collections/collection_2010/bcp-pco/CP32-89-4-2010-eng.pdf*, accessed 24 August 2017.
[34] See Witness Protection Program Act –Annual report: 2015-2016 available at *https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/wtnss-prtctn-rprt-2015-16-en.aspx*, accessed 23 August 2017. See also Royal Canadian Mounted Police (RCMP), First Annual Report to the Commissioner, Witness Protection Program Advisory Committee, April 2015, CAT. NO PS61-32, ISSN: 2369-4386, 22, available at *http://publications.gc.ca/collections/collection_2016/grc-rcmp/PS61-32-2015-eng.pdf*, accessed 23 August 2017.
[35] Jim Bronskii 'RCMP revamps witness protection program following secret review' *The Canadian Press* July 7, 2016 available at *http://www.cbc.ca/news/politics/rcmp-witness-protection-review-1.3668303*, accessed 23 August 2017.

underlying security threats to the existence of the state and to the people. These security concerns prompt the inclusion of securitization into the discussion.

What emerges from the preceding analysis is that witness protection was primarily driven by governmental interests to successfully investigate and prosecute these crimes[36] especially where the witnesses are exposed to serious threats for cooperating with law enforcement authorities.[37] Because of the power wielded by the criminal groups, witnesses testifying in these crimes were threatened and, in some instances murdered.[38] This also justifies the arguments made in chapter three of the application of witness protection to a limited scope of witnesses especially those testifying in organised crime, terrorism and other serious crimes. Accordingly, the prevalence of these crimes, the emergence of powerful criminal groups[39] and the high incidence of intimidation arising therefrom was prioritised in government's security agenda[40] and justified witness protection for these crimes.

Another distinct outcome from the criminal justice developments is that witness protection legislation was often enacted as part of criminal justice reforms. The essence of these laws was to expressly stipulate the basis of witness protection which often reflected the new crime threats and the problem of witness intimidation. For example, in Australia, the Witness Protection Act[41] identifies the seriousness of the offence as a pre-requisite for witness protection.[42] In Italy, witness

[36] Lyne Casavant and Christine Morris 'Bill C-51: An Act to amend the Witness Protection Program Act and to make a consequential amendment to another Act' Publication No. 41-1-C51-E, February 2013, Ottawa, Canada, 2;5, available at *https://lop.parl.ca/Content/LOP/LegislativeSummaries/41/1/c51-e.pdf*, accessed 24 January 2015.
[37] See AFP Annual Report 2011-12 op cit note 20 at 3. See also Crime and Corruption Commission Queensland 'Witness Protection Programme' 28 September 2015 available at *http://www.ccc.qld.gov.au/witness-protection/witness-protection-program*, accessed 13 June 2018.
[38] Mohr Kindra, "New Standards of Justice: Uncovering Motivations for Mexico's Recent Judicial Reforms amid a Security Crisis" (2009) *Law and Justice in the Americas Working Paper Series* Paper 7, 8, available *http://lawdigitalcommons.bc.edu/ljawps/7/*, accessed 24 March 2015.
[39] Ibid.
[40] Roberto Dominiquez 'Mexico: A Reluctant Regional Service Provider (2014) European University Institute, 1, available at *http://cadmus.eui.eu/bitstream/handle/1814/31383/RSCAS_2014_51.pdf?sequence=3*, accessed 25 June 2015.
[41] Witness Protection Act 1994 (Act No 124 of 1994, as amended). Australia has eight separate witness protection programmes, one for each state and territory and a national programme run by the Australian Federal Police.
[42] Ibid, section 8 (3) (c).

protection legislation in 1991,[43] 2001[44] and recently in 2018,[45] specified that witness protection is required for justice collaborators and other threatened witnesses testifying in organised crime prosecutions. This is also the practice in the UK,[46] South Africa[47] and Kenya[48] where witness protection legislation was enacted as part of governments response to organised crime. These laws also established a witness protection programme to provide a coordinated standard for administering witness protection.[49]

5.2.2. Human Rights Developments of Witness Protection

Here, the focus is on witness protection practices that developed from reasons other than prosecuting crimes solely of interest to the government. A unique feature for example is that within these developments, witness protection developed within a transitional justice context and offered protection to witnesses testifying against state actors or individuals with strong ties to the state. For example, in South Africa and Kenya, protection was offered to witnesses who testified against state actors, particularly security personnel, on the accusations of gross human rights violations. While in South Africa witness protection emerged in the early 1990s from the Truth and Reconciliation Commissions (TRC) investigations of crimes committed during apartheid,[50] in Kenya it developed from the post-election violence of 2007-2008.[51] The post-election violence

[43] See Art 1; Act 82 of 1991 New measures on kidnapping for extortion and for the protection of those who collaborate with justice available at *http://www.gazzettaufficiale.it/eli/id/1991/03/16/091A1317/sg*, accessed 13 June 2018. Note the original act is in Italian. The research utilised google translation to get an English version of the law.
[44] Law 45/2001 Modification of the discipline of protection and sanctioning of those who collaborate with justice and provisions for the people who testify available at *http://www.camera.it/parlam/leggi/01045l.htm*, accessed 25 August 2017.
[45] Law 6/2018 Provisions for the protection of witnesses of justice, available at *http://www.gazzettaufficiale.it/eli/id/2018/2/6/18G00022/sg*, accessed 13 June 2018.
[46] See Serious Organised Crime and Police Act (Chapter 15) 2005, available at *http://webarchive.nationalarchives.gov.uk/20080805094345/*, accessed 25 August 2017.
[47] Government enacted the Witness Protection Act 112 of 1998, which established a witness protection programme under the National Crime Prevention Strategy of the Department of Justice.
[48] Witness Protection Act, no 16 of 2006 (as amended).
[49] Owen Bowcott 'UK-wide witness protection programme to be launched in 2013' *The Guardian* 28 December, 2012, available at *https://www.theguardian.com/law/2012/dec/28/ukwide-witness-protection-programme-2013*, accessed 25 August 2017.
[50] Gareth Newham 'Keeping the Wolves at Bay: Issues and Concerns in establishing a witness protection programmes in South Africa, (1995) Research report written for the Centre of the Study of Violence and Reconciliation, available at *http://www.csvr.org.za/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa*, accessed 23 March 2014.
[51] Jemima Njeri Kariri and Uyo Salifu 'Witness Protection Facilitating Justice for Complex Crimes' Institute of Security Studies Policy Brief 88, August 2016, available at *https://issafrica.s3.amazonaws.com/site/uploads/policybrief88.pdf*, accessed 2 August 2017.

was characterised by criminal activities, particularly extra-judicial killings and gender-based violence.[52]

These developments in Kenya and South Africa share similarities with the emergence of witness protection in states such as Argentina, Brazil, Colombia and Mexico. Although the historical contexts of these states vary, they also highlight protection necessitated by gross human rights violations during wars or post-conflict situations.[53] A unique feature in the history of these states was their involvement in prolonged periods of guerrilla warfare, which also led to the collapse of justice structures.[54] This resulted in the infiltration of security forces by criminal cartels and in many instances the acts of intimidation were perpetrated by security personnel.[55] Specifically, they were accused of gross violations of human rights, involving forced disappearances, extra-judicial killings and death squads.[56] Like in the organised crime context, difficulties were experienced in prosecuting crimes committed by security personnel who had the means of intimidating the witnesses.[57]

According to a report by the UNHRC, the prolonged trials and continuing problem of impunity arising from the reluctance of witnesses to testify became a human right concern.[58] Unlike the organised crime scenarios, however, motivation for witness protection was led by non-governmental institutions. For example, in Brazil witness protection emerged in response to civil society's agitations for protecting witnesses of crimes perpetrated by state institutions like the

[52] Akoth op cit note 26 at 19.
[53] Karen Kramer 'Witness protection as a key tool in addressing serious and organised crime' 11, available at *http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf*, accessed 21 January 2013.
[54] Human Rights First, *Baseless Prosecutions of Human Rights Defenders in Colombia In the Dock and Under the Gun* (2009, Human Rights First, New York) 5, available at *https://www.humanrightsfirst.org/wp-content/uploads/pdf/090211-HRD-colombia-eng.pdf*, accessed 28 August, 2017.
[55] Organization of American States Report on the Situation of Human Rights in Brazil, Chapter III, Police Violence, Impunity and Exclusive Military Jurisdiction for the Police, Inter-American Commission on Human Rights, para 1, available at *http://www.cidh.org/countryrep/brazil-eng/chaper%203.htm*, accessed 26 August 2017.
[56] Fabiola Ortiz 'Brazil: Red Tape Undermines Witness Protection-Part 2' Inter Press Service, News Agency' available at *http://www.ipsnews.net/2011/05/brazil-red-tape-undermines-witness-protection-ndash-part-2/*, accessed 25 June 2015.
[57] OAS, Report Situation of Human Rights in Brazil op cit (n 55) para 26. See also Mario Osava 'Brazil-Human Rights: Witness Protection Programme Needed' Inter Press Service, News Agency, 19 April 1996, available at *http://www.ipsnews.net/1996/04/brazil-human-rights-witness-protection-programme-needed/*, accessed 26 august 2017.
[58] Human Rights Council, Universal Periodic Review, Report of the Working Group on the Universal Periodic review, Argentina, United Nations Human Rights Office of the High Commissioner, South America Regional Office, A/HRC/8/34, Eight Session Agenda item 6, May 2008, para 7, available at *http://acnudh.org/en/argentina-2008/*, accessed 26 August 2017.

police.[59] Kramer notes that the aim of witness protection was to 'break the cycle of impunity' arising from a history of human rights abuses by the government.[60] Prosecutions were stalled because of the high level of witness intimidation[61] and the difficulty to prosecute these crimes was directly linked to the status of the defendants against whom the witnesses testified.

The analysis from these developments is useful, in that it furthers human rights arguments that witness protection should not be limited to crimes of prosecutorial interest to the government. It also engages with issues regarding the culpability of the state or state actors in acts of intimidation. In the Kenyan example for instance, the lack of political will to prosecute perpetrators of the post-election violence, led to their prosecution in the ICC.[62] In Brazil[63] and Colombia[64] a separate system of protection exists for witnesses of gross human rights violations. These programmes are managed by the Human Rights Commission or various Non-Governmental Organisations. It has been argued in chapters three[65] and four[66] that it is within the context of gross human rights violations or international crimes, that there exists a possibility of any right to witness protection. That right accrues from the obligation of states within specific international human rights instruments to ensure that complainants are protected against intimidation arising from their complaints.[67]Also, human rights developments account for the inclusion of crimes other than organised crime and terrorism within witness protection discussions. The implication of this is that it extends the scope of crimes within the context of witness protection and is the basis for human

[59] Ortiz op cit note 56. See also Immigration and Refugee Board of Canada, 'Responses to information Requests (RIRs) 4 January 2006, available at *https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/30/BRA100768.E.pdf*, accessed 26 August 2017.
[60] Kramer op cit note 53.
[61] *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11, Situation in the Republic of Kenya, available at *https://www.icc-cpi.int/kenya/kenyatta*, accessed 29 August 2017. See also Nicolas Cook and Tomas F Husted 'The African Union (AU): Key Issues and U.S.-AU Relations' Congressional Research Service December 16, 2016, 12, available at *https://fas.org/sgp/crs/row/R44713.pdf*, accessed 4 May 2017.
[62] Ibid.
[63] OAS, Report Situation of Human Rights in Brazil op cit note 55. See also Osava op cit note 50.
[64] Apart from the witness protection programme established under the office of the Attorney General, other witness protection programmes exist in Colombia. These are the Protection Programme for Victims and Witnesses of the Justice and Peace Law and the National Protection Unit established under the Office of the Inspector General by Decree 1740 of 2010.
[65] See chapter 3: 3.5.3.
[66] See chapter 4: 4.4.3.
[67] See for example Article 13 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

rights propositions by proponents such as the UNHRC for the availability of witness protection for witnesses of all crimes.[68]

Outside the scope of gross human rights violations, the literature establishes that these jurisdictions also prioritise witness protection in prosecutions involving terrorism, kidnappings, drug and human trafficking and organized crime.[69] For example Irish et al[70] clarify that regardless of the all-inclusive scope of crimes recognised by the Witness Protection Act, in practice, witness protection authorities in South Africa restrict protection to witnesses of organised crime and crimes involving peculiar offences such as political violence, faction fighting and taxi violence.[71]

Early witness protection practices in Kenya,[72] Brazil,[73] Colombia[74] and Mexico[75] confirm that witness protection also evolved from widespread violence perpetrated by criminal groups engaged in organised crime and terrorism. The witness intimidation concerns in these jurisdictions were complex because the organised criminal groups had close ties with politicians, state security officials and terrorist groups.[76] This made prosecution difficult and necessitated witness protection. It is difficult to sustain human rights arguments for the inclusion of all crimes. This is because, like the US and other jurisdictions previously examined, the inability to successfully prosecute these organised criminal groups because of witness intimidation motivated the establishment of a

[68] 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, 5 available at *http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf*, accessed 10 January 2012.
[69] Kindra op cit note 22 at 8.
[70] Irish et al op cit note 27.
[71] See also South Africa's Witness Protection Programme: Majority of Witnesses are from KwaZulu-Natal Perspectives on Kwazulu-Natal 1(1) March 2001 *http://www.cherylgoodenough.com/docs/sawitnessprotection.pdf*, accessed 17 January 2013.
[72] Akoth op cit note 26.
[73] Immigration and Refugee Board of Canada 'Brazil: Crime situation, including organized crime; police and state response, including effectiveness; state protection for witnesses and victims of crime (2009-Oct. 2012)' 13 November 2012, available at *http://www.refworld.org/docid/50bf2c812.html*, accessed 26 August 2017.
[74] See 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. See also Immigration and Refugee Board of Canada, 'Responses to Information Requests (RIR)' COL104011.E, 30 March, 2012, 1 available at *https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/COL104011.E.pdf*, accessed 28 August 2017.
[75] See Article 2, The Federal Law against Organised Crime 1996 available at *http://dof.gob.mx/nota_detalle.php?codigo=5441665&fecha=16/06/2016*, accessed 13 June 2018.
[76] Ibid. See also Akoth op cit note 26 at 18.

formal witness protection programme through legislation.[77] Another indication of the nature of crimes is the severity of the crime and the penalties attached to offences.[78] In Nigeria, criminal justice experts have explained that a distinction should be drawn between misdemeanours, simple offences and felonies, especially where committed by high-profile individuals or notorious criminal groups.[79]

5.2.3. Crimes under International Law/ International Criminal Law

This section briefly examines the contribution of international law within the confines of public international law and international criminal law in delimiting the scope of crimes requiring witness protection. The most notable attempt by the international community within the confines of public international law to give universality to the concept of witness protection is the UNCTOC 2004.[80] The signing of the Convention is described as a watershed in international efforts to combat organised crime.[81] The convention was developed with the realisation that organised crime was not merely a domestic threat but a global threat. This thus necessitated an international response to combat the threat of organised crime.[82] The Convention emphasises the links between transnational organised crime and terrorist crimes and seeks to serve as an effective tool and necessary legal framework for international cooperation in combating transnational organized crime and terrorist crimes.[83] Consequently, State Parties undertook to adopt legislative and other measures necessary to criminalise organised criminal activities.[84]

The Convention also required State Parties to prosecute and punish perpetrators of organised crime.[85] The argument made here is that the experience of national law enforcement in prosecuting organised crime influenced the inclusion of witness protection provisions in this Convention. More so, the scope of crimes covered by the UNCTOC includes participation in an organised criminal group, money laundering, corruption in the public sector, trafficking in persons

[77] Chris Mahony *The Justice Sector Afterthought: Witness Protection in Africa*, 101-02, available at *http://www.issafrica.org/pubs/Books/WitnessProt4.pdf*, accessed 10 January 2012.
[78] See Article 2(b) UNCTOC.
[79] See chapter 8: 8.3.4.
[80] See Article 24(1).
[81] See Kofi Anna's statement in the preface of the Convention.
[82] Andre Standing 'Transnational Organized Crime and the Palermo Convention: A Reality Check' International Peace Institute, December 2010, 1 available, at *www.cpahq.org/CPAHQ/CMDownload.aspx?ContentKey=6fdc7034-b0e5*, accessed 28 August 2017.
[83] Preamble to the Convention.
[84] See Article 5.
[85] See Article 11.

and firearms and other serious crimes as defined in the Convention, encompassing the elements of trans-nationality and involvement of an organised criminal group,[86] likened to developments within national criminal justice systems.

Within the international criminal tribunals, witness protection developed as a useful tool for prosecuting crimes brought before the tribunals. These international criminal tribunals were established to prosecute individuals responsible for genocide, the most serious international crimes and violations of international humanitarian law.[87] It is important to note, however, that at the time these Conventions were originally negotiated, the focus was to hold people accountable for the crimes committed, which came within the jurisdiction of the international tribunals. It soon became obvious however that witness protection was an important instrumentality to achieving the objectives of the international criminal tribunals. According to Beqiri, the inclusion of witness protection at the ICC for instance was to comply with internationally recognised standards of fundamental human rights to a fair trial.[88] As indicated in chapter three, within the international criminal tribunals, human rights institutions argue that witness protection is a pre-requisite for the enjoyment of other rights.[89] This right has, however, been qualified to apply within the specific context of trials involving human rights violations[90] and not for other crimes, such as organised crime which form the crux of witness protection jurisprudence in national practices.

An important aspect of witness protection within this context is the culpability of state actors or persons acting with the complicity of the state.[91] They involved members of the armed forces or government officials with the capacity to prevent witnesses from testifying against

[86] See Articles 5, 6, 8 and 23 of the Convention. See also the protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UNCTOC, protocol against the smuggling of Migrants by land, sea, air, supplementing the UNCTOC.
[87] See Articles 1 of the Statute of the ICTY and ICTR. See also Article 1 Rome Statute.
[88] Romina Beqiri 'Reflections on Certain Witness Protective Measures under the Rome Statute of the International Criminal Court' (2017) 13 (34) *European Scientific Journal* 342.
[89] HRC 12th Session op cit note 68 para 32 p 9.
[90] Ibid, para 41 p 12.
[91] See for example *The Prosecutor V. Dusko Tadic* aka "Dule" Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses 10 August 1995, available at *http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm*, accessed 29 May 2017; *The Prosecutor v Zejnil Delalic & Ors*, Decision on the motion to allow witnesses K, L and M to give their testimony by means of video-link conference, 28 May 1997, available at *http://www.icty.org/x/cases/mucic/tdec/en/70528vl2.htm*, accessed 12 September 2017. See also Human Rights Watch 'Rwanda: Justice after Genocide-20 years on', March 28, 2014, available at *https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years*, accessed 28 August 2017.

them.[92] Also, the defendants in these prosecutions had the capacity to retaliate against witnesses testifying against them and hamper successful prosecution at these tribunals. A very good example is the prosecution of the Kenyan President Kenyatta at the ICC.[93] It is usually within the context of the prosecutions at the international criminal tribunals that human rights proponents advocate that witness protection is an obligation on the states and a right of the victims of international crimes.[94] Regardless of this, protective measures are assigned to facilitate the criminal proceedings. This research argues, therefore, that the nature and seriousness of the crimes and the high threat levels associated with prosecuting them[95] confine witness protection to a specific crime context.

5.3 The Relevance of Securitization to Witness Protection

The discussions in this section accentuate that regardless of the system, witness protection evolved from circumstances that prioritised prosecution of certain crimes. That is witness protection concerns emerge because specific issues are securitized and require the adoption of strategies deemed appropriate. As indicated in chapter three, securitization emphasises the security imperatives that justify witness protection.[96] However, the discussions here limit the relevance of securitization to its utility as a political administrative tool which advances the choice of protecting certain crimes and not others in furtherance of criminal justice influences of witness protection.

5.3.1. The 'Art' of Securitization

As highlighted in chapter three, securitization means the speech act of framing an issue as an 'existential threat,' which requires extraordinary measures.[97]According to Walker and Seegers, the process of securitization entails that an 'actor' claims that the existence of an object is threatened and if not adequately addressed, the referent object will be destroyed.[98] When this is applied within the context of witness protection, the preceding analysis confirms the claim either by government

[92] Ibid.
[93] *Prosecutor v Kenyatta* supra note 61.
[94] HRC 12th Session op cit (n 61).
[95] *The Prosecutor v Jean Uwinkindi* Case No ICTR-01-75-PT Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (Pursuant to Article 21 of the Statute, Rules 54,69,73 and 75 of the Rules of Procedure and Evidence) 21 June 2011 para 7 p 4, available at *https://www.legal-tools.org/doc/ff9e04/pdf/*, accessed 29 May 2017.
[96] See chapter 3: 3.6
[97] See Holger Stritzel 'Towards a Theory of Securitization: Copenhagen and Beyond' (2007) 13 (3) *EJIR* 358.
[98] Robin E Walker and Annette Seegers 'Securitisation: The Case of Post-9/11 United States Africa Policy' (2012) 40 (2) *Scientia Militaria, South African Journal of Military Studies* 24.

under the criminal justice developments or civil society under the human rights developments, of the need to tackle the incidence of intimidation, which, when undeterred, produces a cycle of impunity. According to Holger, a defining feature of securitization is the specific security rhetoric it introduces into a conversation marked by survival, priority of action and urgency.[99] This is expected for instance to lead to a mobilisation of political support for new policies and the allocation of additional resources.[100]

Although securitization developed within a political landscape post-Cold War,[101] this thesis recognises its utility in positioning the essence of witness protection within security concerns arising from the inability to prosecute offenders. This theory of securitization as advanced by the Copenhagen School has been criticised. As indicated in chapter three, one of such criticisms is that it focuses on the state as the primary concern of security without much thought to individuals or other groups.[102] That is, it fails to include threats beyond the rubric of state and military security.[103] Bilgin argues, for instance, that securitization theory is slanted in favour of state-society relations and not appropriate within contexts that are characterised by different configurations of state-society dynamics.[104] This criticism is useful within human rights arguments against the limited application of witness protection to specific crimes or witnesses of relevance to the state to the exclusion of others deemed less significant.

Regardless of the complex nature of securitization and the associated criticisms, this thesis recognises its utility in identifying the scope of crimes that have necessitated witness protection within the criminal justice developments as well as in human rights developments. It recognises that the urgency introduced in the need to prosecute crimes whether perpetrated by criminal groups or by state actors speaks to the urgency in curtailing incidences of intimidation. This as Knudsen describes it, is the act of taking an issue out of obscurity or neglect and placing it on the political

[99] Stritzel op cit note 97 at 360.
[100] Ralf Emmers 'ASEAN and the securitization of transnational crime in Southeast Asia' (2003), 16 (3) *The Pacific Review* 425.
[101] See Olav F Knudsen 'Post-Copenhagen Security Studies: Desecuritizing Securitization' (2001) 32 *Security Dialogue* 359.
[102] Rita Floyd 'Human Security and the Copenhagen School's Securitization Approach: Conceptualizing Human Security as a Securitizing Move' (2007) 5 *Human Security Journal* 40.
[103] Ibid.
[104] Pinar Bilgin 'The Politics of Studying Securitization? The Copenhagen School in Turkey' (2011) 42 *Security Dialogue* 401.

agenda.[105] Hallsworth and Lea[106] recognise that in the rhetoric of securitization, changes in criminal law aimed at dealing with new categories of powerful offenders is an essential factor.[107] According to them,

> …we have witnessed a change in the balance of power between some types of offenders and their victims…Thus, a succession of criminal justice 'reforms' has sought to reduce the intimidation capacity of offenders. Some of these policies have changed legal procedure such as…concealing the identity of witnesses and raise important issues of due process.[108]

In practice, the state is more concerned with issues of state security and in most instances has the capabilities to take actions to curb it.[109] This may justify the focus of witness protection on crimes of interest to the state. Balzacq explains also that securitization is a sustained strategic practice aimed at convincing a target audience to accept, based on what it knows about the world, the claim that a specific development is threatening enough to deserve an immediate policy to alleviate it.[110] The inability to prosecute offenders and the impunity arising from unchecked intimidation is regarded as a threat to state legitimacy, which in turn warrants securitization.[111] It is acknowledged that in Nigeria since anti-corruption and counter terrorism are given priority under the current administration, witness protection has been pushed forward to improve government prosecution strategies.[112]

5.3.2. Securitization and Witness Protection

Generally, crime is perceived as a threat to human security with adverse effects on many aspects of life.[113] Organised crime, until securitized was perceived as a matter of law enforcement tackled through the regular processes of criminal law.[114] The 1980s represent a shift in ideology which

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[105] Knudsen op cit (n 101) 361.
[106] Simon Hallsworth and John Lea 'Reconstructing Leviathan: Emerging contours of the security state' (2011) 15(2) *Theoretical Criminology* 141–157.
[107] Ibid 143.
[108] Ibid 147-48.
[109] Floyd op cit note102 at 4.
[110] Thierry Balzacq 'The Three Faces of Securitization: Political Agency, Audience and Context' (2005) 11 (2) *European Journal of International Relations* 173.
[111] Stritzel op cit note 97 at 360.
[112] Opinion on respondent C participating in field component of the research. See chapter 8: 8.3.2.
[113] 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.
[114] Liz Campbell 'Organized Crime and National Security: A Dubious Connection' (2014) 17 (2) *New Criminal Law Review*: *In International and Interdisciplinary Journal* 222.

acknowledged that organised crime endangers the existence of society, the independence of governments and the functioning of democracy[115] and was prioritised in the policy agenda of the international community. As indicated earlier, the nature of organised crime made it manifestly inadequate to use primary investigative techniques to tackle it.[116] By securitizing organised crime, governments were permitted to reform their legal systems to strengthen deterrence.[117]

By introducing the rhetoric of securitization into the inability of the state to prosecute crimes because of witness intimidation, unchecked witness intimidation is framed as an 'existential threat' requiring extra-ordinary measures. For example, in the US, the WITSEC introduced the protection of justice collaborators through identity changes and relocation to counter organised crime.[118] This according to Stritzel is because the main effect of securitization is the potential to allow the audience to tolerate violations of rules that would otherwise have been obeyed.[119] In addition, a policy document of the Centre for the Study of Democracy recognises that,

> In recent decades the Italian authorities implemented several measures and policies as a direct response to the threat of organized crime. These new measures…were an attempt to complement the conventional approaches, which were no longer effective considering the persisting mafia influence against public institutions.[120]

Like organised criminal activities, terrorism concerns were given priority in the national security agenda of states and the international community.[121] Galli notes that the early 2000s saw

[115] Ibid. See also Felix Berenskoetter 'Under Construction: ESDP and the 'Fight against Organised Crime' paper prepared for presentation at the SCIR Sixth Pan-European Conference, Turin, 12-15 September 2007, 2, *http://eisa-net.org/be-bruga/eisa/files/events/turin/Berenskoetter-ESDP%20and%20OC%20Berenskoetter.pdf*, accessed 25 June 2015.

[116] See Clive Harfield 'Paradigms, Pathologies and Practicalities-Policing Organised Crime in England and Wales' *Policing* (2008) 2 (1) 63-67.

[117] Acconcia et al 'Accomplice-Witnesses and Organized Crime: Theory and Evidence from Italy' (2014) *Scandinavian Journal of Economics*, 1.

[118] 'Antimafia: The Italian Experience in Fighting Organized Crime' Policy Brief No. 31, 2011 Centre for Study of Democracy 2 available at *http://globalinitiative.net/wp-content/uploads/2017/01/csd-antimafia-the-italian-experience-in-fighting-organised-crime.pdf* accessed on 4 April 2017.

[119] Stritzel op cit note 97 at 361.

[120] Antimafia op cit note 118 at 2.

[121] Francesca Galli 'The Legal and Political Implications of the Securitisation of Counter-Terrorism Measures across the Mediterranean' Euromesco Paper 71 September 2008, 5, available at *http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.477.4190&rep=rep1&type=pdf,* accessed 25 June 2015. See also Fred Vultee 'Securitization- A new approach to the framing of the war on terror' (2010) 4 (1) *Journalism Practice*, 34.

terrorism as the new global threat to national and international peace and security.[122] The securitization of terrorism as a significant threat legitimised the use of counter-terrorism measures.[123] These include the use of unorthodox means by the state through the enactment of legislation to combat terrorism.[124] The need for witness protection within this context thus emerged from the necessity to investigate and prosecute terrorism with a higher level of efficacy.[125] Consequently, where states can articulate that they are unable to successfully prosecute crime because of intimidation or the potential of unchecked impunity arsing therefrom, they justify the necessity of witness protection for such crimes. Floyd notes that the designation of what constitutes a security concern comes from political actors.[126] One of the central implications of this idea is that once established, securitization enables policy makers to immediately adopt means they deem appropriate to curb the threat.[127]

This therefore suggests that although witness protection advanced primarily through criminal reform strategies, which culminated in witness protection legislation, the underlying extenuating factors hinged on political interests primarily centred on crime and security. Witness protection is thus a risk aversion strategy; the offshoot of national and international security agendas of governments to tackle issues that threaten their peaceful existence. Securitization thus supports a framework that delimits the nature of crimes, the categories of witnesses as well as the nature of protective mechanisms utilised.

5.4. Identifying the Crimes

From the preceding sections, specific crimes are more prominent in the analysis. The aim is to discuss these crimes and highlight their significance in conceptualising the nature of crimes within the context of witness protection.

[122] Ibid 5. In this context, 'securitizing' means declaring that terrorism is an existential threat to national democracies.
[123] Ibid.
[124] Ibid
[125] See also Snezana Brkic 'Witness Protection as a Subjective Right and its Element' (2010) *Annals Constantin Brancusi U. Targu Jiu Juridical Series* 117-140.
[126]Floyd op cit note 102 at 43.
[127] See Thierry Balzac, et al 'Forum: What kind of theory if any is securitization?' (2015) 29 (1) *International Relations* 100.

5.4.1. Organised Criminal Activities

The preceding sections show that organised crime plays a focal role in the evolution of both the concept of and practices associated with witness protection. By its nature, organised crime is characterised by the readiness of its members to use coercion and intimidation against witnesses.[128] 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.[129] Although historically linked to mafia-styled organisations, Standing[130] 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.[131]

A significant characteristic of organised crime is that it is closed structured in nature[132] and this makes it difficult to investigate and prosecute using traditional investigative strategies.[133] 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.[134] Consequently, law enforcement officials increasingly depended on the testimonies of members of the group willing to cooperate and provide evidence against co-perpetrators.[135] This explains the primary focus of witness protection for justice collaborators. It is however important to ascertain the type of crimes that fall within the purview of organised crime.

The preceding sections generally identified crimes such as money laundering, drug trafficking, corruption, trafficking in persons and firearms and kidnapping. These are primarily the

[128] Campbell op cit note114.
[129] Rodrigo Labrdini 'Mexico's Federal Organized Crime Act' (2003) 11 *United States-Mexico Law Journal* 135.
[130] 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.
[131] Campbell op cit note 114.
[132] Article 2 (a) UNTOC.
[133] Council of Europe, Combating Organised Crime – Best Practices Survey of the Council of Europe (Council of Europe Publishing, Strasbourg, 2004) 21.
[134] Kemp and Malcom op cit note 113.
[135] 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.

scope of crimes identified in the UNCTOC.[136] In Nigeria, witness protection has become important in the prosecution of crimes involving money laundering, corruption and human trafficking.[137] Apart from these crimes expressly listed in the ACJA, crimes such as drug trafficking, arms trafficking and kidnapping, which are forms of organised crimes, are prevalent in Nigeria too. Kidnapping forms one of the criminal activities perpetrated within criminal groups and is a recognised tactic of the Boko Haram sect.[138]

5.4.2. Terrorism

Like organised crime, the concept of witness protection gained prominence in the prosecution of terrorism cases. 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.[139]

Like organised criminal groups, terrorist groups comprise structured groups of offenders.[140] They have a highly organised multifarious network with transnational reach.[141] Consequently, investigating and prosecuting terrorism is complex and challenging.[142] The complexity is as a result of the highly covert and structured nature of terrorist groups.[143] 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

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[136] See Articles 5, 6, 8 and 23 of the Convention. See also the protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UNCTOC, protocol against the smuggling of Migrants by land, sea, air, supplementing the UNCTOC.
[137] See the provisions of the ICPC, EFCC and NAPTIP Acts respectively.
[138] 'Nigeria Chibok abductions: What we know' BBC News 8 May 2017, available at *https://www.bbc.com/news/world-africa-32299943*, accessed 27 October 2018.
[139] 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.
[140] Labrdini op cit note129 at 134.
[141] Council of Europe, 'Witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe' Report of the Committee on Legal Affairs and Human Rights, AS/Jur (2014) 6, available at *http://website-pace.net/documents/19838/166208/20141030-WitnessProtection-EN.pdf/ced4664d-1ea6-4200-9af5-1ebcb77b3981*, accessed 1 August 2017.
[142] Ibid.
[143] Ibid.

the prosecution of terrorism, thereby revealing its importance for witnesses of terrorism.[144] As discussed in chapter two, the high level of witness intimidation associated with terrorism prosecutions has significantly influenced the emergence of witness protection in Nigeria.[145]

5.4.3 Gross Violations of Human Rights and International Crimes

Within the context of transitional justice systems, witness protection developed in the (criminal) prosecution of gross violations of human rights and violations of international criminal law.[146] It is significant to witness protection literature, as they raise human rights concerns about the victims of crime. This research argues, however, that human rights motivations for witness protection gained prominence within the field of victim protection, which focuses on the interest and rights of victims of crimes. When put in a historical context, the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of Human Rights[147] was adopted following the transitional justice mechanisms in a series of countries.[148] In these instances, witness protection concerns arose from the prosecution of post-conflict situations.

