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Witness Tampering and International Criminal Tribunals

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Abstract

This article investigates the difficult issues that have been raised in relation to witness tampering before international criminal courts. This is a significant problem for international criminal courts and tribunals, but has not yet been the subject of a great deal of comment. The article begins by setting out the difficulties that the courts and tribunals have encountered, through a discussion of their judgments on this point. It then turns to the black-letter law that the courts and tribunals have adopted to attempt to counter witness tampering. However, a description of the law alone cannot give a full picture of the difficulties that witness tampering, and protecting witnesses from it, present to international criminal courts and tribunals. These are explained, in part, through the fact that international criminal courts and tribunals operate in the absence of an effective international enforcement mechanism. This, and the conflict/post-conflict context against which those bodies tend to operate, is discussed, in part through the lens of the complementarity paradox identified by Paulo Benvenuti. The article concludes that although lessons can be learned from domestic approaches, the main limitation is the absence of any enforcement power at the international level, and that it is unlikely that one is likely to be created soon.

Key words

witnesses; evidence; International Criminal Court; ICTY; ICTR

1. Introduction

The use of witness evidence in international criminal tribunals is widespread. Not necessarily because it is always the best evidence available, but in part because of the other aims and objectives that have been, rightly or wrongly, placed at the door of international criminal law.[1] Victims and witnesses are frequently called as it is thought that testifying before such tribunals will provide some form of catharsis for them.[2] This, plus the fact that they provide some level of theatre in what can be something of a technocratic process. Speaking of analogous domestic trials, in Argentina, Kathryn Sikkink commented that witness evidence 'was drama of the highest level and [the witnesses] were eloquent players'.[3] Furthermore, judges and

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1 See R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2010), Chapter 2.

2 See E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (2005).

3 K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011), 74

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other actors at the ICTY have reported that it is witness testimony that has stayed with them the most.[4]

This is perhaps unsurprising. In many ways, witness evidence is the human face of international criminal law. However, humans being what they are, they come in all shapes and sizes, with different needs, wishes, and agendas. Victim witnesses are decidedly different than perpetrator (or accomplice) witnesses (although there are some, such as child soldiers, who can be considered both),[5] and expert witnesses are a separate category entirely. All have been before international criminal tribunals, and raise different issues.

It would not be possible to undertake a comprehensive empirical study of the issues that witness evidence has given rise to in international criminal tribunals in less than a multi-volume set of monographs.[6] Furthermore, the legal framework in which witness evidence is presented is not the primary focus of this piece; the legal framework has been discussed elsewhere.[7] The focus of this piece is the problem of witness tampering and the difficulties that have attended the responses to this problem in a disaggregated international legal system.

By witness tampering, this article means threats, both express and implicit, to witnesses and/or their families, as well as bribes or other inducements. It is possible that each of these raises slightly different issues. However, space constraints compel looking at a common underlying theme of them, the difficulties of international tribunals in getting long-term, effective witness protection measures that insulate witnesses from such tampering when those tribunals do not have any real coercive enforcement powers.

It may be a cliché to quote Antonio Cassese's famous pronouncement that the ICTY (like other international criminal tribunals) is 'very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of States is not forthcoming, the ICTY cannot fulfil its functions'.[8] The reason it is a cliché, however, is that it contains more than a grain of truth. Cassese was speaking in the context of obtaining state co-operation with the provision of evidence, but his sage words apply at least with equal force to the issue of ensuring the integrity of witness evidence.

This article will, having set out some examples of witness tampering that the courts and tribunals have found, and briefly looked at the legal provisions and practice on point, seek to show that the law in action of the courts and tribunals has shown that there are considerable practical difficulties that attend ensuring the

4 F. Mégrét, 'The Legacy of the ICTY as Seen through Some of Its Actors and Observers', (2011) 3 *Goettingen Journal of International Law* 1011.

5 See C. Rohan, 'Rules Governing the Presentation of Testimonial Evidence', in K. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (2010), 499 at 538.

6 For two recent studies see N. Combs, *Fact-Finding without Facts: The Uncertain Foundations of International Criminal Convictions* (2010); T. Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (2009).

