

## **LEGAL FRAMEWORK OF WITNESS PROTECTION MEASURES DURING CRIMINAL TRIAL IN NIGERIA AND EMERGING PRACTICES\***

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### **ABSTRACT**

Witnesses whether a justice collaborator, victim – witness, innocent bystander, or an expert witness, are integral to any successful criminal justice system. This is because the entire process of investigating and prosecuting offenses depend largely on the information and testimony of reliable and truthful witnesses. Now, where witnesses don't feel safe and secured they are less likely to assist the prosecution. However, where they are protected and secured, they are more susceptible to cooperate with the justice sector in bringing perpetrators of crime to justice. Witness protection is no doubt an essential tool in the fight against domestic and international crime especially corruption and other organized crimes and the lack of it undermines the quality of justice, sought to achieve. It is therefore good practice for any criminal justice system to provide assistance and support measures to victims and other witnesses. Since 2009, Nigeria has been struggling to pass a comprehensive witness protection bill into law but to no avail. However, in 2013 and 2015, major legislations provided for the protection of victims and witnesses only during criminal trials. Such protection does not apply to before trial neither does it extend to after trial. This paper emphasizes the importance of protective measures for witnesses during criminal trials in the absence of a comprehensive witness protection framework. This paper also identifies emerging practices from other jurisdictions that could be adopted to suit the Nigerian context.

**Keywords:** Witness Protection, Corruption, Nigeria, Criminal Justice.

### **INTRODUCTION**

Responding to certain category of offences requires a comprehensive approach that includes a vigorous criminal justice response and witness testimony is a fundamental part. Witnesses and their close associates can face significant danger because of their role in obtaining a conviction. There are instances where witness intimidation has led to cases against defendants being dismissed and this instance is more disturbing when it has to do with corruption and other financial crimes cases as well as terrorism cases, where investigation in itself can be difficult and complex.

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The fact that witness protection is especially important in the fight against organized crime and terrorism can be explained by the closed character of the groups involved, which makes it very difficult to use traditional investigative methods successfully. In such cases, considerable significance is attached to the testimony of witnesses who, by virtue of their personal proximity to the planning and commission of crime, are in a position to make statements leading to the identification of the organizers and beneficiaries of the crimes in question.<sup>1</sup> The absence of witness protection framework in many countries including Nigeria, continue to hamper efforts to successfully prosecute these crimes.

Witness protection for vulnerable witnesses and victims is an indispensable tool in any criminal justice system; therefore, it is good practice for criminal justice systems to provide protective measures to this group so as to facilitate their ability to fully participate in the maintenance of the rule of law. A fundamental tenet in our criminal law jurisprudence is the presumption of innocence, which is provided for in the 1999 Constitution of the Federal Republic of Nigeria. Section 36(5) states that “*every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty...*” and the onus for proving the guilt of the accused person beyond reasonable doubt rest on the Prosecution.<sup>2</sup> The discharge of burden of proof is partially done through the testimonial evidence of witnesses in Court.

The Nigerian criminal justice system dictates the use of witnesses in the proof of cases, except for the special classes of offence, which require corroboration, and no particular number of witnesses is required to prove a criminal charge; it is possible to secure a conviction on the singular testimony of a credible witness.<sup>3</sup> Because of the vulnerability of witnesses, there is general agreement that they should receive assistance before, during and after their participation in a trial.<sup>4</sup>

Who then is a witness? According to a publication by United Nations Office on Drugs and Crime (UNODC), a witness is a person with information that is crucial to judicial proceedings, including criminal proceedings.<sup>5</sup> However, there are three types of witnesses who may require protection and they include justice collaborator,<sup>6</sup> victim – witnesses<sup>7</sup> and other types of witnesses like for instance, innocent bystanders, expert witnesses and others.<sup>8</sup>

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<sup>1</sup> Report on Witness Protection (Best Practice Survey); Adopted by Committee PC-CO at its 3rd plenary meeting (Strasbourg, 15 – 17 February 1999) at pg. 11-12.