Although of limited application, the conversations from these developments have shaped the nature of crimes requiring witness protection, specifically victims of sexual violence perpetrated in furtherance of war crimes and crimes against humanity.[149] The concept of witness protection in this context also shifted its focus from justice collaborators within an organised crime context to include other witnesses, particularly, victim-witnesses of crime.[150] As indicated above,

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[144] Mack op cit note 31 at 206.
[145] See chapter 2; 2.1.
[146] Discussions about the emergence of witness protection in Latin America and early practice in South Africa support this practice.
[147] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Sixtieth session Agenda item 71 (a), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 available at *http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx*, accessed 23 March 2015.
[148] See Theo Van Boven 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' United Nations Audio-visual Library of International Law (2010), 1 available at *http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf*, accessed 26 May 2015.
[149] 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) 12, available at *http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf*, accessed 7 February 2017.
[150] United Nations General Assembly, 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/63/313Extrajudicial, summary or arbitrary executions, accessed 23 March 2017.

the nature of crimes in transitional justice systems emerging from conflict to a large extent is perpetuated by powerful political individuals.[151] It highlights situations where witnesses testify against state actors.[152] Within the context of South Africa, Newham highlights the situation as such:

> These acts of abuse were generally perpetrated by members of the apartheid police force, which acted, as state agents or at least with the implied consent of the state...In this respect, their position remains secure if they are sure that information relating to their past crimes does not emerge from any other source.[153]

The defendants in such prosecutions wield enough power to obstruct prosecution by preventing any evidence that implicates them getting to court.[154] They therefore resort to acts of intimidation to prevent witnesses from cooperating in their prosecution. It is important to note however that the lessons to be drawn within this context are of limited application outside of transitional justice systems.[155]

5.4.4. Serious Crimes

It is often the case that witness protection literature uses the phrase 'serious crimes' to indicate the scope of crimes for which protection applies. The indefinite nature of this phrase could easily rationalise the inclusion of all types of crimes within the context of witness protection. In South Africa for example, witness protection legislation applies to a wide range of crimes.[156] It is beneficial to ascertain what constitutes serious crime. Article 2(b) of the UNCTOC defines a serious crime as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.' In many instances, these include murder prosecutions which occasionally appear in witness protection literature.

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[151] INPROL, 'Witness Protection in Countries Emerging from Conflict' INPROL Consolidated Response (07-008), 5 December 2007, 1, available at *http://www.delhihighcourt.nic.in/library/articles/may/Witness%20protection%20in%20countries%20emerging%20from%20conflicts%20.pdf*, accessed 1 August 2017.
[152] HRC 12th Session op cit note 68 para 41, p 12.
[153] Newham op cit note 50.
[154] HRC 12th Session op cit note 68 para 41, p 12.
[155] For example, the human rights justifications for witness protection. It has developed primarily in the jurisprudence of the ICC, ICTY and ICTR.
[156] See the Schedule of the Witness Protection Act 112 of 1998.

The COE suggests that serious offences should be delimited by reference to the definition of offences captured within the UNCTOC.[157] This research agrees with this limitation as it finds that the often-sparse reference to protection for witnesses in murder prosecution is linked to gang-related criminals or organised crime groups. This trend is noticed in South Africa,[158] the US[159] and the UK.[160] According to a report in the UK, the incidences of witness intimidation arising from the prosecution of gang members for homicide and gun crimes played a pivotal role in bringing about a national witness protection scheme.[161] The argument is made here that the threat and gravity of intimidation in these instances are facilitated by the larger association of the defendant to a criminal group and not to an individual level of intimidation. This is because when a crime is committed in a group context, the defendant would have associates who would want or be compelled to protect the defendant for fear of being exposed themselves, or because of group orders and loyalty. This is exemplified in the gang-styled crimes that necessitated witness protection in the UK for example. Brown notes that where the crime prosecuted involves murder, and robbery committed outside of a group context, the police may use guards and escorts to handle the possibility of intimidation by the offender.[162]

Although the literature focuses on serious crimes committed within a group context, in other instances, it recognises the protection of witnesses where the crime is committed by a high-profile defendant such as a security personnel or a politician. [163] These circumstances are within gross human rights violations and highlights the influences that high-profile individuals have on

[157] COE Explanatory Report op cit note139 para 33, p 6.
[158] Dan Plato 'Witness protection key in fighting gangs' *Cape Argus* 18 May 2015 available at *https://www.iol.co.za/capeargus/witness-protection-key-in-fighting-gangs-1860052*, accessed 15 June 2018.
[159] See also 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, 2, available at *https://www.ncjrs.gov/pdffiles/163067.pdf, accessed* on 10 January 2012.
[160] Nicholas Fyfe and Heather McKay 'Making it safe to speak? A study of witness intimidation and protection in Strathclyde' *Crime and Criminal Justice Research Findings No 26* 1999 the *Scottish Office*, 2 available at *http://www.scottishexecutive.gov.iik/cru7documents/crf26-00.htm*, accessed 10 January 2012. See also 'Witness protection and anonymity' available at *https://www.cps.gov.uk/legal-guidance/witness-protection-and-anonymity*, accessed 15 June 2018.
[161] 'Special report: Life in witness protection' *Independent* 10 September 2010 available at *https://www.independent.co.uk/news/uk/crime/special-report-life-in-witness-protection-2075422.html*, accessed 15 June, 2018.
[162] Vincent O Brown 'An Analysis of Witness Protection Programme in the Nigeria Police Force' in CLEEN Foundation *Emergency Response to victims of Gun Violence and Road Accidents* Conference Proceedings, Monograph Series No 9 (2010) 25, available at *http://www.cleen.org/Emergency%20Response%20to%20Victims%20of%20Gun%20Violence%20and%20Road%20Accidents.pdf*, accessed 24 March 2015.
[163] OAS, Report Situation of Human Rights in Brazil op cit note 55 para 26.

other persons who feel compelled to intimidate a witness. In Nigeria, these scenarios have occurred within the context of prosecution of former government officials for corruption and a political activist for treason.[164] Except in these exceptional circumstances, intimidation instances arising from serious crimes prosecutions can be manged by ordinary policing strategies. Securitization plays a role in drawing this distinction.

5.4.5. Sexual Offences and Domestic Violence

Another category of crimes often identified in witness protection conversations are sexual offences or domestic violence. As indicated in chapter three, high levels of intimidation exist in domestic violence and sexual violence.[165] Intimidation in these instances is fostered by factors such as the vulnerability of the victims and, the relationship and proximity between the victims and offenders. Practice confirms the predominance of these crimes within victim assistance schemes where protection is often limited to the psychological protection of victims aimed at protecting them from re-victimisation.[166] This conclusion is supported by Herman's findings that witness protection is very rarely implemented for these crimes.[167] This is because the incidences of intimidation arising within these crimes are handled by regular policing, social services agencies and other law enforcement agencies trained to cater for the needs of victims involved in crimes.

However, just like with murder and other serious offences, this research argues that sexual offences could be used in furtherance of organised criminal activities such human trafficking or kidnapping. There is enough information within human trafficking conversations that trafficked persons are highly susceptible to sexual assault and exploitation.[168] In this context, it is unlikely that victim protection mechanisms are adequate to protect witnesses. Their protection within the context of witness protection framework is more adequate.

Also, conversations that include sexual offences in witness protection are often within the context of transitional justice systems from armed conflicts or political instability. An example is

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[164] 'Dasuki: Court grant FG's application to shield witnesses' *The Guardian* 15 June 2017, available at *https://guardian.ng/news/dasuki-court-grants-fgs-application-to-shield-witnesses/*, accessed 18 March 2018.
[165] See Chapter 3; section 3.3.
[166] Sunniva McDonagh 'The Victims' Directive and the Prosecutor' Directive 2012/29/EU establishing Minimum Standards on the Rights, Supports and Protections of Victims of Crime 2, available at *https://www.dppireland.ie/filestore/documents/PAPER_-_Sunniva_McDonagh_SC.pdf*, accessed on 11 March 2017.
[167] J L Herman 'Justice from the Victim's Perspective', (2005) 11 (5) *Violence against Women*, 575.
[168] This is confirmed by participants O, P, Q of the empirical component of the research.

the post-election violence in Kenya, and the subsequent prosecution in the ICC.[169] However, they are only prosecuted where perpetrated as part of systemic violations of human rights in the context of crimes against humanity and other international crimes.[170] According to the Victims Witness Unit (VWU) of the ICC, its protection mandate does not include the protection of domestic violence or sexual violence unless such violence was connected to the witness status as a witness for crimes covered by its jurisdiction.[171] It is therefore appropriate to conclude that witness protection for sexual offences is of limited application. That is, where not in furtherance of organised crime or as part of human rights violations in the context of international crimes, sexual offences fall within the purview of victim protection.

5.5. Ascertaining Specific Underlying Factors that Identify the Scope of Crimes

The preceding discussions have established that witness protection gained notoriety in the prosecution of very specific type of crimes. However, despite the seeming uniformity within national jurisdictions, the inclusion of serious crimes that includes a wide range of crimes, creates an impression that the scope of crimes might not after all be finite. Also, the practice of the international criminal tribunals throws in a unique mix of crimes of significance to witness protection discussions. This chapter extends these conversations by proposing that, in determining the nature of crimes requiring witness protection, the problem is not so much about prescribing a definite list of crimes but a matter of identifying specific underlying factors which help identify the nature of crimes.

This section thus provides guiding factors useful in determining the nature of crimes within a witness protection framework. This is relevant specifically given the objection to the appropriateness of witness protection for treason and arms trafficking in the *Dasuki* and *Nnamdi*

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[169] *The Prosecutor v Kenyatta* supra note 61.

[170] See Safety Denied: Victim and Witness Protection in Sexual Violence Cases' A Joint Project of University of California, Los Angeles School of Law's International Justice Clinic and Aids-Free World (May 2011), 2 available at *http://aids-freeworld.org/Our-Issues/Sexual-Violence/~/media/Files/Sexual%20Violence/Witness%20Protection%20Paper%20for%20SOA%20Workshop.pdf*, accessed 24 January 2013.

[171] ICC 'Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court' 2, available at *https://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf*, accessed 7 July 2014. See also Nicola Henry 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence' (2009) *The International Journal of Transitional Justice*, 2.

Kanu cases. It is also useful for identifying the nature of crimes which may apply to section 232 (4) (e) of the ACJA as indicated in chapter two.[172]

A common similarity in the crimes identified in the preceding sections is the nexus between the concept of witness intimidation and the crime. The COE notes that the problem of intimidation frequently occurs in organised crime or terrorism prosecutions as prosecutors experience a higher incidence of witness disappearance, murder or other forms of reprisal attacks against witnesses cooperating with law enforcement.[173] The nature of intimidation in these instances often involves life threatening circumstances. Within this context, there is hardly any difference between organised crime and terrorist organizations as both groups can seriously obstruct justice by intimidating and harming the witnesses.[174] This is arguably responsible for the limited inclusion of domestic violence, sexual offences and other crimes within the scope of crimes requiring protection because the incidence of intimidation arising from these prosecutions are likely not life threatening and are tackled by conventional policing strategies.

Although most of the observations have been made with respect to organised crime and terrorist organisations, there are however shared similarities with the context of intimidation in transitional justice systems. The subsequent paragraphs thus highlight factors which the research proposes are most important in identifying the nature of crimes necessitating witness protection.

5.5.1. Difficult Prosecution/ Organised Criminal Group

A recurring theme in the preceding sections is the persistent difficulty of prosecuting certain crimes. Witness protection was preceded by the inability of prosecutors to prosecute specific crimes because offenders prevented witnesses from testifying against them. Closely associated with the difficulty in prosecution is the existence of an organised criminal group. Within the global context, witnesses testifying in certain prosecutions were subjected to an increased risk and obtaining evidence was extremely difficult.[175] Generally, the defendants belonged to a larger group and testifying against one person implied testifying against the larger group.[176] As indicated earlier,

[172] See chapter 2: 2.2.6.
[173] Preamble Council of Europe Committee of Ministers Recommendation Rec (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://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805b0cf7*, accessed 22 May 2017.
[174] COE 'Witness protection indispensable tool' note 141.
[175] Ibid 7.
[176] COE, Explanatory report, op cit note 139 para 38, p 7.

in states such as the US and Italy, the difficulties in getting witnesses to testify against the Mafia necessitated witness protection strategies.[177] The COE also associates these factors with terrorist groups, which it describes as a 'highly organised multifarious network' that makes it complex and challenging to investigate or prosecute because of their covert nature.[178] This element debunks arguments in support of witness protection for crimes like single assaults, murders, arsons or burglary as they are often perpetrated by individuals, who are not regarded as high profile criminals This is because the difficulty in prosecution is not necessarily within the dynamics between the offender and the witness, but the difficulty that the state experiences in tackling such offenders.

Furthermore, the specific nature of organised crime and terrorism perpetrated by structured criminal groups raises the additional challenge of investigating and prosecuting them without introducing extra-ordinary measures. Within this context, considerable significance is thus attached to the testimony of witnesses who by their proximity to the groups can provide valuable information about the criminal objectives and activities of their organisation.[179] An example is the testimony of a Sicilian mobster, Tomasso Buscetta which led to the indictment of over 400 members of the Mafia.[180] This element contributes to the continuous relevance of justice collaborators in witness protection practices.

5.5.2. Ability to Effect Intimidation/Status of the Defendant

Although the ability to effect intimidation is a common factor in witness protection as well as victim protection, informant protection and whistle-blowers protection, the additional status of the defendant as one who wields significant powers to suppress the witnesses and the relative inability of the justice system to prevent the acts of intimidation constitutes a critical difference.[181] Also, since the criminal activities in these cases are generally perpetrated by more than one individual, even where a specific defendant is being prosecuted, co-conspirators are likely to intimidate witnesses whose testimony can convict them.[182]

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[177] Fyfe & Sheptycki 'Facilitating witness co-operation' op cit note 9.
[178] COE, Witness protection indispensable tool note 141 at 6.
[179] COE, Best Practices Survey op cit note 133. See also Kramer op cit note 53 at 4.
[180] Acconcia et al 'op cit note 117 at 3. See also Tom Hundley 'Italy's Witness Protection Program Glutted with Mafiosi' *Chicago Tribune* August 24, 1997, available at *http://articles.chicagotribune.com/1997-08-24/news/9708240283_1_pentiti-giovanni-falcone-mafia,* accessed 23 August 2017.
[181] Ibid.
[182] Finn and Healey op cit note 159 at 2.

Fyfe observes that in prosecutions involving serious crimes, witnesses normally have a strong sense of fear ensuing from what they know about the defendant and their associates.[183] The status of their associates reinforces their capacity to retaliate against the witnesses.[184] The defendants and their associates usually have the resources and influence to threaten the witnesses and their families and also interfere with the legal process.[185] This factor emphasises the imbalance of power between the witness and the defendant particularly when the latter belongs to a (dangerous) group.[186]

Although witness protection transformed from a limited application to mafia-styled organised crime contexts, its continued relevance in crimes committed in a group context, such as gangs and terrorist groups, cannot be ignored. In Nigeria however, within the context of economic crimes, this factor also accommodates instances where the offender is a high-profile individual capable of influencing their associates to retaliate against witnesses. The status of the defendant as one with significant resources to carry out reprisal attacks is consequently an important criterion. This factor was clearly recognised by the court in the *Dasuki* case wherein the court alluded to the fact that the status of the defendant as a former National Security Adviser to the former President, a former military officer, a former aide de camp (ADC) and a crown prince of the Sokoto Caliphate, signified the potential to threaten the safety of the prosecution's witnesses.[187] Also in the *Nnamdi Kanu* case, although not part of an organised crime group or terrorist group, the defendant's status as the leader of a political tribal group with membership across Nigeria, raised concerns about the safety of witnesses testifying against him.[188]

5.5.3. Seriousness of the Crime

In several jurisdictions, the decision to protect is broadly dependent on the nature of the crime, the seriousness of the intimidation and the severity of the threat to the witness. Most eligibility criteria

[183] Ibid. See also Fyfe & Sheptycki 'Facilitating witness op cit note 9 at 45.
[184] Hadley op cit note 21 at 23-7.
[185] Institute of Security Studies op cit note 185.
[186] Yvon Dandurand 'Protecting Witnesses and Collaborators of Justice in Terrorism Cases' Paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Volume 3: Terrorism Prosecutions (2008) 41, available at *https://www.ufv.ca/media/assets/centre-for-indo-canadian-studies/Air+India+2.pdf,* accessed 23 March 2017.
[187] See also'Court Grants FG's Application for Protection of Witnesses in Dasuki's Trial, This Day June 16, 2017, available at *https://www.thisdaylive.com/index.php/2017/06/16/court-grants-fgs-application-for-protection-of-witnesses-in-dasukis-trial/*, accessed 18 March 2018.
[188] See discussions in chapter 2: 2.4.2.

require that the witness provides evidence in relation to the most serious crimes.[189] This norm is most criticised by human rights proponents. Specifically, they argue that regardless of the seriousness of the crime, protection should be available to all witnesses facing potential risks or intimidation arising from their cooperation.[190] They infer quite correctly that some crimes, though not grave in nature, may expose witnesses to the most serious threats. This for instance is expected in domestic violence cases, where the proximity and the relationship between the offender and the victim increases the threats they are exposed to. This proposes a situation where witness protection is available to witnesses of all types of crimes exposed to serious threats.

However, this proposition is not supported in practice. Thus far, practice confirms that protection is provided to witnesses involved in the most serious criminal cases of prosecutorial interests and not necessarily involving the most serious threats.[191] This is further limited by the recognition of the crimes committed by high-profile individuals or within a group context. This is particularly since there is no recognised right of protection to witnesses. In Nigeria like in other jurisdictions examined in this chapter, the seriousness and nature of crimes which have so far necessitated witness protection cannot be underestimated. Dandurand and Farr explain that the logic behind the restriction of witness protection to the most serious crimes is the necessity 'to establish priorities based primarily on the desire to facilitate the cooperation of witnesses in order to secure criminal convictions rather than on the premise that states have an obligation to protect all witnesses or that all witnesses have the right to be protected.'[192] In the US, witness protection is limited to Mafia and other types of organised criminal activities perpetrated by drug cartels, motorcycle gangs, prison gangs and violent street gangs[193] and terrorism. This is confirmed in Canada where protection remains limited to organised crime and terrorism prosecutions.[194] Ultimately, the seriousness of the offence also increases the threat levels and is enabled by the status of the defendant to carry out threats. Specifically, the priority attached to the inability of the

[189] See section 3521 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) Witness Protection Act 1994; section 7 Witness Protection Programme Act 1996; Section 10 (1) Witness Protection Act 1998; section 6 Witness Protection Act 2010; section 82 (4) Serious Organised Crime and Police Act (Chapter 15) 2005; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.
[190] OHCHR Compilation report op cit note 149 at 2.
[191] Dandurand and Farr op cit note 45 at 17.
[192] Ibid.
[193] See US Manual '9-21. op cit note 11.
[194] See Witness Protection Program Act –Annual report: 2015-2016 available at *https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/wtnss-prtctn-rprt-2015-16-en.aspx*, accessed 23 August 2017

state to successfully prosecute offences which affect the overall effectiveness of the criminal justice system is a fundamental determinant.

5.6. Conclusion

A specific objective of this chapter was to ascertain the nature of crimes that validate witness protection. While defining witness protection, it is important to also define crimes within the context of witness protection. As argued in preceding chapters, witness protection as a concept and a practice evolved within specific circumstances. More specifically, witness protection evolved from witness intimidation issues arising from the investigation and prosecution of crimes.

Using the heuristic tools developed in chapter three: the criminal justice and human rights perspectives, the question about the nature of crimes necessitating protection is problematised in this section framed as follows: is witness protection applicable for all crimes or for specific crimes and how are these crimes determined? This chapter explored the historical context in which witness protection evolved as a means of determining the nature of crimes. The chapter clarified that witness protection is limited to specific crimes and is defined by prosecutorial interest in prosecuting specific crimes: prompted by the prevalence of these crimes and the difficulty associated in prosecuting them. The chapter accentuated that although witness intimidation occurs in a wide variety of crimes, more significance is given to risks that arise where the offender has the capacity to successfully carry out reprisal attacks.

This chapter clarified also that although witness protection evolved from a limited application to mafia-styled organised crimes, it has evolved to include terrorism and other serious crimes, which are adopted within the broader narrative of being committed as part of organised criminal activities or gang-related circumstances. It however refutes human rights claims of the application of witness protection to all crimes. The chapter incorporated securitization discourse into the witness protection discussions to emphasise the security imperatives that justify witness protection. Securitization is relevant in delimiting the scope of crime to the extent that it justifies the underlying political forces that propel the evolution of witness protection. Here it is proposed that the crimes that require witness protection are those which threaten the security of the state. These crimes are thus determined by the priority of action: to ensure that specific crimes that are of interest to the government are successfully investigated and prosecuted.

From the preceding analysis, this chapter clarified that the most prevalent crimes that require protection and are recognised within practice include terrorism, drugs, arms and human trafficking, economic and financial crimes, organised crime and serious crime. It is in ascertaining what crimes connote serious crimes requiring witness protection that the omnibus provisions of section 232 (4) (e) ACJA requires clarification. Therefore, this chapter argues that it is not a matter of organised crime or that terrorism is more serious than other crimes, but simply because, other criminals are involved who may revert to intimidation to protect the perpetrator against prosecution: the threat usually lies within a group context. Another qualifying factor is the high-profile status of the offender who has the requisite means to intimidate witnesses and prevent attempts by the state to effectively investigate and prosecute crime.

Accordingly, factors such as the relevance of difficult prosecution, the status of the defendant/ability to effect intimidation and the seriousness of the crime discussed above are key pointers in determining the scope of crimes requiring witness protection. These factors have influenced the nature of crimes that have evolved within the practice in Nigeria. Also, they are applicable within the context of crimes such as drug-trafficking, arms trafficking, cybercrimes and kidnapping which are prevalent in Nigeria and for which criminal justice experts propose protection for witnesses.

CHAPTER SIX

TYPES OF PROTECTIVE MEASURES FOR WITNESSES

6.1. Introduction

This chapter explores the modalities of the types of protective measures obtainable for witnesses within witness protection schemes. In chapter three, witness protection was described as the application of measures instrumental in preventing or minimising the risk of harm or threats to a witness.[1] Literature on witness intimidation confirms that by nature, intimidation occurs before trial or during trial and does not necessarily stop at the end of the trial.[2] 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.

In Nigeria, the protective measures within the existing legal framework are limited to procedural measures available to witnesses during criminal prosecution in court.[3] It excludes long-term protective measures and pre-trial protective measures This chapter provides a critical appraisal of the types of protective measures available and considers the circumstances that have necessitated adopting these measures. It draws from existing literature to consider the nature of long-term measures and the viability of including these measures within the Nigerian framework. Also, in synthesising and assessing the existing types of protective measures, this chapter highlights the influences of the criminal justice and human rights views on these measures. The analysis in this chapter contributes to the overall objective of this thesis by providing standard indicators useful for improving the existing legal framework for witness protection in Nigeria.

[1] See chapter 3: 3.3.1.
[2] *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 23 p 4 available at *www.legislationline.org/documents/id/8998*, accessed 23 March 2013.
[3] See Chapter 2: 2.2; 2.4.3.

6.2. Classification of Protective Mechanisms

Within the existing literature,[4] protective measures are broadly categorised into physical[5] and psychological measures,[6] which may take the form of procedural or non-procedural/operational measures.[7] This section provides an overview of the types of protective measures that fall within these broad categories. Specifically, the synthesis provides a composite overview of protective measures available and the underlying nuances involved in assigning them to witnesses, from fragmented discussions within national criminal justice systems and the practices of international (criminal) courts/tribunals.

6.2.1. Physical Protective Measures

These are measures that guarantee the physical security of the witnesses and may take the form of operational (non-procedural) or procedural mechanisms.[8]

i. Operational measures

These are protective measures that do not affect the evidential rules of criminal proceedings.[9] They include short-term pre-trial measures and long-term measures adopted prior to the trial and after the trial, respectively.[10] Short-term measures are temporary and are adopted where there are no

[4] Comparative studies within existing literature depict practices that are generally similar among national criminal justice systems. See for example *Law Commission of India* 'Consultation Paper on Witness Identity Protection and Witness Protection Programmes' August 2004, available at *http://lawcommissionofindia.nic.in/Consultation%20paper%20on%20witness%20identity%20Protection%20and%20witness%20protection%20programmes.pdf*, accessed 10 January 2012.

[5] See Article 24 (2) (a-b) of the UNTOC. This is replicated by Art 32 (2) of the UNCAC. See also Article 68 (1) Rome Statute.

[6] See Articles 43 (6) and 68 (1) Rome Statute; see Rule 87(4) ICC RPE. See Rule 34 (A) (ii) ICTR RPE; Rule 34 (A) (ii) ICTY RPE. See also Paragraph 6 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

[7] 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) 5, available at *http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf*, accessed 7 February 2017. See also Nicholas Fyfe & James Sheptycki 'International trends in the facilitation of witness co-operation in organized crime cases' (2006) 3 (3) *European Journal of Criminology* 324.

[8] See Article 24 UNCTOC General Assembly resolution 55/25 of 15 November 2000, available at *https://www.unodc.org/unodc/en/treaties/CTOC/*.

[9] Council of Europe, 'Witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe' Report of the Committee on Legal Affairs and Human Rights, AS/Jur (2014) Para 23 p 8, available at *http://website-pace.net/documents/19838/166208/20141030-WitnessProtection-EN.pdf/ced4664d-1ea6-4200-9af5-1ebcb77b3981*, accessed 1 August 2017.

[10] OHCHR Compilation Report op cit note 7. See also Article 21 ICTR Statute of the ICTR which recognises the need for long-term protective measures. See also Article 22 ICTY Statute.

ascertainable risks but where there is an expectation of some level of risks to the witnesses.[11] These measures provide immediate protection pending the determination of the trial and pending where proper threat assessments are carried out by the appropriate law enforcement authorities. These include police protection involving regular surveillance, escorts and patrolling around the witness's residence and place of work, use of safe houses and temporary change of residence.[12] Although the existing legal framework in Nigeria is silent about these measures, the fieldwork component of this research confirms that in practice they are adopted by security operatives as measures for protecting witnesses.[13]

It is important to note, however, that short-term measures are not exclusive to witness protection. In fact, these measures are adopted by investigators and have more relevance within informant protection and in everyday policing.[14] It is argued by Pearson[15] and again by Finn and Healey,[16] that short-term measures do not fulfil the overarching objectives of witness protection, which is to protect witnesses of serious crimes particularly within the context of organised crime. These arguments are justified considering the discussions in the preceding chapters of this thesis where it was concluded that witness protection evolved within the context of specific crimes especially those difficult to investigate and prosecute using ordinary investigative strategies. Again, these arguments are justified from the historical antecedents of witness protection influenced primarily by criminal justice motivations.

A significant objection to short-term measures is that they are insufficient as the defendants envisaged within the context of witness protection have the capacity to breach these temporary measures. Also, they are expensive and resource intensive[17] and inimical to the kind of structure required of witness protection. Regardless of these objections, short-term measures remain necessary to cater for intimidation that occurs before the trial. The caveat however is that they

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[11] Karen Kramer 'Witness protection as a key tool in addressing serious and organised crime' 6, available at *http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf*, accessed 21 January 2013.
[12] Ibid. See also OHCHR Compilation Report op cit note 7.
[13] Response from participant G in the empirical component of this research.
[14] Kramer op cit note 11 at 6.
[15] See generally Elaine Pearson 'The need for effective witness protection in the prosecution of traffickers: a human rights framework for witness protection' *presented at the First Pan-African Regional Conference on Trafficking in Persons Abuja, Nigeria* 19-23 February 2001, 11, available at *http://old.antislavery.org/archive/other/witnessprotection.pdf*, accessed 4 May 2015.
[16] See 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 November 1996, 20, available at *https://www.ncjrs.gov/pdffiles/163067.pdf*, accessed 10 January 2012.
[17] Ibid.

should not be adopted ad hoc and should be adopted as part of a framework that guarantees more adequate protection.[18]

Regarding long-term protective measures, they are geared towards a somewhat permanent safety for the witness and include measures that minimise or prevent the risks that continue after the trial and possible conviction of the offender. The most recognised forms of long-term measures are identity changes and witness relocation facilitated through a witness protection programme. A witness protection programme is recognised as the most effective and common protective measure and is established through witness protection legislation.[19] In fact, as discussed in chapter five, the formal protection of witnesses began with their physical security in a witness protection programme. This is linked to the historical context in which it evolved, and the type of witnesses envisaged under this type of protection. This will be further elaborated in a subsequent section of this chapter.[20]

ii. Procedural Measures

These are measures adopted by the courts to protect witnesses during criminal proceedings.[21] They include altering evidentiary rules which may affect the rights of the defendant to a fair trial.[22] 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.[23] 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.[24] In

[18] See section 8 Witness Protection Act of South Africa.
[19] See for example section 3521 (a) (1) of Title 18 US Code; section 2 Witness Protection, Security and Benefit Act of Philippines; section 4 Witness Protection Program Act 1996 of Canada, section 4 Witness Protection Act 2006 (as amended 2010) Kenya; section 4 Witness Protection Act 1994 of Australia.
[20] See section 6.3.
[21] Goran Sluiter 'The ICTR and the Protection of Witnesses' 3 *Journal of International Criminal Justice* (2005) 962-966.
[22] 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.
[23] 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/organized-crime/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.
[24] Ibid.

Nigeria, the Evidence Act 2011[25] which provides for the admissibility of evidence produced by computers; electronic evidence, facilitates witness protection by accepting video recording of evidence of witnesses. This makes it possible for evidence to be taken via video conference or pre-recorded and helps to avoid intimidation and fear of reprisals resulting from the physical appearance of the witness and from facing the suspect(s) in court.

It is an accepted legal principle (and practice) that procedural measures should be adopted without prejudice to the rights of the defendant to a fair trial.[26] However, in practice, the application of these measures is objected to as adversely affecting the rights of the defendant to a public trial or cross-examination. As discussed in chapter two, the existing legal framework in Nigeria is limited to procedural protective measures and, so far, has been inconsistently applied by the Nigerian courts.[27] These inconsistencies to a large extent are linked to the nature of procedural measures sought by the prosecution: that is whether they are confidential measures or anonymity measures. It is important to draw these distinctions because they reflect the extent to which procedural measures may be objected to because they affect the rights of the defendants.

Confidential measures are non-disclosure measures and include the conduct of any part of the proceedings in camera or allowing the presentation of evidence by electronic means or use of pseudonyms.[28] A common objection to confidential measures is that they affect the right of the defendant to a fair hearing. As discussed in chapter two, this also formed the basis of the defendant's preliminary objection in the case of *FRN v Karibu Umar*, where the court allowed the use of pseudonyms and excluded the public from court.[29] As discussed, in this case the court interpreted section 34 of the TPAA as permitting the identity of a witness to be protected in 'special

[25] See section 84 (1). Section 83 (1) permits the admissibility of documentary evidence generally.
[26] 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.
[27] Chapter 2; 2.4.
[28] Art 68 (2) Rome Statute.
[29] See also *The Prosecutor v Dusko Tadic aka "Dule"* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses 10 August 1995, available at *http://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm*, accessed 29 May 2017.

circumstances' such as in terrorism prosecutions.[30] However, a significant objection to procedural measures occurs where protection involves anonymity measures.[31]

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.[32] These measures provide partial or absolute anonymity.[33] 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,[34] absolute anonymity conceals the identity of the witness throughout the proceedings. Croquet,[35] Leigh[36] and Trotter,[37] describe anonymity measures as the gravest form of interference with the right to cross-examination, an issue to which discussions return later.[38]

6.2.2. Psychological Protective Measures

These are measures that protect the emotional wellbeing of witnesses by preventing emotional harm and re-victimisation.[39] Psychological measures tackle implicit intimidation in the form of psychosomatic intimidation against witnesses, such as cross-examination tactics used by defence counsels to discredit witness testimony.[40] Examples include witness assistance mechanisms such as counselling, rehabilitation, financial assistance, and administrative support.[41] They may take the form of procedural measures or operational measures.[42] The Trial Chamber in the *Tadic* Case[43] explained that procedural measures such as video links and closed-circuit television which prevent

[30] Ihuoma Chiedozie 'B'Haram: witness refuse to testify in open court' *Punch* 4 April 2014, available at *http://www.punchng.com/news/bharam-witness-refuses-to-testify-in-open-court/*, accessed 6 May 2015.
[31] See *Kostovski v The Netherlands* (Application no, 11454/85) ECHR Judgment 20 November 1989 available at *http://hudoc.echr.coe.int/ENG?i=001-57615*, accessed 15 June 2017. See also *The Prosecutor v Rutaganda*, Case No ICTR-96-3-T, Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses (International Criminal Tribunal for Rwanda, Trial Chamber I, 26 September 1996.
[32] 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.
[33] See Nora V Demleitner 'Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options? (1998) 46 *American Journal of Comparative Law* 646.
[34] See Article 68 (5) Rome Statute. See r 66 (A) (i), and 69 (c) ICTY RPE, Rule 69 (c) ICTR RPE.
[35] Croquet op cit note 32 at 4.
[36] Monroe Leigh 'Witness Anonymity is inconsistent with Due Process' (1997) 91 (1) *The American Journal of International Law,* 80.
[37] 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.
[38] See discussions in 6.3.2.
[39] Paragraph 6 of the United Nations Declaration of Basic Principles of Justice for Victims; Article 25 UNTOC.
[40] These issues have been extensively discussed in chapter 3. See Finn and Healey op cit note 16 at 1-2.
[41] Rule 16 ICC RPE. See Rule 34 (A) (ii) ICTR RPE and Rule 34 (A) (ii) ICTY RPE.
[42] Rydberg op cit note 22 at 462.
[43] *Tadic* Case op cit note 29.

the witness from seeing the defendant while testifying, protect them from possible traumatisation.[44] In Nigeria, except for the NAPTIP Act and VAPPA, which is limited to the victims of human trafficking and acts of violence respectively, and not witnesses of other crimes, psychological protection such as rehabilitation, assistance and counselling is excluded within the existing legal framework.