7 See, e.g., Rohan, *supra* note 5; R. Cryer, 'Witness Evidence in International Criminal Tribunals', (2003) 3 *Law and Practice of International Tribunals* 411.

8 A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', (1998) 9 *European Journal of International Law* 1, at 13.

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integrity of witness evidence. These difficulties relate to the absence of an independent enforcement function in international criminal law and to the situations in which most international criminal prosecutions occur. The article concludes that this is also true with organized crime at the domestic level, but the fact that it is not an issue unique to international tribunals does not make it less problematic for international criminal law. Also, any lessons learned from domestic systems need to be understood *mutatis mutandis*. In the end, though, more independent powers in the ICC to counter witness tampering are required, but these are unlikely to occur in the foreseeable future.

2. The prevalence of the problem

The issue of witness tampering is one that has come up before a number of international criminal tribunals. However, there has not been a great deal of academic attention to the matter. Therefore the following section is intended to give an overview of some of the times in which issues of witness tampering have arisen before the international criminal courts and tribunals. It is intended, though, as a sample, rather than a comprehensive analysis of every instance in which witness tampering has arisen.

2.1. The ad hoc and internationalized tribunals

In the ICTY the question of witness tampering arose in its very first case, but has been more pronounced in cases related to Macedonia and Kosovo. The first case before the ICTY, the well-known *Tadić* case, involved the testimony of a witness, Dragan Opacić, who it turned out had been coached by the Bosnian government to invent claims of atrocities, in particular, the killing of his father by Bosnian Serbs. It is fortunate that this was caught by the Trial Chamber, but this was only due the exertions of the defence, who, had they kept strictly to the confidentiality requirements and protective measures imposed by the Trial Chamber, might not have uncovered the deception.[9] It was a salutary lesson in balancing the rights of victims, witnesses, and the defence, although this was a case of witness tampering that is contrary to the majority of instances in which the ICTY has had to deal with the problem, i.e. the local authorities created, rather than suppressed, evidence.

The more prevalent problem is witness intimidation to not testify, or to testify that events did not occur (or that particular defendants were not involved). Probably the most notable example of this in the ICTY occurred in the *Haradinaj* case.[10] In this case the Trial Chamber noted that a majority of prosecution witnesses had expressed their fear of giving evidence to the ICTY. As a result, the Trial Chamber granted protective measures for 34 witnesses, on the basis of the effects that would be had on their security or welfare if the fact of their testifying became public.[11] These measures were not enough for 18 witnesses, but the response of the Trial Chamber

9 *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-T, 7 May 1997, paras. 553–554
10 *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Judgement, Case No. IT-04-84-T, 3 April 2008.
11 Ibid., para. 22.

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was to subpoena them. This sufficed for 13 of those witnesses, who appeared before the Trial Chamber. That chamber excused on health grounds one of the remaining five, and the other four witnesses who refused to appear on the basis that they were afraid were indicted for contempt of the Tribunal. As a result, two of them testified.[12]

Two other witnesses in the case appeared at the Tribunal without being subpoenaed, but one of them, upon arrival, refused to enter the courtroom. Having heard the views of the Victims and Witnesses Unit, the Chamber let the matter lie. The other witness, Shefqet Kabashi, a key witness and former KLA member, got as far as the witness stand, but refused to answer any substantive questions. The Trial Chamber made an order for him to stand trial for contempt, but Kabashi returned to his new home in the US. Rather than push for his trial for contempt, the Trial Chamber decided to hear Kabashi by videoconference. Kabashi, over that link, though, again refused to testify.[13] This, in some ways small, story is a synecdoche for the general problem that surrounded the trial, as the Chamber itself accepted, '[t]he difficulty in obtaining evidence was a prominent feature of this trial and a few witnesses who were expected to give evidence on central aspects of the case were never heard'.[14]