<sup>2</sup> Section 139, Evidence Act, 2011

<sup>3</sup> Id at section 175, Evidence Act, 2011

<sup>4</sup> Available from World Wide Web: <https://www.unodc.org/unodc/en/organized-crime/witness-protection.html> at page 21 [Accessed 17<sup>th</sup> September 2018].

<sup>5</sup> UNODC (2008) *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, 19. [Accessed 17<sup>th</sup> September 2018] Available from World Wide Web: [www.unodc.org/documents/southeastasiaandpacific/Publications/Projects/indonesia/Good\\_practices\\_for\\_the\\_protection\\_of\\_witnesses\\_in\\_criminal\\_proceedings\\_involving\\_organized\\_crime.pdf](http://www.unodc.org/documents/southeastasiaandpacific/Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf)

<sup>6</sup> A person who has taken part in an offence connected with a criminal organization possesses important knowledge about the organization’s structure, method of operation, activities and links with other local or foreign groups.

<sup>7</sup> They may be the complainant initiating the proceedings or they may be witnesses for the prosecution.

<sup>8</sup> Supra Note 4 (UNODC)

The Nigerian Witness Protection Bill defines a witness as a person who has witnessed or has information about the commission of an offence or other wrongdoing, and has given, is giving, or agreed to give, evidence on behalf of the State in proceedings for an offence, or; hearings or proceedings before an authority; has given, is giving or agreed to give evidence in relation to the commission or possible commission of an offence; has made a statement to a member of the Nigeria Police Force, or a law enforcement agency, in relation to an offence against a law in Nigeria. It also applies to a person who is required to give evidence in a prosecution or an inquiry held before a court or tribunal outside Nigeria for the purposes of a treaty or an agreement to which Nigeria is a party.<sup>9</sup> A family member or an associate is also considered to be a witness and may require protection or other assistance<sup>10</sup>

This paper is divided into five parts. Part one introduces the subject matter. Part two discusses the legal framework of witness protection during criminal proceedings at the international, regional and national levels. Part three, highlights some criminal cases in Nigeria where protective measures have been used and the extent to which these protective measures were used. Part four focuses on some best practices in other jurisdictions where witness protections during criminal proceedings are being utilized. Part five is prescriptive, positing that pending the passage of the Witness Protection Bill which is currently before the National Assembly, proper funding should be provided to the judicial justice sector to ensure that these protective measures are indeed provided for.

## LEGAL FRAME WORK OF WITNESS PROTECTION

Witness protection is the ability of a witness or victim to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal. Witnesses may be reluctant to give information and evidence because of perceived or actual intimidation or threats against themselves or members of their family. This concern may be exacerbated where people who come into contact with the criminal justice system are particularly vulnerable. Victims and witnesses who are protected and secured are more susceptible to cooperate with the justice sector in bringing perpetrators of crime to justice. Witness protection involves various measures; it may include concealing the identity of a witness through the use of facial concealment and voice distortion; closed trials; use of closed-circuit television; giving witnesses pseudonyms, expunging witness names and other information that may allow them to be identified from records.<sup>11</sup> The importance of witness protection is recognized under international conventions, regional and national levels.

### INTERNATIONAL LEVEL

#### United Nations Convention Against Transnational Organized Crime (UNTOC)

Article 24 of the United Nations Convention against Transnational Organized Crime (UNTOC) (General Assembly resolution 55/25, annex I) calls for States Parties to take appropriate measures to provide effective protection from retaliation or intimidation of witnesses who give testimony in cases involving transnational organized crime. The measures envisaged include physical protection, the relocation and non-disclosure or limitations on the disclosure of the identity and whereabouts of the witness and the introduction of evidentiary rules to permit testimony to be given in a manner that ensures the witness's safety. States parties are to consider entering into agreements or arrangements with other States for the

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<sup>9</sup> Section 2.

<sup>10</sup> Id.