Psychological measures gained more prominence within the context of witness protection in the practices of the international criminal tribunals particularly with respect to victims of rape and sexual assault during armed conflicts.[45] The nature of these crimes and the subsequent prosecutions revealed the inadequacy of physical protection, which ignored the specific needs of victim-witnesses, particularly their dignity and privacy.[46] Measures were therefore introduced to support victims to cope with the psychological effects of testifying.[47] Furthermore, these measures developed from the standpoint of the absence of witness protection programmes within the international criminal court systems.[48] Although the use of psychological protection within witness protection discourse suggests a limited application to victim-witnesses, particularly those testifying in crimes of a sexual nature, it remains relevant for witnesses of organised crimes, terrorism and other serious offences. It is suggested that the focus should be on the power relations that exists between the witness and the defendant. Consequently, a witness who faces the risk of retaliation and intimidation and is likely to be exposed to re-victimisation by the events of the crime should be provided psychological protection.

While this suggestion may appear straightforward for victim-witnesses or innocent bystanders, the element of psychological harm within this context is less convincing for justice collaborators. This is because justice collaborators are offenders and are more likely to experience direct intimidation and require physical protection. However, upon necessary assessment by the relevant authorities, it may be helpful to also provide some psychological protection to justice collaborators in addition to physical protection.[49] It is increasingly accepted that a holistic approach to the concept of witness protection recognises that there should be no separation of

[44] Ibid Para 45.
[45] See Article 34 (A) (ii) ICTR Statute. See also Rule 34 A of the ICTY RPE.
[46] OHCHR conference compilation op cit note 7 at 30, 68.
[47] UNODC Good Practices op cit note 23 at 28.
[48] *Tadic* case op cit note 28 Para 65; Ngane op cit note 23 at 449.
[49] See Kramer op cit note 11 at 4.

physical protection from psychological protection.[50] Like physical protective measures, psychological protective measures are provided at all stages of the criminal trial.[51]

6.3. How Have Criminal Justice and Human Rights Perspectives Influenced Protective Measures?

From the preceding discussions, allusions were made to the historical context in which protective measures evolved. Just like the analysis in the previous chapters showed that the predominant debates on witness protection literature fall within two broad perspectives, this section examines how these measures have been influenced by criminal justice and human rights perspectives. This section also considers the criticisms against these measures and how this affects their use in practice.

6.3.1. Witness Protection Programmes

As indicated earlier, witness protection programmes, facilitated through identity changes and relocation are the most recognised forms of long-term measures. According to the UNODC, identity change involves the creation of a new personal profile for the witness, whereby the original identity of the witness is hidden, and new personal documents are issued by creating a substitute life history.[52] Identity changes are adopted in situations where the witness is a justice collaborator testifying against former accomplices and can no longer return to their previous environments.[53] Identity changes are combined with the relocation of the witnesses,[54] which involves permanently resettling the witnesses.[55]

A significant consideration in discussing witness protection programmes is the historical context in which it evolved. Witness protection programmes developed within the context of organised crime cases and terrorism-related offences, and were considered an effective means of dismantling powerful criminal organisations by prosecuting the command structure.[56] Since the

[50] OHCHR Conference compilation op cit note 7 at 68.
[51] UNODC Good Practices op cit note 23 at 27-8.
[52] Ibid.
[53] Ibid.
[54] See for example section 3521 (a) (1) of Title 18 US Code; section 4 Witness Protection Program Act 1996 of Canada, section 4 Witness Protection Act 2006 (as amended 2010) Kenya; section 13 (2) Witness Protection Act 1994 of Australia; section 1 Witness Protection Act 1998 of South Africa. See also National Crime Agency, UK Protected Persons Service, available at *http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-protected-persons-service*, accessed 20 June 2018.
[55] Finn and Healey op cit note16 at 24.
[56] COE Witness protection as an indispensable tool op cit note 9.

witnesses testifying in these cases were predominantly justice collaborators whose identities were known to the defendants, other forms of protective measures, particularly procedural protective measures in court, were inadequate.[57] It is expected therefore that by changing the witness's identity, the previous history of the witness is reconstructed in a way that improves the chances of the witness's ability to own the new identity. More importantly it makes it difficult (for unauthorised persons) to trace the witness's original identity.[58] Relocation helps to reduce the chances of tracing them or discovering their whereabouts by those who seek to attack them.[59] The witness protection programme was then regarded as a critical component of a witness security scheme and the single most effective protection for witnesses[60] exposed to the highest threat levels[61] which cannot be adequately tackled by alternative means.[62]

From all indications, these measures were influenced by criminal justice motivations justifying its use to specific crimes and for justice collaborators. The requirement that a defendant has the right to confront his accusers in cross-examination meant that the justice collaborators, whose identities are known to the defendant, were easy targets for reprisals. In such circumstances, the only realistic options available to the witnesses were identity changes and witness relocation facilitated through witness protection programmes.[63] Over the years, however, witness protection programmes became available for other witnesses, especially eyewitnesses whose identities are known to the defendant.[64] Their inclusion is restricted to eyewitnesses testifying in the most violent

[57] Jonathan Hadley *Witness Intimidation and Protection Practices: A Front-Line View from Helsinki, Consideration of Finnish Police Law, and Review of Research in the UK* POLIISIAMMATTIKORKEAKOULUN TIEDOTTEITA (2006) 23-4, available at *https://www.theseus.fi/bitstream/handle/10024/86795/witness%20intimidation_tiedotteita54.pdf?sequence=1*, accessed 24 March 2017.
[58] Ibid.
[59] Sasa Paunovic, Dusan Starcevic and Laza Nesic 'Identity Management and Witness Protection System' (2013) 66 *Management Journal for Theory and Practice Management* 29.
[60] Finn and Healey op cit note 16 at 24.
[61] OHCHR Compilation Report op cit note 7 at 11.
[62] UNODC Good Practices op cit note 23 at 29.
[63] Hadley op cit note 57.
[64] A Beijer and A.M. van Hoorn 'Report on Anonymous Witnesses in the Netherlands' I July 1997, 528, available at *https://dspace.library.uu.nl/bitstream/handle/1874/43921/b25.pdf?sequence=1...y*, accessed 14 June 2018.

crimes.[65] The seriousness of the crime remains a key consideration for their inclusion within witness protection programmes.[66]

Its limited application to justice collaborators or eyewitnesses testifying in specific crimes as defined in chapter five of this research, and the significance attached to the witness's testimony constitute the primary criticism against witness protection programmes. Central to this is that it places a higher premium on the interest of the state in protecting witnesses of importance to them rather than on the rights of witnesses to protection, regardless of the value of their testimony to the prosecution. That is, it favours the interest of the prosecution and justice collaborators over societal interests.[67] This includes perceptions that witness protection programmes reward former criminals who cooperate in the hope of getting lighter sentences[68] and the harm to the public whose welfare is affected by accepting individuals with previous criminal records into their communities without the knowledge of their criminal history.[69] The apprehension is that justice collaborators have the potential to relapse into criminal activities and, in doing so, they put societal interests at risk.[70]

Over the years, prosecutors have justified witness protection programmes as a choice between harm to the public from the inability of the state to prosecute (organised) crime, above the harm to the public through protection of the witnesses.[71] I argue here that securitization explains the continuous use of these measures despite the criticisms against them. By injecting

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[65] US Department of Justice 'Public Summary: Department of Justice's Response to the Office of the Inspector General's Draft Interim Audit Report entitled Department of Justice's Handling of Known or Suspected Terrorists Admitted into the Federal Witness Security Program (April 19 2013), Office of the Deputy Attorney General, 6 May, 2013, 4, available at, *https://assets.documentcloud.org/documents/701397/odag-public-response-to-oig-witsec-interim-audit.pdf,* accessed 19 June 2018.

[66] Office of the United States Attorneys' Manual 9-21.ooo-Witness Security, United States Department of Justice, available at *https://www.justice.gov/usam/usam-9-21000-witness-security*, accessed 24 August 2017. See also Maeve McClenaghan 'Witness protection: A Life Worth Living? *The Bureau of Investigative Journalism* 28 March 2012, available at *https://www.thebureauinvestigates.com/stories/2012-03-28/witness-protection-a-life-worth-living*, accessed 20 June 2018.

[67] For more debates see Frank Vincent 'Review of the Witness Protection Act 1991' Victoria State Government (March 2016) 17 available at *http://assets.justice.vic.gov.au/justice/resources/81f81a91-0ad6-40ff-8310-3a1a45ce9869/review_of_witness_protection_act_1991.pdf*, accessed 29 March 2017.

[68] See Julie Zaugg 'When the State hides its criminal citizens' 20 February 2013, available at *http://www.swissinfo.ch/eng/witness-protection_when-the-state-hides-its-criminal-citizens/35013458,* accessed 22 March 2013.

[69] Nicholas Fyfe and James Sheptycki 'Facilitating witness co-operation in organised crime cases: An international review' *Home Office Online Report* 27/5 2005, 4 available at *http://www.researchgate.net/profile/Nicholas_Fyfe/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4.pdf,* accessed 9 April 2015.

[70] Vincent op cit note 67.

[71] Fyfe & Sheptycki Facilitating witness co-operation op cit note 69.

urgency into the inability to successfully prosecute offenders without these measures, the state justifies the necessity to adopt them[72] as the most effective means of facilitating witness cooperation and by implication a conclusive trial. However, practice over the years requires the necessary authorities to balance the need to adopt these extra-ordinary measures against their potential danger to the community to where the witnesses will be relocated.[73]

Another criticism is the effect of witness protection programmes on the psychological adjustment of the witnesses, who are not justice collaborators.[74] Since relocation requires the witnesses to sever ties with their family and close associates, this sets some limitations on their liberties.[75] According to Demleitner, while it is easier for the state to impose such limitations on justice collaborators, it is less justifiable for victim-witnesses or innocent bystanders.[76] Furthermore, where witnesses are relocated into close knit communities, they are conspicuous, thereby making it difficult to integrate into their new location and identity.[77] Within closed communal societies, people are inclined to mix with persons of similar ethnic or religious backgrounds. In instances where the witness does not fit in because of religious differences, language or other socio-cultural barriers, this makes it difficult to protect them.[78]

Other criticisms include the high costs associated with effectively facilitating an identity change and relocating witnesses.[79] Obtaining a new identity for the witnesses and settling them into new locations require providing witnesses with means of economic sustenance, as well as producing new documents necessary for sustaining their new identities.[80] A report by Kariri and

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[72] Holger Stritzel 'Towards a theory of securitization: Copenhagen and beyond' (2007) 13 (3) *EJIR* 361.
[73] Chris Mahony *The Justice Sector Afterthought: Witness Protection in Africa*, 10, available at *http://www.issafrica.org/pubs/Books/WitnessProt4.pdf*, accessed on 10 January 2012.
[74] Scott Shafer 'Do witness protection programs really protect' available at *http://www.npr.org/templates/story/story.php?storyId=14034143*, accessed 24 March 2014. See Jeff Sallot 'Life in witness protection: no friends, no job and no security, 17 April 2018, available at, *https://www.theglobeandmail.com/news/national/life-in-witness-protection-no-friends-no-job-and-no-security/article25297147/*, accessed 17 June 2018.
[75] UNODC Good Practices op cit note 23 at 86. See also Wilson Kiprono et al 'Witness Protection Socio Cultural Dilemmas' (2015) 2 (10) *International Journal of Scientific Research and Innovative Technology* 55.
[76] Demleitner op cit note 33 at 659.
[77] Kramer op cit note 11 at 11. See also OSEC 'Review of the Criminal Justice System in Kosovo: The protection of witnesses in the criminal justice system, the administration of justice in minor offences courts, Juveniles in criminal proceedings' (2006) Organization for Security and Co-operation in Europe Mission in Kosovo, 11, available at *http://www.osce.org/kosovo/23307?download=true*, accessed 11 March 2017.
[78] UNODC Good Practices op cit note 23 at 79.
[79] OSEC op cit note 77. See also Demleitner op cit note 33 at 659.
[80] Kramer op cit note 11 at 12; Yvon Dandurand and Kirstin Farr 'A review of selected witness protection programmes' Prepared for Research and National Coordination, Organised Crime Division, Law Enforcement and

Uyo shows that the cost of facilitating identity changes and relocation of witnesses in South Africa and Kenya makes it increasingly difficult to adopt these measures even where they are most suitable in the circumstances.[81]

Regardless of the above criticisms, these measures remain relevant in practice and are considered the most effective means of long-term protection of witnesses.[82] This is specifically relevant in prosecutions where the aim is to tackle organised criminal groups. However, the UNODC emphasises that these are measures of last resort.[83]

6.3.2. Procedural Measures

As indicated earlier, procedural measures, which include confidentiality and anonymity measures, are adopted to protect the witness from intimidation occurring during the criminal trials in court. Like Nigeria, these measures are recognised in other national systems[84] and there is extensive literature on the subject particularly from the jurisprudence of the ECHR,[85] international criminal tribunals[86] and reports of Law Reform Commissions[87] reflecting the practices in several national criminal justice systems.

Since these measures potentially alter the evidentiary rules, they are often criticised as affecting the rights of the defendant to a public trial or cross-examination.[88] These rights are

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Policy Branch, Public Safety Canada 2010, 5, available at *http://www.publications.gc.ca/collections/collection_2011/sp-ps/PS4-96-2010-eng.pdf*, accessed 17 January 2013.

[81] Jemima Njeri Kariri and Uyo Salifu 'Witness Protection Facilitating Justice for Complex Crimes' Institute of Security Studies Policy Brief 88, August 2016, available at *https://issafrica.s3.amazonaws.com/site/uploads/policybrief88.pdf*, accessed 2 August 2017.

[82] They are widely adopted in the US and are considered as beneficial to ensuring conviction of high-profile criminals. See US Department of Justice Public Summary Report op cit note 65 at 2.

[83] UNODC Good Practices op cit note 23 at 8. See also *See Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui*, Situation in the Democratic Republic of Congo, Case No. ICC-01/04-01/07, Victims and Witness Unit's considerations on the system of witness protection and the practice of 'Preventive relocation', 12 June 2008, para 8 p 10, available at, *https://www.icc-cpi.int/CourtRecords/CR2008_03467.PDF*, accessed 4 November, 2017.

[84] See sections 19 Youth Justice and Criminal Evidence Act 1999

[85] See *Kostovski* case supra note 31 para 43; see also *Doorson v The Netherlands* (Application no 201524/92) ECHR Judgement 26 March 1996, para 70-2 available at, *http://www.hr-dp.org/files/2013/09/08/CASE_OF_DOORSON_v._THE_NETHERLANDS_.pdf*, accessed 15 June 2017. See also V*an Mechelen and Others v. The Netherlands*, 55/1996/674/861-864, ECtHR, 23 April 1997 available at *http://www.hrcr.org/safrica/arrested_rights/mechelen_netherlands.html*, accessed 15 June 2017.

[86] See the *Tadic* case op cit note 29. See also *Prosecutor v Rutaganda* op cit note 31.

[87] *Law Commission of New Zealand* Evidence Law and Witness Anonymity *Preliminary Paper 29* A discussion Paper, September 1997, 7, available at, h*ttp://www.nzlii.org/nz/other/nzlc/pp/PP29/PP29.pdf*, accessed 15 June 2018. See also Law *Commission of New Zealand* Evidence *Law: Witness Anonymity* E3IAE, Report 42, November 1997, available at, *http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R42.pdf*, accessed 15 June 2018. See also Law Commission India op cit note 4; See also Beijer and van Hoorn op cit note 64.

[88] See Article 14 (3) (b) (e) ICCPR; section 6 (3) of the ECHR.

established in international human rights instruments[89] and in Nigeria are protected as constitutional rights by section 36 (4) of the 1999 Constitution (as amended). The Law Commission of India explains that the right to a public hearing ensures public attendance at criminal prosecutions, which secure strong confidence in the judicial systems, as secret trials are likely to breed abuse.[90] Due to the adverse effects of intimidation and the need to mitigate against it, the courts were empowered by legislation to adopt confidential measures as an exception to the right to a fair hearing.[91] The tendency was to counter balance the defendant's right against the rights of witnesses to testify, in the interest of justice. [92]

Similarly, anonymity measures that conceal the identity of the witness interfered with the right to cross-examination.[93] This right allows the defendants to confront witnesses testifying against them through a thorough examination of incriminating evidence, including the witness's demeanour.[94] By concealing their identities, it prevents the defence from questioning the witness's credibility.[95] It is argued that where the witness's identity remains unknown throughout the proceedings, the accused is prevented from observing the witness's demeanour, which helps to determine the credibility of the evidence[96] and, according to Bates, poses a significant risk to the legitimacy of the court's decision.[97]

[89] Ibid.
[90] Law Commission India op cit note 4 at 61.
[91] See section 232 (2) (3) ACJA 2015.
[92] Croquet op cit note 32 at 8; See also Mailey Brady Bates 'A Balancing Act: The Rights of the Accused and Witness Protection Measures' (2014) 17 *Trinity College Law Review* 151.
[93] See Article 68 (5) Rome Statute. See r 66 (A) (i), and 69 (c) ICTY RPE, Rule 69 (c) ICTR RPE.
[94] Bates op cit (n 92). See also Jason Swergold 'Taking Blind Shots at a Hidden Target: Witness Anonymity in the United Kingdom (2009) 32 (2) *Boston College International and Comparative Law Review* 474-78 which gives a historical analysis of the right to open confrontation by the accused person.
[95] Beijer and van Hoorn op cit note 64 at 524. See also Joan Coomparet- Cassani 'Balancing the Anonymity of Threatened Witnesses versus a Defendant's Right of Confrontation: The Waiver Doctrine after Alvardo (2002) 39 *San Diego Law Review* 1174.
[96] See Kostovski case op cit note 31 para 43.
[97] Bates op cit note 92 at 152.

Timothy,[98] Coyle[99] and Douglas,[100] however have countered the objections arising from the defendant's inability to observe the witness' demeanour. They note that issues of credibility and demeanour are within the competence of the judge and not the defence (counsel). Timothy for instance argues that, in recent years, psychologists have challenged the viability of a witness's demeanour as a test of credibility as there are other factors more valid in determining witness credibility.[101] Despite the above objections to anonymity measures, however, they are granted under certain circumstances.[102] In such instances, the interest of the defence to a fair hearing is weighed against the interest of the state and the society who protect the witness in the interest of justice.[103]

The above analysis is relevant to the Nigerian discourse because the above criticisms have formed the basis of objection in adopting procedural measures in the Nigerian practice of witness protection, especially as it relates to the rights of witnesses versus the rights of the defendant.[104] While the defendants[105] have expressed that some of the protective measures, such as masks and screen, recognised within the existing legal framework adversely affect their right to cross examine witnesses, the prosecution has argued that failing to adopt measures that guarantee the protection of witnesses, interferes with the rights of the witnesses to safety.[106] The criminal justice experts participating in the fieldwork component of this research agree with the prosecution's arguments and maintain that the refusal to grant protection to witnesses in favour of the defendant's objections 'is an attempt to apply the constitution beyond its limits.'[107]

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[98] James P Timothy 'Demeanour Credibility' (2000) 49 (4) Catholic University Law Review 904, 922.
[99] Ian R Coyle 'How do Decision Makers decide when witnesses are telling the truth and what can be done to improve their accuracy in making assessments of witness credibility'? Report to the Criminal Lawyers Association of Australia and New Zealand, 3 April 2013, available at *https://eprints.usq.edu.au/23356/1/Coyle_Report_2013_AV.pdf*, accessed 18 July 2014.
[100] James Douglas 'How should Tribunals evaluate the evidence' A paper delivered at the 7th Annual Australian Institute of Judicial Administration Tribunal's Conference, Brisbane 11 June 2004, available at *http://www.austlii.edu.au/au/journals/QldJSchol/2004/35.pdf*, accessed 18 July 2014.
[100] Timothy op cit note 98 at 930.
[101] These include the opportunity and capacity to observe and narrate the events that form the fact in issue, existing bias between the witness and accused person, the character of the witness, and prior inconsistent statement. Timothy ibid 908-912; Coyle op cit note 98; Douglas op cit note 100.
[102] This is further elaborated in subsequent sections.
[103] See for example rule 5, Witness Protection Rules 2015 Kenya. See also section 88 Coroners and Justice Act 2009.
[104] See chapter 2; 2.4.
[105] See the cases of *FRN v Sambo Dasuki* and *FRN v Nnamdi Kanu* discussed in chapter 2.
[106] Such right is embedded within para (a) of the proviso of section 36 (4) CFRN 1999.
[107] See discussions in chapter 8: 8.3.5.

The argument made here is that while justifications for procedural measures are driven by both criminal justice perspectives emphasising the need to ensure successful prosecution, and human rights principles, which recognise the need to protect the rights of the witness, the objections to these measures are purely from human rights influences. In chapter three,[108] it was indicated that early traces of procedural measures are linked to victim protection and were incorporated in legislation to protect vulnerable persons.[109] Within this context, these measures were adopted to support their rights to privacy and the psychological wellbeing of victims.[110] With the increasing inclusion of human rights voices within witness protection discussions, particularly the inclusion of victim-witnesses, procedural measures became recognised in witness protection practices and remain relevant.

Regardless, the issue of intimidation remained a criminal justice concern, and confidential and anonymity measures became a means of tackling the effect of intimidation on the society. The court therefore developed rules to ensure a seamless application of these measures by balancing the fair hearing rights of the defendant to the competing rights of the witnesses and the society.[111] Over time, it was implied that, in exceptional circumstances and according to the principles of legitimate expectations,[112] the right to cross-examination is not absolute[113] and the identities of the witnesses may be concealed from the defendant. It is however to be emphasised that anonymity measures were permitted to protect the safety of the witnesses and to prevent any real harm to public interest,[114] especially in prosecutions involving serious crimes.[115] Since the international community prioritised and securitised the effect of intimidation in specific crimes, the courts

[108] See chapter 3: 3.3.2.
[109] See for example sections 19, 23-29 of the Youth Justice and Criminal Evidence Act 1999 UK.
[110] See also 'The Crown Prosecution Service 'Witness Protection and Anonymity,' available at *http://www.cps.gov.uk/legal/v_to_z/witness_protection_and_anonymity/*, accessed 1 August 2017.
[111] Beijer and van Hoorn op cit (n 64) 527. See also Babak A Rastgoufard 'Pay Attention to That Green Curtain: Anonymity and the Courts' (2003) 53 (4) *Case Western Reserve Law Review* 1030.
[112] Ibid 528.
[113] Law Commission New Zealand Report 42 op cit (n 87) 19-20. See also Law Commission India op cit (n 4) 61
[114] Section 89 (2). See Lord Justice Levenson's Ruling on Anonymous Witnesses in *The Leveson Inquiry* 9 November 2011, available at *http://webarchive.nationalarchives.gov.uk/20140122203415/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Anonymous-Witnesses-Ruling-PDF-64.5-KB.pdf*, accessed 19 June, 2018.
[115] Section 74 of the Coroners and Justice Act 2009.

accepted changes in criminal law aimed at dealing with new categories of powerful offenders and criminal reforms, which changed legal procedures.[116]

Over the years, the courts developed specific conditions for granting anonymity measures which evolved mainly from the jurisprudence of the ECHR and are summarised as:[117]

1. the existence of real fear for the safety of the witnesses (including family);
2. the importance and significance of the witness testimony to the prosecutor's case;
3. the ability of the judge to observe the identity and demeanour of the witness;
4. the judges cannot decide the defendant's guilt without the uncorroborated testimony of the anonymous witness;
5. the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that makes identity traceable;
6. the identity of the witness must be released when the threat ceases to exist; and
7. the ineffectiveness or nonexistence of a witness protection programme or other suitable protective mechanisms.

These conditions have been included in national witness protection legislation[118]and have also been established in the practice of the international criminal tribunals.[119] These regulated conditions seek to limit the ad hoc application of procedural measures and the granting of anonymity measures in circumstances other than these, are deemed prejudicial to the rights of the accused.[120] These conditions are useful to Nigerian courts in resolving the inconsistencies that arise from procedural measures as highlighted in chapter two. Preferably, these measures should be incorporated within witness protection legislation in Nigeria or part of formal guidelines prepared by the office of the prosecutor.[121] The fact that anonymity protective measures are

[116] Simon Hallsworth and John Lea 'Reconstructing Leviathan: Emerging contours of the security state' (2011) 15 (2) *Theoretical Criminology* 143-148.
[117] See the *Doorson* case op cit note 85; the *Kostovski* case op cit note 31.
[118] For example, Witness Protection Regulation 2015 Kenya and see section 88(2-5) Coroners and Justice Act 2009.
[119] See *Tadic case* op cit note 115 para 62-71; *The Prosecutor v Slobadan Milosevic*, Case No IT-02-54-T, Decision on Prosecution motions to call additional witness and for order for protective measures including use of video-conference link, 28 August 2002, available at *http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/03190125.htm*, accessed 12 September 2017.
[120] Rydberg op cit (n 22) 475.
[121] 'The Director's Guidance on Witness Anonymity December 2009, Para 10 available at *http://www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html#a01*, accessed 30 September 2017.

acceptable only in exceptional circumstances and subject to restrictions, is further indication that witness protection furthers the interest of prosecution (government) and is reserved for the most exceptional circumstances, particularly involving serious crimes.

6.4. Determining the Degree of Protection

From the preceding analysis, this research identifies certain factors that help determine the protective measures to be assigned in specific circumstances. These are enhanced by the principles of necessity and proportionality. In every instance where protective measures were introduced, they were necessary to ensure the safety of the witness and to further the administration of justice. Protection is necessary to the extent that it is the only means to facilitate the witness's cooperation. According to Croquet, necessity answers questions about whether the protective measure is required to further the declared policy goal of the government.[122] That is, in the absence of a witness protection programme, for instance, it is crucial to adopt procedural measures that guarantee the witness's safety. The court should, however, adopt a measure that least violates the fair hearing rights of the defendant. Proportionality is then used to justify the relevant measure considering what is legally possible. [123]

These principles are applied along three specific lines; the severity of the threat assessment, the relationship between the type of crime and protective measure, and the relationship between the class of witness and the protective measure.

1. Generally, threat assessments determine if a witness needs protection and the level of protection required. Accordingly, the level of risk the witness is exposed to determines the nature and extent of the protective measures adopted.[124] Consequently, it is the case that anonymity measures, identity changes and witness relocation, are limited to high-level threats involving organised crime and where the threat cannot be averted through other measures.[125] In these circumstances, the significant determinant is that the witness is exposed to extreme danger and their testimony is significant.[126]

[122] Croquet op cit note 32 at 10.
[123] Robert Alexy *A Theory of Constitutional Rights (Translated by Julian Rivers* (2001) p xxxi.
[124] Yvon Dandurand 'Protecting Witnesses and Collaborators of Justice in Terrorism Cases' Paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Volume 3: Terrorism Prosecutions (2008) 45, available at *https://www.ufv.ca/media/assets/centre-for-indo-candian-studies/Air+India+2.pdf*, accessed 23 March 2017.
[125] UNODC Good Practice op cit note 23.
[126] Fyfe & Sheptycki Facilitating witness co-operation op cit note 69 at 10.

2. Where the crimes involve high risks, identity changes and witness relocation in witness protection programmes[127] or full anonymity measures may be the protective measures that are proportionate to the level of risk to which witnesses testifying in these crimes are exposed.[128] Where prosecution involves serious crimes, however, the most likely witnesses are justice collaborators whose identities are known to the defendant. In such circumstances, protective procedural measures may be ineffective as they are limited to the duration of the trial and not long term. [129] In chapter three, it was highlighted that witness assistance measures primarily focus on sexual offences and trafficking in persons.[130] This is because these measures are relevant to provide support, counselling and rehabilitation for victim-witnesses involved in these crimes. These measures are necessary where sexual violence is used in furtherance of organised crime.

3. Furthermore, the category of witness plays a significant role in determining the type of protective measure assigned to them. Where the protective measure involves identity change and relocation of witnesses, priority is given to justice collaborators. This is rationalised because where the crime involves an organised criminal group, the evidence provided by justice collaborators cannot easily be provided by other witnesses.[131] In addition, short-term measures may be inadequate since the identity of the justice collaborator is known to the defendant. In such instances it is appropriate for long-term protection such as relocation to be assigned.[132]Although witness protection programmes were historically reserved for justice collaborators, other classes of witnesses may be included as well. However, concerns about their psychological adjustment are raised. In such instances, witness protection programmes are adopted only where there are no options available. To that end, witness protection programmes are measures of last resort.[133]

[127] Trotter op cit note 37 at 535; Hadley op cit note 57.
[128] *Law Commission of New Zealand* Evidence Law and Witness Anonymity *Preliminary Paper 29* A discussion Paper, September 1997, 9, available at h*ttp://www.nzlii.org/nz/other/nzlc/pp/PP29/PP29.pdf*, accessed 15 June 2018.
[129] Trotter op cit note 37 at 535; Hadley op cit note 57.
[130] See chapter 3; 3.1.2.
[131] Kramer op cit note 11 at 9; Dandurand op cit note 124 at 22.
[132] Hadley op cit note 57.
[133] *See Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui,* 'Preventive relocation' supra note 81 para 10 p 8.

On the other hand, although procedural measures are used for all categories of witnesses, it is unlikely that the courts will be willing to grant absolute anonymity to justice collaborators. This is because their prior criminal histories question the credibility of their testimony, thus necessitating further evidence to corroborate their testimony.[134] Consequently, these measures are granted to justice collaborators with caution.[135] Nonetheless, since the defendant already knows the witness, the viability of such measures is inadequate and unrealistic as the defendant is able to identify the witness from the substance of the testimony provided and inform other accomplices who may retaliate against the witness[136] and necessitating longer-term measures of identity change and relocation.

In the case of an innocent bystander, the actual identity of the witness is irrelevant, and the credibility of the witness is not in issue.[137] Consequently in requesting for and assigning anonymity measures, priority is given to innocent bystanders and is deemed appropriate. This is because in the absence of a personal relationship between the witness and the defendant outside witnessing the crime, procedural measures that protect the witness' identity are enough.[138]

6.5. Conclusion

This chapter examined the types of protective measures; these included short term measures, procedural measures and long-term measures to prevent or minimise the risk of harm to the witness before trial, during trial and post-trial. The synthesis in the chapter provides a clear picture of the categories of protective measures available for witnesses drawing on practices across national criminal justice systems and international (criminal) courts/tribunals. Since protective measures are required for all stages of the criminal process, there is a need to include long-term protection in the Nigerian framework, which, in its current form, is inadequate. More so, long-term protection is required given the types of crimes envisaged within the ACJA, such as terrorism, human trafficking, financial and economic crimes, which have the markings of crimes perpetrated in an organised manner.

[134] See *Van Mechelen case* supra note 85. See also Coomparet- Cassani op cit note 95 at 1174.
[135] *Tadic case* op cit note 29 Para 64.
[136] UNODC Good Practices op cit note 23 at 37; Kramer op cit note 11 at 7.
[137] Such as where it has been established that the witness has no ulterior motive.
[138] Ibid.

This chapter provided a critical appraisal of the modalities for adopting these measures and the circumstances that have necessitated them. For example, protective measures such as identity change, relocation and absolute anonymity measures are regarded as measures of last resort and are usually used for the highest-threat levels and where the threat cannot be averted through other means. In such instances, the class of witnesses are likely justice collaborators whose identities are known to the defendant and protective measures limited to confidential measures are unrealistic as the defendant can identify the witness from the substance of the testimony provided and inform other accomplices who may retaliate against the witness. Furthermore, confidential measures and measures that provide psychological support to the witness, such as counselling, are proposed for victim-witnesses, since these measures developed from the need to protect victims of crime, further victimised by the criminal justice system. In Nigeria, there is a need to incorporate psychological measures, as the current legal framework largely excludes psychological protection for witnesses.

As highlighted in chapter two, one shortcoming of the Nigerian framework is that the procedural measures in court are inconsistently applied, as observed from the conflicting decisions by the court in the *FRN v Karibu Umar* and *FRN v Aminu Ogwuche* cases.[139] These inconsistencies arise from objections to the unconstitutionality of procedural measures. As highlighted in chapter two, in the case of *FRN v Nnamdi Kanu and 3 others* the defence questioned the constitutionality of procedural protective measures claiming it interfered with their right to a fair hearing.[140] In Nigeria, these inconsistencies arise because of the absence of clear parameters to guide the courts on the use of protective measures.

The preceding analysis in this chapter confirmed that a distinction is drawn between confidential measures and anonymity measures. Also, the chapter clarified that criminal justice concerns about the effect of intimidation on the overall administration of justice necessitated confidential measures to limit the right of the defendant to a public hearing. The tendency is thus to balance the defendant's rights against the rights of the witness in the interest of justice. However, a significant objection to procedural measures occurs where the measures involve anonymity measures, such as the use of face masks. While the courts are inclined to permit partial anonymity, absolute anonymity is permitted with extreme caution. However, over time, guidelines have been

[139] See chapter 2: 2.3
[140] Ibid.

developed to confirm that in exceptional circumstances and according to the principle of legitimate expectations, anonymity measure may be permitted. This decision, this chapter argued, is influenced both by criminal justice influences and human rights influences aimed at preserving the interest of the state to prosecute and convict offenders and to protect the life of the witnesses.

This chapter thus emphasised that in adopting any protective measure, it should be balanced against the competing interests of the defendants, the witnesses and the society in the overall interest of justice. The balancing process accepts that justice is not perfect, and that a fair trial does not mean a perfect trial, free from possible detriment or disadvantage of any kind.[141] This therefore means that in serious circumstances, especially regarding serious crimes and very high threat levels, extra-ordinary measures should be adopted, which in some circumstances favour certain interests, in this instance prosecutorial and societal interests above the overall rights of the defendant. In terms of procedural measures, the conditions developed from the ECHR, which has also been established in the practice of the international criminal tribunals and national legislations, should be adopted in Nigeria to guide the court. It is proposed that these measures be expressly stipulated in witness protection legislation in Nigeria.