The acquittals that resulted, seemingly in part from this, were appealed by the prosecution. As the Appeals Chamber noted, '[t]he central factual context of the Prosecution's appeal is the unprecedented atmosphere of widespread and serious witness intimidation that surrounded the trial'.[15] They further opined that as a part of the duty of the Tribunal's objective (under Article 20(1) of its Statute) of ensuring that 'trials are fair, expeditious and conducted with due regard for the protection of victims and witnesses .... [c]ountering witness intimidation is a primary and necessary function of a Trial Chamber'.[16] That said, the Appeals Chamber determined, in particular, that the Trial Chamber had not done enough to obtain Kabashi's testimony, but more generally that the Trial Chamber had put too much emphasis on expedition, rather than ensuring testimony was heard, and

> [t]his misplaced priority demonstrates that the Trial Chamber failed to appreciate the gravity of the threat that witness intimidation posed to the trial's integrity. The Appeals Chamber notes that the Trial Chamber was on notice regarding the serious threat to witnesses from the very opening of the trial and yet manifestly failed to take sufficient steps to ensure the protection of vulnerable witnesses and safeguard the fairness of the proceedings ... [and] ... the Trial Chamber failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of Kabashi and the other witness. [Owing to the centrality of his evidence to the Prosecution case, this] resulted in a miscarriage of justice.[17]

12 Ibid., paras. 23–24.
13 Ibid., para. 27.
14 *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Judgement, Case No. IT-04–84-A, 19 July 2010, para. 28.
15 Ibid., para. 34.
16 Ibid., para. 35.
17 Ibid., paras. 40, 49.

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In the ICTY the problem has not been limited to the *Haradinaj* case.[18] To take another example, one of the defence team in the *Lukić* case, Jelena Rasić, bribed witnesses to sign witness statements that were pre-prepared and favoured the defence,[19] and the notorious defendant Vojislav Šešelj has been convicted of contempt of the tribunal three times for releasing information relating to protected witnesses, which, of course, undermines their protection.[20]

In the Rwandan situation, though, the main issue has not been intimidation of prosecution witnesses (one way or another), but, conversely, that of witnesses the defence wish to call. Hence in the *Bizimingu* and *Simba* cases there were significant claims by the defence that the government of Rwanda had been involved in 'persuading' witnesses to toe the proverbial party line, and not to speak up in favour of defendants before the ICTR.[21] To take one example, in the *Simba* case before the ICTR, the defence raised general assertions that the Rwandan government prevented defence witnesses from giving exculpatory evidence before the Tribunal, as well as asserting that there were specific instances of witnesses before the Tribunal whose evidence had been manipulated by the Rwandan government.[22] The defence alleged that there had been threats to the defence witnesses' security up to and including death threats, and that this undermined the fair-trial rights of the defendant.[23] On this point, the Chamber found that with respect to one of the two impugned witnesses, the allegations were not proven, and that although with respect to the other, there had been threats, these did not materially affect the decision. But threats there were.

Problems of this nature are not limited to the ICTY and ICTR, though; the SCSL has had considerable problems with witness intimidation. To take some examples, first in the *Brima* case, the identity of one of the protected witnesses was disclosed to the wives of some of the defendants in that case, who proceeded to intimidate the witness after they had given testimony, although it was not established that the disclosing party had the relevant *mens rea* necessary to be found guilty of contempt of the court.[24] Furthermore, in that case, some of the defendants (Kanu and Kamara) and others were also found guilty of contempt of the court for offering bribes or otherwise interfering with witnesses to ensure that they recanted their testimony.[25] It is worth bearing in mind that they did this whilst in custody. Whilst there is no question that the implementation of pre-trial detention ought to be on the least

18 See also *Prosecutor v. Limaj, Bala and Musliu*, Judgement, Case No. IT-03–66-T, 30 November 2005, para. 15; and *Prosecutor v. Boškoski and Tarčulovski*, Judgement, Case No. IT-04–82-T, 10 July 2008, para. 14

19 *Prosecutor v. Rasić*, Judgement, Case No. IT-98–32/l-R77.2-A, 16 November 2012.

20 For the third judgement see *Prosecutor v. Šešelj*, Public Version of the Judgement Issued 30 May 2013, Case No. IT-03-67-R77.4-A, 20 May 2013.

21 *Prosecutor v. Bizimingu, Mugenzi, Bikamumpaka and Mugiraneza*, Judgement, Case No. ICTR-99-50-T, 30 September 2011, paras. 108–110.

