



**An analysis of the challenges presented to witness protection in combating  
money laundering in South Africa.**

**Ethel Fikile Makhubele**

**3611600**

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of the LLM degree in (Criminal Justice and Procedure)

Prepared under the Supervision of

Dr Albertus C & Prof Hamman A

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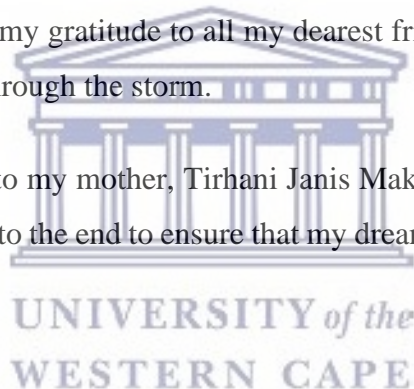
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## **KEYWORDS**

Money laundering

Anti-money laundering

Launderers

Witnesses

Witness protection

Witness Protection Unit

FATF 40 Recommendations

Financial Action Task Force

Prosecution

Organised crime



## **ABBREVIATIONS**

<b>ML</b>	Money laundering
<b>AML</b>	Anti-money laundering
<b>WPU</b>	Witness Protection Unit
<b>FATF</b>	Financial Action Task Force
<b>POCA</b>	Prevention of Organised Crime Act
<b>FICA</b>	Financial Intelligence Centre Act
<b>CFT</b>	Combating the Financing of Terrorist
<b>FIC</b>	Financial Intelligence Centre
<b>SAPS</b>	South African Police Service
<b>NPA</b>	National Prosecuting Authority
<b>NDPP</b>	National Director of Public Prosecutions
<b>AFU</b>	Asset Forfeiture Unit



## CHAPTER 1

### INTRODUCTION AND CONCEPTUAL FRAMEWORK

#### 1.1 INTRODUCTION

The United Nations Asia and Far East Institute ('UNAFEI') and the Department of Justice of the Republic of the Philippines held the Fourth Regional Seminar on Good Governance For South East Asian Countries from 6-9 December 2010.<sup>1</sup> During that seminar, Haruhiko Ukawa, the Deputy Director of UNAFEI, stated in his introductory remarks that to detect, investigate, and prosecute illegal activities and find offenders guilty, the criminal justice systems depend largely on witnesses' testimony. Consequently, it is important for witnesses to testify without fear to ensure the criminal justice system operates properly and achieves their goals.<sup>2</sup> At the outset, however, it ought to be borne in mind that with many financial crimes, more particularly the crime of money laundering, witnesses are often reluctant to testify. The prosecution for such crimes is thus not easily achieved, and conviction rates may be negatively affected.

The evolving nature of financial crime has meant that laundering schemes are complicated and necessitate greater resources and skills to detect such crimes.<sup>3</sup> In the South African context, we are not exempt from this phenomenon. Money laundering ('ML') is usually carried out through techniques which are difficult to identify.<sup>4</sup> The fact that launderers are capable of or have access to sophisticated techniques is an indication of their dexterous nature insofar as the commission of a crime is concerned, and/or it may be warning signs of the powerful characters involved in this underworld. These considerations may affect witnesses' willingness to testify.

Notwithstanding that witnesses may be intimidated by the context in which ML usually occurs and the characters involved, the greatest resources in combating the crime of ML include witnesses. Witnesses can provide important information to assist in uncovering these criminal

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- 1 Ukawa H 'Securing Protection and Cooperation Of Witnesses And Whistle-Blowers' (2011), available at [https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_all.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_all.pdf) (accessed 10 October 2020).
  - 2 Ukawa (2011) available at [https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_all.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_all.pdf) (accessed 10 October 2020).
  - 3 Naheem M.A 'Anti-money laundering/trade-based money laundering risk assessment strategies – action or re-action focused?' (2019) 723.
  - 4 Sharma V 'Complex ownership structures and money laundering' (2014), available at <https://www.moneylife.in/article/complex-ownership-structures-and-money-laundering/37311.html> (accessed 01 October 2020).



acts. Launderers do not only attempt to conceal where the money came from but also try to conceal the identity of the true owners of the laundered funds.<sup>5</sup> Witnesses may be able to identify such true owners and the launderers. This occurs in almost every country in the world, and a single act of ML usually comprises transferring funds through a number of countries to ensure the origin of the funds remain hidden.<sup>6</sup> Conceivably, there may be many witnesses to these crimes. The fact that ML threatens the financial systems of the country and its integrity and sovereignty<sup>7</sup>, is, unfortunately not sufficient motivation for witnesses to testify.

Yet ML is not a novel type of crime. The concept of ML has existed since the 1920s when some criminal groups in the United States of America ('USA'), like Al Capone and Bugsy Moran set up car or clothes laundries that were used to launder money that was generated from different illegal activities.<sup>8</sup> Although the launderers utilised banks and other legitimate financial institutions as the primary means to make otherwise illicitly-gained funds appear legal, ML operations are also carried out in virtually every sphere of society.<sup>9</sup> ML has damaged the economic, security, and social fabric of the structure.<sup>10</sup> Barbot agrees that ML has corrosive consequences, not only on the economy. He opines that

Money laundering has clearly become endemic to our social, economic, and political frameworks; it ultimately affects and often subverts not only banking and other financial institutions but also both small businesses and multinational corporations, legislators and law enforcement officers, lawyers and judges, politicians and high-ranking government officials, as well as newspaper and television media. In addition, money laundering erodes the income tax base of many nations, thereby creating fiscal policy problems.<sup>11</sup>

From the above discussions, it is clear that ML has dire consequences for society. The need to combat such crimes is significant, but it is not an easy feat. Even though money can be

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5 Sharma V (2014), available at <https://www.moneylife.in/article/complex-ownership-structures-and-money-laundering/37311.html> (accessed 01 October 2020).

6 Layton J & Curran O 'How Money Laundering Works' (2018), available at <https://money.howstuffworks.com/money-laundering.htm> (accessed 02 October 2020).

7 'Money laundering poses a serious threat to integrity of country: Court' (2019), available at [https://www.business-standard.com/article/pti-stories/money-laundering-poses-serious-threat-to-integrity-of-country-court-119092000729\\_1.html](https://www.business-standard.com/article/pti-stories/money-laundering-poses-serious-threat-to-integrity-of-country-court-119092000729_1.html) (accessed 30 September 2020).

8 Urziceanu R 'Money Laundering' (2008) 306.

9 Barbot L.A 'Money Laundering: An International Challenge' (1995) 162.

10 McDowell J 'The Consequences of Money Laundering and Financial Crime' (2001) 6.

11 Barbot (1995) 163.

laundered in several different ways, the procedure encompasses typically three main stages.<sup>12</sup> First, the placement stage is where large amounts of cash obtained from criminal activities are converted to a more convenient and manageable amount that would not be questioned when depositing it into the standard banking system.<sup>13</sup> The second stage is layering, where criminals try to hide the source of earning by making numerous transactions that move around the illicit money. In this transaction intensity and speed of the transaction is faster than usual.<sup>14</sup> Finally, the integration stage occurs where the illicit capitals are introduced into the system of finance legally.<sup>15</sup> This stage involves the ‘infiltration of transformed and transferred capital into the formal economy through financial investments (specific deposits, stocks) or property (direct investment in real estates and companies) is primarily completed in countries promising extraordinary short odds’.<sup>16</sup> During all these stages the human factor is present and it is likely that there may be witnesses who are not prepared to testify.

These stages suggest that ML is carried out through a financial system.<sup>17</sup> Most anti-money laundering (‘AML’) efforts are therefore directed at blocking illicit money from infiltrating the financial system. The methods employed to achieve this involve the ‘know your customer’ procedure and transaction reporting.<sup>18</sup> South Africa is confronted with some difficulties in detecting and prosecuting ML as witnesses often refuse to testify or cooperate with law enforcement. The research, therefore, focuses on understanding the law which ought to enable witness protection as the reluctance of witnesses to testify or to cooperate with law enforcement has a negative impact on the prosecution of ML cases.

This research analyses the challenges encountered by the state in protecting witnesses in the fight against ML. Effective witness protection is crucial in combating ML, considering the nature of this crime and the people usually involved. Furthermore, it considers why witnesses often refuse to testify.

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- 12 Ehlers S & Zagaris B ‘Drug Trafficking & Money Laundering’ (2005) available at <https://ips-dc.org/drug-trafficking-money-laundering/> (visited 17 April 2020).
- 13 Buchanan B ‘Money laundering—a global obstacle’ (2004) at 117.
- 14 Schneider F & Windischbauer U ‘Money laundering: some facts’ (2008) 395.
- 15 Nandi S ‘From the Desk of the Credit Editor: Global Money Laundering -The Silent Flow of Money’ (2009) 3.
- 16 Schneider & Windischbauer (2008) 396.
- 17 Tuba D ‘Prosecuting money laundering the FATF way: an analysis of gaps and challenges in South African legislation from a comparative perspective’ (2012) 106.
- 18 Tuba (2012) 106.

## 1.2 BACKGROUND

ML is a technique utilised by criminals to camouflage the source of illicit proceeds, essentially with a primary aim of enjoying such laundered funds without intrusion from ‘predatory underworld rivals’ or ‘law enforcement agencies.’<sup>19</sup> Arguably, in their determination to enjoy such funds in an unfettered manner, the perpetrators may be ruthless in negating evidence against themselves. The risk of harm may be high for witnesses. ML tends to conceal the illicit source of money and make it seem to have been generated legally.<sup>20</sup> By its nature, persons from different industries must be involved, and it would seem that innocent and unsuspecting individuals may also be drawn into this world albeit reluctantly. The likelihood of persons being witnesses to these operations is therefore heightened.

Prior to 1986, ML was not a criminal offence anywhere in the world.<sup>21</sup> ML transpires only after a ‘predicate offence’ has generated funds into the hands of criminals. A predicate offence refers to a crime which is a constituent to a larger crime.<sup>22</sup> Islam Mohammad Saiful, *et al* defined predicate offences as ‘offences committed within or outside the country, the money or property derived from which is laundered or attempt to be laundered’.<sup>23</sup> Examples of predicate offences are crimes such as robbing a bank, selling heroin or accepting a bribe. All of these are motivated by criminals’ desire for profits.<sup>24</sup> Receiving such illicit money may put the offenders in a difficult position of having to reintegrate substantial amounts of money into the legitimate financial system without raising an alarm to law enforcement authorities.<sup>25</sup> Inevitably, innocent persons in legitimate businesses are drawn into this world to ‘clean’ the funds.

The nature of the underlying or predicate crimes is serious and usually involve premeditation. Often, ML activities involve substantial amounts of money and are carried out by hardened criminals. Consequently, witnesses refuse to testify.

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19 Zali M & Maulidi A ‘Fighting Against Money Laundering’ (2018) 41.

20 Urziceanu (2008) 305.

21 Sharman J.C ‘Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States’ (2008) 635.

22 ‘6AMLD: 22 Predicate Offenses For Money Laundering’, available at <https://complyadvantage.com/knowledgebase/adverse-media/6amld-22-predicate-offenses-money-laundering/> (accessed 30 August 2020).

23 Saiful I.M, Akter E.S & Zahed H.M ‘Predicate Offences of Money Laundering and Anti Money Laundering Practices In Bangladesh Among South Asian Countries’ (2017) 64.

24 Sharman J.C & Chaikin D ‘Corruption and Anti-Money-Laundering Systems: Putting a Luxury Good to Work’ (2008) 29.

25 Sharman & Chaikin (2008) 29.

Globally, ML enjoys attention while it continues to pose a threat to most states in relation to the prevention, detection, and prosecution.<sup>26</sup> Despite the attention, the prosecution rate for ML is low. This is despite the existence of ML legislation. The challenges with combating ML may be an indication that ML is not addressed efficiently in South African law.<sup>27</sup>

South Africa is amongst the states that responded to the international call to enact different laws directed at combating ML.<sup>28</sup> Yet, despite the significant role which witnesses can play in prosecuting such crimes, it seems that there is not an appreciation of the importance of witness protection specifically in cases of ML. In addressing serious crimes, it is important for the justice system to have the capacity and capability to provide effective protection to informants, whistleblowers, and witnesses.<sup>29</sup> The closed nature of criminal organisations makes it nearly impossible to use traditional investigative methods successfully.<sup>30</sup> Criminals will often try to stop witnesses from testifying<sup>31</sup> as they want to enjoy the fruits of their illegal acts, and conviction may result in assets forfeiture ('AF'). In South Africa, the principle of AF is contained in the Prevention of Organized Crime Act 121 of 1998 ('POCA').<sup>32</sup> The Asset Forfeiture Unit ('AFU') was created to ensure that powers to seize criminal assets in terms of POCA be utilised the best way possible in the fight against crime, and particularly organised crime.<sup>33</sup> Assets forfeiture, as contained in Chapter 5 of POCA is made up of three stages, including the restraint, confiscation, and realisation stage.<sup>34</sup> The primary objective of AF is to deprive an offender of the proceeds of crime. AF ensures the removal of the proceeds of crime and to remove any other property used in the commission of criminal acts.<sup>35</sup> For these reasons, ML offenders will do everything in their power to silence witnesses.

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26 Ahlers C 'The South African anti-money laundering regulatory framework relevant to politically exposed persons' (2013) 1.

27 Boles J.R 'Anti-Money Laundering Initiatives for the South African Real Estate Market Estate Market' (2017) 197.

28 De Koker L 'Money laundering in South Africa' (2002) 3, available at <https://media.africaportal.org/documents/IDEKOKERPROJECTPAPER.pdf> (accessed 24 October 2020).