The costs associated in adopting these measures should not be underestimated. As highlighted in preceding discussions in this chapter, a specific constraint to identity changes and witness relocation, is the high financial cost involved. Apart from these measures, Kayuni and Jamu[142] note that there are financial costs associated with putting in place the requisite infrastructure for procedural measures, such as video conferencing, audio-visual links, internet services or designated waiting rooms for witnesses. Mahony notes that the cost implications for these are problematic for developing states with limited resources and who may not prioritise their resources for such capital-intensive projects.[143] This is a concern shared by policy reformers in Nigeria, who acknowledged that cost implications associated with witness protection, 'hampered developing a framework.'[144]

Regardless of these costs, the protective measures highlighted in this chapter are relevant to the effective implementation of witness protection. The cost implications involved can be

[141] *Tadic* case supra note 29.
[142] Steven William Kayuni & Edister Jamu 'Failing witnesses in serious and organised crimes: policy perspectives for witness protective measures in Malawi' (2015) 41 (3) *Commonwealth Law Bulletin* 433
[143] Mahony op cit note 73 at 1.
[144] See discussions in chapter 8, 8.5.1 (b)

mitigated by adopting the measures using the necessity and proportionality principles suggested. For instance, identity changes and relocation and absolute anonymity measures should be measures of last resort for specific categories of witnesses. The cost implications associated with these measures will also be mitigated by clearly delimiting the scope of the witness protection framework by clearly stating its intended objectives, limiting the categories of beneficiaries and a limited scope of crimes requiring protection, as proposed in chapter three, four and five of this thesis. Also, challenges relating to cost and infrastructure may be resolved through donor support and international cooperation with other states and institutions that have the means to support states with poor capacity, as is discussed in chapters seven and eight.[145]

[145] See chapter 7: 7.5.2 and 8: 8.5.5.

CHAPTER SEVEN

THE INSTITUTIONAL FRAMEWORK FOR WITNESS PROTECTION: CHALLENGES AND PROSPECTS

7.1. Introduction

This chapter provides a detailed summation of the administrative and institutional practices of witness protection. It explores the administrative models suitable for implementing witness protection objectives. The overview in this chapter contributes to the overall objective of making proposals towards Nigerian efforts in developing a witness protection framework. In chapters one and two,[1] it was shown that a specific inadequacy of the existing legal framework for protecting witnesses is that there is no comprehensive witness protection legislation. Semblances of witness protection exist within the text of several legislative provisions. These laws are administered by different law enforcement agencies: the Police, the NAPTIP, ICPC, EFCC, whose powers are limited by the scope of the specific legislation empowering them to protect witnesses.[2] Consequently, there is no specialised law enforcement authority with the sole responsibility of administering witness protection in Nigeria.

Reform attempts relating to witness protection in Nigeria have inspired different legislative bills.[3] The administrative control of witness protection is differently situated in each of these bills. While the 2008 bill located witness protection in the office of the Minister of Justice,[4] the 2012 and 2017 bills, respectively, proposed the creation of a new independent agency[5] to administer witness protection. There is thus a need to ascertain a suitable administrative framework for witness protection in Nigeria by analysing international institutional practices. This chapter provides an assessment of the literature with a view to highlighting the gaps in the Nigerian system. It examines the different administrative structures of witness protection, the characteristics of witness protection, the challenges that arise from administering witness protection and the

[1] See chapter 1: 1.2. See also chapter 2: 2.5.5.
[2] See chapter 2: 2.2.
[3] Witness Protection Programme Bill 2008, the Witness Protection Bill 2012 and the Public Interest Disclosure and Witness Protection Programme Bill 2017.
[4] Section 4 of the 2008 Bill.
[5] See section 3 and 63 respectively.

prospects for developing a witness protection framework. Proposals made in this chapter are useful for improving the Nigerian witness protection framework.

In this chapter, reference is made to the practice of states with an established witness protection system. The states mentioned in this chapter represent the different administrative models for witness protection. For example, the US and South Africa represent the prosecutor-based systems, Canada and Australia represent the police-based structures, while Kenya and Indonesia represent the independent structures. In discussing the challenges that arise from witness protection, the discussion focuses on the Kenyan and South African practices. These states bring developing country perspectives[6] and represent the witness protection developments within the African continent, being the only states in Africa with a formally established witness protection programme. The Kenyan and South African developments are also relevant as they share similar structural features with the Nigerian case study.

An objective of this thesis is to examine and clarify the scope of what witness protection depicts. This chapter thus extends existing discussions on the institutional and administrative models of witness protection by emphasising that having a clear objective of what witness protection means and what it seeks to achieve, determines how the institutional and administrative structures should be designed.

7.2. The Question of Formality

Ascertaining an appropriate administrative framework within the context of witness protection requires asking questions such as: Is witness protection best actualised within a formal system or an informal system? This question is necessary given the ad hoc practices arising from the current legal framework in Nigeria and the absence of an established witness protection legislation. Generally, witness protection may be specified in different ways, such as through legislation, policy documents or criminal procedure rules. The analysis in this chapter classifies them as informal and formal systems of protection, respectively.

[6] The classifications into developed and developing countries is as determined by the World bank and defined by indicators such as Gross National Income per Capita, industrial base and human development index (HDI). See 'Country Classification' available at *http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf*, accessed 4 October 2018.

7.2.1. Informal Systems of Protection

An informal system of witness protection is implied where the basis for protection is found within government policy documents or within the texts of several criminal procedure laws:[7] that is where witness protection is not administered by a specific witness protection legislation. Informal witness protection systems are found in states such as France and Austria,[8] Namibia, Tanzania, Ghana,[9] and Nigeria.[10] Although the policy documents or procedural rules specify the type of protective measures, they do not specify eligibility requirements, or other operational issues such as those relating to administrative authority, personnel and finances.[11] The perception within such systems is that witness protection is a regular police function derived from their statutory roles to protect citizens from harm.[12] This is however differentiated from jurisdictions where witness protection legislation expressly confers the responsibility for administering witness protection on the police force, such as in Canada and Australia.

Current witness protection practices in Nigeria come within the description of informal systems in the absence of comprehensive witness protection legislation. This is likened to early practices of witness protection in the UK[13] and South Africa[14] where protection was provided by different police agencies. In such instances, the decision to protect a witness was dependent on the

[7] Jemima Njeri Kariri and Uyo Salifu 'Witness Protection Facilitating Justice for Complex Crimes' Institute of Security Studies Policy Brief 88, August 2016, available at *https://issafrica.s3.amazonaws.com/site/uploads/policybrief88.pdf*, accessed 2 August 2017.
[8] Nicholas Fyfe & James Sheptycki 'International trends in the facilitation of witness co-operation in organized crime cases' (2006) 3 (3) *European Journal of Criminology* 324.
[9] Kariri and Salifu op cit note 7.
[10] See the discussions in chapter 2.
[11] 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 49 p 13, available at *http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf*, accessed 5 May 2015.
[12] *United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' 2008, 44, available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf*, accessed 20 December 2011. See also Yvon Dandurand 'Protecting Witnesses and Collaborators of Justice in Terrorism Cases' Paper prepared for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Volume 3: Terrorism Prosecutions (2008) 57, available at *https://www.ufv.ca/media/assets/centre-for-indo-candian-studies/Air+India+2.pdf*, accessed 23 March 2017.
[13] Nicholas R Fyfe and Heather Mckay 'Police Protection of Intimidated Witnesses: A study of the Strathclyde Police Witness Protection Programme" (2000) 10 *Policing and Society* 277-299.
[14] Anthony Minnaar 'Witness protection Programmes-Some Lessons from the South African Experience' (2002) 15 (3) *Acta Criminologica* 123.

discretion of individual police officers[15] and was provided without any precise eligibility criteria.[16] This practice results in an ad hoc witness protection system where different rules apply to the same category of witnesses faced with similar threat situations.

According to Fyfe and Sheptycki, informal systems are unsuitable because of the inadequacy of the framework.[17] One of such inadequacies is the absence of long-term protection mechanisms. Kramer notes for instance that since protection is considered a police function, it is limited to pre-trial measures such as surveillance, police escorts and patrolling around the witness's residence and place of work and use of safe houses.[18] Like Nigeria, protection does not go beyond procedural protective measures in court. A possible explanation is that in the absence of a more formal system, the focus of the prosecutor is limited to the safety of the witnesses during the trial. As discussed in chapter six, these measures are inadequate for the level of protection required in organised crime, terrorism and other serious crimes.

Furthermore, informal systems are peppered with inconsistencies and ad hoc arrangements.[19] These result from the absence of legislation clearly stating the roles and responsibilities of the parties. An implication of this inadequacy is that it disregards the accountability required for effectively protecting witnesses. Minnaar explains that early witness protection practices in South Africa did not focus on witness intimidation concerns but the need to secure convictions.[20] As discussed in chapter three, these issues also marred early practices of witness protection in the US, where witness protection was primarily discretionary and perceived as a way of inducing suspects.[21] The inconsistencies in the witness protection practices in the US and South Africa significantly influenced the reform for a more formal witness protection system.

Apart from issues regarding inconsistency and accountability, informal systems are unable to foster interagency cooperation. According to Kayuni and Jamu, the absence of formal witness

[15] Ibid.
[16] HRC 12th Session op cit note 11.
[17] Fyfe & Sheptycki op cit note 8.
[18] Karen Kramer 'Witness protection as a key tool in addressing serious and organised crime' 6, available at *http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf, a*ccessed 21 January 2013.
[19] 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, available at *http://www.unhcr.org/refworld/docid/45c30c0c0.html,* accessed 20 December 2011.
[20] Minnaar op cit note 14.
[21] See chapter 3: 3.2.

protection frameworks in some European states is responsible for the ineffective interagency cooperation among law enforcement agencies engaged in witness protection.[22] In the absence of clearly defined responsibilities of the protective authority, it is susceptible to changes in the personnel.[23] The United Nations Human Rights Council (UNHRC) explains that experience indicates that the absence of a clear legislative basis and clear roles and responsibilities, both for the witnesses and the protector, leads to considerable problems, litigation as well as loss of life.[24] Consequently protecting witnesses in the absence of clear legislative terms falls short of providing a comprehensive basis for implementation.[25]

7.2.2. Formal Systems of Protection

A 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, the type of protective mechanisms available and the administrative control of witness protection.[26] 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.[27] 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 UNODC[29] and the UNHRC,[30] representing criminal justice and human rights perspectives, respectively. They reason that formal systems are more effective because they

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[22] Steven William Kayuni and Edister Jamu 'Failing witnesses in serious and organised crimes: policy perspectives for witness protective measures in Malawi' (2015) 41 (3) *Commonwealth Law Bulletin* 425.
[23] UNGA op cit note 19.
[24] HRC 12th Session op cit note 11.
[25] Kariri and Salifu op cit note 7 at 7.
[26] See for example section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984. See also Witness Protection Act 2006 (as amended 2010) Kenya.
[27] UNODC Good Practices op cit note 12 at 43.
[28] Yvon Dandurand and Kristin Farr 'A review of selected witness protection programmes *Prepared for Research and National Coordination, Organized Crime Division, Law Enforcement and Policy Branch, Public Safety Canada* 2010, 38, available at *http://www.publications.gc.ca/collections/collection_2011/sp-ps/PS4-96-2010-eng.pdf*, accessed 17 January 2013.
[29] See UNODC Good Practices op cit note 12 at 43.
[30] See HRC 12th Session op cit note 11 para 44 p 13-14.

maximise the efficient use of state resources, are less controversial and more appealing to a broader spectrum of actors within society.[31] Furthermore, formal systems facilitate a process of evaluation which is crucial to the prospects of effectiveness of witness protection objectives.[32]

As indicated above, the witness protection system in Nigeria is informal in the absence of specified conditions for protection. However, recent deliberations propose the need to formalise witness protection in Nigeria. [33] The subsequent sections of this chapter examine the characteristics of formal witness protection systems. However, where necessary, inferences are drawn from informal systems to highlight distinctions and their implications for developing states.

7.3. Administrative Structures of Witness Protection

An examination of global trends indicates that there are largely two models for administering witness protection.[34] The first option is to locate administrative control within an existing government institution; usually within the police force or the office of the prosecutor (Attorney General (AG) or Ministry of Justice). The second option is the establishment of a new independent witness protection agency.

7.3.1. Police-based Structures

Legislation in states such as Australia[35] and Canada[36] confer on the police the responsibility of administering witness protection. There, the Police Commissioner oversees witness protection and has the responsibility of deciding which witnesses require protection. This responsibility is distinct from the regular police functions implied from the general obligations of the police to protect all citizens as in informal systems. Within the formal context, a witness protection Act specifically empowers the Police Commissioner to facilitate the protection of witnesses cooperating with law enforcement within specified parameters. To facilitate the operational aspects of witness protection within this structure, a special witness protection unit is often created.[37] The aim is to separate

[31] Ibid.
[32] 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.
[33] See 'Prosecuting Terrorism Offences and Crimes Against Humanity; Nigeria v Rest of the World' Law Officers' Session, 27th August 2014, at the 2014 Nigerian Bar Association Conference held at Owerri, Imo State from August 25th- 29th.
[34] UNODC Good Practices op cit note 12 at 45-47.
[35] Section 4 Witness Protection Act 1994 (Act No 124 of 1994, as amended).
[36] See section 4 and 5 Witness Protection Program Act S.C 1996, c 15, last amended on July 16, 2015.
[37] See UNODC Good Practices op cit note 12 at 45. See also Minnaar op cit note 14 at 126.

witness protection duties from the primary function of investigating crime and developing some level of specialisation required for witness protection.[38]

7.3.2. Prosecutor-based Structures

Alternatively, witness protection legislation in states such as the US[39] and South Africa[40] place the administrative control of protecting witnesses under the Minister of Justice (Attorney General). The operational mechanisms involve establishing a witness protection unit in the Department of Justice, which provides for the protection needs of witnesses.[41] However, the Attorney General (AG) maintains oversight functions over the unit and reviews their decisions to protect or the refusal to protect witnesses.[42]

7.3.3. Independent Witness Protection Agency

Within this structure, witness protection legislation establishes a new independent agency to manage witness protection objectives. In Kenya[43] and Indonesia,[44] witness protection legislation establishes an independent Witness Protection Agency with powers to maintain a witness protection programme. The Office of the United Nations High Commissioner for Human Rights (OHCHR) explains that, although the independent institution is funded by the state, it is not directly controlled by the machinery of the state, particularly the office of the prosecutor or the police.[45] Ongoing criminal justice reforms in Uganda proposes to establish an independent witness protection agency.[46]

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[38] Ibid.
[39] See s 3521 (a) (1) 18 U.S. Code Comprehensive Crime Control Act of 1984.
[40] See s 2 Witness Protection Act 112 of 1998.
[41] See s 2, 3, 4 and 5 of the Witness Protection Act 1998. In the US, three departments in the Department of Justice share the responsibility of protecting witnesses. See U.S Marshal Service Fact Sheet Witness Security 2018, US Department of Justice, Office of Public Affairs, April 13, 2018, available at *https://www.usmarshals.gov/duties/factsheets/witsec.pdf*, accessed 20 June 2018.
[42] See s 3521 (b) (1) & (c) 18 U.S. Code; s 14 Witness Protection Act 112 1998.
[43] Section 3C, Witness Protection Act No 16 of 2006 (as amended by Act No 2 of 2010).
[44] See article 11, Law of the Republic of Indonesia, Number 13 of 2006, Concerning Protection of Witness and Victim available at *https://www.lpsk.go.id/upload/Buku%20UU%20No%2013%20(English%20Version).pdf*, accessed 23 March 2015.
[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) 47, available at *http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf*, accessed 7 February 2017.
[46] Uganda Law Reform Commission 'Witness Protection Legislation in Uganda' available at *http://www.ulrc.go.ug/content/witness-protection-legislation-uganda*, accessed 28 June 2018.

The choice of an independent witness protection agency is described as 'a growing international consensus',[47] primarily sustained by neutrality considerations, which require that witness protection concerns are kept separate from investigation and prosecution to maintain objectivity.[48] This reflects contemporary notions of good governance, which emphasise the relevance of accountability, transparency and oversight in ensuring that public power and resources are utilised in pursuit of widely accepted social goals.[49]

7.3.4. The Move to an Independent Witness Protection Agency

It is the practice within formal witness protection systems for witness protection legislation to empower a specific law enforcement agency with the responsibility of providing protection for witnesses. Where the administration of witness protection is located within the police or office of the prosecutor, it is founded on considerations that they bear the primary responsibility for investigating and prosecuting crimes and that they primarily depend on the information or testimony provided by witnesses to successfully discharge their duties.

The police-based and prosecutor-based systems are largely influenced by criminal justice developments of witness protection. As discussed in chapter five, in the US for example, the difficulties of the Justice Department to successfully prosecute organised crime, justified the institution of witness protection.[50] Similar experiences are to be found in Canada and Australia, where investigators faced significant barriers in procuring information needed to prosecute criminals and this necessitated witness protection.[51] In each instance, depending on the institution most affected by the incidence of witness intimidation, they were empowered by legislation to administer witness protection. Motanino explains that the prosecutors or investigators, depending on the circumstances, have a higher stake in preserving their evidence by protecting their witnesses.[52] Also their involvement with their witnesses and information about the specific cases

[47] Dandurand op cit note 12 at 65.
[48] See HRC 12th Session op cit note 11.
[49] Michael Johnston 'Good Governance: Rule of Law, Transparency, and Accountability' available at *http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010193.pdf*, accessed 4 October 2018.
[50] See chapter 5: 5.2.1.
[51] Ibid.
[52] See Fred Montanino 'Unintended Victims of Organized Crime Witness protection' (1987) 2(4) *Criminal Justice Policy Review* 392-408.

justified their concerns about the need to protect witnesses from harm, given the criminal history and reprisal capacity of the defendant.[53]

The personal involvement of the prosecutors or police in providing protection to witnesses forms the basis for criticising police-based and prosecutor-based structures. The foremost criticism is the absence of objectivity. Like other aspects of criminal justice influenced developments of witness protection, the criticisms are spearheaded by human rights institutions. Accordingly, the UNHRC argues that since investigators and prosecutors have a stake in ensuring that investigations and prosecutions end in convictions, their objectivity is undermined.[54] The lack of objectivity was a peculiar concern to critics of early practices of witness protection in the US. To them, prosecutors valued their interests in ensuring high conviction rates and therefore jettisoned the use of objective threat assessments and eligibility considerations.[55] This, according to Mahony, undermines their operational objectivity and transparency and the general public perception about the credibility of the system.[56] The fusion of prosecution or investigation with protection could mean that protection is used as leverage in exchange for information.[57] Consequently, the likelihood of flaunting eligibility considerations are higher, since the oversight functions are determined by them and not externally.[58]

In Africa, the nature of this criticism within a prosecutor-based structure is the high level of political interference with the prosecutor's office by politicians.[59] Early witness protection practice in Kenya located administrative control in the Office of the AG.[60] Allegations of corrupt practices in the AG's office questioned the credibility of the system.[61] Gondi notes that the confidentiality of the programme was compromised as evidence against powerful state officials

[53] Dandurand op cit note 12 at 65.
[54] HRC 12th session op cit note 11 para 32 p 9.
[55] See Raneta J Lawson 'Lying, cheating and stealing at government expense; Striking a balance between the public interest and the interest of the public in the witness protection programme' (1992) 24 *Arizona State Law Journal* 1429.
[56] Chris Mahony *The Justice Sector Afterthought: Witness Protection in Africa*, 97, (Institute for Security Studies 2010) available at *http://www.issafrica.org/pubs/Books/WitnessProt4.pdf*, accessed 10 January 2012.
[57] International Commission of Jurists, 'Witness Protection in Nepal: Recommendations from International Best Practices' (August 2011) 13, available at *http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Nepal-witness-protection-analysis-brief-2011.pdf*, accessed 30 May 2017.
[58] For example, in the US and South Africa, oversight functions over the decisions to protect are vested in the Attorney General who technically heads the prosecutions. Similarly, in Canada and Australia, the Commissioner of Police had the sole responsibility of deciding which witnesses may be protected.
[59] Mahony op cit note 56 at 123.
[60] See section 4 (1) and 5(1) Witness Protection Act No 16 of 2006.
[61] Mahony op cit note 56 at 123.

involved in gross human rights violations, post-election, was not preserved.[62] The protection of witnesses by prosecutors was unrealistic since there was evidence of connivance between prosecutors and the defendants.[63] The inability of prosecution to be independent of witness protection thus prompted reforms and the establishment of an autonomous witness protection agency.[64] A report of the OHCHR notes that the new autonomous system has achieved better witness protection objectives in Kenya and inspires the confidence and trust of witnesses as well as that of society.[65] This is primarily because, within the independent system, protection concerns are separated from prosecution, and a system of oversight[66] operates outside the confines of the agency.[67]

Apart from criticisms regarding objectivity, police and prosecutor-based structures also raise concerns about their practical viability. These issues centre around personnel and finance/ budgetary considerations.[68] As indicated earlier, the primary duties of the police and prosecutors are to investigate and prosecute crime. Finn and Healey argue that they are unable to focus on protection concerns[69] when overburdened by their primary duties. For example, since prosecutors lack the requisite expertise to provide security, they rely on the services of other law enforcement agencies particularly the police to provide protection.[70] Although this is not a challenge in the US because a department within the office of the AG, the US Marshal Services, is well equipped to provide physical security for witnesses.[71]

Nevertheless, in South Africa, as well as other developing countries, which lack the financial and human resource capacity of the US, the AG's office is not organised that way.

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[62] James Gondi 'Kenya's Invitation to Al-Bashir An Affront to Poll Violence Victims' Jurist E-Bulletin May 2010, Issue No 1 of 2010, available at *www.Icj-Kenya.Org/Index.Php/Resources/Newsletters-Bulletins?...Icj*, accessed 22 Mach 2013.
[63] Ibid.
[64] UNODC 'One step closer to witness protection in Kenya' 14 January 2010, available at *https://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html*, accessed 25 June 2018.
[65] OHCHR conference compilation op cit note 45.
[66] See section 3 P and 3 Q of the 2010 Act. See also Article 14, Law Indonesia Concerning Protection of Witness and Victim.
[67] OHCHR conference compilation op cit note 45 at 82.
[68] Dandurand op cit note 12 at 66.
[69] Finn and Healey op cit note 32 at 69.
[70] Jenny Irish et al 'Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa' Research report written for the Centre for the Study of Violence and Reconciliation, October 2000 available at *http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf*, accessed 1 August 2017.
[71] See US Marshal Fact Sheet 2018 op cit note 41.

Therefore, to fulfil its mandate, the Office of Witness Protection (OWP) requires the services of the police.[72] According to Minnaar, this created an overlap between the functions of the Director of the OWP and provincial Police Commissioners, since decisions to protect were undertaken by the police.[73] Also, the police provides protection on an ad hoc basis,[74] which defeats the purpose of establishing the OWP to ensure consistency and expertise. To the police, their primary function is to investigate crime and not to protect witnesses.[75] Furthermore, since there are no special budgets allocated to the police for protecting witnesses under a prosecutor-based structure, this raises concerns about who bears the cost of paying police officers scheduled to protect witnesses[76] and this adversely affects interagency cooperation.

Similar concerns are raised in Canada where witness protection is the responsibility of the police. A review of witness protection in Canada revealed that concerns were raised about the lack of autonomy between the management of investigations and the management of witness protection.[77] These concerns led to a reform of the system, which fully established independence between the witness protection function and the investigative function of the Royal Canadian Mounted Police (RCMP).[78] According to Casavant and Morris, it is important for witnesses to believe that witness protection is the primary focus of the people responsible for protecting them rather than to complete the investigation[79] and secure convictions. Accordingly, a distinction is made between investigators and witness protection personnel.[80] The RCMP notes that, since the enactment of the Witness Protection Act in 1994, the practice of witness protection has evolved, and the Canadian practice must be adapted to reflect current realities.[81]

These challenges under the police-based and prosecutor-based structures raise concerns regarding consistency, and the expertise required for protection and increases the likelihood of

[72] See section 5 (1) and 6 of the Witness Protection Act.
[73] Minnaar op cit note 14 at 126.
[74] Ibid 127.
[75] Ibid.
[76] Ibid 129.
[77] Lyne Casavant and Christine Morris 'Bill C-51: An Act to amend the Witness Protection Program Act and to make a consequential amendment to another Act' Publication No. 41-1-C51-E, February 2013, Ottawa, Canada, 6, available at *https://lop.parl.ca/Content/LOP/LegislativeSummaries/41/1/c51-e.pdf*, accessed 24 January 2015.
[78] See RCMP, Witness Protection Program: Annual Report to the Commissioner 2017, 7, available at *https://assets.documentcloud.org/documents/4343400/Witness-Protection-Program-Report-ENG.pdf*, accessed 27 June 2018.
[79] Casavant & Morris op cit note 77.
[80] See RCMP, Annual Report op cit note 78.
[81] Ibid 2.

confidentiality breaches about witness information and sensitive information.[82] These structures thus run the risk of having the same shortcomings inherent within informal systems. These criticisms also justified the need for an independent witness protection agency to administer witness protection. The UNODC notes that the shortcomings inherent within the police-based and prosecutor-based systems are less obvious within the confines of an autonomous witness protection system which separates protection from investigation and prosecution.[83] Apart from establishing an independent agency, witness protection legislation under this system also outlines the functions and powers of the Agency.[84] These include the deliberate staffing of the agency[85] and separate resources and budgets to facilitate witness protection aims.[86] Although interagency cooperation with other law enforcement institutions is envisaged under this structure, the system makes it easy to manage by specifying roles within the interagency arrangements.[87] This advances the prospects of accountability required within the sensitive nature of witness protection since different individuals (institutions) are charged with specific responsibilities.[88]

7.4. Characteristics of Witness Protection

An analysis of the informal systems and formal systems of witness protection highlight specific features identified within the scholarly literature as integral to facilitating witness protection objectives. These are autonomy (independence), accountability and confidentiality. This section, however, emphasises that these characteristics are better achieved within a formal witness protection.

7.4.1. Autonomy/Independence

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.[89] Alternatively, it implies creating a specific witness protection unit to facilitate witness protection.[90]

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[82] Casavant & Morris op cit note 77 at 3.
[83] UNODC Good Practices op cit note 12 at 46.
[84] See section 3 A, B, C, D, Witness Protection Act Kenya 2010.
[85] Ibid s 3F.
[86] *REDRESS* 'Testifying to Genocide: Victim and Witness Protection in Rwanda' (October 2012), 42, available at *http://www.redress.org/downloads/country-reports/1301testifying_to_genocide.pdf,* accessed 3 June 2015.
[87] See UNODC Good Practice op cit note 12 at 80.
[88] See OHCHR conference compilation op cit note 45 at 31.
[89] Ibid 47.
[90] See section 4 Witness Protection Programme Act 1996 Canada and section 4 (1) Witness Protection Act 1994 Australia.

Also, it implies that a specific agency/unit has the financial control of witness protection.[91] When interpreted literally, autonomy implies the expediency of a witness protection authority to act without interference from external authority.[92] The OHCHR categorises these as financial and operational autonomy.[93] 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.[94]

Where there is no specific administrative unit overseeing witness protection, the likelihood of independence is weak. As indicated in preceding discussions on informal systems of witness protection, in the absence of a specific protection authority, witness protection is considered a police function. In practice, the element of autonomy is facilitated by ensuring that there is an independent budget for witness protection.[95] This means that funding for witness protection comes directly from the consolidated funds.[96] Consequently, specific resources are allocated for witness protection and are controlled by the responsible witness protection unit.[97] This according to the UNHRC ensures that financial decisions necessary to facilitate witness protection, such as cooperation arrangements, are not hindered.[98]

It should be emphasised however that the idea of absolute autonomy is unrealistic and most probably overemphasised even where an independent autonomous witness protection agency is established. Within such structures, legislation provides for oversight functions that require some measure of interface with the function of the witness protection agency. Apart from the interactions envisaged by oversight functions, within African societies, and indeed several developing states with weak systems, the likelihood of interface from politicians is a reality. For example, in Kenya and South Africa, there have been reported incidences of interference by politicians who want

[91] See section 3 H and I Kenya.
[92] Section 3 G Kenya.
[93] See OHCHR conference compilation op cit note 45 at 43.
[94] U.S. Marshals Services, Fact Sheet 2019.
[95] OHCHR conference compilation op cit note 45 at 57.
[96] See section 3 H and I Kenya
[97] See section 20 of the Witness Protection Act 1998.
[98] HRC 12th Session op cit note 12 Para 51 p 14.

certain individuals included in witness protection programmes and when their requests are not honoured, the jobs of the protection officers are threatened.[99]

It is suggested that these challenges are mitigated where decisions to protect are not discretionary as is the case in informal systems but is established in legislation with expressly stated eligibility criteria.[100] This includes specifying the categories of beneficiaries of protection and the nature and scope of crimes requiring protection. Also, where clear responsibilities are stipulated, protection officials may be held personally liable for breaches.[101] The OHCHR however acknowledges that this is one aspect of witness protection that requires the political will of government to succeed[102] in Africa.

7.4.2. Accountability

Like autonomy, accountability within the context of witness protection implies operational accountability and financial accountability. Accountability requirements are safeguards provided within a system to ensure that the integrity of witness protection is maintained.[103] Accountability requirements encompass review 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.[104] As discussed earlier, within informal witness protection systems, decisions to protect witnesses are discretionary and lack mechanisms to review the decisions regarding the choice to protect or otherwise. Consequently, these systems are susceptible to abuse, since the existence of witness intimidation which is the crux and a pre-requisite for witness protection, is often absent.[105] The system is also seen as an avenue of self-enrichment through political interference.[106]

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[99] OHCHR conference compilation op cit note 45 at 82.
[100] Ibid.
[101] *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 89 p 15, available at *www.legislationline.org/documents/id/8998,* accessed 23 March 2013.
[102] OHCHR conference compilation op cit note 45 at 82.
[103]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.
[104] See section 30 (1) Australia, section 10 and 16 (1) Canada, see section 3 (Q) (P) (U) Kenya, section 3 (2) and (9) SA.
[105] Minnaar op cit note 14 at 123.
[106] OHCHR conference compilation op cit note 45 at 82.

Within formal witness protection systems, accountability requirements are enshrined in legislation.[107] As examined earlier, the degree of accountability within police-based structures and prosecutor-based structures are debatable. These doubts as highlighted earlier[108] are raised within the context that there is no oversight outside the office of the Police Commissioner or AG to sustain neutrality by ensuring that protection objectives are separate from investigation and prosecution. On this basis, this research supports earlier arguments regarding the need to establish a new autonomous witness protection agency to facilitate witness protection as is the practice in, for example Kenya and Indonesia, where external oversight mechanisms are in place.[109]

Although the susceptibility for abuse is slimmer within states such as the US, Australia and Canada that have a developed criminal justice system with different levels of checks and balances in place to limit abuses within the system, in developing criminal justice systems, the police and prosecutor-based structures should be approached with caution. These structures have recorded significant setbacks within the practice in Kenya and South Africa for example. More so, in states such as Australia and Canada, which represent police-based structures, the police forces are competent administrative state institutions. This is not the case, for instance, in Nigeria, where the ineffectiveness of the Police Force is widely acknowledged.[110] Also, as the UNODC notes, the prosecutor-based system was unrealistic in Kenya and formed the basis of witness protection reform.[111] In Kenya, witness protection within an independent structure has recorded more success than under the control of the AG.[112]

Apart from operational accountability, the issue of financial accountability is also important. This usually entails the protection authority to keep book and proper records of account of expenditure and to have those records audited.[113] The Australian Federal Police sets out a

[107] See section 30 (1) Australia, section 10 and 16 (1) Canada, see section 3 (Q) (P) (U)Kenya, section 3 (2) and (9) SA.
[108] See discussions in 7.3.4.
[109] In Kenya, by Sections 3 Q, P and U of the Act, the activities of the Agency are reviewed in different ways by a Witness Protection Advisory Board and Witness Protection Appeal Tribunal. Also, by Article 11 of the Indonesian Law, the independent institution is responsible to the president.
[110] See for example 'Corruption and Human Rights Abuses by the Nigerian Police Force' 17 August 2010, available at *https://www.hrw.org/report/2010/08/17/everyones-game/corruption-and-human-rights-abuses-nigeria-police-force*, accessed 5 October, 2018. See also Rashidi Akanji Okunola and Adediran Daniel Ikoumola 'Festival of Curses: A Traditional Crime Control Method in Edo State Nigeria' (2012) 7 (1) *Issues in Ethnology and Anthropology* 86, 91-92.
[111] UNODC One step closer op cit note 64.
[112] OHCHR conference compilation op cit note 45 at 82.
[113] See section 3 K Kenyan Law.

detailed annual report where it outlines the total amount expended in furtherance of its witness protection mandate.[114] Also in South Africa, the OWP has through budget containment measures, adequately utilised the budget set aside for witness protection.[115] However, in order to balance accountability requirements with confidentiality, there are special procedures developed to fulfil the requirements for auditing, reporting and review.[116] For example, the personnel of the auditors and review authorities are subject to the highest level of clearance to ensure the necessary levels of confidentiality.[117]

7.4.3. Confidentiality

Primarily, confidentiality is defined by the fact that witness protection is recognised as a covert operation.[118] Across all systems of witness protection, confidentiality is required for its success and it is required of witness protection officers as well as protected witnesses.[119] 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.[120] The breach of confidentiality obligations by the witness constitutes a ground for terminating the protection agreement.[121] Also, penalties are attached to confidentiality breaches by witness protection officials.[122] Where confidentiality is not maintained, the system is compromised, and witnesses may be further exposed to harm and reprisal attacks.[123]

According to Kramer, confidentiality is best achieved within formal systems, which set a high standard for those responsible for witness protection.[124] Also, officials engaged in witness protection in South Africa, have claimed that there have been no leaks or confidentiality breaches

[114] See for example AFP Annual Report 2011-2012 op cit note 103.
[115] Silas Ramaite 'NSSD: Report to Portfolio Committee' 3 May 2007 slide 18, available at *https://pmg.org.za/committee-meeting/7981/*, accessed 23 June 2018.
[116] UNODC Good Practices op cit note 12 at 57.
[117] AFP Annual Report 2011-2012 op cit note 103.
[118] UNODC Good Practices op cit note 12 at 5.
[119] 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.
[120] Ibid.
[121] See section 17 (iii) Australia, section 13 (1) (f) South Africa and section 10 Kenya.
[122] See section 22B and 28 of Australia WPA; 22 South Africa; Section 21 and 30 Kenya and Section 21 Canada.
[123] 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-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa.html*, accessed 16 May 2015.
[124] Kramer op cit note 18 at 14.

by protection personnel, contrary to speculations.[125] They observed that this success is facilitated by the autonomy of the OWP and the specialisation that reduces the likelihood of leaks.[126] These officials, however, note that where witnesses have been killed, harmed or exposed in some ways, they have either not accepted protection, or failed to comply with the terms of protection.[127] Nevertheless, these facts have not been substantiated by empirical research and remain the official statements of prosecutors.