22 *Prosecutor v. Simba*, Judgement, Case No. ICTR-01-76-T, 13 December 2005.

23 Ibid., para. 41.

24 *Independent Counsel v. Brima, Samura* Judgment in Contempt Proceedings, SCSL-2005-01, 26 October 2005.

25 *Independent Counsel v. Bangura, Kargbo, Kanu and Kamara*, Judgment in Contempt Proceedings, SCSL-2011-2-T, 25 September 2012.

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onerous conditions for the detainee possible,[26] it cannot be the case that detainees can be free to interfere with the processes of justice in this manner.

The STL, even though it is not a tribunal with jurisdiction over an international crime in the strict sense (in spite of its pleas to the contrary),[27] has had considerable difficulties on this point. This is perhaps owing to the intensely political and sensitive situation surrounding the creation of the Tribunal and the events over which it has jurisdiction (the assassination of Lebanese president Rafik Hariri). These problems led, inter alia, to even the names of the judges of the Tribunal, for the most part, being kept secret for some time.[28] It is because of the STL's situation as an internationalized tribunal that is not integrated into a criminal-justice system that has a direct enforcement mechanism. In April 2013, following condemnation by the Tribunal of the release of the names of possible witnesses, the president of the STL, David Baragwanath, asked for the appointment of an *amicus curiae* to investigate the leaking of the names of possible prosecution witnesses,[29] which was considered, at least prima facie, to be strongly linked to giving certain parties the opportunity, thereby, to influence witnesses either to not testify or to perjure themselves.[30]

2.2. The ICC

These problems are not limited to the ad hoc or internationalized tribunals, and have been prominent in the first case in the ICC to reach judgment, the *Lubanga* case.[31] The trial involved 'victims and witnesses travelling to The Hague from another continent under colossal legal, logistical and security challenges'.[32] As is well known, questions relating to confidential evidence led to very considerable delays in, and almost the collapse of, the trial. There were also significant allegations of witness tampering, intended both to incriminate and to exculpate Lubanga.

In that case, the trial chamber and the prosecutor were sensitive to these concerns, rightly noting that whether or not the threats were credible (and many were), they had an effect on witnesses and their willingness to co-operate. It is important to understand that in the context of the DRC, the issues affected both prosecution and defence witnesses.[33] Both were afraid of being identified as speaking to the Court's representatives.

Sadly, these issues have not proven to be teething problems. More recently, the Kenyan cases (although by no means just these) have been plagued by allegations of witness tampering. Following the recanting of testimony by a key witness in the

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26 See generally R. Mulgrew, *Towards the Development of the International Penal System* (2013).

27 See *Ayyash* et al., Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01-17 *bis*, 16 February 2011; and see B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Inventions an International Crime of Transnational Terrorism', (2011) 24 LJIL 677.

28 News Briefing of Legal Counsel on the Special Tribunal for Lebanon, available at www.un.org/News/briefings/docs/2009/090303_OBrien.doc.htm.

29 'Tribunal to Launch Investigation in Alleged Witness Intimidation', STL press release, 29 April 2013.

30 'Tribunal Condemns Attempts to Interfere with Judicial Process', STL press release, 11 April 2013; 'STL Appoints Investigator to Probe Unauthorised Disclosures', STL press release, 2 July 2013.

31 *Prosecutor v. Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012.

32 Guido Acquaviva, 'Foreword', (2012) 10 *Journal of International Criminal Justice* 881, at 881.

33 *Lubanga*, supra note 31, para. 156.

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Muthaura case, the prosecutor decided to drop the charges against him, and made clear in her submission to the Court that this was, in part, if not mostly, because of interference with witnesses. As Fatou Bensouda said on the occasion of dropping the charges:

> The *Muthaura* case has presented serious investigative challenges, including a limited pool of potential witnesses, several of whom have been killed or died since the 2007–2008 post-election violence in Kenya, and others who are unwilling to testify or provide evidence to the Prosecution. Despite assurances of its willingness to cooperate with the Court, the Government of Kenya has in fact provided only limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may have been useful in the case against Mr Muthaura. In addition, there have been post-confirmation developments with respect to a critical witness against Mr Muthaura, who recanted a significant part of his incriminating evidence after the confirmation decision was issued, and who admitted accepting bribes from persons allegedly holding themselves out as representatives of both accused.[34]