29 Dandurand Y & Farr K 'A Review of Selected Witness Protection Programs' (2010) 5.

30 Enikö F 'The Rising Importance on The Protection of witnesses In The European Union' (2006) 314.

31 Enikö (2006) 314.

32 Prevention of Organized Crime Act 121 of 1998.

33 'Taking the Proceeds From Crime: The Story Of Arinsa' (2019) 37, available at [https://www.unodc.org/documents/southernafrica/The\\_story\\_of\\_ARINSA.pdf](https://www.unodc.org/documents/southernafrica/The_story_of_ARINSA.pdf) (accessed 24 October 2020).

34 Basdeo V 'The legal challenges of criminal and civil asset forfeiture in South Africa: A comparative analysis' (2013) 305.

35 Willman D 'Taking The Profit Out Of Crime – The Asset Forfeiture Unit', available at

### 1.3 PROBLEM STATEMENT

South Africa's efforts to deal with ML dates back to the 1990s.<sup>36</sup> Pieter Alberts, senior operations manager at the Financial Intelligence Centre, informed delegates at the Anti-Money Laundering & Financial Crime conference held in 2019 that despite the enforcement of ML regulations in South Africa, between \$10-billion and \$25-billion is lost in illicit financial flows every year.<sup>37</sup> This denotes the prevalence of these types of crimes and that it may involve many unsuspected persons. The fact that ML could flourish to the extent mentioned by Alberts, also indicates the magnitude of the problem and that the state has not been able to gain traction over this evil.

One of the ways in which to address crime is to prosecute the criminals. The process of investigating and prosecuting offences is, to a large extent, reliant on the information and testimony provided by the witnesses.<sup>38</sup> Witnesses are the cornerstones of successful national criminal justice systems.<sup>39</sup> A 'witness' is defined as 'any person who is or may be required to give evidence, or who has given evidence in any proceedings.'<sup>40</sup> It has been acknowledged that the safety of a witness and/or their family may be compromised at different stages in a criminal investigation.<sup>41</sup> This may be particularly true regarding witnesses to ML schemes. Such schemes often involve notorious figures such as gang leaders and other habitual or serial criminals. The witnesses are aware of this, and some witnesses may even be victims who had been drawn into this underworld against their will. For this and perhaps many other reasons, witnesses may be unwilling to testify.<sup>42</sup> Witnesses must be able to testify in a court of law or cooperate with law enforcement investigations unafraid of intimidation or reprisal to maintain

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- 36 <https://www.npa.gov.za/sites/default/files/files/FAOs%20on%20AFU.pdf> (accessed 24 October 2020).  
Goredema C 'Confronting money laundering in South Africa: An overview of challenges and milestones' (2007) 74, available at <https://media.africaportal.org/documents/M132FULL.pdf> (accessed 30 September 2020).
- 37 Planting S 'SA's anti-money laundering measures under global spotlight' (2019), available at <https://www.dailymaverick.co.za/article/2019-10-27-sas-anti-money-laundering-measures-under-global-spotlight/> (accessed 28 July 2020).
- 38 Kramer K 'Witness protection as a key tool in addressing serious and organized crime', available at [https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_P3-19.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf) (accessed 17 July 2020).
- 39 Kramer K, available at [https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_P3-19.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf) (accessed 17 July 2020).
- 40 Witness Protection Act of 1998, Section 1.
- 41 Demleitner N 'Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?' (1998) 644.
- 42 United Nations Office on Drugs and Crime 'Victim Assistance and Witness Protection', available at <https://www.unodc.org/unodc/en/organized-crime/witness-protection.html> (accessed 28 July 2020).

the rule of law.<sup>43</sup> In practice this is, however, not always possible. Consequently, ML flourishes and is becoming commonplace in South Africa.

The state's ability to encourage witnesses to testify is negated by the 'high level of intimidation' of witnesses.<sup>44</sup> This problem subverts the proper 'functioning' of the judiciary by discouraging witnesses from giving crucial evidence to law enforcement officials and prosecutors. Contemporaneously, the public loses confidence in the capability of the government to keep its citizens safe.<sup>45</sup> It is important that a variety of measures are adopted, particularly at the trial stage to ensure that cases are efficiently prosecuted, and the trial process is not compromised.<sup>46</sup> To successfully prosecute ML offenders and combat organised criminal groups, it is important that witnesses and victims cooperate. However, for most criminal justice systems, it is a difficult task to get witnesses and victims to cooperate.<sup>47</sup>

In South Africa in 1996, the government established the witness protection programme along with other justice sector reform initiatives.<sup>48</sup> The programme was restructured and incorporated into law with the establishment of the Witness Protection Act 112 of 1998 ('WPA').<sup>49</sup> The WPA was initially presented to Parliament as the Witness Protection and Services Bill early in 1998, and it passed into law in November 1998. The WPA became operational in March 2000 because of financial and manpower limitations.<sup>50</sup> This in itself may be an indication of the lack of priority afforded to witness protection. This is discouraging as such programmes are aimed at keeping witnesses safe to ensure that they may testify. Witness protection programmes are consequently essential to the attainment of justice.

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- 43 'Good practices for the protection of witnesses in criminal proceedings involving organized crime' (2008), available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good\\_Practices\\_for\\_the\\_Protection\\_of\\_Witnesses\\_in\\_Criminal\\_Proceedings\\_Involving\\_Organized\\_Crime.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf) (accessed 26 July 2020).
- 44 Irish J, Magadhla W, Qhobosheane K & Newham G 'Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa' (2000), available at <http://www.csvr.org.za/docs/policing/testifyingwithoutfear.pdf> (accessed 24 July 2020).
- 45 Browning J '#Snitches Get Stitches: Witness Intimidation in the Age of Facebook and Twitter' (2014) 192.
- 46 'Witness protection during and after the prosecution and trial', available at [https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296\\_tool\\_5-18.pdf](https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-18.pdf) (accessed 26 July 2020) at 251.
- 47 United Nations Office on Drugs and Crime 'Victim Assistance and Witness Protection', available at <https://www.unodc.org/unodc/en/organized-crime/witness-protection.html> (accessed 28 July 2020).
- 48 Mahony C 'The justice sector afterthought: Witness protection in Africa' (2010) 95.
- 49 Mahony (2010) 95.
- 50 Minnaar A 'Witness Protection Programmes – Some Lessons From The South African Experience' (2002) 122.

The preamble of the WPA provides that one of its goals was the establishing of the Office for Witness Protection. Other goals included: The regulation of the powers, functions, and duties of the Director; The provision of temporary protection while the case is pending; Protecting witnesses and related persons; Providing services related to witness and related person's protection; The amendment of the Criminal Procedure Act 51 of 1977; and providing witness services at courts.<sup>51</sup>

An Office for the Protection of Witnesses was established in accordance with the WPA.<sup>52</sup> Due to budgetary limitations, the office did not start operating independently. In 2001, the office was renamed the Witness Protection Unit ('WPU') and repositioned in the National Prosecuting Authority ('NPA').<sup>53</sup> It is essential for witness protection units to hold decision-making authority on measures to be applied independently, using for that purpose such criteria as the gravity of the offence, the extent of the risk, the rights of the accused, and the impact of the measures<sup>54</sup>, without the interference of other organs of states. The safety of witnesses is, after all, a delicate issue that needs to be handled decisively and swiftly.

The WPU now reports to the National Director of the NPA via a Deputy Director. This is illegal in terms of the WPA, which requires the director of the WPU to report to the Minister of Justice and to function according to ministerial direction.<sup>55</sup> Section 3 of the WPA provides that the Minister must appoint the Director for the Office of Witness Protection to be its head in accordance with the public service laws. The director is responsible for exercising the powers and performing the duties delegated to him or her by the WPA, under the direction and control of the Minister. In the event that the Director is unable to perform his or her duties, or if the appointment of a new Director is pending, the Minister may appoint an Acting Director to perform the Director's duties.<sup>56</sup>

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51 Witness Protection Act 112 of 1998.

52 Mahony C The justice sector afterthought: Witness protection in Africa (2010) 96.

53 Mahony (2010) 97.

54 'Good practices for the protection of witnesses in criminal proceedings involving organized crime' (2008) 12, available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good\\_Practices\\_for\\_the\\_Protection\\_of\\_Witnesses\\_in\\_Criminal\\_Proceedings\\_Involving\\_Organized\\_Crime.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf) (accessed 26 July 2020).

55 Mahony (2010) 97.

56 Witness Protection Act 112 of 1998, section 3.

Clearly, the WPU's current structure is illegal as it does not comply with the WPA. To boot, the independence of the NPA has been questioned on numerous occasions. Section 179 (4) of the Constitution requires that the prosecuting authority exercises its functions without fear, favour or prejudice.<sup>57</sup> However, the National Director of Public Prosecutions ('NDPP') is not always independent in his prosecutorial decision-making function.<sup>58</sup> Members of the executive, including the president, can stand in the way of the NDPP in carrying out his functions.<sup>59</sup> An example that stands out is the well-known *Zuma arms deal* case.<sup>60</sup> This made headlines when, after 8 years into the case and just two weeks before the elections, charges against Mr Zuma who was then a presidential candidate were dropped.<sup>61</sup> This in itself is discouraging to the public and potential witnesses where they cannot trust the NPA to operate independently.

There is an intersection between the WPA and the Protected Disclosures Act 26 of 2000 ('PDA') as a whistleblower could be asked to testify. Having legislation to protect witnesses has not inspired witnesses to cooperate with the law enforcement or even report crime. This is evident from a National Survey conducted in 2003, which noted that although reporting rates have risen, it was only for certain types of crimes. It was further stated in the National Youth Victimization Survey from 2005/2006 that only one out of every ten respondents reported cases of assault to the police.<sup>62</sup> One of the causes of these low reporting rates of crimes and criminal victimisation in South Africa is because witnesses are afraid of offenders, the fear of harassment, intimidation, and other repercussions likely to flow from their decision to report the crime.<sup>63</sup> While these surveys may be dated at the time of writing, there are no indications that the reporting rate for crime has increased over the years. During the period 2019/20, overall crime rates dropped when compared to the previous because a small number of crimes were reported in communities, and also, very few crimes were detected through police action.<sup>64</sup>

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57 Constitution of the Republic of South Africa., Section 179(4).

58 Selabe B.C 'The Independence of the National Prosecution Authority of South Africa: Fact or Fiction?' (2015) 44.

59 Selabe (2015) 44.

60 February J 'Protecting the public or politically compromised?' (2019) 5.

61 'NPA drops corruption charges against Zuma', available at <https://mg.co.za/article/2009-04-06-npa-drops-corruption-charges-against-zuma/> (accessed 20 October 2020).

62 Le Roux-Kemp 'anonymity and the South African Criminal Justice System' (2010) 351-352.

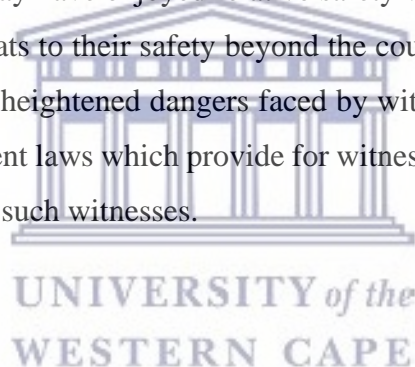
63 Le Roux-Kemp (2010) 351.

64 'South Africa crime stats 2020: everything you need to know' (2020), available at <https://businesstech.co.za/news/government/421424/south-africa-crime-stats-2020-everything-you-need-to-know/> (accessed 24 October 2020).



While there are many cases involving intimidation of ML witnesses, a good example is the case involving a prominent Cape Town lawyer, Anthony Broadway. He was arrested in 2013 on racketeering, money laundering and fraud charges linked to an alleged abalone-poaching syndicate that gathered about R2 billion.<sup>65</sup> The two main witnesses in the case against him were terrified to testify because their lives and those of family members' were in danger.<sup>66</sup> Mr Broadway was subsequently acquitted of all 51 charges because witnesses were afraid to testify.<sup>67</sup> It is highly likely that the perception of the witnesses was that the witness protection programme could not guarantee their safety. This case, though one of many, illuminates the problem of inadequate witness protection in South Africa. It must therefore be questioned what makes these programmes ineffective from the perspective of witnesses.

The *Grebelands Eight* case is another case in point. It involved eight men facing 22 charges, including nine murder and seven attempted murder charges. In this case, it became necessary for proceedings to be conducted *in camera* as three witnesses had already been killed.<sup>68</sup> Although the proceedings were *in camera*, the witnesses were terrified.<sup>69</sup> In these circumstances, the witnesses may have enjoyed relative safety while testifying *in camera*, but there could have been real threats to their safety beyond the courtrooms. Moreover, given the complex nature of ML and the heightened dangers faced by witnesses to such crimes, it must be questioned whether the current laws which provide for witness protection are appropriate to reasonably ensure the safety of such witnesses.