It is acknowledged also that confidentiality breaches are likely within the ad hoc nature of informal witness protection systems.[128] This is because, within these systems, there is significant dependence on external assistance to achieve witness protection.[129] In the absence of clear roles and responsibilities, informal systems lack the necessary bureaucratic safeguards required to ensure confidentiality.[130] Apart from informal systems, confidentiality breaches are also likely within inter-agency cooperation arrangements in police and prosecutor- based systems.[131]

Although it is impossible to eliminate the likelihood of confidentiality breaches caused by human elements,[132] it is suggested that confidentiality is best achieved within the structure of a specialised autonomous agency with specified and designated officials who have developed specialisation over the course of their official duties. In such instances, the specialised agency is staffed by specially trained officers whose operations are highly confidential.[133] In Kenya, this is reinforced by internal mechanisms and oversight functions, which ensure that staff are properly

[125] Monique Mortlock SA Witness Protection Unit 'Among the Best in the World' Eyewitness News 24 August 2015, available at *http://ewn.co.za/2015/08/24/SAs-Witness-Protection-among-the-best-in-the-world*, accessed 12 June 2018.
[126] Ibid.
[127]'Witnesses Can't be forced to have protection' 7 October 2016, Cape Argus available at *https://www.iol.co.za/news/crime-courts/witnesses-cant-be-forced-to-have-protection-2077412*, accessed 2 December 2017.
[128] ICJ Kenya 'ICJ Kenya's Critique of the Witness Protection (Amendment) Bill 2010' Kenyan Section of the International Commission of Jurists, 2, available at *http://www.iccnow.org/documents/Critique_of_the_WitnessProtection_Act_and_Amendment_Bill.pdf*, accessed 23 February 2017.
[129] Ibid at 3.
[130] UNGA Extrajudicial Summary op cit note 19.
[131] OHCHR Compilation Report op cit note 45 at 76.
[132] Kramer op cit note 18 at 14.
[133] See Piotr Bakwoski 'Witness Protection Programmes European Experiences in the International Context' Library Briefing, Library of the European Parliament, 28 January, 2013, available at *http://www.europarl.europa.eu/document/activities/cont/201301/20130129ATT59967/20130129ATT59967EN.pdf*, accessed 3 December 2017.

vetted, and appointment and reappointment is based on satisfactory performance[134] and protection is restricted to high-level personnel. Also, the criminal penalties for confidentiality breaches serve as an additional deterrence.

7.5. Challenges and Prospects for Developing a Witness Protection Framework

Regardless of the witness protection model, there are challenges that arise from administering witness protection. Such challenges are inter-related and broadly categorised as economic and political. Notwithstanding the challenges, there are prospects that mitigate against their effects. Although these challenges and prospects cut across developed and developing jurisdictions, their implications are more pronounced within the context of developing countries. This section however accentuates that the challenges are heightened within informal systems and the prospects are better within formal witness protection systems, particularly within the confines of a new autonomous agency.

7.5.1. Challenges

a. Economic Factors

Underlying these challenges are factors such as cost, inadequate funding, inadequate/lack of trained personnel and inadequate infrastructure. By nature, witness protection is expensive[135] and requires adequate funding and resource allocation from the government.[136] The costs of developing a framework often discourages states from investing in formal witness protection systems, particularly from establishing a new independent witness protection agency.[137] Apart from the initial cost of establishing formal systems through legislation, cost includes salaries for protection personnel and administrative staff, administrative expenses and cost of protective measures, particularly relocation expenses.[138]

[134] OHCHR compilation report op cit note 45 at 81.
[135] Fyfe and Sheptyki notes that the figures are as high as $17-24 Million per year. See Fyfe and Sheptycki op cit note 8 at 27.
[136] See Transitional Justice Unit, The Need for Witness Protection and Transitional Justice in Zimbabwe, Zimbabwe Human Rights NGO Forum (September 2015) 26, available at *http://www.hrforumzim.org/wp-content/uploads/2015/10/Witness-protection-and-Transitional-Justice-in-Zimbabwe.pdf*, accessed 13 April 2017.
[137] UNODC Good Practices op cit note 12 at 50.
[138] Casavant and Morris op cit note 77 at 4.

In Kenya and South Africa, inadequate funding and poor resource allocation pose challenges to the effectiveness of witness protection.[139] This invariably results in inadequate and untrained personnel and the inability of administrative heads of witness protection authorities to invest in retraining personnel.[140] Generally, witness protection is time consuming and requires skilled and competent personnel to ensure the effectiveness of the system.[141] Where personnel are inadequate and unskilled, the confidentiality of the system is threatened.[142] Apart from the effect on personnel, inadequate funding affects the availability of infrastructures needed to facilitate procedural protective measures such as screens and video links[143] and long-term measures such as safe houses. Accordingly, witness protection administrators are unable to adopt adequate protective mechanisms based on threat assessments. These challenges are, however, a reflection of the overall attitude of governments to criminal justice administration within African societies. The unwillingness of government to invest in developing the overall outlook invariably affects every aspect of the system and witness protection is not excluded.

It is important to stress the implication(s) of economic factors on the accountability, independence and confidentiality requirements. For example, because of the cost implications involved, states are reluctant to establish formal witness protection systems, particularly an independent witness protection agency. Consequently, they choose to locate the witness protection unit within an existing law enforcement institution or settle for informal systems. These raise concerns regarding accountability and confidentiality, particularly visible in informal systems. This affects the overall effectiveness of witness protection.

Although the costs of developing a formal witness protection system is high, it appears however higher within informal systems. For example, accountability requirements require protection agreements in formal systems to stipulate the terms and conditions for financial assistance,[144] including, how and when such payments should be made and record keeping by

[139] Kariri and Salifu op cit note 7 at 7.
[140] Keynote address by the Deputy Minister of Justice and Constitutional Development, the Hon J H Jeffery, MP, at the International Conference of AU members on Witness Protections, Pretoria, 25 August 2014, available at *http://www.justice.gov.za/m_speeches/2014/20140825_WitnessProtection.html*, accessed 12 June 2016.
[141] OHCHR Conference Compilation op cit note 45 at 43;58.
[142] UNODC Good Practices op cit note 12 at 48.
[143] Ibid 37.
[144] See section 9 (2) Australian Act.

issuing receipts to witnesses.[145] However, within informal systems, these time frames are undefined, and protection may be indefinite or terminated without objective considerations. Also, as discussed in chapter six, the short-term (ad hoc) protective measures adopted within regular policing functions are inadequate for witness protection, particularly within the prosecution of terrorism, organised crime and serious crime. Also, they are expensive, time intensive and require a lot of human resources.[146]

It is difficult to draw a clear distinction in the forms of protection adopted between a formal and informal system in Africa. This is primarily because the idea of a highly formalised system as depicted within developed country perspectives is less likely within African societies. Thus far, formal witness protection systems within the African context are represented by stipulating witness protection objectives and responsibilities in a comprehensive Act. This is to reduce the likelihood of discretion and inconsistency in granting protection to witnesses.[147] In South Africa, a mixture of regular policing measures and procedural protective measures prominent in informal systems, and witness relocation as within a formal witness protection programme[148] is utilised. Its formality, however, settles issues of inconsistency and ad hoc application of these measures.

b. Political Factors

Within these categories of challenges are the lack of political will, political interference and corruption. Political will reflects the priority given to witness protection concerns and the funds allocated towards it. Consequently, the inadequate allocation of resources and funding to actualise the objectives of witness protection is at least in part indicative of lack of political will.[149] For example, a report of the UNHRC revealed that, despite the availability of surplus funds in Indonesia, the Indonesian government failed to allocate resources for witness protection purposes. The government did not spend about 30% of its annual national budget[150] which could be used for

[145] Office of Police Integrity, Review of the Victoria Police Witness Protection Program Report of the Director, Victoria Police Integrity (July 2005, Victorian Government) 43 available *at http://www.ibac.vic.gov.au/docs/default-source/reviews/opi/review-of-the-victoria-police-witness-protection-program---july-2005.pdf?sfvrsn=8*, accessed 18 April 2017.
[146] See chapter 6; 6.2.2.
[147] HRC 12th Session op cit note 11.
[148] See Mahony op cit note 56 at 106-108.
[149] Kariri and Safiu op cit note 7.
[150] 'Asia: Effective witness protection lacking in Indonesia and Nepal' Human Rights Council Fifteenth Session, Agenda Item 4, General Debate, A written statement submitted by the Asian legal Resource Centre (ALRC), a non-governmental organisation with general consultative status, ALRC-CWS-15-01-2010, 24 August, 2010, available at

criminal justice initiatives like witness protection or other development initiatives. Also, in the 2014/2015 financial year, the Kenyan government allocated about US$2 894 000 for witness protection when the required budget was about US$4 902 000.[151] This amount was insufficient to effectively protect witnesses, as the number of witnesses requiring protection had increased exponentially.[152] This is an indication of the general apathetic attitude to issues concerning the administration of criminal justice within African societies like Nigeria where such issues are not considered a priority. This is further elaborated in chapter eight.

Connected to the issue of political will is the presence of political interference in the management of witness protection as in the case of both South Africa and Kenya.[153] Although not an issue limited to witness protection, political interference has the tendency to adversely affect the confidentiality, accountability and autonomy required to protect witnesses. As indicated earlier, political interference marred early practices of witness protection in Kenya.[154] Although of a different nature, attempts by politicians in South Africa to interfere with the admission of witnesses into the witness protection programme have been identified as a challenge. In both scenarios, the credibility of the system was threatened. This defeats the purpose of witness protection as witnesses are unlikely to cooperate with a system that they distrust.[155]

Corruption is identified as another factor that affects the success of witness protection. Where inadequate funding is allocated to witness protection resulting in the underpayment of witness protection officers and administrative staff. There is the likelihood that protection officials may breach confidentiality about the location of witnesses, thereby compromising their safety and the effectiveness of the programme for a bribe.[156] Although no example of this is found within witness protection literature, corruption within public service institutions within African societies is acknowledged,[157] and is thus probable within the context of a witness protection institution, which is a reflection of the society. Lack of political will and the insufficient allocation of resources have generally affected the capacity to improve witness protection including awareness campaigns

http://www.scoop.co.nz/stories/WO1008/S00382/witness-protection-lacking-in-indonesia-nepal.htm, accessed 24 June, 2016

[151] Kariri and Salifu op cit note 7 at 7.

[152] Ibid.

[153] OHCHR conference compilation op cit note 45 at 82.

[154] 7.3.4.

[155] Minnaar op cit note 14 at 126.

[156] Ibid.

[157] See Mahony op cit note 56 at 12; 110.

aimed at educating criminal justice stakeholders as well as the society in general of the significance of witness protection to the overall effectiveness of the criminal justice system.[158]

7.5.2 Prospects for Mitigating the Challenges

Despite the challenges, witness protection is attainable in developed as well as developing states. In Kenya[159] and South Africa,[160] a self-assessment by the respective witness protection authorities shows that witness protection has been successfully implemented and has been used positively to secure testimony. In South Africa which has the oldest formal system in Africa, from its inception over 15 years, no witnesses in the witness protection programme have been killed.[161] Although the level and nature of success is different from developed systems, there is success, nonetheless. The subsequent paragraphs highlight the prospects of witness protection drawn from the Kenyan and South African experiences.

a. Funding Prospects

Cost implications, inadequate allocation of resources and funds are central to the challenges of developing a witness protection framework. However to generate funds, the possibility of redirecting funds from proceeds of crime into witness protection is considered.[162] Witness protection may be funded through the confiscation of illegitimate capital and assets that are uncovered by law enforcement institutions, particularly where information about those illicit funds were provided by witnesses requiring protection.[163] For example, section 3 I of the Kenyan legislation expressly envisages a situation where proceeds of crime are paid into the Victims Compensation Fund as a means of raising funds. It is suggested that such provisions should be expanded to include the proceeds of crime acquired by justice collaborators who then would be

[158] Kariri and Salifu op cit note 7 at 7.
[159] Witness Protection Agency 'Report of the Auditor General on the Financial Statements of Witness Protection Agency Kenya for the year ended 30 June 2016,' 12, available at *http://www.oagkenya.go.ke/index.php/reports/doc_download/1127-witness-protection-agency*, accessed 25 June 2017.
[160] National Prosecuting Authority 'Sub-Programme 2: Witness Protection, Annual Report 2008/09, available at https://www.npa.gov.za/sites/default/files/annual-reports/SUB-PROGRAMME%202%20-%204%20%28OWP%2C%20DSO%2C%20AFU%29-08-09.pdf, accessed 25 June 2018
[161] Mortlock op cit note 124.
[162] Newham op cit note 122.
[163] Ibid.

protected as well.[164] In such instances, these illegally acquired assets should be appropriated and handed over to the protection unit.[165]

b. Scope of Witness Protection Framework

As indicated earlier, the costs associated, corruption and lack of political will are the challenges for developing a framework. Despite the cost implications, witness protection programmes have been successfully developed in Kenya and South Africa. However, from preceding discussions, it is inferred that these challenges are best managed within a formal witness protection system. The presence of a legislative basis with strict eligibility criteria helps reduce the reoccurrences of political interference, exploitation and confidentiality breaches.[166] In addition, a formal system reduces the likelihood of ad hoc and inconsistent application of witness protection, which creates opportunities for corrupt practices.

In developing a witness protection framework, the scope of protection should be determined by the specific witness protection needs of individual states. States should be proactive in developing a manageable framework that captures the central rationale for witness protection, such as protecting witnesses from high-level threats and intimidation. As argued in chapter three, this entails deconstructing the concept of witness protection and separating it from other related concepts. This is the practice in Kenya where a distinction is made between victims and witnesses and only witnesses are protected in the witness protection programme.[167] Also, as argued in chapter four, the scope of witnesses should be defined within eligibility considerations determined by the nature of crime and the significance of evidence provided by the witness. The witness protection framework should exclude expert and official witnesses. In South Africa, protection for prosecutors and judges is provided administratively by a unit outside the OWP.[168]

In addition, it is important for developing states to pay attention to the cost implications generated by developed states since the actual financial obligations vary across jurisdictions. Since witness protection needs differ, the amounts budgeted for implementation also differ. For example,

[164] UNODC Good Practices op cit (n 12) 51.
[165] Ibid.
[166] OHCHR conference compilation op cit note 45 at 82.
[167] Ibid 80.
[168] Ibid 81.

the US WITSEC is complex and envisages protection during the transfer of prisoners.[169] This thus affects the budget allocated for protection needs which are not anticipated in developing states.

c. *The Prospects for Interagency Cooperation*

Regardless of the structure, witness protection requires the cooperation of security agencies and other government institutions, such as the court and judiciary personnel, to be effective.[170] While the court plays a central role in ensuring that procedural protective measures are adopted within approved guidelines, the police and other security intelligence personnel play a role in investigating crimes to which the witnesses are testifying and the information gathered by these security agencies help in threat assessments.[171] Also, the services of other professionals such as psychologists may be best provided within interagency arrangements as is the practice in South Africa. However, as discussed in preceding sections, interagency cooperation is best achieved within formal structures to limit the likelihood of confidentiality breaches.[172]

d. International Cooperation/Partnerships

International cooperation agreements and partnerships help mitigate the challenges arising from inadequate funding, inadequate and unskilled personnel and lack of technical capacities. In this sense, international cooperation is used to facilitate the exchange of best practices, information sharing and training programmes for members of witness protection agencies.[173] This is available between states collaborating, or international institutions and donor agencies partnering with states that have committed to reforming their criminal justice systems and facilitate witness protection. Although scanty within the regional and sub-regional groups in Africa, within Europe,[174] the Caribbean[175] and Baltic states of Lithuania, Latvia and Estonia,[176] interstate cooperation

[169] Ibid.
[170] UNODC Good Practices op cit note 12 at 80.
[171] Finn and Healey op cit note 32 at 70.
[172] Ibid 72.
[173] Human Rights Council, fifteenth session; Agenda items 2 and 3-Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development July 2010, para 39 p 12, available at *http://www2.ohchr.org/english/issues/women/docs/A-HRC-15-40.pdf,* accessed 10 January 2012.
[174] COE Explanatory Report op cit note 101.
[175]Agreement Establishing the Regional Justice Protection Programme 1999, available at *https://www3.nd.edu/~ggoertz/rei/rei520/rei520.33tt1.txt*, accessed 7 December 2017.
[176] Agreement between the Government of the Republic of Latvia, the Government of the Republic of Estonia and the Government of the Republic of Lithuania on Cooperation in Protection of Witnesses and Victims, available at *https://m.likumi.lv/doc.php?id=8209,* accessed 7 December 2017.

agreements have been executed to facilitate cooperation in witness protection.[177] In practice, interstate cooperation has played a significant role in issues relating to witness relocation.[178]

For example, in Africa, there was an arrangement between Nigeria and South Africa in the prosecution of Henry Okah for terrorism, where witnesses from Nigeria were accommodated and protected by the South African Witness Protection Programme.[179] This led to the successful prosecution of this case and has contributed to the jurisprudence of witness protection in Africa. It is therefore suggested that this option be considered and developed in Africa. However, the role which the underlying political tensions between the two governments at the time should not be underestimated when discussing the success of this arrangement.

Also, in developing a witness protection framework in Uganda, stakeholders and policymakers engaged with their counterparts in Kenya.[180] This facilitated free technical support in developing a witness protection regime for Uganda.[181] Although details are not provided, the Office of the Witness Protection in South Africa has through international cooperation provided assistance to the Netherlands, Germany and the UK.[182] In terms of assistance from international institutions, the UNODC supports member states in developing witness protection programmes by providing technical assistance.[183] Consequently, Kenya, in reforming its witness protection framework received support from the UNODC.[184]

7.6. Conclusion

This chapter provided a detailed overview of the administrative and institutional arrangements for witness protection. It explored the administrative models suitable for implementing witness protection objectives. From the preceding analysis, informal witness protection systems, such as the current practice in Nigeria, are systems without definite witness protection legislation. Such systems create a less favourable option in both developed and developing jurisdictions. For

[177] There is however no information on how this is achieved in practice.
[178] HRC 15th Session op cit note 172 para 40 p 13.
[179] Kariri and Salifu op cit note 7 at 8.
[180] Mododi Musa 'Witness Protection Benchmarking in Kenya' 22 September 2014 available at *http://www.jlos.go.ug/index.php/news-media-events/newsroom/latest-news/item/376-witness-protection-benchmarking-in-kenya,* accessed 25 June 2018.
[181] Ibid.
[182] Ramaite op cit (n 114) slide 13.
[183] UNODC, 'Victim assistance and witness protection' available at *https://www.unodc.org/unodc/en/organized-crime/witness-protection.html*, accessed 7 February 2017.
[184] UNODC 'One step closer op cit n (64).

example, there is a likelihood within an informal system to conflate witness protection objectives with other inter-related concepts. Furthermore, within the informal systems the inadequacies of stipulating specific roles and responsibilities create inconsistencies. Consequently, stakeholders in Nigeria recommend a system of witness protection enshrined within a comprehensive piece of legislation.[185] This is favoured by the UNODC and OHCHR, which advocate for a formal system with clear parameters for protection.

From the preceding discussions, clear eligibility considerations are central to the effectiveness of witness protection systems. As discussed in chapter four, eligibility considerations help delimit the scope of witnesses. In addition, the nature and seriousness of the crime, the extent of threat and the nature of protective mechanisms are determined within eligibility considerations. Eligibility considerations provide a basis for determining the objectives of witness protection within a particular jurisdiction. States can delimit the scope of crimes, scope of witnesses, protective mechanisms, roles and responsibilities of the parties to a witness protection arrangement, as it helps reduce the cost implications and other challenges discussed within the chapter.

The Deputy Minister of Justice and Constitutional Development in South Africa noted that the success of witness protection lies in guaranteeing the safety of witnesses and their loved ones and strict compliance by them to the stringent rules of the protection agreement.[186] This is however best achieved within a formal framework and specifically within the creation of an autonomous witness protection authority to implement the objectives of witness protection. This thesis thus recommends the enactment of a comprehensive witness protection Act for Nigeria: which establishes an Independent Witness Protection Agency to administer protection to witnesses. From the preceding analysis in this chapter, the challenges highlighted are best managed within this structure, and autonomy, accountability and confidentiality are better actualised therein. The idea of 'independence' is emphasised even within prosecutor-based systems and police-based systems too. With an independent witness protection agency, there are specified and designated officials and over time, specialisation which is required for witness protection, is developed.

[185] This is further elaborated in chapter 8.
[186] John Jeffery 'Truth about SA's witness protection' *Cape Argus* 4 June 2015, available at *https://www.iol.co.za/capeargus/truth-about-sas-witness-protection-1867598,* accessed 12 June 2018.

The establishment of an independent witness protection agency also means that underlying institutional incapacities that exist are improved. Specifically, witness protection will only be achievable and successful where governments commit to an overall reform of the criminal justice system and have the political will to follow through. This however does not mean that informal practices, which enhance the interest of justice, should be disregarded until such time that a well-developed system exists. The establishment of an independent agency within a formal system grounded in legislation is thus a workable option for Nigeria, pending improvements.

CHAPTER EIGHT

WITNESS PROTECTION IN NIGERIA: PERSPECTIVES OF CRIMINAL JUSTICE EXPERTS AND PRACTITIONERS

8.1. Introduction

This chapter returns to Nigerian developments in witness protection. The discussion draws on data collected through semi-structured interviews that explores the views and experiences of a sample of criminal justice experts and practitioners about witness protection; particularly regarding the existing legal framework of witness protection in Nigeria.

The Nigerian case study reflects the need to pay attention to the lack of clarity underlying the concept of witness protection. Recent attempts by the Nigerian legislature to enact witness protection legislation in 2017 shows that witness protection is defined in a way that encapsulates the concept of whistle-blower's protection. This expansive definition confirms that there is need for a conceptual clarification about the meaning of witness protection in Nigeria. The analysis in this chapter offers insights into the evolving practice of witness protection in Nigeria. It accentuates that, although witness protection is still emerging in Nigeria, its legal developments thus far are predominantly motivated by a criminal justice rationale; specifically, from the need to prosecute specific crimes of interest to the Nigerian government. Before engaging the field data, some remarks on the research design are provided.

8.2. Research Methodology

In pursuit of a more detailed understanding of developments relating to witness protection in Nigeria, field research was undertaken. A qualitative methodology[1] was employed, and it adopted a selection method of purposive and snowball sampling. This consists 'of identifying respondents who in turn refer researchers on to other respondents.'[2] Upon preliminary desk research, individuals, who play key roles in criminal justice reforms in Nigeria and government institutions engaged in protecting witnesses, were identified as useful participants for the research. Having

[1] This primarily means collecting data in the form of words. See Florian Kohlbacher 'The Use of Qualitative Content Analysis in Case Study Research' (2006) 7(1) Art 21 *Forum: Qualitative Social Research*, 2.
[2] Rowland Atkinson and John Flint 'Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies' (2001) 33 *Social Research Update* 1.

identified these groups, heads of these institutions, were approached to nominate specific personnel with knowledge in the field to participate in the research as key informants.

The field research was undertaken using semi structured interviews with a total of 18 participants comprising individuals with first-hand information about witness protection in Nigeria. A semi-structured interview schedule allows a researcher to 'ask informants a series of pre-determined but open-ended questions'[3] about the topic. The semi-structured interviews were useful to engage the key informants on their perceptions about legal issues and practices of witness protection generally and in Nigeria specifically.

The field research targeted two broad groups: policy reformers and personnel attached to government institutions. The policy reformers comprised individuals in academia and legal practice, engaged in policy formulation in criminal justice administration in Nigeria. They were members of different criminal justice reform committees in Nigeria and have been involved in enacting key pieces of legislation on witness protection, like the Administration of Criminal Justice Act (ACJA) 2015. Also, they have engaged in research and published academic articles and reports that have contributed significantly to criminal law and jurisprudence in Nigeria. The second group of interviewees were attached to law enforcement agencies that have provided some form(s) of protection for people at different levels in Nigeria. While some were identified from a review of the existing legislation in Nigeria as they are empowered to administer these laws, others were identified because of the nature of the crimes they investigate and prosecute. The respondents from these institutions were investigators and prosecutors. They comprised heads of prosecuting units and senior investigators with an average of 12 to 15 years' experience in the field.

8.2.1. Ethical Considerations

The empirical component of this research was carried out with the approval of the Ethics Committee, Faculty of Law, University of Cape Town, and in compliance with the University of Cape Town's Ethics Policy. The participants were assured that information provided by them would be presented in a confidential manner in the thesis.

[3] Lioness Ayres 'Semi-Structured Interview' Sage Encyclopaedia of qualitative Research Methods, available at *http://methods.sagepub.com/base/download/ReferenceEntry/sage-encyc-qualitative-research-methods/n420.xml*, accessed 3 May 2018.

8.2.2. Data Collection

Data was collected between May and September 2016. The research was conducted in Abuja and Lagos where the headquarters of these government institutions are located, and the policy reformers identified for this research, are domiciled. The interviews were conducted within the official premises of the respondents. A total of 18 individuals comprising five policy reformers (respondents A-E) and 13 officials (respondents F-R) from five government institutions (10 prosecutors and three investigators) participated in the semi structured interviews.

The semi-structured interviews were aided by interview guides that contained a set of questions for the respondents. The questions for the policy reformers focused on more conceptual matters; such as the reason for the inclusion of witness protection in the ACJA; the justification for witness protection; the definition of beneficiaries of witness protection; and, the scope of crimes requiring protection. Respondents from the government institutions were asked questions about the institutional and operational practice of witness protection. During the interviews, an audio recorder (and where applicable notes) was used to record the interviews. Written consent to use the audio recorder was obtained from authorised personnel (of government institutions) and individually from each respondent. The length of each interview was about 30 minutes and was conducted in English.

8.2.3. Negotiating Access and Limitations

As to be expected, the process of negotiating access through institutional gate keepers was time-consuming. Two senior colleagues assisted with accessing relevant networks both within the policy and law enforcement community. After initial introductions through the interlocutors, contact was made with policy reformers and contact persons at the government institutions through email and phone calls. This was followed up with official letters that outlined the objectives of the research in more detail. Getting approval from the authorised personnel at the government institutions proved challenging. Two of the initial government institutions were substituted since they were unwilling to participate despite previous assurances given.

Also, in institutions that agreed to the research, even where permission was granted, it was difficult to fulfil the research expectations completely. For example, letters sent to these government institutions requested for four officials each to participate in the interviews. The institutions at their discretion determined the number of personnel who could participate in the

interviews. In one instance, the head of the institution decided that only one participant was enough to provide the information needed for the research. The reasoning was that the official was the head of the unit and had more knowledge and experience than other members of the unit. The researcher had anticipated interviewing a minimum of 25 respondents but in the end only 18 people participated.

Even where official clearance was given, some government respondents appeared hesitant to participate. This reluctance seemed a function of their concern about the motives of the research. When probed they expressed concerns that they could be 'implicated' because 'witness protection is a sensitive issue.' Assurances of anonymity and confidentiality and explaining the ethics clearance involved however helped ease these concerns. Also, it was expected that each interview would last about 60 minutes each but on average the interviews lasted about 30 minutes. This did not adversely affect the quality of information obtained from the participants during this time frame. Overall, the timeframe was determined by the extent of information and knowledge available to them.

As indicated earlier, the interviews were undertaken in 2016, the second year of the doctoral studies and at the time, the interview questions designed were determined by the extent of information known about the topic from preliminary desk research. More interaction with the literature in the subsequent years of the studies revealed aspects which required more critical engagement with the interviewees. For example, the human rights versus criminal justice dichotomy adopted in the research would have been further explored in terms of the five critical issues examined in the thesis and deepened the analysis from practitioner's views. Also, issues about inter-agency and inter professional cooperation would have been further investigated to propose a more suitable system for administering witness protection in Nigeria.

In terms of securing more participation of interviewees, the scope of policy reformers could have been expanded to include more academics researching in criminal law and justice and the law of evidence, and legal professional bodies like the Nigerian Bar Association (NBA), to get the views of legal practitioners, especially defence attorneys. Their views would have deepened conversations about the justifications and relevance of witness protection in the administration of criminal justice, and constitutional issues which strike at balancing the rights of defendants to fair hearing and the state to protect witnesses. These issues would have been probed more tenaciously within the Nigerian context given the significance to the topic of witness protection.

Despite the initial difficulties in gaining access, most interviewees in both groups expressed their interest in the research. They believed that substantive research into the policy and administrative arrangements for witness protection could contribute to developing a suitable programme in Nigeria. They expressed interest in the research findings of the project. The data collected through the interviews add a valuable qualitative aspect to the existing body of research. Such data combined with the review of the relevant literature, allowed for a more detailed view of issues relevant to an understanding of current attempts at providing protection for witnesses in Nigeria.

8.2.4. Thematic Analysis

After data collection, the interviews were transcribed first into a written form and subsequently into a typed electronic form. As indicated earlier, an interview guide was used during the interviews. The interview guides as utilised, contained a set of questions under different themes. The questions were shaped by the major themes identified from the literature review on witness protection.[4] The data collection was analysed along the following broad themes: clarification of the definition of witness protection; rationale for witness protection in Nigeria; the significance of witness protection in Nigeria; definition of witnesses in Nigeria; types of crimes necessitating witness protection in Nigeria; perceptions of existing witness protection structures in Nigeria; the nature of protective mechanisms in Nigeria; challenges of and the prospects for witness protection in Nigeria.

The research adopted a thematic analysis of the data. A thematic analysis focuses on identifiable themes and patterns emerging from the data.[5] By adopting a thematic analysis, the researcher identifies how overarching themes are supported by excerpts from the data to ensure that the interpretation of data remains directly linked to the respondents' answers.[6] The data is discussed and analysed in the subsequent sections.

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[4] Anthony G Tuckett 'Applying Thematic Analysis Theory to Practice: A Researcher's Experience' (2005) 18 (1-2) *Contemporary Nurse* 78.
[5] Jodi Aronson 'A Pragmatic View of Thematic Analysis' (1995) 2 (1) *The Qualitative Report* 1-4; See also Mojtaba Vaismoradi et al 'Content Analysis and Thematic Analysis: Implications for Conducting a Qualitative Descriptive Study' (2013) 15 (3) *Nursing and Health Sciences* available at *https://doi.org/10.1111/nhs.12048*, accessed 4 April 2018.
[6] Ibid.

8.3. The Practice of Witness Protection in Nigeria

The data obtained from the field work serve two key purposes: First, they identify the inadequacies of the existing legal framework of witness protection and consider how this affects the practice of witness protection in Nigeria. Secondly, they help substantiate or verify information obtained from the doctrinal analysis of the existing legal framework.

8.3.1. What is Witness Protection in Nigeria?

This section describes how, according to the interviewees, witness protection is being defined in Nigeria. To determine this, the objectives of witness protection within the existing legislation are examined. It is also inferred from the respondents' answers regarding who the beneficiaries of protection should be and the context within which institutions protect their witnesses in practice.

From the discussions in chapter two, it became clear that within the existing legal framework for witness protection, the concept of witness protection is not expressly defined. The legislative attempts at witness protection have resulted in differences in terms of the scope of witness protection.[7] Apart from the inconsistency in legislative attempts, definitions provided by the respondents were also not uniform. When asked 'Has your institution been engaged in witness protection?' one respondent L answered by posing a counter question, 'Can I ask what the definition of witness protection is? Is it in terms of individuals as an investigator or as an informant?' Although his institution is primarily involved with the investigation and prosecution of a major crime of interest to government, this respondent and two others from the same institution averred that they were unaware of any instance of witness protection by their institution. According to respondent M, 'We are engaged with informant protection.' According to this respondent, 'We have been, and we have our own witness protection in the sense that what we do, whenever someone gives us information, we protect the informant.' This suggests that the respondent believes that there is a difference between witness protection and informant protection and should be approached as two different concepts.[8]

[7] See chapter 2: 2.2.5.

[8] See *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*, para 21, p 4, available at *https://wcd.coe.int/ViewDoc.jsp?id=849237&Site=COE*, accessed 23 March 2013.

Although the NAPTIP Act is highlighted as an existing piece of legislation that furthers the objectives of witness protection in Nigeria, three respondents noted that the objective of the NAPTIP Act is more consistent with victim protection because they focus on rehabilitating victims who are not necessarily witnesses in a criminal proceeding.[9] Respondent Q noted specifically that, 'our laws in the Agency is geared towards protecting victims. Even though we are a law enforcement agency, we take the victim as the focal point of our work.' Similar views were shared by a policy reformer, A, who stated that, 'I can tell you that in Nigeria there is no strong witness protection programme. As far as I know, only one organization seems to have a programme, but this is probably for victims and not witnesses.'

Still, two respondents, noted that the ICPC Act is more reflective of whistle-blowers protection.[10] These views are supported by the findings discussed in chapter three.