The withdrawal of the charges has not led to an end to allegations of witness tampering in Kenya, and in relation to the *Kenyatta* and *Ruto* cases, the prosecutor has repeatedly drawn attention to the fact that witnesses have been intimidated and/or killed by those acting in the perceived interests of high-ranking Kenyan officials, and this has had a huge effect on the proceedings.[35] This culminated in the issuance of an indictment (unsealed in October 2013) against Walter Osapisi Barasa for offering bribes to prosecution witnesses to get them to withdraw from proceedings.[36]

3. The legal framework

The above discussion ought to show two things: first, that there is a problem with witness intimidation before international criminal tribunals; and second, that they are, at least to some extent, aware of the problems.[37] To be fair, so were the drafters of the Rome Statute and post-Rome Tribunals' Statutes.

The ICTY has developed provisions designed to counter witness intimidation. For example Rule 40(iii) of the ICTY (and ICTR) Rules of Procedure and Evidence provides that in urgent cases the prosecutor can request states to 'take all necessary measures to prevent ... injury to or intimidation of a victim or witness'. Pursuant to Rule of Procedure and Evidence 40 *bis* a judge can order provisional detention of the accused if it is necessary to prevent injury or intimidation of a witness. Furthermore, any person who

34 *Prosecutor v. Muthaura and Kenyatta*, Prosecution Notification of the Withdrawal of Charges against Francis Kirimi Muthaura, ICC-01/09-02/11, 11 March 2013, para. 11.

35 See, e.g., B. Momanyi and S. Jennings, 'Kenya Witnesses Face Harassment', International Justice – ICC, ACR Issue 350, 5 June 2013, www.iwpr.net/report-news/kenya-witnesses-face-harassment.

36 *Prosecutor v. Walter Osapisi Barasa*, Warrant of Arrest for Walter Osapisi Barasa, ICC 01/09-01/13, 2 August 2013.

37 See generally J. Liang, 'The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application', (2012) 15 *New Criminal Law* Review 375.

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> threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness' commits contempt of the Tribunal.[38]

It took, however, until 2009 for the ICTY to develop a specific Rule of Procedure and Evidence to deal with the evidence of witnesses who have been subject to 'interference'. This rule (Rule 92 *quinquies*) permits a written statement or transcript to be admitted into evidence where a person has not appeared or given all material evidence, when that failure has been 'materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion'. Within the ad hoc tribunals, the ICTY is, as might be expected, not alone. In addition to the Rules mentioned above in the context of the ICTY, the ICTR also has made provision for the admission of '[s]pecial depositions ... and exhibits from the file that are relevant and of a probative value not outweighed by their prejudicial effect',[39] inter alia, 'in exceptional circumstances is unwilling to testify following threats or intimidation', and it is in the interests of justice to do so.[40]

It is not the purpose of this piece to say that nothing has been done by the relevant actors: far from it. There were a large number of sensible precautions adopted by all of the relevant investigators.[41] To take one case from the ICTY, the Trial Chamber, in order to protect witnesses, made various orders, including

> ordering that protective screens be erected in the courtroom; employing image altering devices to prevent certain witnesses from being identified by the public; ensuring that no information identifying witnesses testifying under a pseudonym be released to the public, and requiring that transcripts of closed session hearings be edited so as to prevent the release of information that could compromise a witness' safety.[42]

In the ICC context, Article 68 of the Rome Statute requires the Court to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, and provide protective measures such as hearing evidence *in camera* and withholding certain information prior to trial'.[43] When it comes to prosecuting offences against the administration of justice, Article 70(1)(c) gives the court jurisdiction over 'corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness.[44]

The ICC, inter alia, in the *Lubanga* case, has undertaken various measures such as witness relocation and the use of intermediaries to attempt to protect witnesses from

38 Rule 77 (to which the Rule 77 of both the ICTR and SCSL *mutatis mutandis*, conform).
39 Rule 71(N) ICTR RPE.
40 Rule 71 (O)(iii)(iv) ICTR RPE.
41 Some of which are documented in *Lubanga*, supra note 31, paras. 164–168.
42 *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 50. It is notable that these measures are similar to those suggested in Article 25 of the 200 UN Convention on Transnational Organized Crime, on which see D. McLean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (2007) 266–9.
43 See generally W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute of the International Criminal Court* (2011), 824–7.
44 See, e.g., ibid., at 855–6.