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- 65 Nombembe P 'Lawyer on abalone poaching charges after syndicate heads pay R5m' (2018), available at <https://www.timeslive.co.za/news/south-africa/2018-12-18-lawyer-on-abalone-poaching-charges-after-syndicate-heads-pay-r5m/> (accessed 30 September 2020).
- 66 Cruywagen V 'Witnesses 'too scared to testify' against city lawyer Anthony Broadway' (2019), available at <https://www.iol.co.za/capeargus/news/witnesses-too-scared-to-testify-against-city-lawyer-anthony-broadway-37118438> (accessed 29 September 2020).
- 67 Cruywagen V 'Cape lawyer acquitted of 51 charges as witnesses were afraid to testify' (2019), available at <https://www.iol.co.za/capeargus/news/cape-lawyer-acquitted-of-51-charges-as-witnesses-were-afraid-to-testify-37404703> (accessed 29 September 2020).
- 68 Erasmus D 'Murder of three witnesses over the years leads to trial being held in camera' (2019), available at <https://www.dailymaverick.co.za/article/2019-09-03-murder-of-three-witnesses-over-the-years-leads-to-trial-being-held-in-camera/> (accessed 17 October 2020).
- 69 Erasmus (2019), available at <https://www.dailymaverick.co.za/article/2019-09-03-murder-of-three-witnesses-over-the-years-leads-to-trial-being-held-in-camera/> (accessed 17 October 2020).

## **1.4 RESEARCH QUESTION(S)**

This research attempts to answer the following questions:

- How may the reasonable protection of witnesses in ML cases contribute to greater levels of prosecution?
- How do the witness protection laws in South Africa give effect to ML witnesses' needs for protection?
- What are some of the main legal features of an effective witness protection programme in complex and serious crimes such as ML?

## **1.5 SIGNIFICANCE OF THE RESEARCH**

This study is unique in that it does not look at witness protection in general. It in fact, considers witness protection in relation to the highly complex crime of ML. The study also seeks to consider whether current laws on witness protection can speak adequately and appropriately to the profound dangers which witnesses to ML face.

## **1.6 LIMITATIONS OF STUDY**

This study is limited to the importance of witness protection, particularly in the context of ML. The discussions centre around the laws regulating witness protection and AML laws will not be discussed extensively. Further, although other countries like the United States, Australia, and Canada will be discussed, the main focus is South Africa.

## **1.7 METHODOLOGY**

This research relies on a review of the literature. The purpose of using the literature review method is to touch on some of the areas where thorough research is still needed. Primary sources such as international instruments and case law, and secondary sources like journal articles, papers, theses, and media articles are considered.

## 1.8 LITERATURE REVIEW.

According to Ferguson, ML describes different practices used to conceal the origin of ill-gotten gains and integrate them into the legitimate financial system.<sup>70</sup> ML is an indispensable part of most illegitimate operations, even though the techniques are different.<sup>71</sup> Scholars seem to agree that ML is critical to criminal operations because funds obtained illegally will be useless if the criminals are unable to launder them. Levi and Reuter opine that criminals who break the laws for economic gain do not only want to elude incarceration, but also want to benefit from their crimes.<sup>72</sup> Eliminating any threat to their goal of avoiding prison and enjoying the fruits of their crimes, therefore, becomes essential, and witnesses are therefore at a heightened risk of harm at the hands of such criminals. Unfortunately, there is a dearth of literature on the plight of witnesses insofar as ML is considered. Little is to be gleaned regarding the efficacy of the protection services (if any) afforded to them.

Criminals may do everything in their powers to ensure that their unlawful activities are not detected by the 'tax department', 'police' and/or 'law enforcement authorities'.<sup>73</sup> Whenever these criminals want to spend the proceeds of their crime, they are faced with the challenge of spending or investing large sums of money without a legitimate source to show for it because that could draw the attention of tax examiners or auditors'.<sup>74</sup> However, where illicit money is laundered successfully, criminals are motivated to carry on with their illegal dealings because they enjoy such illicit proceeds without the 'criminal activity' or 'origin of money' being uncovered.<sup>75</sup> Inevitably innocent persons may be drawn into these dealings against their will. Such persons and others may become witnesses who will need protection, yet the laws specific to ML do not expressly pronounce themselves on the safety of such witnesses. Significant legal research in this regard is also not widely available at the time of writing.

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70 Ferguson G 'Global Corruption: Law, Theory & Practice' (2018) 306.

71 Ferguson (2018) 306.

72 Levi M & Reuter P 'Money Laundering' (2006) 289.

73 'Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors' (2009) at 9, available at <http://www.oecd.org/ctp/crime/money-laundering-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf> (accessed 20 August 2020).

74 'Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors' (2009) at 9, available at <http://www.oecd.org/ctp/crime/money-laundering-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf> (accessed 20 August 2020).

75 Patel H and Thakkar B.S 'Money Laundering Among Globalized World' (2012), available at <https://www.intechopen.com/books/globalization-approaches-to-diversity/money-laundering-among-globalized-world> (accessed 20 August 2020).

ML facilitates crime by enabling criminal organisations and networks to generate enough funds to finance themselves, change, and expand.<sup>76</sup> ML undermines the principles of transparency, accountability, and integrity, which are the core values of good governance, and causes the public to lose confidence in markets and innovation development.<sup>77</sup> Thus, there is widespread agreement that it is in the best interest of every society to fight against ML. Such an approach, however, may depend to a substantial degree on the co-operation of witnesses.

Furthermore, ML must be addressed through different AML schemes as this is extremely important to counter related crimes like terrorist financing, organised crime and corruption.<sup>78</sup> Effective witness protection ought to be an integral part of AML schemes. In the South African context, this does not seem to be the case. It appears that the general witness protection regime is simply applied to witnesses in ML cases. As already indicated, this is, in all likelihood, a futile approach.

Moshi explains that the secretive nature of ML makes it arduous to quantify accurately how much money is laundered in any part of the world.<sup>79</sup> This secrecy in itself also poses significant dangers to witnesses of such crimes and may only magnify their fears of testifying. Complex crimes like organised crime, money laundering, terrorism, international crimes, and cybercrime are continuously advancing, bringing along unique and more unprecedented challenges to the judicial systems.<sup>80</sup> Witnesses become more important in prosecuting these crimes. Guaranteed witness protection affords the courts a chance to obtain witness testimony and further evaluate the evidence, especially in cases involving individuals in prominent positions with extensive connections.<sup>81</sup> It has been acknowledged through various legal regimes, policies, and declarations that witness protection is of utmost importance.<sup>82</sup> Some of the global instruments and agreements that recognised the importance of witness protection in reinforcing efforts to

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76 Levi M 'Money Laundering and Its Regulation' (2002) 183.

77 Dobrowolski Z and Sułkowski Ł 'Implementing a Sustainable Model for Anti-Money Laundering in the United Nations Development Goals' (2019) 1.

78 Ferguson G (2018) 307.

79 Moshi H 'Fighting money laundering: The challenges in Africa' (2007) 2.

80 Njeri J 'Witness protection: the missing cornerstone in Africa's criminal justice systems', available at <https://issafrica.org/amp/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems> (accessed 17 October 2020).

81 Njeri J 'Witness protection: the missing cornerstone in Africa's criminal justice systems', available at <https://issafrica.org/amp/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems> (accessed 17 October 2020).

82 Njeri J 'Witness protection: the missing cornerstone in Africa's criminal justice systems', available at <https://issafrica.org/amp/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems> (accessed 17 October 2020).

deal with complex and serious crimes include the UN Convention against Transnational Organised Crime and the UN Convention against Corruption.<sup>83</sup>

It is important that a witness is able to testify in a court or to assist with law enforcement investigations and to do so unafraid of intimidation or reprisal to ensure the rule of law is maintained.<sup>84</sup> In some instances, victims and witnesses are unwilling to report the incidents to the police or to help with the prosecution of offenders.<sup>85</sup> A threat of possible retaliation by the offender or his associates may give rise to such reluctance, and it could also be due to the *boni mores*, which discourage members of a society to cooperate with police officials and the prosecuting authority.<sup>86</sup>

Intimidation does not need to flow from the offender himself. Dedel supports this idea by stating that although in most cases it is the offender him/herself who intimidates witnesses, it is also often the offender's friends, family members, or his criminal associates who intimidate and inflict pain on the witness.<sup>87</sup> Anderson also states the perpetrator, fellow gang members, or even friends or family who are not members of the gang can carry out the act(s) of intimidation.<sup>88</sup> According to McDonough, the prosecutor is faced with a considerable challenge if the witness is silenced by a third party, and not the perpetrator himself.<sup>89</sup> While the offender awaits trial in custody, his fellow gang members may be in a better position and willing to intimidate or harm any witness against the perpetrator while avoiding contact with the offender that might draw the attention of the law enforcement authorities to such consultation.<sup>90</sup> While this may be true in respect of many offences, the possible anonymity of perpetrators in ML

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- 83 Njeri J & Salifu U 'Witness protection' (2016) 4, available at <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/ISS%20Africa%20Witness%20Protection.pdf> (accessed 19 October 2020).
- 84 'Good practices for the protection of witnesses in criminal proceedings involving organized crime' (2008), available at <https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf> (accessed 10 October 2020).
- 85 Dedel K 'Witness Intimidation' (2006) 2, available at <https://biblioteca.cejamericas.org/bitstream/handle/2015/3729/e07063407.pdf?sequence=1&isAllowed=y> (accessed 11 October 2020).
- 86 Dedel (2006) 2, available at <https://biblioteca.cejamericas.org/bitstream/handle/2015/3729/e07063407.pdf?sequence=1&isAllowed=y> (accessed 11 October 2020).
- 87 Dedel (2006) 7, available at <https://biblioteca.cejamericas.org/bitstream/handle/2015/3729/e07063407.pdf?sequence=1&isAllowed=y> (accessed 11 October 2020).
- 88 Anderson J 'Gang-Related Witness Intimidation' (2007) 2, available at <https://www.nationalgangcenter.gov/content/documents/gang-related-witness-intimidation.pdf> (accessed 10 October 2020).
- 89 McDonough K.M. 'Combating gang-perpetuated witness intimidation with forfeiture by wrongdoing' (2013) 1284.
- 90 McDonough (2013) 1284.

may pose a significant threat to witnesses. The need for reasonable witness protection in ML cases is therefore substantial.

Witness intimidation can be direct or indirect, whichever form it takes the primary objective is for the offender to evade justice by preventing witness testimony or other cooperation with law enforcement.<sup>91</sup> Essentially, the offenders often intimidate or cause others to intimidate witnesses with an expectation that the witnesses do not testify at all, change, or fabricate testimony.<sup>92</sup> The most prevalent examples of intimidation are ‘acts of physical violence’, ‘verbal and nonverbal communication of threats’, ‘threats implied by conduct’, and ‘emotional manipulation’.<sup>93</sup> While the aforementioned applies to witnesses in other serious crimes, there is no authoritative information available on the common methods used against witnesses in ML cases. Witness intimidation undermines the proper functioning and fair operation of the criminal justice system. Without witnesses, the justice system will not work.<sup>94</sup> Consequently, even in instances where many people did witness the criminal act(s), prosecutors will have no choice but to drop or lose the case.<sup>95</sup>

It is accepted that South Africa has come a long way in enhancing its anti-money laundering - combating the financing of terrorism (‘AML/CFT’) legal and institutional framework from the last time it was assessed against the AML/CFT standard in 2008.<sup>96</sup> However, the Mutual Evaluation Report (‘MER’) also indicated that South Africa does not seem to have alleviated the risks of ML well enough.<sup>97</sup> To support this view, in 2019, in City Press, it was reported that ‘the [NPA] in its annual report has stated that prosecution rates of severe offences have been as low as 2%.’<sup>98</sup> However, the NPA is silent on what could be the reason for such a low prosecution rate. Much is written about how AML measures affect banks and lawyers. There,

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91 ‘Witness Intimidation: Meeting the Challenge’ (2013) 7, available <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Witness%20Intimidation-Meeting%20the%20Challenge.pdf> (accessed 11 October 2020).

92 Anderson (2007) 2, available at <https://www.nationalgangcenter.gov/content/documents/gang-related-witness-intimidation.pdf> (accessed 10 October 2020).

93 ‘Witness Intimidation: Meeting the Challenge’ (2013) 7, available <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Witness%20Intimidation-Meeting%20the%20Challenge.pdf> (accessed 11 October 2020).

94 Anderson (2007) 1, available at <https://www.nationalgangcenter.gov/content/documents/gang-related-witness-intimidation.pdf> (accessed 10 October 2020).

95 Chen E.Y ‘Victim and Witness Intimidation’ (2009) 838.

96 International Monetary fund ‘Anti-Money Laundering And Combating The Financing Of Terrorism (AML/CFT)—Technical Note’ (2015) 4.

97 International Monetary fund (2015) 9.

98 Versluis J and de Lange J ‘Rising crime, low prosecution rates: How law enforcement in SA has all but collapsed’ (2019), available at <https://www.news24.com/citypress/news/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021> (accessed 25 September 2020).

however, a gap in the literature with regards to how reluctance to testify or cooperate with law efforts contribute to low prosecution rate in ML cases specifically. This research seeks to explore this vacuum.

## **1.9 CHAPTER OUTLINE**

### **Chapter 1**

This chapter discusses the concept of money laundering and highlights important ML concepts. It looks at the importance of witnesses in ML cases. In this chapter, the research problem was identified and contextualised. It further outlines the significance of the study.

### **Chapter 2**

This chapter discusses the concept of ML and the domestic legal framework regulating ML. It also considers how the law deals with witnesses within the context of ML, both South Africa's and International laws are discussed.