8.3.2. Why Witness Protection in Nigeria?

The interviews also explored what respondents perceived to be the driving forces behind the establishment and refinement of witness protection. According to majority of the respondents,[11] the rationale for witness protection in Nigeria is linked to the nature of high-profile crimes such as terrorism and economic and financial crimes, particularly corruption, currently prosecuted in Nigeria and the high incidences of witness intimidation from prosecuting these cases. As one interviewee put it, 'the nature of the cases now prosecuted in our courts, particularly cases involving powerful people has justified witness protection.'[12] According to another, witness protection in Nigeria is necessary 'to improve the sanction and enforcement regime of criminal justice administration.'[13] There is evidence of this in chapter two as witness protection provisions were introduced as part of criminal law reforms such as in the EFCC Act, the TPAA, the NAPTIP Act, the VAPPA and the ACJA. The respondents emphasised also, that the nature of crimes currently prosecuted are perpetrated by organised groups with the capacity to retaliate, thereby justifying concerted measures by government. As one respondent put it,

> …Anyone of these offences can only be perpetrated by an organised group and there have been findings and revelations that some of these

[9] Respondents P, Q, R.
[10] Respondents H and I.
[11] Respondents A, B, C, F, G, I, K, M, P, R.
[12] Respondent B.
[13] Respondent C.

> offences, are committed in an organised way. Now if you have that kind of organized criminality, certainly, apart from other methods, they will also have the capacity for reprisals… political actors are thus open to developing witness protection programmes subject to budgetary constraints…[14]

These kinds of justifications support a criminal justice perspective of witness protection. That is, the practice of witness protection in Nigeria is indicative of a limited application to specific crimes, with witness intimidation and the status of the defendants as strong motivations for introducing extra-ordinary strategies to ensure the successful prosecution of these crimes.[15]

Both policy reformers and practitioners emphasised the role of witnesses in ensuring that these crimes are successfully investigated and prosecuted and how this is hampered by witness intimidation concerns. The four extracts below capture the way in which individual respondents articulated the importance of witnesses for successful prosecution:

> 'The role of the witness in criminal justice administration cannot be over emphasised because you need the witness to be able to prove your case.'[16]
>
> 'Witness protection assists in motivating witnesses to cooperate with the prosecution.'[17]
>
> 'The major reason why we ask for witness protection is that these cases of terrorism are very sensitive and the witnesses who we may wish to call are usually reluctant to appear in court because they fear that there could be attacks by persons supporting the defendant.'[18]
>
> 'Without the witnesses, we cannot try our cases.'[19]

By securitizing serious crimes, the Nigerian government stresses the ability of these crimes to weaken the fabric of society, foster inequality as well as become a hindrance to an effective legal system.[20] A policy reformer, emphasised that 'since anti-corruption is a priority under this present administration, within this mind set (sic) is the opportunity to further push witness

[14] Respondent A.
[15] Respondent A notes that witness protection is a result of 'weakness of prosecution strategies' and a 'means of reformers to tackle intimidation issues.'
[16] Respondent D. These views are also shared by respondents G and H.
[17] Respondent E.
[18] Respondent F. Also shared by respondent N.
[19] Respondent B.
[20] See Taiwo Osipitan and Abiodun Odusote 'Nigeria: Challenges of Defense Counsel in Corruption Prosecution' (2014) Vol 10 (3) *Acta Universitatis Danubius. Juridica.*

protection and other complimentary measures like whistle-blowers protection and improvement in crime data registry.'[21]

The responses as articulated by interviewees demonstrate the importance of criminal justice reform considerations for witness protection. The dominant views amongst those interviewed was that witness protection in Nigeria has developed within the context of crimes of significant interest to the state for which priority is ensured, such as terrorism and economic and financial crimes. Only two respondents considered the possibility of human rights motivations within the context of the increasing recognition of the rights of victims in cases involving sexual crimes.[22] It is important to emphasise that this opinion was specifically elicited in response to the nature of protective mechanisms available to victims under the mandate of the NAPTIP.

8.3.3. Who is a Witness?

As discussed in chapter two, within the existing legislative framework a witness is not defined. Also, the discussions in chapter four illustrated that the literature identifies a broad category of persons who are likely beneficiaries of protection. More so, the *Dasuki* and *Nnamdi Kanu* cases presented the courts with an opportunity to clarify the scope of beneficiaries that require witness protection in Nigeria. There is yet no judicial clarification about the definition of witnesses for the purpose of witness protection in Nigeria.[23]

Apart from the courts, respondents in this study were uninformed about the implications of defining witnesses within the context of witness protection. When asked how witnesses are defined,[24] four respondents[25] alluded to a broad and literal definition of witnesses. To them, any person who witnesses a crime and is part of an investigation or has something to contribute to justice, is a witness. This invariably includes, victims, bystanders, justice collaborators, informants and investigators. Alternatively, a fifth policy respondent said that within the context of witness protection, 'not everybody who comes to testify' is a witness. He emphasised for instance that 'beneficiaries of witness protection should exclude official and expert witnesses.'[26]

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[21] Respondent C.
[22] The respondents were asked 'Can you please tell me what factors your institution generally considers in deciding to protect the witnesses?'
[23] See chapter 2: 2.4.
[24] The question was specifically addressed to policy reformers
[25] Respondents A, B, C, and D.
[26] Respondent E.

Two respondents[27] however qualified their responses by confirming that they had not considered the implications of defining a witness within the context of witness protection. They proposed that definitions of witness should be determined by factors such as 'threat of direct physical harm or death.' In that case, they affirmed that whistle-blowers should be excluded as whistleblowing happens in diverse situations and may not be life threatening. Also, that whistleblowing focuses on ensuring that the whistle-blower is not victimized. One of them went further to state that 'we use victims and witnesses interchangeably much as not all witnesses are victims, but most victims are witnesses.'[28]

Much like the policy reformers, the criminal justice responders also failed to provide clarity. While four respondents defined witnesses as victims of crime, two respondents defined witnesses as whistle-blowers and two others defined witnesses as informants. It was observed that their responses were influenced by the nature of protection provided under the Acts establishing their institutions. Regarding victims, the point has been made that international practice recognises the inclusion of victim-witnesses as beneficiaries of witness protection. In Nigeria, victims should be included to the extent that they are testifying in a criminal proceeding, subject to other eligibility considerations. This eliminates a wide range of persons particularly those not testifying in court. In such instances, these persons remain under the purview of victim protection, focusing on their rehabilitation and psychological support and protection. This view is affirmed by respondent R who stated that 'most times, our victims are our witnesses. We also have others who are not victims but are witnesses to corroborate or confirm what our victim-witnesses would have said.' Also, another interviewee noted that 'we focus on the victims and we still prosecute the suspect. If there is any need for us to have someone outside, that is not a victim but a third-party witness who needs protection, we also accord that person protection.'[29]

Regardless of the inadequacies of the existing legislation and case law, the information retrieved from the interviews shows that practice in Nigeria supports the protection of investigators or informants. A policy reformer noted that the witnesses that the government usually depends on are often either state agencies or other people who have played one role or the other in investigating

[27] Respondents A and B. Respondent A said, 'Well I must admit that I have not really given that much thought to it.'
[28] Respondent B.
[29] Respondent O.

a case.[30] The criminal justice respondents agreed with this and established that they depend primarily on the information from their informants or investigators to discharge their statutory duties. As one respondent explained,

> Most of our witnesses so far in majority of our cases are our officers. So, there may be no reason to do any kind of protection for them except the protection which our security officers need to ensure for themselves…Again because we have not had so many outsiders coming to testify… When the identities of these officials are known, they however become vulnerable. [31]

This formed the crux of the prosecution's argument in the *Nnamdi Kanu* case when requesting protection for its witnesses who were investigators. I argue that the dependence on investigators in these circumstances results from the absence of a viable witness protection framework which guarantees the safety of witnesses. In the absence of willing witnesses, security agencies in Nigeria have had to adopt strategies that favour the use of informants or their investigators for intelligence gathering.[32] Their testimonies are often limited to their roles as investigators and are not vital to proving the actual commission of the crime. This is so considering the definitions by the policy reformers that a witness should be 'somebody that has witnessed, who was present when an offence was committed and who was part of an investigation.' In the *Nnamdi Kanu* and *Dasuki* cases, there is no evidence that the investigators were undercover agents. They were the arresting officers and did not personally (covertly) witness any of the crimes for which the defendants were indicted. Respondent K acknowledges that since most of their witnesses are investigators, they do not require special protection because they can protect themselves. In extreme circumstances, as Demlentier suggests, their protection, (in their capacity as undercover agents) is limited to partial anonymity. This in effect means that the information disclosed about them is limited to their undercover names and their office addresses.[33]

It has been established in chapters three and four that the element of testifying during court proceedings is central to the concept of witness protection. The EFCC, ICPC, TPA and NAPTIP Acts all recognise the protection of informants. Criminal justice respondents however confirmed that it is unnecessary to disclose the identities of informants. Respondent M for instance suggested

[30] Respondent C.
[31] Respondent K.
[32] See also *James Igbinovia v State (1981)* 2 S. C (Reprint) 3.
[33] Nora V Demleitner 'Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options? (1998) 46 *American Journal of Comparative Law* 661.

that for their protection, (criminal) informants may be arrested with no formal charges preferred against them. The idea of arresting them is to 'douse the suspicions of co-conspirators that the informant is a snitch as they assume that they are all being investigated.'[34] That way, there is no means of tracing the information to anyone. Therefore, informants should not come within the definition of witnesses in Nigeria as their mandates are different.[35] More so, distinct uses of words like *informants* and *witnesses* within these Acts,[36] envisage a different function between these two categories of persons. While the informant 'offers relevant information,' the witness is one who testifies in a proceeding before the court, and protection becomes necessary for safeguarding the life of the witness whose identity is disclosed because of the testimony in court.

In delimiting the scope of beneficiaries of protection, the respondents suggested a range of factors to determine their inclusion. These included the likelihood of physical harm,[37] the materiality/value of the testimony,[38] the nature of the crime/case[39] and testifying on behalf of the government.[40] In certain circumstances, especially in high-profile crimes like terrorism, a defendant may be used as a witness for the state.[41] In such circumstances, another respondent explained that:

> …there are also people who in line with our criminal justice systems who may be collaborators or conspirators that we feel we should use them as prosecution witnesses…they are now our witnesses and whatever measures we think we should offer them by way of protection we give them as witnesses. [42]

Thus far practice in Nigeria accepts the protection of eyewitnesses, victim-witnesses,[43] and justice collaborators.[44]

[34] Respondent M.
[35] I argued in chapter four that they may be included as eyewitnesses in circumstances where they are undercover agents and witnessed the crime while undercover.
[36] See for example sections 39 EFCC Act and 33 and 34 (1) of the TPAA.
[37] Respondent A, C, F (vulnerability), I.
[38] Respondent A, C (interest of government in the testimony), H (nature of the witness), L.
[39] Respondent F, G, H, J.
[40] Respondent A, C (interest of government in the testimony), H (nature of the witness), L.
[41] Respondent F. Respondents K, L, M also confirms the use of justice collaborators.
[42] Respondent R.
[43] Respondent O.
[44] Respondent F.

8.3.4. Witness Protection for what Crime(s)?

When asked about the types of crimes which require witness protection the question elicited contradictory responses from the respondents. Four policy reformers[45] preferred that protection is available to witnesses of all types of crimes. In contrast, a fifth policy reformer favoured a limited application and argued that the severity of the crimes and penalties attached to them should define the scope of crimes. According to that respondent,

> …under the law, every crime is not the same that is why the penalty for crime varies from crime to crime, so depending on the severity. If you look at those crimes that were listed in the ACJA that says protection should be available for witnesses testifying in these offences, you would agree that these are very high-profile cases, and these are cases where the life of the witness can be endangered; one because of the calibre of the persons that are mostly involved in these crimes. These are not crimes committed by the ordinary persons. Also, the tendency of interfering with the witness is very high in these cases …[46]

This research aligns with this reasoning. The responses of the four respondents however contradicted their responses regarding the rationale for witness protection that favours a limited scope of crimes. The responses which favoured an all-inclusive crime list, seemed to suggest a trivialisation of the significance of witness intimidation and the gravity of crimes, which have in fact shaped Nigeria's witness protection strategies over time.

Nevertheless, from their responses, the scope of crimes that have necessitated witness protection in Nigeria so far are terrorism[47] human trafficking,[48] economic and financial crimes such as corruption,[49] cyber fraud, money laundering and advance fee fraud.[50] These crimes conform with the type of crimes captured within the existing legal framework for witness protection in Nigeria. Although the ACJA recognises that for the investigation and prosecution of sexual offences protective measures may be adopted, the respondents did not include it as a crime that has justified witness protection in practice. Both respondents A and O however noted that in

[45] Respondents A, B, C, E.
[46] Respondent D.
[47] Respondents A, B, C, F, K.
[48] Respondents A, B O, P, Q, R.
[49] Respondents A, C, G, H, I, K.
[50] Respondents A, G.

the context of human trafficking, sexual offences may be perpetrated, thereby necessitating witness protection.

Three policy reformers[51] reasoned that the ACJA restricted the scope of crimes because of limited funds. According to respondent A, 'well I do not really understand the choice of these crimes in the ACJA because these are probably things that manifested to the legislature at the time.' Some respondents agreed that there are other crimes that should be included within the scope of crimes. These crimes include kidnapping, drug trafficking and other drug related offences and cybercrimes.[52] The respondents who preferred protection for all crimes however qualified their responses by stating that the type of crimes should be 'subject to some objective criteria stipulated by legislation.'[53] These respondents suggested some factors to delimit the scope of crimes. They noted for example that witness protection in Nigeria was necessitated because of the growing organised crime and criminal groups.[54] As one respondent put it '…there are so many dimensions to organised crime in Nigeria. We have cybercrime, militancy and insurgency.'[55] 'So witness protection has always been clearly meant to address organised crime because it helps to dismantle organised crime.'[56] In reference to the type of crimes for which witness protection has been adopted in practice and for those suggested by the respondents to be included, one respondent noted:

> Now, it strikes me that anyone of these offences can only be perpetrated by an organised group and there have been findings and revelations that some of these offences, some of these crimes are committed in an organised way. they will also have the capacity for reprisals, they will have a memory because if you take out one member of the group, the other members are still very much around to extract harm.[57]

The respondents therefore suggested that witness protection is necessary where it involves high-profile cases involving politically exposed persons who are wealthy, powerful and influential

[51] Respondents A, B, C.
[52] These crimes were commonly suggested by the respondents.
[53] Respondent A.
[54] Respondents A, B, D, E, K, N.
[55] Respondent D.
[56] Respondent E.
[57] Respondent A.

individuals,[58] organised groups[59] with the capacity for reprisals,[60] defendants with high disposition to violence and capacity for reprisal[61] the gravity and impact of the offence, and the nature of the threat.[62] Respondent C notes for instance that 'the evidence out there is just that for petty cases, misdemeanour, and the chances of a witness being threatened is very slim. Witnesses could even tell the accused person, 'I am going to give evidence against you, I saw you drive recklessly etc.' The consensus to the scope of crimes was therefore that the nature of crime is committed in an organised way or where the defendant is influential and has the capacity for reprisal attacks against the witness. As discussed in chapter two, the court in the *Dasuki* case took cognisance of these factors as a consideration for granting witness protection. It is important to delimit the scope of crimes along these lines to mitigate against the cost implications of developing a wide scope in the context of resources.

8.3.5. Methods of Protection in Nigeria

Discussions in chapter two indicate that protective measures within the existing legal framework in Nigeria are inadequate. Where they are specified in legislation, they are limited to procedural protective measures adopted during criminal proceedings.[63] The respondents noted that these measures are inadequate because they do not provide long term protection after the trial.[64] They propose that given the types of crimes that have necessitated protection in Nigeria, there is a need for long-term protection and more comprehensive measures such as identity changes and witness relocation.[65] One respondent said that while the measures are inadequate, they are the basic minimum required and are a useful starting point.[66] Another respondent noted that though not comprehensive, the existing measures are sufficient depending on the circumstances of each case.[67] According to this respondent,

[58] Respondent A, B, C, N, P, Q.
[59] According to respondent A '…The witness to a petty theft you know even if that witness is likely to suffer harm for testifying, I believe it is easier to trail or monitor the suspect because the suspect of a petty theft is an individual. But when you are looking at crimes that are grievous and grave and are of an organised nature, you are not able to put anybody under surveillance. The only thing is really to protect the target.'
[60] A, B, M, N, P, Q.
[61] C, K, N, P, Q 'such as a drug baron who has recruited an army of criminals that can go after a particular person.'
[62] A, C, M, N.
[63] See chapter 2; 2.2.
[64] Respondent A, B, C, D, E, F, I, L.
[65] Respondent A, B, C, D, E, F, I, L.
[66] Respondent A.
[67] Respondent D.

> …if the purpose is to shield the witness from the public, providing a face mask for instance can suffice. Once the face of the witness is shielded and the public is not able to recognise who the witness is, when he finishes testifying and he goes out, he mingles with the general public, it will be difficult for anybody to identify him as the witness…

Another respondent agrees that these measures 'only protect the witness against the public' and not against the defendant who is able to identify the witness.[68]

Respondent G however clarified that in practice within his institution, other measures apart from procedural measures are adopted. These include police escorts, surveillance and temporary relocation of witnesses.[69] He noted however that these measures are discretionary. It is suggested that these measures should be backed up with statutes[70] and that there should be 'a standard guideline that would be a Nigerian standard.'[71] Other measures used in practice in Nigeria include measures such as rehabilitation, counselling, financial support and shelters.[72] These measures depend on the nature of the witness, especially victim-witnesses of human trafficking as their institution has the mandate to protect the victims of human trafficking.

A significant issue underlying the protective measures in Nigeria is the objection that they are unconstitutional. The policy reformers refuted these arguments especially that the measures prevent the defence from observing the witness' demeanour. To them, the right to observe demeanour does not belong to the defendant but to the judge. To one policy respondent, it defeats the purpose of protection if you screen the witness from the public and not the defendant.[73] For him, the demeanour of the witness was only one factor to consider in looking at the credibility of evidence. For another, 'the fact that somebody uses a mask does not mean you cannot ask questions…. I think that some of these issues are symptomatic of lack of capacity and understanding of the framework…'[74] In addition, a UNODC manual observes that,

> the right of accused persons to examine… witnesses against them does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel…Moreover, in exceptional cases it may be limited to protect the safety of the witness or on grounds of national

[68] Respondent E.
[69] Response from Respondent G.
[70] Respondent F.
[71] Respondent K.
[72] Respondent H, O, P, Q, R.
[73] Respondent A.
[74] Respondent C.

> security. These limitations are not spelt out in the human rights treaties, but have been developed by national and international courts and other treaty monitoring bodies applying human rights norms to specific cases before them...[75]

In questioning the basis for these objections about the constitutionality of protective measures and the refusal of the court in some instances to grant protection, one respondent interpreted this as 'an attempt to apply the constitution beyond its limits.'[76] For another respondent 'such refusals are not properly founded because the objective of the constitution is to do justice and the reason why the witnesses are in court is to do justice. I do not see how we can interpret witness protection measures to be anti-constitutional.'[77] These views expressed by the respondents confirm some of the views expressed in chapter six that issues of demeanour do not affect the validity of protective measures.[78]

8.4. Institutional Framework in Nigeria

The discussion now turns to an examination of the administrative aspects of witness protection in Nigeria as understood by the two groups of interviewees.

8.4.1. Witness Protection Legislation

A significant aspect of a formal witness protection framework is the existence of a comprehensive witness protection Act that clearly defines functions, powers, rights and duties. Nine respondents[79] from the group of 13 law enforcement interviewees unanimously agreed that protection standards in Nigeria are not institutionalised and depend on the individual interests of the prosecutor to ensure the conclusion of a case. In such circumstances, the prosecutor is left to use personal resources such as monies from their salaries to actualise this.[80]

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[75] UNODC, Training Modules on Human Rights and Criminal Justice Responses to Terrorism, Module IV Human Rights Aspects of Special Investigation Techniques, The Nigeria Training Modules on Human Rights and Criminal Justice Responses to Terrorism, an initiative of the European Union Instrument for Stability (Draft 2015).
[76] Respondent D.
[77] Respondent B.
[78] See Ian R Coyle 'How do Decision Makers decide when witnesses are telling the truth and what can be done to improve their accuracy in making assessments of witness credibility'? Report to the Criminal Lawyers Association of Australia and New Zealand, 3 April 2013, available at *https://eprints.usq.edu.au/23356/1/Coyle_Report_2013_AV.pdf*, accessed 18 July 2014.
[79] Respondents G-N.
[80] Responses from respondents H, I, J, M.

Also, within the existing structures in Nigeria, there are no clear policies concerning the eligibility criteria for protecting witnesses or the terms of the protection arrangements. The failure to clarify this has resulted in the inconsistent application of procedural protective measures. Also, there are no specified commitments regarding the duration of protection or the grounds for terminating protection. In the absence of these, a wide range of issues such as confidentiality breaches and lapses in protection arrangements are possible. Questions about eligibility were restricted to respondents from the government institutions. According to them,[81] the choice to protect is usually at the discretion of individual prosecutors or investigators depending on their interests in the case.[82] Therefore, within the same institutions, informal attempts at protecting witnesses are not uniform and the outcome in practice is inconsistent.

It is argued therefore that the absence of a comprehensive witness protection Act is the primary reason for the ad hoc practice of witness protection in Nigeria. Accordingly, enacting a comprehensive witness protection Act is essential in improving the witness protection framework in Nigeria.

8.4.2. Administrative Control

As discussed in chapter seven, international trends indicate that witness protection authorities are either located within existing government institutions or created by establishing new institutions. Views on the preferred institutional locality of witness protection varied. One-third of the respondents[83] supported the establishment of an independent witness protection agency. To them, this enhances a uniform standard for protecting witnesses in Nigeria and fosters specialization. In contrast, half of the respondents[84] supported the location of administrative control within existing institutions. They in turn reasoned that creating a new institution runs the risk of duplication of agencies with additional cost implications and bureaucratic bottlenecks.

There were obvious disparities in the choice of institution among the respondents. For example, while three respondents[85] favoured the creation of a unit within the office of the Federal

[81] Except for NAPTIP which has some form of assessment done by the Counselling and Rehabilitation Department of the agency.
[82] They are influenced by factors such as vulnerability of the witnesses, nature/existence of threat to the witness, significance of witness testimony to the case and (dangerous) status of the defendant.
[83] Six Respondents A, B, H, K, L, and M.
[84] Nine Respondents C, D, E, F, G, I, J, N, Q.
[85] Respondents C, E, F.

AG, six respondents agreed that institutions other than the office of the AG should administer witness protection.[86] Specifically, they suggested their individual institutions as the suitable options. Although there was no indication from their responses that they were conscious of how criminal justice perspectives and human rights perspectives influence the choice of administrative control, it was apparent that the preference for their institution centred on the need to control the dynamics of the protection to guarantee the cooperation of their witnesses, in the interest of the case they investigate or prosecute. Some of these respondents however suggested the creation of an independent unit within the office of the Attorney General for instance, to allow for oversight and to separate witness protection issues from prosecution.[87] This aligns with the views of the one third who suggested the creation of an independent witness protection agency to manage witness protection concerns.

8.5. Challenges and Prospects for Developing a Witness Protection Framework in Nigeria

Both groups of respondents were asked to reflect on the challenges and prospects for developing a framework for witness protection in Nigeria. This section provides a summation of the responses received. The challenges here include those that may arise while developing the framework and/or in fulfilling witness protection objectives.

8.5.1. Likely Challenges

The likely challenges to be confronted in the process of institutionalising witness protection as raised by the interviewees may be broadly categorised as political, economic and social factors.

a. Political Factors

Predominantly in this category of challenges is the political will particularly on the part of the legislature. The policy reformers noted that previous attempts at enacting witness protection legislation failed because of the lack of understanding by legislators of the significance of witness protection.[88] Lawmakers in Nigeria failed to prioritise witness protection and focused on enacting other laws which they considered more important to them. Inadequate briefing and lack of technical support by sponsors of the bills are believed to be responsible for this lapse. One respondent emphasised that a bill of such significance to the administration of criminal justice in

[86] Respondents D, G, I, J, N, Q.
[87] Respondents E, F.
[88] Respondents A, B, D.

Nigeria should be promoted by the AG of the Federation.[89] In the absence of such efforts by the executive, the state fails to take ownership resulting in delays to enact legislation.[90] The respondents noted that this challenge is not specific to witness protection legislation but is a common attitude of the legislature concerning issues to which they do not ascribe priority.

A second challenge within this broad category of political will relates to interagency rivalries. Witness protection requires interagency cooperation, particularly between the investigators and prosecutors, and the witness protection authority. Although a degree of inter-agency cooperation exists among the security agencies in Nigeria, lack of trust is often a problem creating the likelihood of closed systems that may bedevil the exchange of information among them. As one respondent noted, witnesses are material evidence and agencies are jealous of their sources of information. Asking an agency to surrender a witness to another specialised agency requires one to cross that bridge of trust. He added for example that the Financial Intelligence Unit[91] which needs to piece intelligence from different agencies does not get the necessary cooperation.[92] 'Turf protection' is linked to the reluctance of institutions to surrender their autonomy.[93] This is an issue of political will that can be resolved by government ensuring that the necessary cooperation is provided in fulfilment of its general duties within the social contract.

As a challenge, corruption was also identified as a factor that could inhibit the objectives of witness protection. Where the process of recruiting personnel is marred by nepotism and favouritism resulting in the employment of unqualified staff the credibility of the system will be compromised. Recruitment into government institutions in Nigeria often lacks transparency and unqualified persons may be employed as a favour to government officials. This is problematic within a witness protection framework which demands credibility, secrecy and professionalism. Respondents were clear that government must thus be willing to allocate the necessary resources for witness protection to reduce the likelihood of corruption by personnel.

[89] Respondent D.
[90] Over the years, the witness protection bills fail to become law because it always elapses the tenure of the legislative assembly considering the bill.
[91] 'The Nigerian Financial Intelligence Unit (NFIU) is the Nigerian arm of the global financial intelligence units domiciled within the EFCC as an autonomous unit and operating in the African Region.' For further information see *https://efccnigeria.org/efcc/nfiu*, accessed 16 April 2018.
[92] Respondent L.
[93] Respondent F.

b. Economic Factors

Closely linked to the issue of political will is the challenge of funding or the allocation of resources to actualize witness protection objectives. The policy reformers noted that the cost implications of the previous bills 'hampered developing a framework.' The cost of implementing witness protection is high and 'government is deliberately shying away from its responsibilities because of cost implications.' According to one respondent, 'government fears putting money on (sic) bureaucracy anywhere now… there is a cost attached to witness protection which government is not readily disposed to providing now because of the prevailing economic situation.'[94]

Apart from the initial resources needed to establish the witness protection institution, funding becomes a challenge when government is reluctant to allocate the resources necessary to achieve the aims of witness protection. As one respondent observed, 'it is not as if there are no resources; when it comes to criminal justice, people are just not interested.'[95] Accordingly, another respondent added that, 'because of our level of development, people still believe that the resources you deploy to institutionalizing things like this should be deployed to the construction of roads and bridges.'[96] The cost involved in witness protection, so argued a number of the respondents, may mitigate against the establishment of a new witness protection. They observed that within the present dispensation, government has deliberately introduced policies geared at reducing the cost of governance. In the absence of adequate funding, it is impossible to manage the framework, and this undermines its effectiveness.

Secondly, 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.'[97] Another respondent noted that, 'often, we have very good legal framework and policy documents, but implementation is terribly hindered just because of inadequate funding.'

[94] Respondent C.
[95] Respondent D.
[96] Respondent E.
[97] Respondents P & Q.

c. Social Factors

A wide range of social factors such, religion, cultural beliefs, education and awareness may influence the effectiveness of witness protection. For example, relocation is in certain circumstances the most appropriate method of protecting witnesses. However, as one respondent noted, 'Nigerians are typically a family and community people and separating people from their families or communities is problematic. It is highly unlikely that people will be willing to give up their families and start a new life just to testify.' The importance of social factors is recognised by Alexander when he says:[98]

> …it is more foreseeable that, where a witness is relocated within Nigeria, they could be found. This is exacerbated by Nigeria's cultural diversity… A Yoruba person from Lagos will be conspicuous in Hausa land, nor may be particularly comfortable, given the strains that arise from time to time between the two. Similarly, a Christian from Port Harcourt may not fit in particularly well in Kaduna or Katsina.[99]

It is likely that such witnesses will opt out of the protection agreement.

Within the context of relocation also, another respondent reflected on gender dynamics as when the witness is a woman, it is difficult to get her participation without the consent of her husband. There are restrictions on her, and she may be unable to relate with law enforcement officials who are predominantly male. Furthermore, a third respondent noted that, if a female witness from the north is under some religious obligation like *'purdah,'* she cannot be relocated to a Christian environment as she will not be able to adapt to her new environment. Accordingly, before government begins to invest in relocation programmes, it will be best to take these into consideration.

Secondly, other social factors may prevent people from utilising the possibilities under the witness protection framework. According to one policy reformer, 'our society is largely informal, and people do not want to be seen cooperating with law enforcement agencies.' This in return is responsible for a culture of silence among most Nigerians. He noted that given our socio-economic development and level of education, Nigerians are not at the point where people ascribe importance to issues like witness protection. He emphasised that 'there are people who observe crime but are reluctant to come forward to give evidence even where they are not intimidated by anybody.'

[98] Richard Alexander 'The Role of Whistleblowers in the Fight against Economic Crime' available at *https://eprints.soas.ac.uk/89/1/JFC_-_Dec_2004.pdf*, accessed 19 September 2018.
[99] Ibid.

Another respondent referred to this attitude as 'general apathy on the part of the public to support law enforcement agencies.' He ascribed religious and tribal sentiments as contributory factors to this attitude. For example, the religion or tribe of the suspect, may determine the willingness or otherwise of witnesses to testify in a case. Witnesses may use any of the existing fault lines to justify their reluctance to support the witness protection agency. There is therefore the need for awareness and the reorientation of members of the public on the importance of the collective security of everyone.[100]

8.5.2. Prospects for Witness Protection in Nigeria

Despite the inherent challenges, interviewees also engaged the prospects for developing a witness protection framework in Nigeria. Their views relating to prospects are organised under nine headings.

a. Reform Prospects

Although witness protection concerns in Nigeria are relatively new, given the antecedents, the prospects are encouraging.[101] The recent interest of government to prosecute high profile crime, involving powerful people and politically exposed persons who wield a lot of influence, has given witness protection the much-needed attention required within the government structures. According to one respondent, because of these high-profile crimes, political actors are quite open to witness protection programmes. This is reflected in the current attempt to enact the 2017 Witness Protection Programme Bill which is currently awaiting presidential assent. For another respondent, 'for the bill to have been initiated by the government and approved by the Federal Executive Council and transmitted to the National Assembly means the political will is there.'[102]

Also, in recent times, the government has committed to enacting laws that reform the administration of criminal justice in Nigeria. The most notable is the ACJA. As the provisions of the ACJA are being implemented, the lapses within become clearer prompting the need to focus and reform the witness protection objectives therein. A policy reformer affirmed that within the Federal Justice Sector Reform Committee, witness protection is given priority in its reform agenda

[100] Respondent B.
[101] There have been three witness protection bills within 10 years. This to some participant is indicative of the political will of the executive arm of government to pursue witness protection concerns.
[102] Respondent Q.

and development partners and other stakeholders continue to emphasise the need to develop a witness protection framework in Nigeria. To him, this is the right time to promote witness protection policies.

b. Existing Institutional Capacities

Although existing structures are limited, they do provide a useful starting point. For example, security agencies in Nigeria have certain capabilities that may be utilised. Respondents from the government institutions acknowledged the dependence on the Department of State Security Services (DSS) and the Police, who have managed to successfully relocate witnesses under certain circumstances.[103] The NAPTIP also has significant knowledge of witness protection as they are the only institution with clear institutional policies and eligibility criteria. They also have shelters for victim-witnesses to provide them with temporary relocation. The experiences from these institutions should be drawn upon by the proposed witness protection agency. Furthermore, staff with some witness protection experience should be pooled from existing institutions to form the central agency.[104] This also reduces the chances of a totally inexperienced workforce and decreased the resources needed to train personnel from scratch. For one respondent, this also reduces the problem of allocating new budgets as these personnel are already captured within the salary platforms of government.

Also, in facilitating relocation, it was mentioned that the possibilities of relocating witnesses within other states in Nigeria and not necessarily outside Nigeria should be considered.[105] Furthermore, the ACJA has provided opportunities for exploring witness protection practices in Nigeria. The witness protection regime under the ACJA has prompted the recent judicial pronouncements. The ACJA thus provides a platform for creating the needed awareness for reforming the existing structures.

The suggestion by policy reformers to establish a single witness protection institution at the federal level should be considered. Such an agency, although at the federal level, will provide services not only to other federal law enforcement institutions but also to state institutions subject to the stipulated eligibility considerations. It should be fashioned after the Nigerian Prisons Service

[103] Respondents I, J, N, P. Details about this was however not given to the researcher.
[104] Respondent N.
[105] Respondent A.