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intimidation. These, however, come with their own costs and problems.[45] Many of these measures are entirely sensible, and consistent with what is done at the national level, although, as we will see, the black letter of the law does not give the full picture of the issues that arise in practice. Many of the problems stem from the difficulties of having international criminal courts that are not parts of a comprehensive criminal-justice system which has an enforcement arm.

4. Translating the framework on the ground: problems and prospects

As the above sections have shown, the international courts and tribunals, as a matter of law, sought to mitigate the difficulties that have arisen. However, the law on the books, and the law in practice are not really the same. There are three linked aspects to this. The first is the absence of enforcement capacity on the part of the tribunals. The second is the context of conflict and post-conflict societies in which much of the work of the international criminal tribunals is done. The third issue is the inability or unwillingness of many of the states of *loci delicti* to undertake the necessary measures to prevent witness tampering.

4.1. Absence of enforcement powers

The international criminal courts and tribunals operate in a disaggregated system, where they do not have enforcement capacity on the ground, and have to rely on local bodies to provide protection. The ICTY Appeals Chamber spoke to the core of the matter in the *Haradinaj* case when it noted that:

> in open court, Kabashi raised the endemic problem of witness intimidation, stating 'there were persons who were asked questions as witnesses and whose names don't even appear on witness lists because they have been killed. I don't want protective measures because such measures do not exist in reality; they only exist within the boundaries of this courtroom, not outside it'.[46]

This is an important issue: protective measures ordered by the ICTY or any other international courts are not simple to translate into effective measures at ground level. International criminal courts and tribunals do not have even the (relational) advantage of domestic authorities in terms of witness protection. They have no police or other such authorities to provide protection, nor is there any practical way in which the courts and tribunals can ensure that their protective mandate can be run in the *locus delicti*.

The difficulty for the ICTY, as with the other international criminal courts, is that in the absence of its own police force and criminal-justice system, it is difficult to detect and, importantly, prevent interference with witnesses. It is helpful to point out the cases in which such activity has occurred, but there is another problem

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45 *Lubanga*, *supra* note 31, paras. 181–185, 203–205, 482–483. The SCSL has faced cognate difficulties; see, e.g., *Prosecutor v. Brima, Kallon and Kamara*, Judgment, SCSL- 04–16-T, 20 June 2007, paras. 126–129; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, 2 March 2009, paras. 525–527.

46 *Haradinaj*, *supra* note 10, para. 49.

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when the issue remains *sub silentio*, with people refusing to come forward, or being less than fully frank in their evidence owing to situations they are in. As much can be seen from the ICC's comments in the *Lubanga* case (these ought to be read against the backdrop that the Trial Chamber had had significant problems with the prosecutor's insistence that some evidence from UN monitors not be disclosed since he had obtained it pursuant to confidentiality agreements). In that case the Chamber noted that:

> The initial missions were very difficult for a number of reasons, but most particularly because of the lack of external support for the Court's activities in the field. At a local level, various UN agencies helped the investigation team. However, there were contradictions and inconsistencies in the approach of the UN that created real problems for the OTP's investigators, and when assistance was sought the UN sometimes declined or imposed excessive constraints. Because of these difficulties, it was impossible to find witnesses quickly, and the team was unable to provide them with security.[47]

In the absence of their own enforcement capacities, international criminal courts and tribunals have to rely on others to assist them in their endeavours. This leads to difficulties, as can be seen above, and will also be shown below.

4.2. Conflict and post-conflict situations

The difficulties that arise from the absence of enforcement powers are exacerbated by the fact that the international courts and tribunals tend to have operated in conflict and post-conflict situations. In these situations there are multifarious opportunities for tampering with witnesses, owing to the background situations in which they have to work, of absent, weak, or involved official entities.