### **Chapter 3**

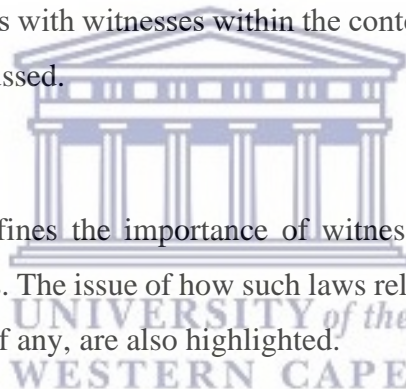
This chapter discusses and defines the importance of witness protection as well as South Africa's witness protection laws. The issue of how such laws relate to witnesses in ML cases is analysed. The gaps in the law, if any, are also highlighted.

### **Chapter 4**

This chapter discusses other jurisdictions with good witness protection programmes. This chapter looks at the USA witness protection, also known as the Witness Security Program or WITSEC, Australian witness protection run by the Australian Federal Police ('AFP'), and Canada's witness protection run by the Royal Canadian Mounted Police.

### **Chapter 5**

This chapter discusses recommendations as to how South Africa's witness protection can be enhanced and provides the conclusion.



## CHAPTER 2

### THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK FOR THE PROTECTION OF WITNESSES IN MONEY-LAUNDERING CASES

#### 2.1 INTRODUCTION

Chapter 1 alluded to the importance of AML measures in all countries. Such measures always include the effective prosecution of offenders. To this end, witnesses' ability to testify without fear and/or the heightened risk of harm is vital to ensure that an offender is prosecuted successfully.<sup>1</sup> In the context of ML this is, however, often not possible. The reluctance of witnesses to testify or cooperate with investigators may be attributed to a myriad of factors including the threat of harm to them or their family members. In this chapter, the legal framework which ought to protect such witnesses, will be sketched. The international and domestic laws which ought to protect persons from dangers emanating from their status as witnesses in ML cases will be delineated in this chapter with a view of identifying the strengths and weaknesses (if any) in these systems.

In most justice systems, an individual who gives a statement to the police may be required to appear in court to testify.<sup>2</sup> The nature of a trial is such that the prosecution depends on the testimony of the witness and other forms of evidence to prosecute the suspect. Arguably, in cases involving ML there may be attempts by the accused or others involved in ML to stop the witness from giving his testimony or to discredit the witness.<sup>3</sup> In the context of ML cases, as discussed in chapter 1, an accused may employ illegal measures which could prevent a witness from testifying freely or at all. It cannot be denied that by agreeing to testify and cooperate, a witness takes a major risk by subjecting himself to possible threats.<sup>4</sup> Naturally, a witness may suffer from the psychological and emotional trauma that comes with testifying, and may also be confronted with serious threats to their physical security.<sup>5</sup> These risks are heightened in ML cases, and therefore greater legal protection is warranted for such witnesses. Persons who come

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1 Kayunia S.W and Jamub E 'Failing witnesses in serious and organised crimes: policy perspectives for witness protective measures in Malawi' (2015) 423.

2 Kayunia S.W and Jamub E (2015) 423.

3 Kayunia S.W and Jamub E (2015) 422.

4 Bates M 'Balancing Act: The Rights of the Accused and Witness Protection Measures' (2014) 147.

5 Bates M (2014) 147.



forward as witnesses are more likely to be confronted with retaliation from offenders, and the consequences do not only affect them, but also their family.

As discussed in Chapter 1, to prosecute successfully, the prosecuting authority must prove beyond a reasonable doubt that a defendant possessed the required guilty state of mind, and that at the time he also committed the '*actus reus*' of the crime. One of the most prevalent attributes of the '*actus reus*' of ML offences in different countries is that the prosecution generally needs to prove, among other things, that possessions which were subjects of the transaction were indeed proceeds of crime.<sup>6</sup> The decision to prosecute and the outcome of the prosecution is to a large extent fact-dependent.<sup>7</sup> Again, as mentioned early, witnesses become important.

Most states adopted and use witness protection measures to reinforce their competence to prosecute offenders successfully. This ensures that critical testimony is available as part of related criminal proceedings.<sup>8</sup> The perpetrators may influence innocent persons to bear the consequences of such crimes by standing trial and/or serving prison time on their behalf. Furthermore, the advancement in communication technology allows for evidence to be destroyed expeditiously. It thus becomes almost impossible for these offenders to be punished because their acts are often discreet and covert.<sup>9</sup> The testimony of witnesses in these cases are thus even more crucial for effective investigations and prosecutions.<sup>10</sup>

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

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- 6 Bell R.E 'Proving the Criminal Origin of Property in Money-Laundering Prosecutions' (2000) 12.  
7 Ratliff R 'Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion' (1996) 180.  
8 United Nations Office on Drugs and Crime 'South Asia: The importance of witness protection in criminal proceedings', available at <https://www.unodc.org/southasia/en/frontpage/2013/Oct/south-asia-the-importance-of-witness-protection-in-criminal-proceedings.html> (accessed 08 December 2020).  
9 Poonyarith S (2014) 56 available at <file:///C:/Users/dell/AppData/Local/Temp/40753-Article%20Text-93536-1-10-20151009.pdf> (accessed 05 November 2020).  
10 United Nations Office on Drugs and Crime 'South Asia: The importance of witness protection in criminal proceedings', available at <https://www.unodc.org/southasia/en/frontpage/2013/Oct/south-asia-the-importance-of-witness-protection-in-criminal-proceedings.html> (accessed 08 December 2020).

## 2.2 INTERNATIONAL INSTRUMENTS ON WITNESS PROTECTION

As mentioned above, there is no legislation at the United Nations ('UN') level that deals solely with witness protection or the protection of collaborators with justice. However, the introduction of the United Nations Office on Drugs and Crime ('UNDOC') and the United Nations Convention against Corruption ('UNCAC') do take into consideration the role of witnesses and collaborators who can potentially provide useful information about the issues dealt with in these Conventions.<sup>11</sup> The conventions necessitate the establishment of witness protection measures and the international community to work together for the protection of witnesses.<sup>12</sup>

### 2.2.1 UNITED NATIONS CONVENTION AGAINST CORRUPTION ('UNCAC')

The United Nations Convention Against Corruption ('UNCAC') is the first binding global agreement aimed at combating corruption.<sup>13</sup> UNCAC does cater for the protection of witnesses from potential retaliation or intimidation should they testify. Article 32 of the UNCAC specifically provides for the protection of witnesses, experts, and victims.<sup>14</sup> States Parties are also required to take appropriate measures to ensure that witnesses and experts who provide testimony regarding offences under UNCAC are protected from potential retaliation or intimidation.<sup>15</sup> The protection extends to witnesses' relatives and other persons they are close to. Article 32 allows many protective measures to be taken, provided they are not prejudicial to the defendant's right to due process and other rights. Protection measures may include: Relocation of witnesses, where necessary and feasible; Permitting the protection of their identity and whereabouts if appropriate; and utilising communications technology to avoid face-to-face testimonies. The States Parties are also required to enter into agreements for the relocation of their citizens with other States.<sup>16</sup>

It follows a similar approach as the United Nations Convention Against Transnational Organized Crime also known as the ('Palermo Convention') which contains an escape clause.

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11 Enikö F 'The Rising Importance on the Protection of witnesses In The European Union' (2006) 316.

12 Dandurand Y & Farr K 'A Review of Selected Witness Protection Programs' (2010) 77.

13 Webb P 'The United Nations Convention Against Corruption: Global achievement or missed opportunity' (2005) 191.

14 United Nations Convention Against Corruption, Article 32.

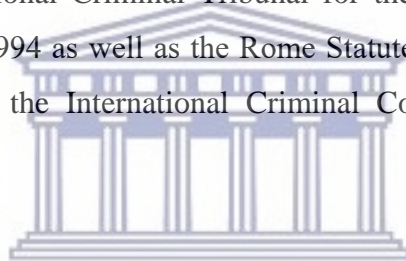
15 United Nations Convention Against Corruption, Article 32(1).

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

The protection measures under UNCAC are mandatory for crimes covered by UNCAC itself, however they are only obligatory when ‘appropriate’, ‘necessary’, ‘without prejudice to the rights of the defendant’ and ‘within the means of the state’. For this reason, the obligation to provide witnesses with effective protection is restricted to specific cases or specified conditions and officials have some discretion in assessing the level of threat and determining what protective measures are appropriate.<sup>17</sup> UNCAC does not explain when protection is appropriate and necessary, nor does it explain when the state is considered to have sufficient means to provide such protection. This means that protection is not guaranteed, which in turn defeats the purpose of having a witness protection measures at all.

### **2.3. INTERNATIONAL COURTS**

International law does not outline the level of protective measures that a witness should expect in criminal proceedings.<sup>18</sup> However, the measures for the protection of witnesses are provided in the Statutes of the International Criminal Tribunal for the Former Yugoslavia of 1993 (‘ICTY’) and for Rwanda of 1994 as well as the Rome Statute of the International Criminal Court (‘Rome Statute’)<sup>19</sup> and the International Criminal Court. These measures will be elaborated upon below.



#### **2.3.1. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (‘ICTY’)**

The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) was established in 1993 by the United Nations.<sup>20</sup> The ICTY comprises three organs: the Chambers; the Office of the Prosecutor (OTP); and the Registry which administers services to the court, and caters for protection of witnesses and detention of the accused.<sup>21</sup> Reportedly, most witnesses in ICTY trials request and receive protection ranging from:

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- 17 Dulume W ‘Ethiopian Witness Protection System: Comparative Analysis with UNHCHR and Good Practices Of Witness Protection Report’ (2017) 136.  
18 Mackarel M, Raitt F and Moody S ‘Briefing Paper on Legal Issues and Witness protection in criminal Cases’ (2001) 9.  
19 Végvári R ‘Shifts in Thinking Concerning Law of Criminal Procedure in Witness Protection’ (2007) 364.  
20 Ivkovic S ‘Justice by the international criminal tribunal for the former Yugoslavia’ (2001) 255.  
21 Wald P.M ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of Comes of Age: Some Observations on Day-To-Day

- (1) non-disclosure of their identity to the media or in the public record;
- (2) court orders to defense counsel to keep a log and notify the prosecutor of all contacts with witnesses;
- (3) facial and voice distortion of the witness on camera since the proceedings are televised to the Balkans; and
- (4) in extreme cases taking testimony in closed session which will not appear in the public transcripts.<sup>22</sup>

Despite these protective measures, the tension in the courtroom can still be felt.<sup>23</sup> The former Registrar of the ICTY emphasised the significance of having a victim and witness protection programme by admitting that trials would not take place at all without witnesses.<sup>24</sup>

### 2.3.2. THE INTERNATIONAL TRIBUNAL FOR RWANDA ('ICTR')

The International Tribunal for Rwanda ('ICTR') was established in November 1994.<sup>25</sup> The ICTR had an operational Victim and Witness Protection Unit.<sup>26</sup> Most witnesses who sought protection were Rwandans who lived in Rwanda. Only a few resided abroad. In terms of the Tribunal's statute, the ICTR had an obligation to provide protection to victims and witnesses in its Rules of Procedure and Evidence.<sup>27</sup> Most witnesses who testified at the ICTR, requested protection, but providing protection often conflicted with the right of accused to a 'fair and public hearing' because some witness protection measures limited the defence's ability to cross-examine.<sup>28</sup> Unfortunately, the Rwandan statute provided no guidance on how judges could balance between the rights of the accused against the safety of the witnesses. Consequently, often when the ICTR was confronted with matters of this nature, the fairness and accuracy of ICTR trials were questioned.<sup>29</sup>

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Dilemmas of an International Court an International Court' (2001) 88.

22 Wald (2001) 108-109.

23 Wald (2001) 108-109.

24 Clark P 'Testifying to Genocide: Victim and Witness Protection in Rwanda' (2012) 14, available at <https://www.refworld.org/pdfid/50a3a9002.pdf> (accessed 15 November 2022).

25 Shraga D and Zacklin R 'Symposium Towards an International Criminal Court: The International Criminal Tribunal For Rwanda' (1996) 501.

26 Pozen J 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials' (2013) 296.

27 Pozen (2013) 296.

28 Pozen (2013) 296.

29 Pozen (2013) 297.

### 2.3.3. INTERNATIONAL CRIMINAL COURT ('ICC')

In March 2010, witness protection was recognised as a concern for the International Criminal Court ('ICC') when it further clarified the roles of its organs.<sup>30</sup> Evidence during ICC proceedings was mostly obtained through witness testimony.<sup>31</sup> The Court is thus required to protect witnesses and victims according to article 68 of the Rome Statute. Article 68(1) requires that the Court takes all reasonable steps to ensure the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses. The Court will consider all relevant factors, including age, gender, and health, as well as the nature of the crime, particularly if it involves sexual or gender violence or violence against children. As part of the investigative and prosecutorial process, it is the Prosecutor's responsibility to take such measures, which must not be prejudicial to the rights of the accused or incompatible with impartiality.<sup>32</sup>

The ICC's obligation to protect applies to all witnesses regardless of whether they are for the prosecution or the defence as well as all victims.<sup>33</sup> Even though the Rome Statute and the Rules of Procedure and Evidence ('RPE') make provision for witness protection, many difficulties related to interpretation and implementation on the bases of policy and law occur.<sup>34</sup> These difficulties vary amongst the different organs of the ICC such as the Chamber, the Office of the Prosecutor and the Witnesses and Victims Unit not working efficiently together, collaboration among states parties, also collaboration amongst different organisations and financial issues.<sup>35</sup> It should be noted that witness protection as provided for under articles 43 and 68 of the Rome Statute can happen only if those provisions are well understood, applicable, and implemented.<sup>36</sup>

Article 68 does not restrict protective measure to those that are expressly provided for in the ICC documents, but it affords the ICC the discretion to take any other 'appropriate measures'.<sup>37</sup> The provision states that the measures which the ICC take, should not be 'prejudicial' or 'inconsistent' with the rights of the accused. Despite these safeguards to strike a balance

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30 Eikel M 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice' (2012) 97-98.