<sup>11</sup> Supra Note 4

relocation of witnesses.<sup>12</sup> The provisions of the article apply also to victims insofar as they are witnesses.<sup>13</sup> The protection of victims and/or witnesses is also explicitly addressed in the protocols to the United Nations Convention against Transnational Organized Crime.<sup>14</sup>

### **United Nations Convention against Corruption (UNCAC)**

Article 32 and 33 of UNCAC also provides that States Parties should take appropriate measures for the protection of witnesses against retaliation or intimidation for their testimony. Article 32 highlights those measures that could be taken to protect not just witness collaborators but also victims who become witnesses, and it can extend to family members or persons close to the witness. The measures envisaged include: (a) Physical security procedures, such as relocation and non-disclosure of information about the witness' identity details and whereabouts; (b) Evidentiary rules to ensure the witness's safety during courtroom testimony; (c) Signing of agreements among States Parties to facilitate the international relocation of witnesses.

Article 33 provides that States Parties should consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention.

### **United Nations Convention Against Torture (UNCAT)**

Article 13 provides that State Parties are obliged to ensure that the complainant and witnesses are protected against all ill treatment or intimidation as a consequence of his complaint or any evidence given.

## **REGIONAL LEVEL**

### **The African Union Model National Law on Universal Jurisdiction over International Crimes**

This law stipulates both prosecutorial and court responsibility to ensure protection of witnesses. The objectives of this law are to: combat immunity for crimes and prevent and punish such crimes; confer jurisdiction on the courts to try crimes under the law; define jurisdiction of the court over such crimes; define the crimes that are punishable and provide for the power to prosecute those responsible for such crimes; ensure fair trial of persons accused of such crimes; give effect to immunities enjoyed by foreign State officials under international law; provide for mutual legal assistance and cooperation amongst States; provide for the punishment of the persons convicted of the crimes and provide for rehabilitation and reparation for victims.<sup>15</sup>

Section 7 of the law provides that prosecuting authority and the Court should ensure that any witness is accorded the necessary protection. However, the law does not highlight what that

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<sup>12</sup> Para. 3.

<sup>13</sup> Para. 4.

<sup>14</sup> Specifically in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex II, articles 6 and 7) and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex III, articles 5 and 16).

<sup>15</sup> Section 3. (AU Model)

necessary protection may be like in the case of UNTOC and UNCAC. In this case, domestic laws should be enacted to provide for protection mechanisms for witness.

### **Rules of Procedure of the African Commission on Human and Peoples' Rights**

The Rules of Procedure of the African Commission on Human and Peoples' Rights<sup>16</sup> also acknowledges the role of witnesses<sup>17</sup> and the need to prevent reprisal against them. Rule 100(4) states that State Party to the communication shall give an undertaking not to victimize or persecute the witnesses or experts, or carry out reprisals against them or their family members because of their statements or expert opinions given before the Commission.

### **National Level**

The framework for witness protection is relatively new under Nigerian laws and only apply to protective measures during criminal trials. It does not apply before or after trial. The first time witness protection was referred to under Nigerian law was in the Corrupt Practices and other Related Offences Act, 2000 in section 64 which provides that the identity of a person who gives information to the commission will be protected except that, the extent of such protection was not stated.

### **Terrorism (Prevention) (Amendment) Act, 2013**

The next time witness protection was provided for is in section 33 and 34 of the Terrorism (Prevention) (Amendment) Act, 2013. Section 33 states that where a person volunteers to the relevant law enforcement, any information that may be useful in the investigation or prosecution of an offence, the agency must take all reasonable measures to protect the identity and life of that person and the information so volunteered shall be treated as confidential.

Section 34 went further to state that the court may on its own or on a motion by the Attorney-General or a relevant law enforcement or security agency, protect a witness or any person in any proceeding before it where it is satisfied that the life of the person or witness is in danger and take such measures as it deems fit to keep the identity and address of the witness or person secret.<sup>18</sup> Measures which the court may take may include- holding of the proceeding at a place to be decided by the court; avoidance of the mention of the real name and address of the witness or person in its orders, judgments or records of the case, which are accessible to the public; or issuing of a direction for ensuring that the identity and address of the witness or person are not disclosed; undertaking the proceeding in camera in order to protect the identity and location of witnesses and other persons.<sup>19</sup>

The court may also decide, in the public interest and national security that all or any of the proceedings pending before the court shall not be published in any manner; and that such

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<sup>16</sup> Available from World Wide Web: [http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf) [Accessed 1st October 2018].