The problem is one that has arisen clearly in the context of the ICC. In the *Lubanga* case the Trial Chamber noted that the very serious security situation in Ituri (in the Democratic Republic of Congo (DRC)) heavily impeded the investigations by the Office of the Prosecutor,[48] and that there were very significant practical risks faced by witnesses who had co-operated with the court, or indeed were even perceived to have possibly done so. As the chamber noted, it was impossible for investigators to operate openly, as the local population was aware that the ICC was investigating in the area, and any foreigner in Bunia was assumed to be an ICC investigator.[49] Furthermore, anecdotally, if a local person had an unexplained absence from their village for more than a short period of time they were assumed to be co-operating with, or giving evidence at, the ICC, and opened themselves up to reprisal.[50] The witnesses' fear was that they would be identified at the community level, and that the ICC would be unable to protect them:

> Several militias were investigated for threatening witnesses. However, the real problem was not the threat from the various groups but rather the risk of an individual being identified by members of his or her community, village or family as having cooperated

47 *Lubanga*, *supra* note 31, para. 135. For discussion on point see L. Johnson, '*The Lubanga* Case and Cooperation between the UN and the ICC', (2012) 10 *Journal of International Criminal Justice* 887.

48 Ibid., paras. 151–154.

49 Ibid., para. 155.

50 I am grateful to Sarah Nouwen for this point.

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> with the Court. In particular, those who assisted were worried about being identified by the people they had spoken about, given most of the witnesses mentioned the names of the militia leaders who did not want to be implicated. The witnesses were at risk from these individuals, who were in a position to threaten them.[51]

In addition, it needs to be remembered that the people indicted before international criminal tribunals tend to be high-level officials or rebels. As such they have considerable influence in their societies, and so the possibilities they enjoy in terms of affecting witnesses, even where they are in detention, are considerable.[52] Trials of international crimes, be they national or international, occur against the background of defendants often enjoying considerable personal support at home. That support can easily translate into express, implicit, or perceived social pressure to give testimony skewed one way or the other.

It might be thought that the fact that these issues were captured in the judgments means that the problem is one that can be effectively countered.[53] To some extent, this may be true; however, what is caught in the judgments may only be the tip of the iceberg. Also, given that the relationship between an international jurisdiction and a witness is an ongoing one that begins at the investigative stage, measures intended to prevent witness tampering need to begin early. As the Kenyan situation before the ICC and the practice of the STL has shown, pre-trial tampering has occurred, or at least been attempted, by some defendants or their supporters. This necessity exists in a tense relationship with the fact that it is early in the investigative stage, which may be in the context of an ongoing, simmering, or recently ended conflict, when the authorities are least likely to be effective.

4.3. Inability and unwillingness

These difficulties can be viewed also through the lens of a problematic issue that has, unfortunately, some pedigree. Early on in the Rome Statute era, Paulo Benvenuti identified a thorny issue that he called the complementarity paradox. This is, for the ICC, the difficulty in obtaining co-operation for cases rendered applicable on the basis of complementarity, i.e. that the relevant authorities are unwilling or unable to act with respect to a case. Where this is the case, those authorities can often not be expected to order effectively the relevant compliance. The reasons for admissibility do not go away when the questions of investigation and co-operation arise.[54]

A very similar issue arises with witnesses. This is perhaps not surprising, as the provision of witness evidence is, when it comes to international criminal tribunals, an aspect of state co-operation with the relevant court.[55] This causes two problems for ensuring witnesses are not tampered with. The first is where, as discussed above, the central government authorities, although sympathetic to the prosecution of some

51 *Lubanga*, supra note 31, para. 159.

52 See *supra* note 25 and accompanying text.

53 R. Roberts, 'The *Lubanga* Trial Chamber's Assessment of Evidence in Light of the Accused's Right to the Presumption of Innocence', (2012) 10 *Journal of International Criminal Justice* 923, at 938–41.

54 P. Benvenuti, 'Complementarity of the International Criminal Court to National Jurisdictions', in F. Lattanzi and W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (1999), 21 at 50.

55 For the difficulties of this, from a political point of view, see V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (2008).