31 Eikel (2012) 98.

32 Rome Statute of the International Criminal Court, Article 68(1).

33 'Victim and Witness Protection and Support', available at <https://www.hrw.org/reports/2008/icc0708/9.htm> (accessed 03 December 2020).

34 Kayuni S 'The ICC's witness protection measures through the lens of policy-oriented jurisprudence' (2015) 271.

35 Kayuni (2015) 271-272.

36 Kayuni (2015) 272.

37 Irving E 'Protecting Witnesses at the International Criminal Court from Refoulement' (2015) 5.

between the accused's rights and witnesses' safety, the discretion of the ICC to employ suitable protective witness measures still raises concern, because in some instances a witness may have to testify anonymously. Evidently, an accused's right to confront and question the witness will be impacted upon in such cases. Furthermore, the Statute imposes protection obligations on the Prosecutor, the Chamber, and the Registry. Thus, it is not clear which organ should take the lead.<sup>38</sup>

The Victims and Witnesses Unit ('VWU'), along with the Office of the Prosecutor, have established response systems to ensure that witnesses know whom to contact and what to do should they feel unsafe.<sup>39</sup> Mechanisms and policies have been set in motion to guarantee 24-hour protection, and psychological support for witnesses. To protect witnesses, employees of the VWU have travelled to places and been in the field where the ICC is investigating or where development of local protection measures occur.<sup>40</sup>

Because of interests involved at all levels of society, participation becomes risky in these trials.<sup>41</sup> Curiously, although witnesses at the ICC can have satisfactory protection through the ICC, witnesses are often reluctant to accept such protection because the ICC witness protection programme is mainly characterised by an opaqueness.<sup>42</sup> Witnesses believe that the programme lacks transparency and thus hides some of the shortcomings that limit its ability to produce desired or intended results.<sup>43</sup> Irving opines that the nature of protection that a witness will be afforded is not always clear, leaving other witnesses discontented with the protection offered by the ICC.<sup>44</sup> This may also be true in ML cases. The dangerous context in which witnesses find themselves and the unknown nature of protection programmes appear to risky for them.

It is noteworthy that the VWU provides a neutral environment which takes into consideration the interests of witnesses regardless of their role in a trial.<sup>45</sup> Witnesses should be encouraged to testify truthfully and freely without feeling the need or pressure to alter their testimony. It is unfortunate that protection of witnesses at the ICC has not been the subject of extensive

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38 Irving (2015) 6.

39 Ngane, S. 'Witnesses before the international criminal court' (2009) 454.

40 Ngane, (2009) 454.

41 Irving E 'Protecting Witnesses at the International Criminal Court from Refoulement' (2015)1.

42 Irving E 'Protecting Witnesses at the International Criminal Court from Refoulement' (2015)1.

43 Irving (2015)1-2.

44 Irving (2015) 7.

45 Rydberg A 'Case analysis: The protection of the interests of witnesses the ICTY in comparison to the future ICC' (1999) 459.

documented research to date.<sup>46</sup> Such research may have had a positive impact on witness protection generally and globally.

## **2.4. WITNESS PROTECTION IN THE CONTEXT OF MONEY LAUNDERING IN THE GLOBAL ARENA**

The United States of America's ('USA') fight against ML commenced with a provision in the Bank Secrecy Act of 1970, which covered only depository institutions.<sup>47</sup> This was the beginning of the collaboration by the international community to combat ML. Since then, the AML regime has advanced to a well-structured international regime that regulates different institutions.<sup>48</sup> This notwithstanding, witness protection still requires attention. Below some of the main instruments relevant to AML will be discussed. First, however, witness protection in general at the level of international law will be discussed. This will be followed by an analysis of legal provisions specifically applicable to AML.

### **2.4.1. THE UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES 1988**

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ('Vienna Convention') was a significant step towards global collaboration in the fight against illicit drug trafficking.<sup>49</sup> It became the first comprehensive legal instrument in the international sphere relevant to ML as it mandated its States Parties to outlaw the 'act of laundering the proceeds of drug-related crimes, and to adopt confiscation measures'.<sup>50</sup> The Vienna Convention, however, has no provisions on witness protection. Perhaps this can be attributed to the fact that it was only the first AML effort at addressing ML at an international law.

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46 Eikel M (2012) 98.

47 Reuter P & Truman E.M 'Chasing dirty money: The Fight Against Money Laundering' (2004) 1.

48 Reuter & Truman (2004) 1.

49 Le Nguyen C 'The International Anti-Money Laundering Regime and Its Adoption by Vietnam' (2014) 201.

50 Le Nguyen (2014) 201.

#### 2.4.2. UN CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME ('PALERMO CONVENTION')

On 15 November 2000, the UN Convention against Transnational Organised Crime ('Palermo Convention') was adopted by the General Assembly with the intention to eradicate organised crime dealing specifically with the smuggling of migrants and trafficking in persons.<sup>51</sup> Uniquely, this Convention criminalised the act of obstruction of justice which includes the use of force, intimidation, or bribery to tamper with witnesses or experts who are willing to testify and also the justice or law enforcement officials from carrying out their duties accordingly.<sup>52</sup> Arguably, this is the first significant acknowledgment of the problem with witnesses' safety.. The Convention caters for witness protection which is important to combatting organized crime.<sup>53</sup>

Article 24 of the Palermo Convention obligates states to take necessary steps to ensure witnesses are protected from possible reprisal or intimidation when testifying in criminal proceedings relating to offences listed by the Convention. The protection also extends to witnesses' relatives and other persons close to them.<sup>54</sup> Protection measures include relocating witnesses and, where suitable allowing non-disclosure or setting perimeters regarding their identity and location or allowing them to testify through communications technology, like video links or other acceptable means.<sup>55</sup> This will afford a witness a chance to testify without the physical presence of the accused and the risk of intimidation, thus, encouraging free and truthful testimony.

Article 25 of the Palermo Convention requires states to assist and protect victims of crimes. States parties must take reasonable measures within their means to protect victims. Each States Party must establish appropriate procedures for compensating and reimbursing victims of offences covered by this Convention. Furthermore, in accordance with its national laws, each

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51 Veng Mei Leong A 'Chasing dirty money: domestic and international measures against money laundering' (2007) 146.

52 Vlassis D 'Overview of the Provisions of the United Nations Convention Against Transnational Organized Crime And Its Protocols' (2000) 456, available at [https://www.unafei.or.jp/publications/pdf/RS\\_No59/No59\\_32VE\\_Vlassis1.pdf](https://www.unafei.or.jp/publications/pdf/RS_No59/No59_32VE_Vlassis1.pdf) (accessed 30 November 2020).

53 Vlassis (2000) 456, available at [https://www.unafei.or.jp/publications/pdf/RS\\_No59/No59\\_32VE\\_Vlassis1.pdf](https://www.unafei.or.jp/publications/pdf/RS_No59/No59_32VE_Vlassis1.pdf) (accessed 30 November 2020).

54 United Nations Convention against Transnational Organized Crime 2000, Article 24(1).

55 United Nations Convention against Transnational Organized Crime 2000, Article 24(2).



States Party must ensure that victims' opinions are heard at appropriate stages of criminal proceedings against offenders without prejudicing the rights of the defence.<sup>56</sup>

Article 25 applies to victims, but it is worth mentioning as it is possible for victims to be witnesses too. . The article affords the necessary protection to persons who would otherwise be even more vulnerable and at risk of harm. Despite the protection provided, article 24 and 25 provide limited protection because States Parties must fulfil their duties ‘within its means’ and reservation in favour of domestic law ‘subject to its domestic law’. These limitations are brought about by what may be regarded as an escape clause. An escape clause is defined by Okoli and Arishe as

... a provision inserted in a legal instrument to supplement or cure the defect in the main rule, especially where the main rule has little or no connection with the issue to be resolved before the court. Escape clauses honour the claim that no legal instrument is perfect and strive to improve the instrument by giving the court the discretion to locate the law of a country that is more or most closely connected with the subject-matter.<sup>57</sup>

The escape clause exempts States Parties from the obligation to protect witnesses under the Convention. The words ‘within its means’ imply that states should take necessary measures to protect witnesses if they have the means to do so. This is problematic because states can escape liability by relying on the fact that they have limited or no resources available to protect victims and witnesses. Some may correctly argue that having limited resources does not mean that a state is absolutely excused from fulfilling its obligation. In practice, however, this is how some states shirk their obligations. On the other hand, reservations are defined as ‘statements that purport to modify a state’s obligations under a ratified treaty’.<sup>58</sup> They allow states to adjust particular obligations to suit them. The Palermo Convention, by virtue of having an escape clause and a reservation, does not guarantee witness protection absolutely. Witnesses to serious crimes such as ML offences need absolute assurances that reasonable efforts will be employed to ensure their safety. These limitations are major weaknesses to their protection.

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56 United Nations Convention against Transnational Organized Crime 2000, Article 25.

57 Okoli C And Arishe G ‘The Operation of the Escape Clauses In The Rome Convention, Rome I Regulation And Rome II Regulation’ (2012) 513.

58 Zvobgo K, Sandholtz W & Mulesky S ‘Reserving Rights: Explaining Human Rights Treaty Reservations’ (2020) 785.

## 2.5. INTERNATIONAL ORGANISATIONS

Some AML organisations have been established to fight AML and related crimes. The United Nations in the United Nations Office on Drugs and Crime ('UNODC') are such organisations. They are instrumental in aiding the protection of witnesses.

### 2.5.1. FINANCIAL ACTION TASK FORCE ('FATF')

A major achievement in the international AML regime was the establishment of the Financial Action Task Force ('FATF') in 1989, to reinforce AML/CTF practices across the globe.<sup>59</sup> The FATF is a prominent standard-setter in AML/CTF, and it is also a high-powered force capable of shaping and regulating nations' policies via its AML/CTF Recommendations.<sup>60</sup> The FATF is continuously revising the counter-measures at a domestic and global level.<sup>61</sup> FATF, as a driving force in combatting ML, ought to have influenced the introduction of witness protection laws. Instead, similarly to the Vienna Convention, the FATF does acknowledge that witnesses may be required to testify in ML proceedings, but it does not provide concrete protection for witnesses.

FATF recommendation 31 provides that competent authorities should have access to all necessary information and documents to conduct investigations into ML, associated predicate crimes, and terrorist financing. There should also be the ability to use coercive measures to obtain records from financial institutions and other natural or legal persons.<sup>62</sup> Unfortunately, there is no acknowledgment of the dangers which witnesses may face or the need for protection. This is a significant omission, as the failure to protect witnesses may be fatal to prosecuting ML crimes. This is a substantial limitation to the combatting of ML crimes.

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- 59 Chohan U.W 'The FATF in the Global Financial Architecture: Challenges and Implications' (2019) 5 available at <https://poseidon01.ssrn.com/delivery.php?ID=059127068100112070104116085016090066097054010027075048118120110099111069006064012103010024035061107029062021089123096000101011016081075008087124083083093107098020006033059024126081030088126026084085001115066023013082112118076019029083029095089119105082&EXT=pdf> (accessed 08 November 2020).
- 60 De Pascalis F 'Financial Crime Prevention and Control: The Reforms of a 'Unique' Jurisdiction under EU Law and International Standards' (2015) 529.
- 61 Hamin Z, Omar N & Kamaruddin S 'FATF and Lawyers obligations under the AML/AFT Regime in the Malaysia' (2015) 759.
- 62 FATF Recommendation 31.

## 2.5.2. THE UNITED NATIONS IN THE UNITED NATIONS OFFICE ON DRUGS AND CRIME ('UNODC')

All the efforts at drug control, combating transnational organised crime, and ML is now concentrated within the United Nations in the United Nations Office on Drugs and Crime ('UNODC').<sup>63</sup> UNODC was formed in 1997<sup>64</sup> by the Secretary-General of the United Nations to allow the Organisation focus on and improve its capability to deal with the interrelated issues of drug control, crime and international terrorism in all its forms.<sup>65</sup> The UNODC is a frontrunner in the international fight against 'illicit drugs', 'transnational organized crime', 'terrorism', and 'corruption', and it is the lineage for some conventions like the Palermo Convention and its three protocols (against trafficking in persons, smuggling of migrants and trafficking in firearms), UNCAC and all other international drug control conventions.<sup>66</sup>

The UNODC published a handbook on good practices for witness protection in criminal proceedings concerning organized crime.<sup>67</sup> According to the UNODC Good Practices for the Protection of Witnesses manual, a witness protection programme is

a formally established covert program, subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.<sup>68</sup>

The UNODC organised regional meetings with experts from the police force, the prosecuting and judicial authorities of states parties to compile good practices to be for the establishment and functioning of witness protection programmes.<sup>69</sup> The UNODC started with these regional

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63 Unger B & van de Linder D 'Research Handbook on Money Laundering' (2013) 195.

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

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

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

67 Dandurand Y & Farr K 'A Review of Selected Witness Protection Programs' (2010) 77.

68 Kramer K 'Witness protection as a key tool in addressing serious and organized crime', available at [https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_P3-19.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf) (accessed 17 July 2020).

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

workshops in 2005, and they were attended by officials from different geographical regions whom have been exposed to organised crime and from different socio-political circumstances and legal systems.<sup>70</sup> Consequently, UNODC adopted guidelines which deals with procedural protection and the establishment of covert witness protection units.<sup>71</sup> Based on the level of participation in the 2005 workshop it may be inferred that the guidelines were probably informed by the experiences of diverse groups.