<sup>17</sup> Rule 98(8) provides that hearings on communications before the Commission shall be held in camera. Unless the Commission decides otherwise, no person shall be admitted, other than: a. The parties to the Communication or the representatives duly mandated; b. Any person being heard by the Commission as a witness or as an expert; c. The persons referred to in Rule 33 (2) or any person whom the Commission may decide to invite under Article 46 of the African Charter.

<sup>18</sup> Section 34(1).

<sup>19</sup> Section 34 (2) (a-d)



proceedings shall be adjourned and the accused persons detained pending when the Attorney-General is able to guarantee the protection and safety of persons, witnesses and other persons involved in the matter.<sup>20</sup> To establish the seriousness of these protective measures, the section went further to criminalize the contravention of any order or direction made under section 34 and imposes an imprisonment term of not less than five years upon conviction.<sup>21</sup>

### **Administration of Criminal Justice Act (ACJA) 2015**

In recognition of the risk of intimidation of witnesses and victims or retaliation against them, the ACJA provides protective measures for witnesses and such measures include limiting public disclosure of the witness' or victim's identity,<sup>22</sup> delaying the disclosure of the witness or victim's identity to the accused, or in exceptional cases,<sup>23</sup> completely denying the accused the benefit of knowing the identity of the witness against him. Section 232 provides a wide range of possible scenarios where witnesses and victims should be protected during trial. It is important to note that this section applies only to trials for rape, defilement, incest, unnatural or indecent offences against a persons;<sup>24</sup> offences under the Terrorism (Prevention) (Amendment) Act; offences relating to Economic and Financial Crimes; trafficking in Persons and related offences and; 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.<sup>25</sup>

Furthermore, trial of offences referred to here may not, where the court so determines, be held in open court.<sup>26</sup> The names, addresses, telephone numbers and identity of the victims of such offences or witnesses shall not be disclosed in any record or report of the proceedings and it shall be sufficient to designate the names of the victims or witnesses with a combination of alphabets.<sup>27</sup> Section 232(3) provides measures where the court in any proceeding may deem it necessary to protect the identity of the victim or a witness as thus: receive evidence by video link;<sup>28</sup> permit the witness to be screened or masked; receive written deposition of expert evidence and; any other measures that the court considers appropriate in the circumstance. Any contravention of the provisions of section 232(2), that is the non disclosure of names, addresses, telephone numbers and identity of victims and witnesses, shall be an offence and liable on conviction to a minimum term of one year imprisonment.

### **Witness Protection Programme Bill 2012**

To compliment the ACJA is the Witness Protection Programme Bill 2012, which transcends protective measures during trials. Whilst the ACJA provides measures where the court may protect the identity of a witness during trial, the Witness Protection Programme Bill "provides for the safety and well-being of witnesses in criminal and other related

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<sup>20</sup> Section 34(3).

<sup>21</sup> Section 34(5).

<sup>22</sup> By excluding the public from live testimony, assigning an alias, the use of technology to distort the face or the voice of the witness or victim when it is broadcast.

<sup>23</sup> For instance in terrorism or organized crime cases.

<sup>24</sup> Section 231 Administration of Criminal Justice Act, 2015.

<sup>25</sup> Id at Section 232(4).

<sup>26</sup> Id at Section 232(1).

<sup>27</sup> Id at Section 232(2).

<sup>28</sup> This means video conferencing via, the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions.

proceedings.<sup>29</sup> Hence, this bill makes provisions for witness protection prior to, during and after trial. The objective of the Bill is 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 and provide a framework for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk of intimidation due to their cooperation with prosecution, investigation, inquiry or tribunal, as the case may be.