(NPS) or the Nigerian Police Force (NPF). As one policy reformer noted, although the NPS and NPF are federal institutions, they are operative and have jurisdiction at all spheres of government, from the local government to the federal government.[106] These institutions can provide the needed operational framework for the witness protection agency.

c. Interagency Cooperation

Regardless of the challenges that arise within the context of interagency cooperation in Nigeria, the respondents were more affirmative of the opportunities therein. The investigators and prosecutors all admitted that their relationships with other law enforcement institutions, particularly the DSS and Police, are instructive to successfully fulfilling their mandates. One respondent noted that regardless of their specific responsibilities, all law enforcement agencies generally aim at protecting society from crime and to encourage interagency cooperation.[107] Within the context of interagency cooperation, infrastructure should be shared. For example, another respondent said that

> …We have the (X institution), we make use of their facilities when we are over stretched, because we cannot say because our shelters or safe houses cannot contain more let's push them out. What we do is that we look for those credible and notable institutions or NGOs that partner with us and who share the same vision with us to assist us; it has always been on the very positive side…[108]

There are thus prospects within the confines of interagency cooperation that help reduce the challenges that arise from inadequate or untrained personnel and infrastructural capacities. This remains a viable option in the administration of criminal justice.

d. Donor Support and International Cooperation

Literature on witness protection recognises the role of donor support and international cooperation in developing a witness protection framework.[109] Interagency cooperation and donor support provide opportunities and assistance in the areas of funding, infrastructure, technical support and the training of personnel. In recent times, development partners have assisted Nigeria in different

[106] Respondent B.
[107] Respondent Q.
[108] Ibid.
[109] UNODC 'One step closer to witness protection in Kenya' 14 January 2010, available at *https://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html*, accessed 25 June 2018. See discussions in chapter 7: 7.5.2.

areas of reform, particularly in the criminal justice sector. For example, since 2012, the UNODC has provided an 'enhanced programme of specialized counter-terrorism capacity building and technical assistance to Nigerian authorities.'[110] Other known initiatives are the Nigeria- European Union (EU)-United Nations Office on Drugs and Crime (UNODC)-Counter-Terrorism Committee Executive Directorate (CTED) partnership on Strengthening Criminal Justice Responses to Terrorism.[111] Also within the framework of the UNCTOC, the UNODC supports states by providing technical support and awareness programmes for stakeholders in the criminal justice sector. Furthermore, Nigeria should also consider the possibilities within international cooperation agreements and foster such agreements with other states. Already, Nigeria and South Africa have utilised this opportunity in the terrorism prosecution of Henry Okah.

e. Proceeds of Crime

A lot of funds have been recovered from the current investigation and prosecution of economic and financial crimes in Nigeria, particularly from money laundering. There is currently an attempt by government to centralise the proceeds of crime confiscation from these prosecutions. One policy reformer suggests that these funds should be channelled towards witness protection objectives and should be considered an aspect of government social spending to enable government to benefit from these funds. This should constitute a part of the Witness Protection Fund created to fund witness protection in Nigeria.

f. Witness Participation

Guarantees that witnesses will be protected encourage more cooperation from witnesses. Respondents confirmed that, from their experience, where protection is made available and witnesses are aware, they are more likely to cooperate. This in turn helps improve the outlook to criminal justice in Nigeria and strengthens the rule of law, where crimes are conclusively investigated and prosecuted. One respondent suggested that 'we must proceed on the assumption that citizens also do not like crime. They are abhorrent of crime and criminality.' Public concern may motivate government to ensure that a framework is developed.[112]

[110] UNODC, Training Modules op cit note 75 at 3.
[111] Ibid.
[112] Respondent F.

g. Confidentiality and Professionalism

Although confidentiality breaches were an anticipated challenge, the practitioners were adamant that the chances of such a breach was unlikely. According to them, within existing structures, confidentiality breaches are hardly an issue and basically non-existent. They noted that confidentiality is handled institutionally by the Oath of Secrecy Act and internal mechanisms founded on the principle of 'need to know.' Also, they note that there are checks in place such as ensuring that sensitive issues are handled by very senior personnel with more professional experiences. In addition, there are policies in place to ensure 'public confidence in the integrity of the criminal justice system… and exercise the highest standards of integrity.'[113] Within these parameters, personnel reluctant to lose their jobs or face criminal prosecutions for confidentiality breaches are unlikely to act in this manner. This explanation provides a way to mitigate against the challenges that may arise from corruption and political interference in the discharge of official duties. This structure should be adopted in the proposed framework.

h. Scope of framework

Limited resources are often an excuse for failing to commit resources to witness protection. Since it involves financial obligations, governments need to see the need to invest in it. A policy reformer noted that previous attempts to develop a witness protection framework failed because they were very elaborate and not based on the realities of Nigeria. If government is given a framework that does not require a lot of resources, they might be willing to develop a framework. This research maintains that resources must be prioritized, and the scope of the framework should be limited as not every person can benefit from it. The framework should be less complicated, less expensive and more pragmatic. Such scope will include a limited scope of beneficiaries as well as applicability to very serious offences, such as those identified in preceding sections in line with criminal justice perspectives to witness protection. The framework developed should consider that the socio-economic and socio-political peculiarities of the Nigerian state, such as an undeveloped criminal justice system and poor political will, require that modesty and realism should guide policy reformers.

[113] See Code of Conduct for Prosecutors (2013). See also the National Policy on Prosecution (2014).

i. Opportunities for Public Private Partnerships (PPP)

Government should consider the opportunities available to them in PPPs. For example, government should also consider the opportunities that NGOs and civil society provide particularly with infrastructure, training of staff and support services. Four respondents[114] acknowledged that NGOs have been instrumental in the protection arrangement within their institutions. This opportunity can be harnessed whenever a comprehensive witness protection system is established.

8.6. Where is Nigeria Headed Now?

In furtherance of criminal justice reform, the Nigerian Senate has passed the Public Interest Disclosure Bill and Witness Protection Bill 2017.[115] Commentators observe that the bill was necessitated in the context of the 'current government's anti-corruption campaign involving whistle-blowing policy, when citizens help government in the recovery of stolen loot…'[116] This is indicative of the political will of government to take matters of protection seriously and develop a framework in furtherance of this objective. The bill merges witness protection with whistleblowing. From all indications, it appears that the central objective of the bill is whistle-blowers protection, primarily to stimulate accountability and transparency in the management of public funds.[117]

Furthermore, the scope of crimes covered by section 2 of the 2017 bill is enormous. Although it captures the offences under the ACJA, it also includes all offences under the criminal and penal codes in Nigeria. Subparagraph (2) qualifies the scope of the crimes by stating that the bill applies to 'wrong doing and unlawful activities by public authorities and offices in the performance of their duties and responsibilities.' If anything, this is because the public interest disclosures within the public sector are more in line with whistle-blowers protection objectives. Alexander clarifies that 'frequently the crime concerning which a person wishes to blow their whistle is actually committed inside their organisation, perhaps by a senior officer. This of course

[114] Respondents O, P, Q, and R.
[115] Available at *http://www.justice.gov.ng/documents/PUBLIC%20INTEREST%20DISCLOSURE%20AND%20%20%20WITNESS%20PROTECTION%20BILL,%202017%20FINAL%20040417.pdf*, accessed 18 July 2017. The bill is waiting for adoption at the House of Representative and further assent of the House of Representatives.
[116] Abigael Joshua 'Anti-Graft: How Safe are Whistle Blowers' The Tide July 10, 2017 available at *http://www.thetidenewsonline.com/2017/07/10/anti-graft-how-safe-are-whistle-blowers/*, accessed 18 March, 2018.
[117] Ibid.

applies to all crime, but it is perhaps particularly true of economic crime.'[118] This does not detract from the fact that those wide scopes of crimes are justifiable within the scope of whistle-blowers protection and not witness protection.

Additionally, sections 1 and 11 of the bill apply to witnesses, informants, whistle-blowers, expert witnesses and persons making disclosures in their capacity as employers in the public sector. I argue that this provision is too broad, because the bill has conflated many items into one piece of legislation thereby expanding it and in turn losing its effect as a framework specifically for witness protection. Furthermore, a substantial part of this bill is geared towards the protection of whistle-blowers and persons in the employment of public service rather than witnesses of crime in the real sense of it.[119]

The preceding sections of this chapter focused on the need for Nigeria to consciously conceptualize a definition of witness protection, the scope of crimes and a working definition of witnesses to reflect global practice of witness protection. As it is, it is my observation that policy reformers are not consciously engaging in matters regarding witness protection. The bill, though a step in the right direction, is too elaborate and unrealistic as it extends beyond the scope of witness protection. As a policy reformer observed:

> We should start thinking about definitional challenges. We should learn from the experiences of other jurisdictions so that we do not have to reinvent the wheel so that when we are making our laws, these things can be taken into consideration. There is nothing stopping us from studying the experience of other jurisdictions and then leveraging on that experience in developing our own framework.[120]

8.7. Conclusion

This chapter examined the practice of witness protection in Nigeria as perceived and experienced by a sample of policy reformers and criminal justice practitioners. The data was guided by a qualitative framework and involved semi-structured interviews. The chapter proceeded by analysing data from the empirical study within a thematic framework by comparing practice in

[118]Alexander op cit note 98.
[119] The scope of the legislation is wide because it is a merger of two bills 'The Witness Protection Programme Bill' and 'Public Interest Disclosure Bill. See Sahara Reporters 'Nigerian Senate Passes Whistle-blower Protection Bill' Premium Times, June 8, 2017, available at *http://saharareporters.com/2017/06/08/nigerian-senate-passes-whistleblower-protection-bill*, accessed 3 April 2018.
[120] Respondent B.

Nigeria with international practices on witness protection. The perspectives from the field research provide an exploratory basis for piecing together the legal issues underlying witness protection in Nigeria, which is at a formative stage. This helps to clarify aspects of witness protection not clearly settled within the existing legal framework. Also, apart from expatiating on the discussions on the legal framework of witness protection examined in chapter two, this chapter in analysing the data, sought to ascertain the influence of criminal justice and human rights perspectives on Nigerian developments regarding witness protection.

The findings confirm that the rationale for witness protection in Nigeria conforms with criminal justice perspectives since witness protection evolved from the priority given to prosecuting high-profile crimes that threaten the security of the state. Also, witness protection in Nigeria has been necessitated within a specific scope of crimes and not all scopes of crimes as prescribed by human rights proponents. This conforms with the discussions in chapters three and five that witness protection developed significantly as a criminal reform strategy.[121] This generally came about as a way to tackle intimidation arising from prosecuting high-profile cases involving organised criminal groups and influential individuals with the capacity for reprisals.[122] Regarding the beneficiaries of protection, although undefined by legislation, respondents acknowledged that the practice in Nigeria favours the protection of investigators; this is qualified by the fact that the protection available to them is restricted to administrative protection by the institutions for which they work. This view is shared by Chene, who notes that investigators are included in witness protection programmes in exceptional circumstances.[123] The UNODC[124] and Fyfe and Sheptycki[125] note that this involves instances where they are undercover. It is argued here that

[121] See Chapter 5: 5.2.1.
[122] See the Witness Protection Program Act S.C 1996; see also Nicholas Fyfe & James Sheptycki 'International trends in the facilitation of witness co-operation in organized crime cases' (2006) 3 (3) *European Journal of Criminology* 321.
[123] See Marie Chene 'Good Practice in Witness Protection Legislation' *Transparency International* 29 November 2012, 3, available at *https://www.transparency.org/files/content/corruptionqas/Helpdesk_good_practice_in_witness_protection_legislation.pdf*, accessed 14 May 2018.
[124]*United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' (2008) 19;22 available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf*, accessed 20 December 2011.
[125] Nicholas Fyfe & James Sheptycki 'Facilitating witness co-operation in organised crime cases: an international review' *Home Office Online Report* 27/5 (2005) 5, available at *http://www.researchgate.net/profile/Nicholas_Fyfe/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4.pdf*, accessed 9 April 2015.

questions regarding the beneficiaries of protection should be restricted to victim-witnesses, justice collaborators and eyewitnesses of crimes committed within an organized crime or group context, or crimes involving powerful persons with the capacity to intimidate witnesses or carry out reprisal attacks.[126]

More so, human rights perspectives that define witness protection as a human right of everyone participating in a criminal process have played no significant role in witness protection developments in Nigeria. This is because witness protection so far depends on the interest of law enforcement authorities to adopt strategies to facilitate their interests in fulfilling their law enforcement mandates. In defining the scope of a witness protection framework therefore, criminal justice stakeholders should recognise that the essence of witness protection is primarily to ensure the safety of a small number of important witnesses in instances of serious threats of harm.[127]

The challenges identified by the respondents in this chapter are like those discussed in chapter seven, reflective of international practice.[128] Regarding the prospects, the respondents made suggestions as to what is practicable for Nigeria given the existing practices within law enforcement procedures. Largely, these suggestions are like the successes of witness protection in South Africa and Kenya for example.[129] Lawmakers in Nigeria should not only be concerned with enacting a witness protection legislation in the spirit of joining the band wagon of states that have a witness protection framework. It is necessary to pre-determine the institutional basis for protection before investing in developing a framework. In Kenya a distinction is drawn between victim protection and witness protection and only witnesses are protected in the witness protection programme.[130] Also in South Africa, protection for official witnesses is provided administratively

[126] See section 3521 (c) 18 U.S. Code Comprehensive Crime Control Act of 1984; section 8 (3) (f)Witness Protection Act 1994; section 7 (a)Witness Protection Programme Act 1996; Section 10 (1) (a)Witness Protection Act 1998; section 6 (c) Witness Protection Act 2010; section 82 (4) (a) Serious Organised Crime and Police Act (Chapter 15) 2005; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.

[127] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group of Government Experts on Technical Assistance Seventh session Vienna, 28-30 October 2013 Item 2 of the provisional agenda* Assistance, good practices and the comparison of national legislation in identifying and protecting victims of and witnesses to organized crime, CTOC/COP/WG.2/2013/2, 19th August 2013 Par 22-3, p 6-7, available at *http://www.unodc.org/documents/treaties/organized_crime/2013_CTOC_COP_WG2/CTOC_COP_WG2_2013_2_E.pdf*, accessed 5 May 2015.

[128] See generally chapter 7: 7.5.1.

[129] Ibid, 7.5.2.

[130] 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) 80, available at

by a unit outside the national witness protection programme.[131] The witness protection framework in Nigeria must be comprehensive, practical and designed to improve criminal justice administration. It is critical that those sporadic provisions scattered across various pieces of legislation need to be aggregated and improved upon.

http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf, accessed 7 February 2017.

[131] Ibid.

CHAPTER NINE

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

9.1. Overview

This research set out to explore the concept of witness protection with the aim of identifying conceptual and legal issues requiring clarification. Specifically, the thesis investigates Nigerian efforts in developing a witness protection framework by examining the existing legal framework and practices. In Nigeria, witness protection as a critical aspect of criminal justice administration is still evolving. Since witness protection is still at an early developmental stage, there is no clear legal jurisprudence. The practice is at a delicate point of deciphering conceptual and legal issues underlying the concept of witness protection. The thesis pieces together the practice of witness protection in Nigeria and, through an exploration of international discussions, legal developments and institutional practices of witness protection, provides a basis for evaluating Nigerian efforts in improving its witness protection framework and for making normative proposals to that effect.

Chapter one introduced the research with a general overview of the research, the statement of the problem, scope and limitations of the research, research methods and the significance of the research.

Chapter two situated the concept of witness protection within the context of Nigeria and examined the existing legal framework for protecting witnesses. Here, the inadequacies in the legal framework comprising legislative provisions and case law were highlighted. Specifically, the *Nnamdi Kanu* and *Dasuki* 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.

Chapter three examined the first conceptual issue that required clarification: what is witness protection? In this chapter, witness protection was distinguished from interrelated concepts such as victim protection, informant protection and whistle-blower protection. It identified certain organising principles for delineating the scope of witness protection. The criminal justice and human rights perspectives were formulated here as useful analytical tools for determining how witness protection is construed.

Chapter four examined the question 'who is a witness for witness protection purposes?' The chapter differentiated between a literal interpretation and a context specific definition of witnesses. Using the heuristic tools developed in chapter three, the criminal justice perspectives justified limiting the scope of witnesses within clear eligibility criteria because witness protection evolved within specific circumstances. The human rights perspectives justified an all-inclusive scope that extends protection to all persons participating in a criminal trial and exposed to harm on the basis that witness protection is a right for all citizens. The analysis in this chapter supported the criminal justice arguments limiting the scope of beneficiaries and defining witnesses within definite parameters.

Chapter five explored witness protection trends and ascertained the nature of crimes requiring witness protection. The chapter argued that witness protection evolved within specific crime contexts and its relevance is limited to crimes of a defined nature and not for all crimes. This chapter clarified that the problem is not so much about prescribing definite types of crimes but a matter of identifying the underlying characteristics indicative of the nature of crimes requiring protection. The chapter refutes human rights arguments for the application of witness protection to all crimes. This chapter referred to securitisation debates to accentuate the security imperatives underlying witness protection. 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.

Chapter six 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 analysis in the chapter identified certain factors that help to determine how protective measures are assigned in specific circumstances. It clarified that necessity and proportionality are guiding principles for assigning protective measures. The chapter also examined 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. Chapters five and six showed that the severity of crime influences the type of protective measures adopted.

Chapter seven explored 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. The chapter emphasised that human rights oppositions to the prosecutor-based and police-based systems prompted the evolution of witness protection to recognise the need for an independent witness protection agency. The chapter also discussed the characteristics of witness protection. It emphasised that autonomy, accountability and confidentiality are essential for achieving the objectives of witness protection. In conclusion the challenges and prospects of developing an administrative framework for witness protection were discussed.

Finally, chapter eight provided a critical engagement with the Nigerian developments of witness protection. It elaborated on the discussions in chapter two by introducing field data collected by way of semi-structured interviews with criminal justice experts and stakeholders in Nigeria. the discussion set out the key research findings relevant to the major themes identified from the previous chapters before considering the key recommendations regarding the normative proposals for conceptualising a legal framework for witness protection in Nigeria. It also highlights the contribution of the thesis and the conclusion.

9.2. Research Findings

9.2.1. Definition of Witness Protection

Although there is no universal definition of witness protection, an explanation of what it depicts is inferred from academic literature. Witness protection comprises all measures utilised to prevent or minimise the risk of harm or threats to a witness cooperating with law enforcement authorities. The concept of witness protection is conceptually different from other concepts, such as victim protection, whistle-blowers' protection and informant protection, which are often conflated in witness protection discussions.[1] Although similar since they all involve the adoption of strategies used to enhance cooperation and to prevent or minimise the risk of harm to cooperating persons, the extent of harm sought to be protected differs and this requires adopting different strategies. Witness protection is restricted to the highest threat levels.

Furthermore, the testimonial requirement of a witness and the element of open confrontation distinguish witness protection from other related concepts. The level of threat is

[1] See chapter 3: 3.3.

magnified by the element of open confrontation in court since the identity of the witness is likely to be revealed in court. Definitions of witness protection from a human rights perspective tend to conflate witness protection with other concepts. This extends far beyond the scope of witness protection. Criminal justice constructs whereby the difficulty to investigate and prosecute crimes with the highest threat levels and which emphasise the significance of the witness testimony reflect the objectives of witness protection. The way witness protection is construed is significant in determining the scope of a witness protection framework.

9.2.2. Witness Intimidation

Witness intimidation forms the crux of witness protection. Where witnesses fear no threat of harm for cooperating with law enforcement authorities, protection is unnecessary.[2] The element of intimidation helps differentiate witness protection from other concepts. Specifically, the findings accentuate that there is a strong correlation between witness intimidation and the nature of adversarial systems. The requirement of testifying in open court and confrontation by the defendant increases the susceptibility to intimidation, as the identity of the witness is likely to be revealed to the defendant.[3] That is, the level of threat is magnified by the element of open confrontation.

Also, within the context of witness protection, intimidation focuses on factors such as the status and the capacity of the defendant to retaliate against a witness. This justifies the conclusion that the defendant is usually the source of intimidation, while the prosecution's witnesses are the likely targets of intimidation. This explains the proposition in chapter four of this thesis that the defendant's witnesses be excluded as beneficiaries of witness protection. The thesis however finds that within the witness protection practice of the international criminal tribunals, the source of intimidation and the target of intimidation can be either the prosecution or defence. This explains the inclusion of the defendant's witnesses as beneficiaries of protection within the practice of the international criminal tribunals, a practice uncommon within national criminal justice systems.

The risk of intimidation is more prevalent in specific crimes than in others necessitating witness protection for some crimes and not for all crimes. Although intimidation occurs in a wide

[2] Ibid, 3: 3.4.
[3] Ibid, 3: 3.2.

variety of crimes, more significance is given to risks that arise where the offender has the capacity to successfully carry out reprisal attacks, usually in a group context.

9.2.3. Rationale for Witness Protection

Witness protection has evolved significantly as governments' response to curb witness intimidation. The prevalent rationale for witness protection is that it is a criminal justice response to witness intimidation arising from the prosecution of high-profile or serious crimes. That is, new crime threats and the incidence of intimidation arising therefrom necessitated law reforms to incorporate witness protection. This supports witness protection as a criminal justice strategy primarily from the need to successfully investigate and prosecute crime.[4] The state is willing to protect because it has an interest in the outcome of the prosecution of certain crimes of priority to it. States do not generally recognise witness protection as a right to all witnesses.

However, the rationale for witness protection is not limited to its utility in promoting successful investigations and prosecutions, but also its necessity in protecting persons who are willing to assist society in curtailing crime and injustices. Criminal justice prescriptions however limit these categories of persons by stipulating eligibility considerations.

9.2.4. The Influence of Human Rights

At the inception of this research, it was assumed that witness protection was a right available to every witness as a citizen. This assumption was informed by the fact that, in recent years, there have been attempts by human rights institutions to redefine the way witness protection is construed.[5] However, a closer examination of the scholarly literature and institutional practices confirm that witness protection remains largely defined by criminal justice constructs of witness protection, which limit protection to the prosecution of crimes of interest to state/prosecutors. In fact, human rights constructs of witness protection are more acknowledged within criminal prosecutions at the international criminal tribunals focusing on violations of international criminal laws which are not the primary focus within national criminal jurisdictions.[6]

However, human rights influences have modified practice in certain aspects of witness protection such as the extension of protection to witnesses other than justice collaborators

[4] Ibid, 3: 3.5.4. See also chapter 5: 5.2.1.
[5] Ibid, 3: 3.5.3.
[6] See chapter 5: 5.4.3.

especially, the recognition of victim-witnesses as beneficiaries of protection, the inclusion of psychological protection as a relevant protective measure, and the establishment of an autonomous witness protection agency outside the control of the prosecutor or investigator.

9.2.5. Classification of Witnesses

A 'witness' within the context of witness protection is contextually different from its ordinary usage.[7] Literal definitions of the word witness reflect human rights propositions, that witness protection is a right available to all citizens and applicable to everyone participating in a criminal proceeding. There is little support in the literature to justify such constructs of witnesses within the context of witness protection. Witness protection systems favour a criminal justice approach which limits the scope of beneficiaries. Just like the concept of witness evolved within specific circumstances, so also are witnesses defined within specific parameters: the value/significance of testimony, the existence of intimidation, testifying on behalf of the prosecution and other factors that constitute eligibility considerations within witness protection legislation delimit the scope of beneficiaries.[8]

Furthermore, the requirement of testifying in court is significant in definitions of a witness for protection as this requirement eliminates categories of persons such as informants, victims and whistle-blowers who do not necessarily provide evidence in court during criminal proceedings. The risk to the witness specifically arises from exposing the witnesses in court, in the context of adversarial prosecution. More so, the scope of witnesses has over the years expanded from its limited application to justice collaborators to include other classes of witnesses especially eyewitnesses/ innocent bystanders and victim-witnesses. This is linked to the expanded scope of crimes that does not focus only on mafia styled organised crimes but generally to crimes committed in a group context involving a wider range of suspects and by implication individuals who witness crimes committed by these suspects. The underlying factor in such instances is the significance of the witness's testimony to the prosecution.

There is insufficient evidence in the literature to justify the inclusion of the defendant's witnesses, expert witnesses and official witnesses such as investigators, as beneficiaries of witness

[7] See chapter 4.
[8] Ibid, 4.3.

protection.[9] The practice that recognises witness protection as a tool for facilitating cooperation with law enforcement authorities requires that the beneficiary of witness protection testifies on behalf of the state. While there is no consensus within the literature to justify a human rights definition of the beneficiaries of witness protection, there is more consensus within the literature to support the criminal justice influences in defining witnesses.

9.2.6. Scope of Crimes

Although witness protection historically focused on organised crimes involving the mafia and terrorism cases, it evolved to include gang related offences and crimes committed within an organised or group structure.[10] There is no consensus within the literature to justify a human rights approach to protecting witnesses of all type of crimes.[11] Witness protection evolved from circumstances that prioritised the prosecution of certain crimes. The scope and nature of crimes requiring protection remain motivated by criminal justice developments that limit the scope of crimes to serious offences, with the essential element being crimes committed in a group context. The availability of witness protection to gross human violence and other international crimes is limited to transitional criminal justice systems and the practice within the international criminal tribunals.

Securitization plays a crucial role in ascertaining the nature of crimes. It emphasises the security imperatives inherent in the crimes that justify witness protection.[12] The crimes that require witness protection are those which threaten the security of the state. These crimes are thus determined by the priority of action, to ensure that specific crimes are successfully investigated and prosecuted.

Likewise, the nature of crimes prosecuted within the international criminal tribunals is fundamentally different from crimes prosecuted within national criminal justice, except in instances where witness protection developed within transitional justice systems. However, I proposed in chapter five that there are certain mutual factors within these two justice systems. These factors are the difficulty of prosecution, closed structured group, the status of the defendants

[9] Ibid, 4.4.
[10] See chapter 5: 5.2.
[11] Ibid 5.4.
[12] Ibid, 5.3.

in effecting intimidation, threat assessments and eligibility criteria.[13]These factors provide objective parameters to guide policy makers in determining the nature and scope of crimes included within a witness protection framework.

9.2.7. Types of Protective measures / Degree of Protection

Protective measures include all measures adopted at all stages of the criminal proceedings to guarantee the safety of witnesses. These are broadly classified as physical measures and psychological measures. Although initial global practices limited the scope of protective mechanisms to witness relocation and identity changes within a witness protection programme, practice evolved to recognise a wider scope of protective measures.[14] Also, the focus of protection from the physical protection of witnesses transformed to recognising the importance of the psychological protection of witnesses. I argued that this transformation is influenced by victim protection practices that recognised the need to ensure that the emotional needs of victims are safeguarded.[15]

The principles of necessity and proportionality are useful to determine how protective measures are assigned. Although developed within the practice of the international criminal tribunals and within the context of procedural protective measures, the thesis supports the utility of these principles in assigning all types of protective mechanisms. While necessity dictates that protective measures are necessary to the extent that it is the only means of facilitating witness cooperation, proportionality is used to optimise the relevant principles considering what is legally possible. By and large, the level of risk the witness is exposed, the nature of the crime and the category of witnesses determine the nature and degree of protection provided. In adopting any protective measure, it should be balanced against the competing interests of the defendants, the witnesses and societal interest in the overall interest of justice.

9.2.8. Institutional Framework

The institutional framework of witness protection is relevant to its effectiveness. Within global practice, there are three broad recognised options: Ministry of Justice (office of the prosecutor);

[13] Ibid, 5.5.
[14] See chapter 6: 6.2.2.
[15] Ibid, 6.2.3.

the police force; or the creation of a new and independent witness protection agency.[16] However, recent practice favours the establishment of a new independent witness protection[17] agency as it facilitates specialization, autonomy and confidentiality, required for the effectiveness of witness protection objectives. Also, a formal witness protection system is preferred to informal systems that operate on an ad hoc basis. Informal systems of witness protection create a less favourable option in both developed and developing jurisdictions.

There is a likelihood within an informal system to conflate witness protection objectives with other inter-related concepts. Furthermore, within the informal systems the inadequacies of stipulating specific roles and responsibilities create inconsistencies. Within formal systems, the basis for protection is by a single comprehensive Act, specifying eligibility requirements, the scope of crimes, the definition of witnesses, the type of protective mechanisms available and the administrative control of witness protection. Both criminal justice proponents and human rights developments recommend a formal system of witness protection. A formal system of witness protection facilitates a process of evaluation, which is crucial to the effectiveness of witness protection objectives.

9.3. Recommendations for Nigeria

9.3.1. Definition of Witness Protection

Current developments in Nigeria show that there is no definite basis for defining witness protection. Existing constructs of witness protection in Nigeria merge witness protection with interrelated concepts such as whistle-blowers protection, victim protection and informant protection, which this research argues are conceptually different. Therefore, policy formulators in developing a witness protection framework should consider the implications of merging these interrelated concepts.

It is proposed that in developing a witness protection framework in Nigeria, the definition of witness protection should exclude other interrelated concepts in line with criminal justice constructs of witness protection. Witness protection should be limited to witnesses testifying during a criminal prosecution and exposed to severe threat levels. Also, the definition of witness protection should reflect one that applies not only to persons cooperating during investigation but

[16] See chapter 7: 7.3.
[17] Ibid, 7.3.4.

must emphasise their cooperation during prosecution in court. This reduces the likelihood of conflating witness protection with other concepts. This also fosters a framework that is less complicated and is pragmatic. This is the practice in Kenya, where a distinction is drawn between victim protection and witness protection and only witnesses are protected in the witness protection programme.[18]

9.3.2. Beneficiaries of Witness Protection

The current scope of witnesses in the practice of witness protection in Nigeria is very wide. The range of persons to benefit from witness protection should be well defined. Current practice in Nigeria accommodates victims, informants, whistle-blowers, as well as official and expert witnesses. There should be a more purposeful definitional scope of witnesses, reflective of eligibility considerations defined in the thesis as well as the significance of witness intimidation indicators. Consequently, witnesses under the Nigerian witness protection framework should be limited to justice collaborators, victim-witnesses and innocent bystanders (eyewitnesses) of crimes defined by the witness protection legislation. The testimonial requirement expected of these classes of witnesses excludes informants, victims, whistle-blowers, experts and official witnesses. Victims, informants and whistle-blowers are beneficiaries within the context of victim protection, informant protection and whistle-blower protection, respectively.[19]

It is proposed that investigators testifying in their official capacity are excluded as beneficiaries of witness protection but may be accommodated within official administrative processes except where their testimony results from their undercover status. This is the practice in South Africa where the official witnesses are protected administratively by a unit outside the national witness protection programme. [20]

Also, the definition of witnesses should recognise the importance of witness protection as a tool that enhances cooperation with law enforcement agencies.[21] This eliminates the inclusion of the defendant's witnesses within the scope of beneficiaries. The following factors are thereby

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[18] 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) 80, available at *http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf*, accessed 7 February 2017.

[19] *United Nations Office on Drugs and Crime* 'Good practices for the protection of witnesses in criminal proceedings involving organised crime' (2008) 19;22 available at *http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf*, accessed 20 December 2011.

[20] OHCHR conference compilation (op cit) n 18.

[21] See Article 24 of the UNCTOC.

proposed as organising principles for identifying the beneficiaries of witness protection. These are the element of witness intimidation, the role of the witness during criminal proceeding in court and the value/significance of the witness's testimony. These factors are used in Australia, Canada, Kenya, South Africa and Indonesia.[22]

9.3.3. The Nature and Scope of Crimes

The present scope of crimes in Nigeria under section 232 (4) (e) of the ACJA is too broad and should be limited. The historical antecedents of witness protection in Nigeria provide a useful direction for delimiting the nature and scope of crimes necessitating protection. It reveals that witness protection evolved within specific crime contexts such as terrorism, kidnapping, drug trafficking, trafficking in persons, corruption and economic and financial crimes.

Bearing in mind the objections in the *Nnamdi Kanu* case and *Dasuki* case regarding the exclusion of protection in crimes not listed in the witness protection legislation, such as treason and arms trafficking, I propose that the omnibus provision in section 232 (4) (e) of the ACJA be modified to cater for such unanticipated instances. This omnibus provision should be couched in a manner that reflects significant factors such as organized criminality, the severity of the crime, the high-profile nature of defendants, high threat levels, the difficulty of prosecution, the calibre of the defendant and capacity for reprisals. Consequently, the crimes envisaged in the omnibus provision should bear close semblance to the expressly listed crimes. This will be a question of law for the courts to interpret in line with the intent and purpose of witness protection. Here it is proposed that the crimes that require witness protection are those which threaten the security of the state. These crimes are thus determined by the priority of action, to ensure that specific crimes are successfully investigated and prosecuted. These criteria should also be used in interpreting the nature of crimes currently envisaged in section 232 (4) (e) of the ACJA.

Objections to the limited scope of crimes can be justified by the 'art of securitization.' Accordingly, government can justify the choice of crimes based on their ability to destroy the essence of society and challenge the effectiveness of the legal system. The emphasis is thus on the 'existential threat'[23] inherent in these crimes, requiring extraordinary measures beyond normal

[22] See section 8 (3) (d)Witness Protection Act 1994; section 7 (c) (d) Witness Protection Programme Act 1996; Section 10 (1) (c)Witness Protection Act 1998; section 6 (b) Witness Protection Act 2010; Art 28 Law of the Republic of Indonesia, Number 13 of 2006.
[23] See H Stritzel 'Towards a theory of securitization: Copenhagen and beyond' (2007) 13 (3) *EJIR* 358.

policing. Delimiting the scope of crimes also mitigates the cost implications of having a wide scope of crimes in the face of limited resources.

9.3.4. Protective Measures

Adequate protective measures ranging from physical protection, psychological protection and protection from unfair treatment are required for the successful implementation of witness protection programmes.[24] The current witness protection measures in Nigeria are inadequate as they exclude long-term protective measures, such as identity change and relocation, and psychological protection. These measures are necessary for an effective witness protection framework as they are vital to the wellbeing and safety of witnesses and can be a decisive factor in whether witnesses testify against perpetrators of crimes. Where witnesses are not confident that they may be adequately protected from intimidation and physical harm, they may be less inclined to assist law enforcement officers and prosecutors in prosecuting criminals.[25]

Consequently, the framework should include all measures that guarantee the physical and psychological safety and security of witnesses during all stages of the criminal proceedings (from the investigation to the post-conviction stage) as necessity demands. This includes pre-trial measures, procedural measures and a witness protection programme to facilitate identity changes, in extreme instances, and witness protection. This is the practice in Kenya, for example where witness protection legislation provides for the adoption of both procedural and long-term protection.[26] It should also include psychological protection to cater for the psychological wellbeing of witnesses, especially victim-witnesses. In assigning protective mechanisms, the level of risk the witness is exposed should determine the nature and extent of the protective measures adopted.