During the compilation of good practices in witness protection, UNODC consulted with over 60 Member States and global organisations like Europol, Eurojust, the International Criminal Court, the International Criminal Tribunals for former Yugoslavia and for Rwanda, Interpol and the United Nations Interregional Crime and Justice Research Institute ('UNICRI').<sup>72</sup> On 13 February 2008, UNODC disseminated a manual on 'Good Practices in the Protection of Witnesses in Criminal Proceedings Involving Organized Crime'.<sup>73</sup> UNODC develops model laws to help governments incorporate international treaty obligations into national law. Model laws are not designed to replace national legislation, and they emphasise substance over form, which varies from state to state.<sup>74</sup>

The good practices identified in the manual consist of 'early identification of vulnerable and intimidated witnesses'; 'management of witnesses by the police'; 'protection of witness identity during court testimony'; and 'permanent relocation and re-identification' if necessary.<sup>75</sup> UNODC encourages an integrated and holistic approach which consists of preliminarily identifying witnesses who are defenceless and frightened, managing witnesses by trained law officers, and in very special cases, witness protection may necessitate 'permanent relocation' and 're-identification'.<sup>76</sup> UNODC supports Member States to reinforce

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70 United Nations Office on Drugs and Crime 'Good practices for the protection of witnesses in criminal proceedings involving organized crime' (2008), available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good\\_Practices\\_for\\_the\\_Protection\\_of\\_Witnesses\\_in\\_Criminal\\_Proceedings\\_Involving\\_Organized\\_Crime.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf) (accessed 08 February 2020).

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

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

73 United Nations Office on Drugs and Crime 'UNODC Launches Witness Protection Manual', available at <https://www.unodc.org/unodc/en/press/releases/2008-02-13-2.html> (accessed 30 January 2021).

74 Nelken D 'Whose Best Practices? The Significance of Context in and for Transnational Criminal Justice Indicators' (2019) 35.

75 United Nations Office on Drugs and Crime 'UNODC Launches Witness Protection Manual', available at <https://www.unodc.org/unodc/en/press/releases/2008-02-13-2.html> (accessed 30 January 2021).

76 United Nations Office on Drugs and Crime 'Victim Assistance and Witness Protection', available at

witness protection programmes and approaches through technical assistance which includes legal and institutional evaluations, legislative support, programmes to raise awareness among criminal justice officials. Support and advice on developing standard operating procedures, appropriate structures, and staffing arrangements to aid in the establishment of witness protection unit are also provided. UNODC also helps to increase international cooperation for witness protection.<sup>77</sup>

However, it is evident that little has improved regarding witness protection in ML cases. Although the UNODC supports the fight against ML and the concept of witness protection, many states still do not adequately adhere to witness protection, especially for ML and related crimes, and witnesses are not willing to testify. There also appear to be limited or no data readily accessible on specific protection for witnesses. Next, regional instruments will be discussed.

## **2.6. WITNESS PROTECTION IN THE REGIONAL CONTEXT**

There are various agreements which acknowledge the need for the protection of victims and witnesses during legal proceedings within the regional sphere.<sup>78</sup> For purposes of this chapter, only European Union ('EU') and African Union ('AU') instruments will be discussed.

### **2.6.1. WITNESS PROTECTION IN THE EU**

Witness protection was introduced into European law to fight against international organised crime and terrorism. Witnesses are guaranteed protection provided they testify against alleged suspects.<sup>79</sup> Numerous factors caused the role of witnesses in criminal proceedings to be given greater attention at both the European and the international level.<sup>80</sup> Enikö opines that maybe

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<https://www.unodc.org/unodc/en/organized-crime/witness-protection.html> (accessed 27 November 2020).

77 United Nations Office on Drugs and Crime 'Victim Assistance and Witness Protection', available at <https://www.unodc.org/unodc/en/organized-crime/witness-protection.html> (accessed 27 November 2020).

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

79 Zgaga S 'Witness protection in European and Slovenian law' (2007) 51.

80 Enikö (2006) 313.

major factors were influenced by the development interest in the status of victims and witnesses in criminal trials and the rate at which terrorist and organised crime is increasing.<sup>81</sup>

The Council of the European Union has formulated several Council Resolutions on witness protection.<sup>82</sup> For instance, the Resolution of the Council of 23 November 1995 on witness protection in the fight against international organized crime was adopted.<sup>83</sup>

A further development is the Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime.<sup>84</sup> In this resolution, the Council called for EU state parties to implement appropriate measures of protection for individuals who collaborate with the police enforcement and justice system and who could potentially be in danger, especially because of that collaboration, and that their families and close relatives should also be afforded protection.<sup>85</sup> This provision targeted specifically “crown witnesses” who could be perpetrators themselves and part of organized crime groups and were presented with the possibility of being afforded benefits in exchange for information.<sup>86</sup> This may seem unfair as such individuals are also culpable of committing organised crimes. This reality must, however, be balanced with the benefits of increased successful prosecutions and the expertise and knowledge acquired by the state on how these criminals operate.

On 10 September 1997, the Committee of Ministers of the Council of Europe drafted its Recommendation on Witness Protection and the Rights of the Defence.<sup>87</sup> The Recommendation comprises thirty recommendations, each on a specific topic.<sup>88</sup> The Council of Europe has recognised different circumstances where witnesses may need to be protected. Witness protection is addressed in Recommendation (97) 13 on the Intimidation of Witnesses

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81 Enikö (2006) 313.

82 Van Lent Y ‘Legal Regulation of Witness Protection in the European Union’ (2018) 142.

83 Zgaga (2007) 52.

84 Zgaga (2007) 53.

85 Van Lent Y ‘Legal Regulation of Witness Protection in the European Union’ (2018) 142.

86 Van Lent Y (2018) 142.

87 Nijboer J.F ‘Children and Young Persons in the Criminal Justice system: The Council of Europe Recommendation On witness Protection And Rights Of The Defence’ (1999) 443,available at <file:///C:/Users/dell/AppData/Local/Temp/Nijboer1999 Article ChildrenAndYoungPersonsInTheCr.pdf> (accessed 07 December 2020).

88 Nijboer (1999) 443,available at <file:///C:/Users/dell/AppData/Local/Temp/Nijboer1999 Article ChildrenAndYoungPersonsInTheCr.pdf> (accessed 07 December 2020).

and the Rights of the Defence as well as in the recently adopted Recommendation (2005) 9 on the protection of witnesses and collaborators of justice.<sup>89</sup>

The Recommendations provide guidelines that are clear on witnesses in general and witnesses who are intimidated, which states parties could/should incorporate into their domestic laws.<sup>90</sup> Basically, the documents of the EU Council and the Council of Europe recommend that Member States introduce appropriate legislative and practical measures to protect witnesses, to ensure they testify freely and without intimidation, and respect the rights of the defence.<sup>91</sup> While these recommendations have no formal bearing in the South African context, we can certainly borrow the lessons of clarity and express protection for witnesses.

#### **2.6.1.1. RECOMMENDATION REC (2005) 9 OF THE COMMITTEE OF MINISTERS**

The most recent legal instrument on witness protection and protection of collaborators of justice is Recommendation Rec (2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. This Recommendation was introduced following a proposal of the Committee of Experts on Protection of Witnesses and Collaborators of Justice.<sup>92</sup> The Recommendation has its roots in Recommendation Rec (97)13 and evolving case law in the European Court for Human Rights ('ECHR').<sup>93</sup> It strengthened and extended the provisions of the former regarding terrorist and organized crime cases and international cooperation in this field.<sup>94</sup>

Reports have pointed out that the UN conventions, the practice of international criminal tribunals, the Council of Europe recommendations and the case law of the European Court of Human Rights (ECtHR) have inspired other states to establish witness protection programmes of their own. An example of this is, that in terms of the Palermo Convention and UNCAC it was mandatory for member states to take the necessary steps 'within their means' to protect

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89 Vermeulen G 'EU standards in witness protection and collaboration with justice' (2005) 20.

90 Vermeulen G (2005) 28.

91 Enikö F (2006) 316.

92 Stanica N & Coman F 'European standards in witness protection' (2014) 280.

93 Stanica & Coman (2014) 280.

94 Stanica & Coman (2014) 280.

witnesses efficaciously in criminal trials who give information and testify about offences listed in the Conventions.<sup>95</sup>

Though the implementation of witness protection programmes is vital, there are imaginably also challenges to it. Challenges range from lack of resources to the absence of bilateral agreements amongst states which ultimately results in no efficient cooperation in the investigation of crime and control of offenders.<sup>96</sup> The difficulty that countries are confronted with in aiding and protection measures for victims and witnesses of crimes are worsened in cases of cross-border organized crimes because even if a country does have well-established and effective witness protection measures, it may still fail to protect witnesses due to lack of cooperation mechanisms in the other countries.<sup>97</sup>

## 2.7. WITNESS PROTECTION IN THE AFRICAN UNION ('AU')

The African Union (AU), under the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, and the African Union Model Law on Universal Jurisdiction over International Crimes, called upon member states in the African Union to establish witness protection measures, and guarantee the rights of victims and witnesses to a fair trial.<sup>98</sup> However, these instruments are not binding on the court because they are soft law. The objective is to influence the attitude of African states with regard to the significance of introducing protection measures.<sup>99</sup> Where states have witness protection legislation, witnesses are protected subject to stated 'eligibility considerations'. In the US, for instance, the courts are reluctant to enforce any right to witness protection. They consider the decision to protect to be discretionary.<sup>100</sup>

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95 Koren E 'Witness Protection Programs in Selected Countries' (2014), available at <https://www.publicsafety.gc.ca/cnt/rsres/pblctns/rgnzd-crm-brf-43/rgnzd-crm-brf-43-eng.pdf> (accessed 08 December 2020).

96 Koren E (2014), available at <https://www.publicsafety.gc.ca/cnt/rsres/pblctns/rgnzd-crm-brf-43/rgnzd-crm-brf-43-eng.pdf> (accessed 08 December 2020).

97 United Nations Office on Drugs and Crime 'Victim Assistance and Witness Protection', available at <https://www.unodc.org/unodc/en/organized-crime/witness-protection.html> (accessed 27 November 2020).

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

99 Oyakhire (2019) 54.

100 Oyakhire (2019) 55.



### **2.7.1. AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS, PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA.**

The African Commission on Human & Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa does not allow a witness to testify anonymously without the judicial official officer knowing such witness' identity.<sup>101</sup> However, there is an exception to this rule. A witness may testify anonymously in 'exceptional circumstances' only, and the court will consider the nature and circumstances of the crime.<sup>102</sup> The security of the witness and whether it is in the best interest of justice will also be considered.<sup>103</sup> This provision aims to protect witnesses, but it is silent on what constitutes 'exceptional circumstances. This provision is outright flawed due to the lack of guidance which makes it susceptible to manipulation.

### **2.7.2. AFRICAN UNION MODEL LAW ON UNIVERSAL JURISDICTION OVER INTERNATIONAL CRIMES**

According to the African Union Model Law on Universal Jurisdiction over International Crimes, the Prosecuting Authority and the Court have to ensure that any witness is provided with the necessary protection.<sup>104</sup> This law does not specify at what stage of the trial the protection ought to be afforded, nor what kind of protection shall be provided. Little is written on witness protection under the AU.

Strikingly, there are numerous articles on the protection of child witnesses. There are also many instruments aimed at protecting child witnesses, and some of those instruments could be helpful if incorporated into witness protection in ML cases. The UN Guidelines, for example, were established with 'special consideration' in mind of the unsatisfactory recognition of the rights of child witnesses and their suffering of additional hardship when helping in the justice process.<sup>105</sup> In recent years, prosecutors and witness protection agencies have experienced an

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101 African Commission on Human & Peoples' Rights: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

102 African Commission on Human & Peoples' Rights: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

103 African Commission on Human & Peoples' Rights: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

104 African Union Model National Law on Universal Jurisdiction over International Crimes.

105 Fambasayi R & Koraan R 'Intermediaries and the International Obligation to Protect Child Witnesses in South Africa' (2018) 9.

increase in the numbers of under-aged witnesses to serious crimes seeking protection.<sup>106</sup> In many jurisdictions, the safety of child witnesses is prioritised. The ICC does take measures to ensure the child's best interest are prioritised. This is attributable to society's belief that children are vulnerable and need protection.<sup>107</sup>

The United Nations Economic and Social Council introduced the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime in 2005.<sup>108</sup> The Guidelines were aimed at assisting states in improving the protection of child victims and child witnesses in the criminal justice system, and this confirms the perspective that efforts must be collaborative to safeguard children.<sup>109</sup> Given the complex nature of ML cases and the dangers involved, it is important that special consideration is taken as well when establishing witness protection measures. The two major cases discussed earlier in this thesis do show the dangers in ML cases.

South Africa does have legislation that deals exclusively with the protection of witnesses, namely, the Witness Protection Act 112 of 1998 ('WPA'); however, it does not relate to ML cases specifically. South Africa's WPA and ML legislation will be discussed in Chapter 3.

## 2.8. CONCLUSION

The majority of ML instruments recognise the need for witnesses' testimony; however, none of them cater for witness protection measures. The AML regime consists of laws that deal with ML exclusively; hence it sets out activities that constitute predicate offences for ML and appropriate sentences for anyone who is found guilty. Given the nature of ML and the manner in which it is dealt with, it makes sense for ML legislation to establish witness protection programmes of its own that is independent, and which specifically address the safety and security issues encountered in this world.