The Witness Protection Programme shall take actions necessary and reasonable to protect the safety and welfare of a witness at risk. The actions to be taken may include: physical and armed protection; making arrangement necessary to allow the witness to establish a new identity; relocating the witness; providing accommodation for the witness; providing logistics for transporting the property of the witness; providing reasonable financial assistance to the witness; permitting a person involved in the administration of the programme to use an assumed name in carrying out his duties and have proper documentation supporting the assumed name. This action also applies to a foreign witness present in Nigeria, pursuant to an agreement or arrangement between Nigeria and the country of the foreign witness.<sup>30</sup>

In terms of protective measures during criminal trials, the courts are expected to implement such measures as deemed necessary and this may include: holding closed sessions; the use of pseudonyms; the reduction of identifying information; the use of video link; and employing measures to obscure or distort the identity of the witness. The bill was passed by the Senate on June 8<sup>th</sup>, 2017 and has been sent to the House of Representatives for concurrence before it can be sent to the President for assent.

### **Anti – Torture Act 2017**

This law provides for the protection of the victim, witnesses and persons reporting torture. Section 17 provides that it is the responsibility of the State to ensure that any person including the complainant; witnesses; or person making a complaint, whether the victim or not, is protected against all manner of ill treatment or intimidation as a consequence of his or her complaint or any evidence given.

### **CRIMINAL CASES WHERE PROTECTIVE MEASURES HAVE BEEN USED**

The elements usually taken into account by Judges when considering the application of procedural measures are the nature of the crime; type of victim; relationship with the defendant; degree of fear and stress of the witness; and the importance of the testimony. Even though these measures are relatively new, they have been requested by counsels and ordered for use by judges in some criminal cases as enumerated below.

### **Kabiru Umar V Federal Government**

Kabiru Umar was charged for bombing St Theresa's Catholic Church, Madalla, Niger State on 25 December 2011 that killed about forty- five persons and wounded seventy-five others.<sup>31</sup> During his trial on a three-count charge at the Federal High Court, Abuja Division,

<sup>29</sup> See Objective of the Bill.

<sup>30</sup> Section 20(1) & (2).

<sup>31</sup> Available from the World Wide Web: <https://www.vanguardngr.com/2013/12/catholic-church-bombing-court-sentences-kabiru-sokoto-life-imprisonment/> [Accessed 10<sup>th</sup> October 2018)

the court employed identity-protecting measures including the use of masks and pseudonyms to refer to witnesses, and also excluded the public from court. Kabiru was convicted of terrorism and handed a life sentence on December 20<sup>th</sup>, 2013.

#### **Aminu Ogwuche V Federal Government**

Aminu Ogwuche was charged on a two-count charge for allegedly bombing a crowded motor park at Nyanya, Abuja on April 14 2014. Bomb blast killed over seventy-five people and wounded one hundred others.<sup>32</sup> In contrast to Kabiru Umar's case, the judge did not allow witnesses to wear masks due to opposition from the defense. Prosecutors were instead allowed to make use of pseudonyms and camera testimony. The judge in this matter struck out the charges against Aminu Oguiche, based on lack of "diligent prosecution by the state."<sup>33</sup>

#### **Mohammed Nazeef Yunus V Federal Government**

Mohammed, a university lecturer, spiritual leader and recruitment coordinator of a terrorist cell in Kogi state was charged in 2013 for allegedly planning to carry out terrorist attacks in Kogi state.<sup>34</sup> Mohammed reportedly refused to testify given the judge's ruling against wearing masks during trial.<sup>35</sup> The judge in this case also ruled against excluding the public from court, rather, opted for cubicles to be used to shield the witness from public viewing. The trial is still ongoing.

#### **Sambo Dasuki V Federal Government**

In 2017, the Federal High Court, Abuja division, allowed witnesses to testify behind a screen, protecting them from the public.