Anonymity measures, identity changes and witness relocation should be restricted to the highest threat levels, in exceptional circumstances as defined by the provisio contained in section 36 (4) of the 1999 Constitution of the Federal Republic of Nigeria and where the threat cannot be averted through other means. In adopting any protective measure, it should be balanced against the competing interests of the defendants, the witnesses and societal interest in the overall interest

[24] Global Programme against Trafficking in Human *Beings Toolkit to Combat Trafficking in Persons* 2nd ed (2006) 245-246.
[25] Ibid.
[26] See section 4 Witness Protection Act 2006 (as amended 2010) Kenya.

of justice. As regards procedural protective measures it is proposed that to minimise the inconsistencies in adopting procedural protective measures as noticed in the *Umar*, *Ogwuche*, *Dasuki* and *Nnamdi Kanu* cases discussed in chapters two and six, legislation should expressly stipulate the guidelines to guide the courts in adopting confidentiality or anonymity measures as suggested in chapter six.[27] Alternatively, such guidelines could be stipulated in a policy document developed by the Body of Attorneys General in Nigeria or by the Chief Judge of the Federal High Court.

9.3.5. Legislative and Institutional Framework

To move beyond the ad hoc practices of witness protection in Nigeria, it should be institutionalized through a comprehensive witness protection Act that establishes an independent and centralized witness protection agency to administer the objectives of the legislation. An independent and centralised witness protection agency may give rise to an effective witness protection system and aid in minimising the miscarriage of justice that ensues from corruption. It would also prevent the fragmentation of authority and duties that come from having more than one agency dealing with witness protection. The agency should have a budget, adequate funding, and an enforcement unit to guarantee the protection of witnesses.[28]

The legislation should also expressly define the scope of beneficiaries, scope of crimes, the eligibility considerations, the functions and powers of the witness protection authority and the obligations and rights of all parties to the protection arrangement. It should also provide for a witness protection fund to cater for the financial requirements of witness protection. The witness protection legislation should be of federal application having the same effect as the Nigerian Prisons Service or the Nigerian Police Force, from which all tiers of government can benefit.

The creation of a new independent witness protection agency is proposed because the characteristics of witness protection discussed in chapter 7: autonomy, accountability and confidentiality, especially financial and operational autonomy are best achieved within this structure.

[27] Chapter 6: 6.3.2.
[28] Ibid, 249.

9.3.6. Strengthening Existing Structures

Having proposed the clear demarcation of witness protection objectives from whistle-blowers, informant and victim protection, respectively, government should commit to strengthening existing agencies that already fulfil these mandates. For example, the ICPC which already engages in whistle-blowers protection should be strengthened to administer the public disclosure objectives in the proposed Pubic Interest Disclosure and Witness Protection Bill, which this research argues is in furtherance of whistle-blowers objectives. Also, the NAPTIP should be strengthened to further victim protection objectives. It is, however, proposed that the focus should be on the rehabilitation of victims who are not witnesses. This allows adequate physical protection to be provided for victim-witness (by the proposed protection agency), which is inadequate within the current dispensation because it focuses on their psychological protection.

Furthermore, sexual offences, simple offences and other offences excluded from the protection legislation should be restricted to regular policing functions and specialized agencies with existing capacities such as the NAPTIP as envisaged by section 44 of the VAPPA. Consequently, the police, the DSS and other law enforcement agencies should be strengthened to cater for these needs. This reduces the likelihood of duplication of agencies with the same functions.

9.3.7. Possibilities for Inter-agency and Inter- Professional Cooperation

Inter-professional and interagency cooperation should also be considered within the existing structures. For example, a role for the National Human Rights Commission (NHRC) should be envisaged. The NHRC is empowered to deal with all matters relating to the protection of human rights in Nigeria and to assist victims of human rights violations, and seek appropriate redress and remedies on their behalf.[29] It also has the mandate to 'liaise and co-operate with local and international organisations on human rights with the purpose of advancing the promotion and protection of human rights.'[30] Accordingly, the NHRC has a role in facilitating witness protection objectives, where victim-witnesses testify in prosecutions involving crimes perpetrated by state actors for gross violations of human rights or international humanitarian and criminal laws, especially where such prosecutions take place in international criminal tribunals.[31] There should

[29] See National Human Rights Commission (Amendment) Act 2010; section 5 (a) & (c)
[30] See Ibid, section 5 (g).
[31] See chapter 5:5.2.2.

also be collaboration between the proposed agency and those working in other government institutions like the Ministry of Health, Ministry of Justice, Ministry of Education, that provide relevant social services like health, finance, education and housing, required in instances where relocation of the witness is desired.

Although inter-agency and inter-professional cooperation among government institutions is desirable, the challenges of actualising it within Nigeria should be contemplated. As discussed in chapter eight, even among agencies within the criminal justice sector, with shared crime control responsibilities, cooperation is hindered by factors such as lack of trust and turf protection.[32] Undoubtedly, such cooperation becomes more complex with other institutions, given that they have different priorities in terms of work responsibilities, bureaucratic hurdles, budgetary restrictions, poor communication between institutions, inadequate orientation and, inadequate and unqualified personnel.[33]

To achieve inter-agency and interprofessional cooperation, proper coordination between the proposed witness protection agency and other government institutions is required as much as 'political expediencies and administrative processes can permit.'[34] Specific personnel in the proposed agency will be appointed to coordinate collaborative issues with other institutions, through for example, a joint task force on witness protection[35] where each agency's responsibilities are clarified and modalities for sharing information are provided.[36] The benefits of inter-agency cooperation should be emphasized[37] and overtime, a working system will be developed. Political will plays a key role in ensuring this.

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[32] See 8.5.1 (a).
[33] Manpaa Aliyu Musa, Ifatimehin O. Olufemi and Yakubu Garba 'Interagency Collaboration Challenges in the Management to Internal Displaced Persons (IDPS) in Borno State, Nigeria' (2018) 1(1) *SAJRED: Journal of Resources & Economic Development* 139-40.
[34]Alex Ekemenah 'The Imperative of Interagency Cooperation among the Security Agencies' *NextMoney* 16 August 2019, available at *https://nextmoneyng.com/2019/08/16/the-imperative-of-interagency-cooperation-among-the-security-agencies/*, accessed 1 April 2020.
[35] Olusegun Adeniyi 'Terrorism and Inter-Agency Coordination in Nigeria' *Sahara Reporters* 29 November 2012, available at *http://saharareporters.com/2012/11/29/terrorism-and-inter-agency-coordination-nigeria-olusegun-adeniyi*, accessed 1 April 2020.
[36] Abdulkarim Chukkol 'Interagency Collaboration and Coordination: The Role of Investigators' available at *https://nji.gov.ng/wp-content/uploads/2019/06/INTERAGENCY-COLLABORATION-AND-COORDINATION-THE-ROLE-OF-INVESTIGATORS-converted.pdf*, accessed 1 April 2020.
[37] *Ibid*.

9.3.8. Awareness Initiatives

Witness protection is a specialized area of the criminal justice system and thus requires significant orientation and awareness. Consequently, it is important for government to invest in awareness programmes to enlighten policy formulators, prosecutorial authorities, law enforcement agencies, security agencies, witnesses and the public regarding how it operates and its value to the administration of criminal justice in Nigeria. There is also a need to enlighten the legal profession about the legal implications of witness protection to criminal proceedings. Defence lawyers particularly need to understand that protecting a witness does not diminish the quality of the evidence given. This would reduce the likelihood of objecting to procedural measures because of its perceived implications for the constitutional rights of the defendant to a fair hearing.

There is also the need for significant investment in the training and retraining of judges on witness protection best practices as they are vital in awarding procedural protective measures, to which the defendant is likely to object. Government should make use of the media and other awareness raising initiatives, such as training, and public sensitization programmes. It requires intergovernmental co-operation as well as co-operation between the government, media establishments and the public.

9.4. Conclusion

Witness protection is still emerging in the criminal justice systems of several developing states and is a relatively new trend in Africa, where it has only been formalised in South Africa and Kenya. In Nigeria, witness protection is still evolving but its relevance as a critical aspect of criminal justice administration cannot be overemphasised. Prosecutors depend on the testimony of witnesses, and oral evidence remains central to proving crime. The presence of witnesses in trials is essential to having a seamless criminal justice process in Nigeria. However, there is, at this point, no clear plan of action for ensuring the participation of witnesses in criminal trials through their protection. The case law on witness protection is scanty and issues arising therefrom are primarily preliminary objections about procedural issues and do not form substantive law. There is yet no conclusive judicial interpretation on some issues raised in the cases discussed in the thesis as the trials are still ongoing.

The thesis advances the literature by introducing the Nigerian context into witness protection discussions, which is largely missing within witness protection literature. The qualitative research

by way of semi-structured interviews of a selected sample of criminal justice experts and practitioners provides a more detailed understanding of witness protection developments in Nigeria. The analysis in the thesis contributes to the gap in the literature by offering insights into the emerging witness protection framework in Nigeria. It goes beyond the descriptive engagements so characteristics of the existing literature by clarifying problematic issues underlying the concept of witness protection using the Nigerian case study.

Also, this thesis provides an in-depth engagement with the concept of witness protection. It brings to light the need for clarification in discussing witness protection. This thesis adds to the literature by making certain distinctions clear concerning the concept of witness protection. This includes differentiating between the concept of witness protection and other concepts, such as victim protection, informant protection and whistle-blowers' protection, which this thesis finds are often conflated. Through the distinctions provided in the analysis, the thesis offers a substantive delineation of witness protection.

Furthermore, the thesis advances the existing witness protection conversations as it offers an analytical basis for discussing witness protection and proposes organising principles for delineating the scope of witness protection. Specifically, it formulates two distinct perspectives: the criminal justice and human rights perspectives as heuristic tools for analysing the concept of witness protection and to separate the disparate influences that shape how it is construed. It draws on the securitization discourse to emphasise the security imperatives that buttress a criminal justice approach to witness protection by justifying its utility to specific scopes of crimes of interest to the government/state.

Accordingly, this research has both a conceptual contribution and a normative contribution. Its conceptual contribution recognises the complexity of the concept of witness protection and clarifies the distinctions in otherwise conflated concepts. These conceptual clarifications then provide the basis for developing a normative framework to shape a legal framework for witness protection in Nigeria. The analysis and proposals made in this thesis may serve as a useful starting point to fill in the gaps in the existing legal framework and practice of witness protection in Nigeria. It is likely that in future academic writings in this field will change the trajectory. In the meantime, however, this research provides the opportunity for such analytical conceptual engagement that will prompt further research on the topic.

The implications of 'policy transfer'[38] in crime control strategies generally and specifically within the context of implementing the recommendations for witness protection should be considered. To this end, a specific note of caution is to 'the importation of ideas from abroad,'[39] in terms of administrative techniques, ideologies and structure[40] in fulfilling its witness protection mandate by the proposed witness protection agency. It speaks to the need to avoid the fallacy of a 'one size fits all approach' in proposing models of crime control strategies drawn from developed country context into developing countries, without due considerations of the possible limitations and implementation problems.[41] That is, the care not to 'replicate models encountered elsewhere.'[42]

Transferring witness protection 'best practices' into Nigeria requires that factors that constrain and enable transfer should be considered. Possible constrains include 'institutional and structural impediments, a lack of ideological compatibility between transferring countries, insufficient technological, economic, bureaucratic and political resources on the part of the receiving country to implement transferred policies.'[43] The adoption of long-term protection facilitated through identity changes and relocation is an obvious example. As highlighted in preceding discussions,[44] relocation and identity changes involve the creation of a new identity for the witness. Also, severing ties with families, difficulties of resettling in close knit communities, high cost of relocating witnesses and lack of basic infrastructure are some of the socio-economic and socio-cultural challenges that may impede the actualization of relocation within developing countries like Nigeria. In addition, the cost of establishing a new witness protection agency, inadequate personnel and infrastructure, employment of unqualified witness protection personnel,

[38] 'Policy transfer is widely understood as a process by which knowledge of policies, administrative arrangements, institutions and idea in one political system (past or present) is used in the development of similar features in another.' See David Benson & Andrew Jordan 'What Have We Learned from Policy Transfer Research? Dolowitz and Marsh Revisited' (2011) 9 *Political Studies Review* 366.
[39] Trevor Jones & Tim Newburn *Policy Transfer and Criminal Justice Exploring US Influence over British Crime Control Policy* (2007)1.
[40] Benson & Jordan op cit note 41 at 370.
[41] Edward R. Maguire & William R. King 'Transferring criminal investigation methods from developed to developing nations' (2013) 23 (3) *Policing and Society* 349. See also Jones & Newburn op cit note 42 at 3.
[42] Tim Newburn and Richard Sparks 'Criminal justice and political cultures' in Tim Newburn and Richard Sparks (ed) *Criminal Justice and Political Cultures National and International Dimensions of Crime Control* (2004) 3.
[43] Benson & Jordan op cit note 41 at 372. See also Newburn and Sparks Ibid, 8.
[44] See chapter 6:6.3.1; chapter 7:7.4.1 & 7.5.1 and chapter 8:8.5.1(c).

inadequate staff training, resource allocation and budgetary concerns are political hurdles that may affect the implementation of the witness protection in Nigeria as prescribed in this thesis.

To check this, local peculiarities of the Nigerian environment must be considered by policy reformers and criminal justice stakeholders to achieve the desired expectations of witness protection. This reduces the chances of adopting models that may become inappropriate, unsustainable or rejected in the long term.[45] Achieving this involves a 'shift away from externally imposed towards locally owned.'[46] It would nonetheless require the willingness of government to allocate resources and invest in the criminal justice sector. It also requires consultations with stakeholders, strengthening existing structures and engaging in awareness initiatives to enlighten and persuade the relevant actors engaged in policy transfer within criminal justice contexts. Specifically, witness protection will only be achievable and successful where government commits to an overall reform of the criminal justice system and have the political will to follow through.

The proposals of this thesis recommending the conceptual clarification of witness protection objective, delimiting the scope of beneficiaries and crimes requiring protection, adequately accommodates concerns of policy transfer discussions. The policy recommendations in this research are timely because Nigeria is in the process of enacting witness protection legislation and a general reform of the criminal justice system.

[45] Ursula C. Schroeder, Fairlie Chappuis & Deniz Kocak 'Security Sector Reform from a Policy Transfer Perspective: A Comparative Study of International Interventions in the Palestinian Territories, Liberia and Timor-Leste' (2013) 7 (3) *Journal of Intervention and Statebuilding* 381.
[46] *Ibid,* 382.

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APPENDICES

Appendix 1: Faculty of Law University of Cape Town Ethics Clearance Letter

Faculty of Law

Research Ethics Committee

Private Bag X3 Rondebosch, 7701 South Africa Room 6.28
Kramer Building, Middle Campus
Tel: +27 021 650 3080 Fax: +27 021 650 5660
E-mail: lamize.viljoen@uct.ac.za Internet: www.law.uct.ac.za

05 April 2016

Ms Suzzie Onyeka Oyakhire
c/o Public Law Department Level 6, Kramer Law Building
Faculty of Law
University of Cape Town
Email: suzansuzzie@yahoo.com

Dear Ms Oyakhire

Re: Clearance Process: ref L0004/2016: "Towards Conceptualizing a Framework for Witness Protection in Nigeria"

Thank you for your application. The Faculty's Research Ethics Committee very much appreciates the considerable effort put into the documentation. The REC commends you for a very well put-together application.

This study has been carefully considered and all ethical issues have been adequately addressed.

Ethics clearance is granted with effect from 24 March 2016 for 12 months subject to renewal for another 12 months. Please note that any material changes to the proposal will need to be cleared as an amendment.

With best wishes,

pp

Associate
Julie Berg
Chairperson
of REC

Appendix 2: Letters requesting permission to relevant institutions to carry out research/consent forms

Dear Sir/Madam

Towards Conceptualizing a Framework for Witness Protection in Nigeria

Good day Sir/Ma. My name is Suzzie Onyeka Oyakhire (Mrs) and I am conducting research towards a doctoral degree in Criminal Justice at the Faculty of Law, University of Cape Town, South Africa. I am researching the prospects of conceptualizing a framework for the protection of witnesses in the administration of criminal justice in Nigeria and would like to invite you to participate in the project.

The primary focus of research is Nigeria. Currently, the criminal justice sector in Nigeria is undergoing significant reforms. Issues of witness protection have in recent times gained more prominence both in academic and professional forums as well as its visible inclusion within legislative enactments. However there appears to date to be no established framework for witness protection in Nigeria, suggesting a system of ad hoc practices. The research thus considers the prospects of conceptualizing a framework for witness protection in Nigeria, which reflects its unique peculiarities.

As part of my research, I would like first-hand information from experts who have during discharging their duties either as investigators or prosecutors in Nigeria been confronted with the task of providing protection for their witnesses and the intricacies involved in discharging such tasks. The research is expected to derive practical insights about the informal or semi-formal structures of witness protection measures in existence in the country. In addition, the findings are expected to clarify the appropriateness or inappropriateness of formal structures for witness protection in Nigeria; or justify why the existing structures are in fact best suited for Nigeria's socio-cultural, economic and political realities.

I wish to request your permission to conduct my research with your institution. I would also like to request your permission to interview professionals within your institution. I kindly seek your assistance in nominating professionals with working knowledge of the issues to be explored in this research for the interviews.

The interview will be **audio recorded** and will be semi-structured. The audio recording will help me conduct the interview faster and will be a complete documentation of the interview. I will however like your **express permission** to enable me to record the interview. If you do not feel comfortable with audio recording of the interview and will prefer any other form of documentation, please let me know. I will ask questions to guide the information the interviewees provide. You are welcome to provide any other information that you consider valuable to the objectives of the research. It is expected that the duration of each interview will be about 60-90 minutes and will be held within your office premises.

Please be informed that your participation is without any form of payment or benefit (monetary or otherwise). Be assured that should you consent to the interviews, anonymity and privacy will be preserved. I can also assure you that there will be no risk of harm to staff members who may be participating, and the questions asked will not be linked to sensitive information about any specific

case which they have handled in the past or are currently investigating or prosecuting or engaged with. If, however, there is the need to make direct reference to any information given, this will be done anonymously, or a separate consent will be sought to publicize your name in relation to the information.

Any information obtained from you will be included within my research work and form part of my PhD thesis which will be available at the Faculty of Law, University of Cape Town. Should you require any feedback on the research work, an online link of the final thesis on the Faculty of Law, University of Cape Town thesis database will be made available you.
If you have **concerns about the research, its risks and benefits or about your rights as a research participant in this study**, you may contact the Law Faculty Research Ethics Committee Administrator, Mrs Lamize Viljoen, at 021 650 3080 or at lamize.viljoen@uct.ac.za. **Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.28 Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701**.'

Kindly revert to me through the relevant contact person in your organization. Thank you for your time and I look forward to hearing from you.

Yours Faithfully,

Suzzie Onyeka Oyakhire (Mrs) - OFNSUZ001
PhD Candidate
Faculty of Law,
University of Cape Town
South Africa.

HEAD OF INSTITUTION CONSENT FORM

I, [full name] _____the [rank]_____ of the Federal Ministry of Justice, hereby grant **Suzzie Onyeka Oyakhire (Mrs)** permission to conduct her research titled: **Towards Conceptualising a Framework for Witness Protection in Nigeria** in my institution.

I hereby confirm that I have read and understood the above written information regarding the study. I hereby grant/ do not grant permission for audio recording of the interview.

Comments:

_____

_____

_____

Signature: _____ Date _____

Appendix 3: Outline of Interview Questions for Policy Contributors

1. **Introduction**

(Pleasantries) Do you have any objection to the audio recording of this interview? I will ask questions to guide the information you provide. You are welcome to provide any other information that you consider valuable to the objectives of the research. You may decide not to answer any question, and you may withdraw from the interview at any point you feel so inclined. However, I would be grateful if you would assist me by answering my questions.

2. **Background information about the interviewee.**
    - **a.** Can you please state your name?
    - **b.** Note gender: Male/Female
    - **c.** What is your occupation?
    - **d.** Could you provide me with some details relating to your educational and professional background?
    - **e.** How has your work contributed to the overall reform of the criminal justice sector in Nigeria?

Do you mind if your personal details are included in my PhD thesis? If you do not wish them to be so included, I shall assign a pseudonym to you that will be used in the thesis.

3. **Questions on Witness Protection**

    a. Can you please share your views about what is responsible for the recent visible appearance of witness protection provisions in legislations in Nigeria particularly the celebrated Administration of Criminal Justice Act 2015?

    b. In your opinion what do you think may be responsible for the prominence witness protection issues/concerns have recently gained in discussions within academic and professional forums and the media in Nigeria?

    c. There have been two attempts by the National Assembly (the apex legislative body in Nigeria) to enact a witness protection legislation in Nigeria. In your opinion what do you think is responsible for these unsuccessful attempts at enacting the legislation?

    d. Generally, in jurisdictions where they exist, witness protection initiatives became necessary as a reform initiative or as a mechanism for dismantling organised crime. In your opinion what are the philosophical or institutional considerations that should inform the decision of if to develop a framework for witness protection in Nigeria? Please explain.

    e. Generally, various studies are unanimous that the presence of a viable witness protection programme guarantees more cooperation of witnesses. Can you please share your opinion on these assumptions?

f. Currently there is no single legislation on witness protection in Nigeria. However, semblances of witness protection are found within several legislations in Nigeria. Can you please share your views on the significance or insignificance of enacting witness protection legislation in Nigeria?

g. In your opinion how do you perceive the existing structures of witness protection in Nigeria?
   - considerations as to structure/coordination of witness protection;
   - creation of new autonomous witness protection agency v existing institution;
   - implications of federal structure of government,

h. In your opinion, are there definitional challenges associated with defining witnesses for witness protection? Please explain.
   - In your opinion, how should definitional challenges associated with defining witnesses for witness protection be managed?

i. The ACJA which has the most recent inclusion on witness protection recognises that protection should be available for witnesses of terrorism, trafficking in persons, economic and financial crimes as well as sexual crimes including rape, defilement, incest and indecent assault. In your opinion do you think that witness protection should be available for witnesses of all types of crimes? What factors should be considered in delimiting scope of crimes? please explain

j. In legislations such as the ACJA protective measures such as video link, face mask and anonymous statement are listed as types of protective measures available to witnesses? In your opinion do you think that these measures are sufficient/ insufficient? Please explain.

k. In your opinion do you think that the judiciary/courts have a role to play in developing a framework for witness protection in Nigeria? Please explain.

l. 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?

m. Generally, factors such as confidentiality, secrecy and professionalism are perceived as vital to the success of witness protection initiatives. In your opinion how can these requirements be ensured by institutions engaged with witness protection?

n. In your opinion what are the likely challenges that may arise in developing a framework for witness protection in Nigeria? How can these challenges be managed?

o. Can you please tell me whether and how socio cultural, economic and political factors may affect witness protection in Nigeria?

p. In your opinion would you say that there has been a general lack of interest by government on issues concerning witness protection in Nigeria?

q. Would you say that witness protection issues should be given more significant attention in the administration of criminal justice in Nigeria? Please explain.

r. In your opinion what are the prospects for developing a coordinated and institutional framework for witness protection in Nigeria?

Thank you for your time.

Appendix 4: Outline of Interview Questions for Government Institutions

1. Introduction

(Pleasantries) Do you have any objection to the audio recording of this interview? I will ask questions to guide the information you provide. You are welcome to provide any other information that you consider valuable to the objectives of the research. You may decide not to answer any question, and you may withdraw from the interview at any point you feel so inclined. However, I would be grateful if you would assist me by answering my questions.

2. Background information about the interviewee.

a. Can you please state your name?

b. Gender to note: Female/Male

c. Could you tell me a bit about your educational and professional background?

d. What position do you occupy within your agency?

e. What are your duties?

f. How long have you worked as an investigator/prosecutor in this agency?

3. Questions on Witness Protection

a. Has your institution been engaged with witness protection concerns during discharging its duties? Can you please explain under what circumstances?

b. Witness protection issues have in recent times gained more prominence and are the subject of discussion in professional and academic forums and in the Nigerian media. What in your opinion is responsible for the sudden interest given to witness protection in Nigeria?

c. Can you briefly explain to me the considerations given by your institution to concepts and practices associated generally with witness protection?

- Considerations on who initiates protection
- Considerations that may influence classification of witnesses
- Considerations on type/nature of crime that may justify the decision to protect witnesses?
- Considerations on methods of protection (anonymity v constitutional issues).

d. Can you please tell me what factors your institution generally considers in deciding to protect the witnesses?

- eligibility considerations;
- considerations as to type of witnesses to be protected;
- considerations as to nature of evidence and significance of information;
- considerations of witness intimidation;
- duration of protection
- considerations about decision to terminate protection in any given instance
- How significant are these factors?

e. In your opinion how do you perceive the existing structures of witness protection in Nigeria?

- considerations as to structure/coordination of witness protection; creation of autonomous witness protection agency; implications as federal structure of government, viability of existing structures where different agencies are responsible for protecting their witnesses; other available alternatives?

f. Can you please tell me whether and how socio-cultural factors influence the decision to provide protection in circumstances where witnesses consist of vulnerable groups such as women and children? Are there specific considerations given to them by your agency? Please explain.

g. Generally, factors such as confidentiality, secrecy and professionalism are perceived as vital to the success of witness protection. Can you briefly explain what measures have been adopted by your institution to ensure that these are maintained by officials involved in protecting witnesses and other staff of your agency who may come across confidential information about witnesses?

h. Are you aware of instances where witnesses suddenly resiled from further cooperating with investigators? Can you please share your experiences on how this situation was resolved?

- considerations as to frequency of occurrence if any
- considerations as to status of suspects

i. In your opinion what role has inter-agency cooperation with other institutions played in the success or otherwise of protection arrangements undertaken by your institution?

j. Can you please share your experiences regarding challenges faced by your institution in protecting witnesses? What is the nature of these challenges? Please explain.

- Considerations as to how these challenges have been managed.

k. In your opinion do you think that the judiciary/courts have a role to play in witness protection? Please explain.

l. In your opinion what are the prospects for developing a coordinated and institutional framework for the protection of Witnesses in Nigeria?

m. What in your view are the key challenges confronting the establishment of a witness protection scheme in Nigeria today?

n. Would you say that witness protection issues should be given more significant attention in the administration of criminal justice in Nigeria? Please explain

Thank you for your time.

Appendix 5: Summary of Legislative Provisions for Witness Protection in Nigeria

S/N	Name of Legislation	Section/ Brief Description of Content
1.	*The Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended)* Cap C 23 LFN 2010.	The proviso to *section 36 (4)*. It is relied upon as an implied basis for witness protection. It empowers the court to adopt protective mechanisms in the interest of justice, public morality, public safety and public interest. Relied on in the case of *FRN v Nnamdi Kanu & Ors.*
2.	*The Corrupt Practices and Other Related Offences (ICPC) Act, Act No 5 of 2000 LFN 2010.*	*Section 64*-protection of informants who provide information in corruption and related offences as defined in the Act.
3.	*The Economic and Financial Crimes Commission (Establishment) (EFCC) Act* No 1 of 2004, Cap E1 LFN 2010.	*Section 39*-protection of informants who offer information useful for investigating and prosecuting economic and financial crimes as defined by *section 6* of the Act.
4.	*Terrorism (Prevention) (Amendment) Act (TPAA) 2013*.	*Section 34*-procedural protection for informants and witnesses cooperating in terrorism investigations or prosecutions. *Section 34 (3-4)*-conditions for granting protective measures include that the life of the witness is in danger, public interest, public safety and national security. Relied on in the case of *FRN v Nnamdi Kanu & Ors; FRN v Karibu Umar: FRN v Aminu Ogwuche; FRN v Mohammed Yunus Nazeef.*
5.	*The Trafficking in Persons (Prohibition) Enforcement and Administration (NAPTIP)* Act No 4 of 2015	*Section 1 (b)*- protection of victims of human trafficking. *Sections 46 & 47*-protection of informants and witnesses with useful

		information in investigation and prosecution of human trafficking. *Section 45 (4) & 47 (2)*-use of procedural protective measures such as video link, use of pseudonyms, non-disclosure of the identity of witnesses, non- publication of proceedings and the exclusion of the public during proceedings. *Section 64*- psychological protection such as establishment of shelters aimed at providing protection, assistance, counselling and training for the victims and to facilitate their reintegration into the society. *Section 5 (m)(i)*-rehabilitation of victims in shelters.
6.	*The Administration of Criminal Justice Act (ACJA) 2015*	*Section 232 (1*)- provides for protection of witnesses. *Section 231 & 232 (4) (a-e)*-scope of crimes requiring protection; sexual offences, terrorism, economic and financial crimes and trafficking in persons and any other offence for which an Act permits the use of protective measures. *Section 232 (2-3)*-procedural protective measures such as the use of pseudonyms, video link evidence, screens or masks, or any other measure which the court considers appropriate in the circumstances. *Section 251*- payment of witness expenses. *Section 260*- protection of child witnesses and young persons in court.

		Relied on in the case of *FRN v Sambo Dasuki*
7.	*The Violence Against Persons (Prohibition) Act 2015*	*Sections 1-26; 46*- scope of crimes under the VAPPA: physical, sexual, psychological violence, economic harm, political violence, violence by state actors. *Section 18*- criminalises intimidation. *Section 28*- protection orders. *Sections 32 (1) (a-d) & 38 (1) (a-c)*- protective measures access to medical, psychological, social and legal assistance, rehabilitation and reintegration programmes and other forms of assistance provided to the victims through government agencies. *Section 32 (2)*- arresting suspects who commit acts of violence against the victim. *Section 39 (1)*- prohibits the publication of information which reveals the identity of the parties during trial.

Appendix 6: Table of Recommendations for Nigeria

S/N	Thematic Issues	Current Practice in Nigeria	Proposals
1.	Rationale for Witness Protection	a. Witness protection has emerged as a criminal justice reform strategy. b. There is no express right to witness protection.	Legal and conceptual issues underlying witness protection in Nigeria should be resolved from criminal justice perspectives.
2.	Definition of witness protection.	a. No express definition of witness protection. b. Witness protection encapsulates victim protection, informant protection and whistle-blower's protection.	a. Witness protection should be defined to include all measures utilised to prevent or minimise the risk of harm or threats to a witness cooperating with law enforcement authorities, specifically those testifying during trial. b. Witness protection should not be conflated with victim protection, informant protection and whistle-blower's protection. c. Witness protection should reflect a definition that connotes a restricted application to persons not only cooperating during investigation but must emphasise their cooperation during prosecution.
3.	Beneficiaries of Witness Protection	a. No express definition of witnesses. b. The scope of beneficiaries is unsettled. c. Witnesses broadly include eyewitnesses/innocent bystanders, victims, informants, whistle blowers, defendant's witnesses, expert witnesses and official	a. Definition of witnesses within the context of witness protection is within specific parameters. b. The element of witness intimidation is significant in determining witnesses. c. The element of open confrontation in court is crucial in delimiting the scope of witness protection. d. The defendant's witnesses are excluded from the definition

		witnesses such as investigators.	since witness protection evolved as a means of protecting witnesses cooperating with the prosecution. e. Victims, whistle-blowers, informants, official and expert witnesses should be excluded within a witness protection framework. f. Investigators are given limited protection where they are undercover and witnessed the crime prosecuted. g. The scope of beneficiaries are eyewitnesses/by standers, victim-witnesses and justice collaborators.
4.	Scope of Crimes	a. Witness protection is available to prosecution witnesses testifying in cases involving sexual offences, economic and financial crimes, terrorism, human trafficking. b. Unclear if witness protection applies to crimes not listed in the ACJA. c. The *omnibus provision* in section 232 (4) (e) suggests an all-inclusive scope of crimes requiring protection.	a. The scope of crimes is determined within specified parameters. b. Securitization plays a role in determining the nature of crime requiring protection. Witness protection is justified for crimes which threaten the security and legitimacy of the state from the failure to prosecute criminals who perpetrate crimes. c. Witness protection legislation should contain an omnibus clause to accommodate crimes not specifically listed in the legislation. d. The omnibus clause should specify factors such as organized criminality, the severity of the crime, high profile nature of defendants, high threat levels, the difficulty of prosecution, the calibre of the defendant and capacity for reprisals, as indicators for defining the

			scope of crimes necessitating witness protection in Nigeria.
5.	Methods of protection	a. Protective measures are inadequate and limited to procedural protective measures. b. Protective measures exclude long-terms measures such as identity changes or witness relocation. c. Protective measures are adopted ad hoc. d. No stipulated guidelines for assigning protective measures.	a. Witness protection legislation should include all measures which guarantee the physical and psychological safety and security of witnesses during all stages of the criminal proceedings (from the investigation to the post-conviction stage) as necessity demands. b. This includes pre-trial measures, procedural measures and a witness protection programme to facilitate identity changes and witness protection. c. The guidelines stipulating the conditions for granting procedural protective measures should be incorporated within witness protection legislation. d. The principles of necessity and proportionality should guide in assigning protective measures taking into consideration the specific class of witness to be protected. e. Anonymity measures, identity changes and witness relocation should be restricted to the highest threat levels, in exceptional circumstances as defined by the provisio of section 36 (4) of the 1999 Constitution of the Federal Republic of Nigeria
6.	Institutional Framework	a. Current system fits the description of an informal system of witness protection.	a. Develop a formal system of witness protection and enact a comprehensive witness protection Act clearly stating

		b. No comprehensive witness protection legislation. c. No clear eligibility considerations/ ad hoc practice. d. No specialised witness protection agency.	eligibility considerations and other rights and obligations of the parties to a witness protection arrangement. b. Develop a manageable framework which captures the central rationale for witness protection, such as protecting witnesses from high level threats and intimidation c. The witness protection legislation should clearly state its objectives and should not be conflated with other related concepts such as whistle-blower's protection. d. The legislation should specify the definition and class of witnesses; scope of crimes and protective measures taking into consideration the criminal justices influences on these issues. e. Establish a new autonomous witness protection agency to administer witness protection.