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106 Gilad M 'Who will protect the children: The untold story of unaccompanied minors in witness protection programs' (2012) 46.

<file:///C:/Users/dell/AppData/Local/Temp/12WhittierJChildFamAdvoc4.pdf>

107 Simon J 'Pre-Recorded Videotaped Evidence of Child Witnesses' (2006) 56.

108 Bekink M 'The Protection of Child Victims and Witnesses in a Post-Constitutional Criminal Justice System With Specific Reference to the Role of an Intermediary: A Comparative Study' (2016) 11.

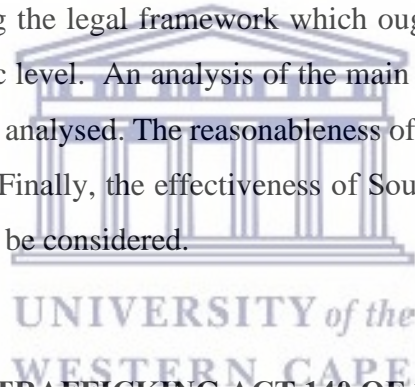
109 Bekink (2016) 11.

## CHAPTER 3

### WITNESS PROTECTION IN THE SOUTH AFRICAN ANTI-MONEY LAUNDERING LEGAL REGIME

#### 3.1. INTRODUCTION

This chapter is focused on witness protection in the South African context. It is important to sketch the legal landscape which ought to give effect to the protection of witnesses whose testimonies are essential to the successful prosecution of ML cases. Witnesses to ML are in a particularly precarious position regarding their safety. This may be attributed to the reality that the perpetrators of ML schemes are likely to be powerful and wealthy individuals who wish to escape criminal liability at all costs, including causing harm to witnesses to silence them. Furthermore, the legal mechanisms which ought to afford protection to witnesses may also be questionable and may thus be a contributing factor to the danger which witnesses face. This chapter is thus aimed at tracing the legal framework which ought to afford witnesses in ML cases protection at the domestic level. An analysis of the main legislation which affects such witnesses will be discussed and analysed. The reasonableness of the protection afforded by the legislation is also considered. Finally, the effectiveness of South Africa's witness protection programme in curbing ML will be considered.



##### 3.1.1. DRUGS AND DRUG TRAFFICKING ACT 140 OF 1992 ('DRUGS ACT')

As mentioned earlier in this thesis, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ('Vienna Convention') was the first comprehensive instrument to deal with ML in the international sphere. Subsequent to ratifying the Vienna Convention, South Africa began to enact laws aimed at combatting activities related to the proceeds of drug-related offences.<sup>1</sup> The Drugs and Drug Trafficking Act 140 of 1992 ('the Drug Act') was passed in 1992.<sup>2</sup> It was the first South African legislation to address ML.<sup>3</sup> It incorporated the first general provision for the confiscation of the proceeds of crime. This allowed for someone found guilty of a drug-related crime, to be deprived of the profits derived

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1 Van Jaarsveld I.L 'Aspects of Money Laundering in South Africa' (2011) 461.

2 Van Jaarsveld (2011) 461.

3 Itzikowitz A 'The prevention and control of money laundering in South Africa' (1999) 90.

from the crime.<sup>4</sup> Section 6 of the Drugs Act provides that ‘no person shall acquire any property, knowing that [it] is the proceeds of a defined crime’.<sup>5</sup> This provision, could in principle have some diminishing effect on the powers wielded by the main perpetrators of AML. Whether or not this is the case in practice is not clear from the literature, however. It is contended here that if the provision had been implemented successfully, offenders may have lost some of their power to commit further crimes and to intimidate witnesses. This would also have been evidenced by a decrease in this crime type.

The Drugs Act provides further that once the defendant has been found guilty of offences specified under section 13(f) or section 14(b), the court may, upon application of the prosecutor, consider if he has benefited from drug trafficking. If the court finds the defendant has benefitted, it may, in addition to the penalties that may be imposed for that offence, order that the defendant pay the State such amount as the court deems appropriate. The amount will not exceed the profits generated from drug trafficking. Alternatively, in any case where a court is satisfied that the amount which might be realized as contemplated in section 37(1) of this Act is less than the value referred to in paragraph (a), the court shall not exceed the amount that it believes might be realized.<sup>6</sup>

Section 13(f) provides that any person who fails to comply with section 5(b) shall be guilty of an offence.<sup>7</sup> Section 5(b) provides that no person can buy and sell any dangerous dependence-producing substance or any undesirable dependence-producing substance, except if they purchased or received it from a medical professional and to be used for medical purposes as per the relevant medicines regulations.<sup>8</sup> In terms of section 14 (b) anyone who contravenes a provision of section 7 is guilty of an offence. Section 7 provides that a person who converts any property, being aware or having reasonable grounds to suspect that any such property is the profit of a defined crime, is guilty of an offence.<sup>9</sup>

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4 Prophet v National Director of Public Prosecutions (CCT56/05) para 62, available at <https://collections.concourt.org.za/bitstream/handle/20.500.12144/2491/Respondent%27s%20Heads%20of%20Argument-5905.pdf?sequence=6&isAllowed=y> (accessed 20 July 2021).

5 Drugs and Drug Trafficking Act, section 6.

6 Drugs and Drug Trafficking Act, section 35(1).

7 Drugs and Drug Trafficking Act, section 13(f).

8 Drugs and Drug Trafficking Act, section 5 (b).

9 Drugs and Drug Trafficking Act, section 7.

As mentioned earlier, the Drugs Act incorporated the provision for the confiscation of the proceeds of crime and was dealt with in the *Kunjana* case. In *Minister of Police and Others v Kunjana*, an informant reported to members of the South African Police Service (SAPS) that a substantial amount of illicit drugs were kept in two separate locations. Both of these properties were leased by the respondent, Ms Grace Nomazizi Kunjana.<sup>10</sup>

Consequently, the police organised search and seizure operations at both premises. They seized substantial numbers of Mandrax tablets at both the Kenilworth and the Wynberg premises. They also found methamphetamine (“Tik”) and cash in an amount of R1 823 200 at the Wynberg premises.<sup>11</sup> The respondent was apprehended and charged with being in possession of, and dealing in Mandrax and “Tik”, in contravention of the Drugs Act.<sup>12</sup> The search and seizure were done in terms of section 11(1)(a) and (g) of the Drugs Act, which authorises a police officer to seize anything that, in his view, is linked with or proves contravention of the Drugs Act.<sup>13</sup> Even though the Act gives these powers to police and despite it seeming like extensive powers, there is nothing regarding the protection of informants. In this case, the informant's information was vital and integral to the eventual prosecution. It is highly arguable that such an informer may have been at risk of harm, yet both the Act and the case are silent on this issue. It is thus not surprising that there are not many similar reported cases.

Based on the abovementioned provisions it is apparent that the Drugs Act did not have any provisions which were evidently of value to the protection of witnesses. Yet cases like, *Kunjana*, demonstrate the pivotal role which witnesses play in the prosecution of crimes of this nature. The erstwhile silence of legislation on the important question of witness protection lingered for many years and still seems to exist to a large extent. This is not to say that other legislation to combat ML was not passed. Below, the Proceeds of Crime Act 76 of 1996 will be discussed to determine if it afforded any or greater protection to witnesses.

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10 Minister of Police and Others v Kunjana [2016] ZACC 21: para 2  
11 Minister of Police and Others v Kunjana [2016] ZACC 21: para 3.  
12 Minister of Police and Others v Kunjana [2016] ZACC 21: para 4.  
13 Minister of Police and Others v Kunjana [2016] ZACC 21: para 4.

### 3.1.2. PROCEEDS OF CRIME ACT 76 OF 1996 ('POCA')

In 1996, the South African Law Commission recommended the enactment of the Proceeds of Crime Act 76 of 1996 ('POCA').<sup>14</sup> POCA extended the limited scope of the Drug Act.<sup>15</sup> Prior to the passing of POCA, the Drugs Act and the Criminal Procedure Act 51 of 1977 ('CPA') were both aimed at fighting ML, but they offered limited assistance.<sup>16</sup> The CPA catered for the forfeiture of the instruments that were utilised to commit an offence and not the actual proceeds of an offence.<sup>17</sup> On the other hand, the Drugs Act criminalised the act of money laundering of drug-related proceeds. Just like the CPA, the Drugs Act also catered for the confiscation of the proceeds of drug-related offences.<sup>18</sup>

This extended the offence of ML to include any other crimes and was not only limited to the proceeds of drug-related criminal activities.<sup>19</sup> Based on a reading of the legislation it appeared that South Africa had taken a strict approach regarding the confiscation of the proceeds of crime. There were some reports to the effect that excellent results had been achieved in this regard.<sup>20</sup> According to POCA, concealing the proceeds of any crime; helping another person to reap the benefits of crime; and acquiring, using or possessing property knowing it to be the proceeds of crime all constitute a criminal offence.<sup>21</sup> The extension of the scope of ML logically also means that more people could be prosecuted in terms of the POCA and furthermore that the investigation of such crimes would involve the cooperation of more witnesses. POCA imposes a severe sentence for any person found guilty of the act of ML. Under section 2(1), a person found guilty of ML will be liable to pay a fine not exceeding R1 000 million, or to imprisonment for a period of up to life imprisonment.<sup>22</sup> The severity of the sentences which could be imposed under POCA arguably meant that some perpetrators would try to escape prosecution by all means. Witnesses to such offences under POCA were therefore at a heightened risk of harm by these often, powerful perpetrators. Given the grave risks that witnesses would therefore face, it may be expected that POCA would provide for the protection

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14 Bourne J 'Money laundering: What is being done to combat it a comparative analysis of the laws in the united states of America, the United Kingdom and South Africa' (2002) 487.

15 Van Jaarsveld I.L (2011) 461.

16 Bourne (2002) 487.

17 Bourne (2002) 487.

18 Bourne (2002) 487.

19 Bourne (2002) 487.

20 FATF 'Anti-money laundering and counter-terrorist financing measures South Africa' (2021) 8, available at <http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf> (accessed 23 December 2021).

21 Prevention of Organised Crime Act, section 4.

22 Prevention of Organised Crime Act, section 2.

of witnesses to ML cases. Alternatively, it may also be reasonably expected that if POCA did not contain such protective provisions for witnesses to ML crimes, that other measures would be introduced to reasonably secure the safety of witnesses. Unfortunately, POCA itself did not contain such provisions, nor were there other measures specifically aimed at affording protection to witnesses of ML crimes who are on the whole, faced by real risks to their safety.

In terms of section 54(1) of POCA, any individual who is affected by a forfeiture order who was entitled to receive notice of the application for the order under section 48(2), but did not receive such notice, can apply for an order excluding his or her interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property, within 45 days after the notice of the making thereof is published in the Gazette.<sup>23</sup> Section 54 (5) further provides that such a person can testify himself, present evidence or call a witness to testify on his behalf.<sup>24</sup> The explicit mention of witnesses in the aforementioned provision, suggests that the drafters of POCA did recognise that witnesses may be important during ML investigation and in court proceedings. However, recognition was only given to witnesses of the perpetrators. State witnesses and the risks they faced were completely overlooked. As already mentioned, similarly to the Drugs Act, POCA also has no single provision catering for the protection of witnesses, nor collaborators of justice.

POCA is not a punitive statute in nature.<sup>25</sup> The purpose of POCA is not to deprive persons of property which they legitimately acquired. In a similar fashion as the Drugs Act, POCA seeks to ensure that no person enjoys the fruits of unlawful activities.<sup>26</sup> POCA is centered around the idea of depriving ownership, possession, and control of property generated from unlawful acts from those that hold that property in the manner described at the time of initiating proceedings under the POCA.<sup>27</sup>

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23 Prevention of Organised Crime Act, section 54(1).

24 Prevention of Organised Crime Act, Section 54 (5).

25 *Hackl v Financial Intelligence Unit* (2010) SLR 98, available at <https://seylli.org/sc/judgment/constitutional-court/2010/1/Hackl%20v%20Financial%20Intelligence%20Unit%20%282010%29%20SLR%2098.pdf> (accessed 28 July 2021).

26 Mujuzi J 'Ten Years of The South African Prevention of Organised Crime Act (1999–2009)' (2010) 1.

27 *Hackl v Financial Intelligence Unit* (2010) SLR 98, available at <https://seylli.org/sc/judgment/constitutional-court/2010/1/Hackl%20v%20Financial%20Intelligence%20Unit%20%282010%29%20SLR%2098.pdf> (accessed 28 July 2021).

According to Mujuzi, in determining whether or not POCA is applied successfully, one needs not only to look at how many offenders were successfully prosecuted under the Act but also how many people have been deprived of property that was acquired as a result of unlawful activities.<sup>28</sup> The courts have set in place criteria that must be applied cautiously to ensure that the forfeiture to the state of property in terms of POCA does not amount to the unjustifiable violation of the property owner's constitutional right to property.<sup>29</sup> In line with this criteria, prior to issuing an order for the forfeiture of property to the state, the court ought to consider whether: (1) The property in question was an instrumentality of an offence; (2) Any interest (that is, a third-party interest) should be excluded from the forfeiture order; and the forfeiture sought would be disproportionate.<sup>30</sup> These factors denote that the POCA seeks to avoid the unfair and unconstitutional deprivation of property. The intention is clearly not to cause undue hardship to persons. While this cannot be easily criticised, it must be considered that POCA does create the scope for perpetrators to hold onto some proceeds which puts them in a position of power to cause harm to witnesses. This will be elaborated upon next.