### **WITNESS PROTECTION DURING CRIMINAL PROCEEDINGS; BEST PRACTICES**

Today, witness protection is viewed as a crucial tool in combating crime, and a large number of countries around the world have enacted laws addressing witness protective measures during criminal proceedings or a holistic witness protection programme. These protective measures can be grouped as follows depending on their purpose:<sup>36</sup> measures to reduce fear through avoidance of face-to-face confrontation with the defendant;<sup>37</sup> measures to make it difficult or impossible for the defendant or organized criminal group to trace the identity of

<sup>32</sup> Available from the World Wide Web: <https://www.vanguardngr.com/2015/07/nyanya-bombing-court-dismisses-ogwuches-n600m-suit-against-fg/> [Accessed 10<sup>th</sup> October 2018]

<sup>33</sup> Available from the World Wide Web: <https://www.premiumtimesng.com/news/headlines/171825-alleged-nyanya-bomber-cleared-court.html> [Accessed 10<sup>th</sup> October 2018]

<sup>34</sup> Available from the World Wide Web: <https://www.dailytrust.com.ng/news/general/sss-parades-lecturer-four-others-as-boko-haram-suspects/32720.html> [Accessed 10<sup>th</sup> October 2018]

<sup>35</sup> Available from the World Wide Web: <http://www.punchng.com/news/bharam-witness-refuses-to-testify-in-open-court/> [Accessed 10<sup>th</sup> October 2018]

<sup>36</sup> Karen Kramer (2012) *Protection of Witnesses and Whistle-Blowers: How to Encourage People to Come Forward to Provide Testimony and Important Information*, Resource Material Series No. 86 UNAFEI Fuchu, Tokyo, Japan.

<sup>37</sup> Such as the use of pre-trial statements in lieu of in-court testimony (where permitted); removal of the defendant from the courtroom (while still watching the trial via a video link); and testimony via closed-circuit television or audio visual links, such as video- conferencing;



the witness;<sup>38</sup> measures to limit the witnesses' exposure to the public and psychological stress.<sup>39</sup> These measures may be used alone or combined depending on the circumstances of the case. Examples from different jurisdictions and their main elements are provided below.<sup>40</sup>

### Germany

Under article 247 of the German Code of Criminal Procedure, the exclusion of the defendant is provided for where it is feared that, in his or her presence, the witness may not tell the truth.<sup>41</sup> The German Code of Criminal Procedure also allows for other protective measures under certain circumstances, including: the exclusion of the public from proceedings;<sup>42</sup> the attendance of expert counselors;<sup>43</sup> the exclusion of the media;<sup>44</sup> examination of witnesses by video.<sup>45</sup> Keeping some or all of a witness' identity details hidden from the defense and the public can be an effective means of protection in the rare case where the substance of the testimony itself does not identify the witness to the defense and the testimony is corroborated by other evidence. The court at the request of the witness usually grants this measure. The problem with this method is that the ruling can usually be appealed and is revocable.

In Germany, when total anonymity is granted, a law enforcement officer gives the evidence in court in place of the witness, stating what the witness saw. With the exception of information relating to the identification details of the witness, there are no limitations to the right of the defense to challenge the testimony as relayed by the law enforcement officer. Additionally, the defense has the right to submit in writing questions to be put to the anonymous witness by the reporting officer, who will subsequently report the answers to the court. The Federal Court of Justice has ruled that, because of its largely hearsay character, such testimony has limited value unless otherwise corroborated by other material evidence.<sup>46</sup>

<sup>38</sup> By the use of anonymous testimony or a screen, curtain or two-way mirror to shield the witness while giving testimony.

<sup>39</sup> Such as by a change of the trial venue, removal of the public from the courtroom (hold the session "in Camera") and by having the presence of an accompanying person to provide support for the witness.

<sup>40</sup> UNODC (2008) *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*.

<sup>41</sup> That a considerable burden would be placed on witnesses under 16 years of age; or that there is an extreme danger of grave detriment to the health of witnesses. In such cases, the defendant is removed from the courtroom for the duration of the examination of the witness and readmitted thereafter, and informed of the essential substance of the examination by the presiding judge.

<sup>42</sup> Article 171.

<sup>43</sup> Article 175.

<sup>44</sup> Article 169.

<sup>45</sup> Article 247.