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actors in those contexts, simply do not have the domestic effectiveness to ensure that witnesses are protected. Although the situation in the DRC was canvassed above, similar considerations have arisen in the LRA cases, where the government simply does not have the capacity to provide protection against non-state actors who are, in practice, more powerful on the ground, or, at the very least, able to operate with impunity.[56]

Indeed, part of the reason that some states have self-referred has been that they have taken the view that they cannot undertake prosecutions themselves properly. Where they cannot, given that witness protection has to occur to a considerable extent through state apparatus, where the writ of the state does not run its chances of preventing witness tampering are slim. It is true that mechanisms such as relocating witnesses can help. However, the difficulty here is linked to getting witnesses into protection quickly enough. Witnesses have to be identified, and then processes to protect them put in place. In practice, this is exceptionally difficult in situations where security for all concerned is, to say the least, precarious, and where any opportunity to tamper with a witness (or their family) is apt to be exploited, as the ICC accepted in *Lubanga*.[57]

The second problem arises where governments are the alleged perpetrators, as in Kenya.[58] In such cases the power of international tribunals (in this instance, the ICC) to issue effective orders or attempt to operationalize a witness protection system comes up against the simple issue that the relevant government has no incentive to implement the order, or at least no incentive that would not be outweighed by reasons not to allow co-operation by their judicial arms. Indeed, to ask for protective measures of such a government is to identify those very witnesses to officials who may have an interest in affecting their testimony.

It could be countered that the relevant court will issue such requests for assistance to other public officials than those indicted or being investigated. It is the case that with respect to the ICC there is the right of the Court, pursuant to Article 87(4) of the Rome Statute, to 'request that any information that is made available . . . shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families'.[59] However, such a position is likely to be excessively confident about the ability (or willingness) of such officials to prioritize their country's international obligations over their personal domestic position. Furthermore, such officials may be immune from the contempt jurisdiction of international criminal courts for activities undertaken as part of their official duties. There has been no comprehensive answer to the

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56 On the abilities of the LRA see C. Nalule and R. Odoi-Musoke, 'The Complementarity Principle Put to the Test: The Ugandan Experience', in V. Nmehielle (ed.), *Africa and International Criminal Justice* (2012) 243, at 248–9.

57 *Lubanga* supra note 31.

58 Similar considerations apply in the context of Sudan, where co-operation by the Sudanese authorities has been negligible since warrants of arrest were issued against government officials. See, e.g., R. Cryer, 'Darfur: Complementarity as the Drafters Intended?', in C. Stahn and M. el Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011), at 1097.

59 On which see Schabas, supra note 43, at 982.

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complementarity paradox identified by Benvenuti, and it represents a considerable challenge to this day, including in the present context.

5. Conclusion

The situation of witnesses before international courts and tribunals can be perilous, and those bodies do not have all of the necessary practical tools in their armory to counteract the problems that have arisen in this regard. Some of the most developed domestic criminal-law systems are unable to deal fully with the challenges that analogous organized criminality represents at the practical level. International criminal tribunals are in a worse position, being the quadriplegic giants that Cassese referred to. Still, it is the case that where international crimes are at issue, the evidential problems are cognate to some domestic situations. For example in relation to organized crime, the issue of powerful non-state actors and sometimes complicit officials may arise in a similar fashion to those in international crimes.[60] Therefore discussion between national, transnational, and international lawyers as to how most effectively to counter witness tampering would be very useful.

It is, however, unfortunate that the international criminal courts and tribunals do not exist in the context of an international criminal-justice system, and when it comes to enforcement, have to rely on the vagaries of the ability and willingness of other actors to help avoid witness tampering. It would be very useful were the ICC to be granted some enforcement authority of its own that could counter these problems. Still, there is little succor to be found in the Statute for such a mandate. It is true that positive complementarity is intended to develop state capacity. This could mitigate some of the issues raised above, but no one at Kampala thought it wise to suggest such a radical change as giving the court real powers to prevent witness tampering. Such interference is, therefore, likely to remain a blot on the international criminal landscape for some time yet.

60 On the nature of such offences see N. Boister, *An Introduction to Transnational Criminal Law* (2012), Chapter 1.

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