<sup>46</sup> Council of Europe (2006) *Terrorism: Protection of Witnesses and Collaborators of Justice* (Strasbourg, Council of Europe Publishing. Also, The jurisprudence of the European Court of Human Rights on implementation of article 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, No. 2889) has created a set of conditions for the use of anonymous witnesses that are incorporated in the respective legislation and court practices of the 46 States parties to the Convention and that limit the weight or probative value that may be placed on such evidence.

**Japan**

Under the Criminal Procedure Code of Japan, pretrial statements may be used instead of witness testimony only with the consent of the defense. If consent is withheld, the witness has to testify in court. However, the court may, under certain conditions and despite objections from the defense, decide to use the pretrial statement of the witness, for instance, if it deems that the witness is in a pronounced state of fear or anxiety that makes his or her testimony different from the pretrial statement made before a prosecutor.<sup>47</sup>

The use of screens, curtains or two-way mirrors may be ordered by the court to shield witnesses and their identity from the defendant and from the public and the media as a means to reduce potential intimidation. Screens would not prevent the judge, magistrates, jury and at least one legal representative of each party to the case from seeing the witness and the witness from seeing them.<sup>48</sup> Screening is done in such a way that the defense counsel can still see the witness, so the right to face-to-face examination is not greatly affected. The exclusion of the defendant from the courtroom is done only in exceptional circumstances. Even then, the defendant has to be informed of the content of the witness' testimony and be given the opportunity to challenge it.

**Chile**

In Chile, there are distinct sets of protection measures for felony and non-felony cases. The first category includes measures such as shielding the identity of witnesses, protective incarceration, relocation and change of identity. The second category includes softer remedies, such as police patrols, changing of telephone numbers and other common measures. The police, at the request of the prosecutor or the court, apply both sets of measures.

**Republic of Korea**

In the Republic of Korea, protective measures used during the investigation stage include: appointing assistants and trustees to accompany the witness and offer support; expunging the personal information of the witness and; using video links or two-way mirrors. The protective measures used during testimony include in camera sessions, witness anonymity and testimony by video link.<sup>49</sup>

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<sup>47</sup> Allowing pretrial statements as evidence in court when the witness is available to testify could be used as a protective measure insofar as it does not expose the witness to potential intimidation by the defendant. Conversely, doing so could affect the defendant's right to a fair trial, preventing him or her from directly challenging the witness's testimony and raising additional points other than those recorded during the taking of the statement. As a result, pretrial statements could be allowed on the condition that the defense (counsel/ defendant) has the chance to examine and challenge the credibility of the statement and the granting of its admissibility. Those standards are easier to maintain when the statement is taken with the exclusive purpose of being used in court in the place of live witness testimony. In such cases, at the request of the prosecutor, the pretrial hearing of a witness can be conducted as an alternative to in-court witness testimony.

<sup>48</sup> Their use affects the right to face-to-face confrontation, with no opportunity for the defendant to see the expression or attitude of the witness and to challenge the latter's credibility on the basis of such appearance. The right to cross-examination is not affected.

<sup>49</sup> In the Republic of Korea, a special, new court-house has been built specifically to accommodate the taking of remotely given evidence via video link.

## England and Wales

Under the Youth Justice and Criminal Evidence Act 1999 (YJCEA), Sections 23 to 30 sets out the individual special measures that the court can apply, either individually or severally. Under section 23 (1) a screen may be used to protect the witness from the accused.<sup>50</sup> Section 32A of the Criminal Justice Act 1988 provides for the use of live TV link<sup>51</sup> for some child witnesses under 14 years of age in the Crown Court and youth court with coverage extended to those under 17 for those involved in sex offence cases.<sup>52</sup> Section 25 YJCEA provides for evidence in private.<sup>53</sup> It provides for the court to direct the exclusion of persons from the courtroom while a witness is giving evidence.<sup>54</sup> The defendant(s), the legal representatives, the interpreter or other assisting person may not be excluded.<sup>55</sup> One nominated representative of a news gathering or reporting organization will also not be excluded.<sup>56</sup>

Section 26 of the YJCE Act provides a special measure direction for the wearing of wigs or gowns to be dispensed with during the giving of the witness's evidence.<sup>57</sup> The aim of this measure was to assist witnesses with learning disabilities and child witnesses who may perceive the courtroom costumes inhibiting and unfamiliar, a recommendation made in the Pigot Committee's report.<sup>58</sup> However, where the defendant is a young person, the current Crown Court practice direction on the trial of children and young person's states, "Robes and wigs should not be worn unless the court for good reason orders that they should."<sup>59</sup> Section 29 of the YJCE Act provides for any examination of the witness to be conducted through an interpreter or other person approved by the court. The intermediary must make a declaration to the court that they will faithfully carry out their role. Furthermore, intermediaries are also subject to the Perjury Act 1912.<sup>60</sup>

<sup>50</sup> However, the witness must stay in view of the judge, the jury, the legal representatives of each party and where appropriate the interpreter (S. 23(2)(a-c)).

<sup>51</sup> The live link is defined in section 56(2) of the Criminal Justice Act 2003 and Section 24(8) of the YJCE Act 1999 as a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in section 23(2)(a) to (c)." The wording of section 56(2) of the Criminal Justice Act 2003 inserts a stipulation that the person giving evidence is inside the UK.

<sup>52</sup> Section 54, Criminal Justice Act 1988

<sup>53</sup> This special measure direction can only be made when the proceedings relate to a sexual offence or where there are grounds to believe that someone other than the defendant might intimidate the witness. See section 25(4).

<sup>54</sup> The exclusion detail is contained in the direction.

<sup>55</sup> Section 25(2), YJCE Act.

<sup>56</sup> Section 25(3), YJCE Act.

<sup>57</sup> While the details of court dress are governed in England by Practice Directions 500 from the Lord Chancellor (for judges) and the Bar Council (for counsel) the trial judge's power to order the removal of wigs and gowns is set out in section 26 of the YJCEA 1999.

<sup>58</sup> Burton, Evans and Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies' p 58, referring to Home Office (1989) Report of the advisory group on video-recorded evidence. Chairman His Honour Judge Thomas Pigot, QC.

<sup>59</sup> The Consolidated Criminal Practice Direction (2005) Part III.30.14.

<sup>60</sup> See section 29(7), YJCE Act..

## CONCLUSION

The legal obligation for a witness to give testimony in a criminal trial is only fair if they do not have to fear for their lives when they comply with this obligation. As already established, a comprehensive witness protection framework is a critical requirement of any criminal justice system and in order to strengthen the capacity of the judicial system to effectively prosecute perpetrators of crime the use of witness protection measures is necessary. The process of investigating and prosecuting offenses no matter the extent of the crime depends largely on the information and testimony of witnesses and where witnesses are unwilling to testify, may affect the very foundation of the case.

Research shows that witness protection is administratively complex and expensive and this is because it needs to include physical protection, provision for daily living requirements of witnesses and their families, ensuring that witnesses abide by the set rules to protect their safety, guarding against interference by authorities and others. In the Nigerian context, under the proposed Witness Protection Bill, establishing a comprehensive witness protection program will involve setting up a witness protection agency that will establish and maintain a witness protection programme. The witness protection programme is to take such action as may be necessary and reasonable to protect the safety and welfare of a witness at risk which includes: physical and armed protection; making arrangement necessary to allow the witness to establish a new identity; relocating the witness; providing accommodation for the witness; providing logistics for transporting the property of the witness and; providing reasonable financial assistance to the witness. Clearly, all these interventions are obviously capital intensive.

It is however recommended that in the short term and before the passage of the Witness Protection Bill, adequate actions should be taken during criminal proceedings to provide protective measures for vulnerable witnesses and victims and this would involve properly funding the judicial justice sector. It is one thing for procedural laws to provide for this measures and it is another thing to actualize these measures that have been provided for, as such, adequate funding should be provided and such funding should be monitored for effective utilization. Finally, Judges have the discretion to apply whatever measures they believe would be well suited in a particular case; they should use that discretion effectively.