The NPA's Asset Forfeiture Unit has civil forfeiture powers under the POCA which is aimed at a property that is connected to the commission of a crime or constituting the proceeds of crime.<sup>31</sup> Although the authorities have shown positive outcomes for recovery of proceeds of crime in respect to fraud and economic crime which includes ML, efforts to recover properties from the state capture and proceeds that have been moved to other states have not been fruitful because of the phenomenon of state capture itself and lack of resources.<sup>32</sup> Moreover, retrieving the profits of criminal activities taking place outside of South Africa are not adequately pursued considering South Africa's role as a regional financial hub.<sup>33</sup> This is especially concerning because ML is often a cross-border crime. Large-scale ML schemes always consist of cross-border elements.<sup>34</sup> Thus, failure to locate and recover properties that have been moved to other countries defeats the purpose as criminals will be able to conceal their profits generated

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28 Mujuzi (2010) 3.

29 Mujuzi (2010) 3.

30 Mujuzi (2010) 3.

31 FATF (2021) 8, available at <http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf> (accessed 23 December 2021).

32 FATF (2021) 8, available at <http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf> (accessed 23 December 2021).

33 FATF (2021) 8, available at <http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf> (accessed 23 December 2021).

34 'Manual on Asian Development Bank March 2003 Countering Money Laundering and the Financing of Terrorism' (2003), available at <https://www.adb.org/sites/default/files/publication/27932/countering-money-laundering.pdf> (accessed 13 January 2022).



illegally and therefore, enjoy the fruits of their illegal activities. They may still be able to use their resources to undermine the safety of witnesses.

Apart from the Drug Act and POCA, the Financial Intelligence Centre Act 38 of 2001 is also vital legislation in the fight against ML. It is, therefore, necessary to consider this legislation and to determine whether it affords any kind of protection to witnesses.

### 3.1.3. FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001 ('FICA')

In South Africa became a member of the Financial Action Task Force ('FATF') in 2003 and ratified the United Nations Convention Against Corruption ('UNCAC') in 2004.<sup>35</sup> Subsequently, the Financial Intelligence Centre Act 38 of 2001 ('FICA') was enacted. FICA became the main governing instrument to safeguard financial institutions against illegal processes and ML.<sup>36</sup> The FICA was established to regulate financial intelligence and curb financial crime.<sup>37</sup> FICA puts a number of measures in place to help with the detection of ML.<sup>38</sup> The measures are premised on three fundamental principles of facilitating the identification, prevention, detection, and prosecution of ML.<sup>39</sup> The three basic principles of ML detection and investigation, necessitate that: (1) intermediaries in the financial system know who they are doing business with; (2) record-keeping; and (3) transaction reporting.<sup>40</sup>

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35 'FIC Amendment Bill' (2015), available <https://www.masthead.co.za/newsletter/fic-amendment-bill/> (accessed 03 November 2020).

36 De Jagar M.J 'A Comparative Study Between Anti-Money Laundering Legislation of South Africa And International Standards' (2018) 42.

37 'New FICA requirements for accountable institutions' (2017), available at <https://www.nea.co.za/NewsResources/NewsArticle.aspx?ArticleID=2044> (accessed 04 November 2020).

38 'New FICA requirements for accountable institutions' (2017), available at <https://www.nea.co.za/NewsResources/NewsArticle.aspx?ArticleID=2044> (accessed 04 November 2020).

39 Njotini M 'The Transaction or Activity Monitoring Process: An Analysis of The Customer Due Diligence Systems of The United Kingdom And South Africa' (2010) 565.

40 'Financial Intelligence Centre Guidance Note 3A Guidance for accountable institutions on client identification and verification and related matters' 1, available at <https://www.fic.gov.za/Documents/130328%20GUIDANCE%20NOTE%203A.pdf> (accessed 4 February 2022).

Moreover, South Africa recognises Accountable Institutions ('AIs') as fundamental to the performing of the control measures.<sup>41</sup> Section 1 of FICA provides that Accountable Institutions include *inter alia*: attorneys; boards of executors or trust companies; estate agents; financial instrument traders; management companies; persons who carry on the business of banks; mutual banks; persons who carry on long-term insurance businesses; persons who carry on a business in respect of which a gambling licence is issued; and persons who carry on the business of dealing in foreign exchange. It also provides that the listing of AIs is in response to the desire of money launderers to using AIs as a vehicle to launder illegal money.<sup>42</sup>

Section 21 of FICA requires that AIs ought to know who they are transacting with.<sup>43</sup> Section 21 of FICA prohibits an accountable institution from establishing a business relationship or close a single transaction with a client unless: (1) It has established and verified the identity of that client; (2) established and verified the identity of the person acting on behalf of the client; and Established and verified the authority of the client to establish a business relationship or close a single transaction for the other party.<sup>44</sup>

If an AI opens an account or transacts with a client without properly identifying him/her, the AI commits an offence in terms of FICA.<sup>45</sup> The sanction for this offence is imprisonment for a maximum period of 6 months or a fine of R100 million.<sup>46</sup> Obtaining sufficient information to help identify existing and current customers AIs and other financial institutions is part of customer due diligence measures. These measures are used to detect suspicious transaction activities that are usually connected with ML and/or the financing of terrorist activities by high-risk customers in South Africa.<sup>47</sup> Moreover, in terms of FICA, financial institutions are required to employ simplified customer due diligence measures regularly to identify and report suspicious transactions to the Financial Intelligence Centre ('FIC') and the police to detect and

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41 Njotini (2010) 566.

42 Financial Intelligence Centre Act, Schedule 1.

43 Lawack V 'The Legal and Regulatory Aspects of International Remittances and their Impact on Migrant Workers and Asylum Seekers in South Africa' (2014) 363.

44 Financial Intelligence Centre Act, section 21(1).

45 Lawack (2014) 363-364.

46 Lawack (2014) 364.

47 Chitimira H 'An exploration of the current regulatory aspects of money laundering in South Africa' (2021), available at [https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm\\_source=TrendMD&utm\\_medium=cpc&utm\\_campaign=Journal\\_of\\_Money\\_Laundering\\_Control\\_TrendMD\\_0&WT.mc\\_id=Emerald\\_TrendMD\\_0](https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm_source=TrendMD&utm_medium=cpc&utm_campaign=Journal_of_Money_Laundering_Control_TrendMD_0&WT.mc_id=Emerald_TrendMD_0) (accessed 14 August 2021).

fight ML activities in South Africa.<sup>48</sup> This provision means employees of the financial institutions could be called to testify, which could make them targets of the perpetrators of these crimes. Thus, FICA must have provisions dealing specifically and comprehensively with the protection of such witnesses (employees).

AI have a duty to keep customer due diligence records and all transaction records obtained in terms of the FICA to trace, detect, investigate and prevent any possible ML or terrorist financing activities in South Africa.<sup>49</sup> These records are to be kept for at least five years after the date on which the business relationship is terminated.<sup>50</sup> In terms of section 26 of FICA, an authorised representative of the Centre can access any of the records kept by or on behalf of the AI in terms of section 22 or 24 during ordinary working hours, either to examine, make extracts from or copies.<sup>51</sup> There may thus be a likelihood that such a representative might have to give evidence in a case of ML. The need for protection of such representative seems apparent yet, FICA does not contain provisions to this effect, nor does it refer to other measures of protection for witnesses.

Furthermore, section 29 of FICA places an obligation on the AIs and other financial institutions to report suspicious and unusual transactions.<sup>52</sup> Section 29 of FICA provides that if any person who engages in business dealings, whether they are managing the business or they are just employed, becomes aware or suspects business has been given or is about to be given illicit profits, must report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.<sup>53</sup> According to FICA section 29(1), financial institutions are required to report: Transactions or a series of transactions in which the business is a party to a transfer that facilitates or is likely to facilitate the transfer of proceeds of unlawful activities: Transactions which has no apparent business or lawful purpose; Transactions conducted in order to avoid triggering a reporting requirement;

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48 Chitimira (2021), available at [https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm\\_source=TrendMD&utm\\_medium=cpc&utm\\_campaign=Journal\\_of\\_Money\\_Laundering\\_Control\\_TrendMD\\_0&WT.mc\\_id=Emerald\\_TrendMD\\_0](https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm_source=TrendMD&utm_medium=cpc&utm_campaign=Journal_of_Money_Laundering_Control_TrendMD_0&WT.mc_id=Emerald_TrendMD_0) (accessed 14 August 2021).

49 Chitimira H (2021), available at [https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm\\_source=TrendMD&utm\\_medium=cpc&utm\\_campaign=Journal\\_of\\_Money\\_Laundering\\_Control\\_TrendMD\\_0&WT.mc\\_id=Emerald\\_TrendMD\\_0](https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm_source=TrendMD&utm_medium=cpc&utm_campaign=Journal_of_Money_Laundering_Control_TrendMD_0&WT.mc_id=Emerald_TrendMD_0) (accessed 14 August 2021).

50 Financial Intelligence Centre Act, section 23.

51 Financial Intelligence Centre Act, section 29 (1).

52 Chitimira H (2021), available at [https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm\\_source=TrendMD&utm\\_medium=cpc&utm\\_campaign=Journal\\_of\\_Money\\_Laundering\\_Control\\_TrendMD\\_0&WT.mc\\_id=Emerald\\_TrendMD\\_0](https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm_source=TrendMD&utm_medium=cpc&utm_campaign=Journal_of_Money_Laundering_Control_TrendMD_0&WT.mc_id=Emerald_TrendMD_0) (accessed 14 August 2021).

53 Financial Intelligence Centre Act, section 29(1).

or transactions which may be relevant to an investigation of evasion or attempted evasion of a duty to pay any tax, duty, or levy imposed by South African Revenue Service legislation.<sup>54</sup>

The abovementioned transactions arguably require human engagement. This suggests some of these actors involved in the transactions may become witnesses and, therefore may face risks to their safety. Despite the risks, FICA does not offer one measure which relates to the protection of witnesses. This early and glaring omission insofar as witnesses' protection is concerned may be one of the major contributing factors to the prevalence of ML crimes in South Africa and the common phenomenon of reluctant witnesses today.

In summation, it appears that though South Africa had clearly taken a stance against ML by way of introducing legislation to combat and deal with such crimes, there was a major gap insofar as the protection of witnesses were concerned.

### **3.2. THE EFFECTIVENESS OF SOUTH AFRICA'S WITNESS PROTECTION PROGRAMME IN CURBING ML**

As mentioned earlier, South Africa's criminal justice system like the majority of jurisdictions requires the court to establish an accused person's guilt beyond a reasonable doubt, before he can be convicted.<sup>55</sup> For this reason, a testimony of a credible witness is often very important in establishing the guilt of such a person. As a result, it is important to ensure that witnesses are protected in cases where their testimonies are crucial to the effective prosecution of accused persons.

Before 1992, South Africa did not have any witness protection programme.<sup>56</sup> However, the Criminal Procedure Act made provision for witnesses to be placed in 'protective custody'.<sup>57</sup>

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54 Financial Intelligence Centre Act, section 29(1).

55 Newham G 'keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa' (1995), available at <https://www.csvr.org.za/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa> (accessed 27 April 2021).

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

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

Following 1992, a few different programmes were established to ensure that witnesses were protected in particular circumstances and where they were associated with specific investigations or Commissions of Inquiry.<sup>58</sup> A number of informal nodal points were formed to help in the gathering of intelligence, and these included the National Intelligence Agency, the D'Oliviera investigative, the Investigation Task Unit and the Department of Justice witness protection programme.<sup>59</sup> Moreover, security officers were encouraged to keep in touch with their former units and look up their informer networks.<sup>60</sup>

South Africa's witness protection unit ('WPU') has led the way with regard to witness protection in Africa.<sup>61</sup> In 1998, South Africa became the first African country to introduce a comprehensive witness protection law.<sup>62</sup> The witness protection programme was established as a responsive plan of action by the government to support witnesses and victims of crime and organised crimes.<sup>63</sup> South Africa remains the continent's standard-setter in witness protection with a formal witness protection programme. In addition, South Africa provides mentorship and training to fellow African countries that wish to set up protection programmes.<sup>64</sup> The witness protection programme was, however, not specifically aimed at witnesses in cases of ML. Mahony opines that witnesses of crime in South Africa are often threatened by the increase in organised crime and gang groupings trends.<sup>65</sup> This is definitely the case for witnesses to ML. Realistically, their safety may be threatened by some of the most powerful and sophisticated criminal networks and gangs.

Prior to 1992, a witness who needed protection was kept in similar circumstances as awaiting-trial prisoners.<sup>66</sup> The witness was held in protective custody, in a police or prison cell and this

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58 Irish, Magadhla, Qhobosheane & Newham (2000), available at

<http://www.csvr.org.za/docs/policing/testifyingwithoutfear.pdf> (accessed 16 December 2020).

59 Tutu D, Mkhize H, Boraine A 'Truth and Reconciliation Commission of South Africa Report' (1998) 389.

60 Tutu, Mkhize, Boraine (1998) 389.

61 Mahony C 'The justice sector afterthought: Witness protection in Africa' (2010) 95.

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

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

64 Mphaphuli (2020) 64.

65 Mphaphuli (2020) 64.

66 Minaar A 'Witness Protection Programmes – Some Lessons From the South African Experience' (2002) 118.

was not good for anonymity and information relating to the identity of such a witness would spread very quickly.<sup>67</sup> The protection was not voluntary, and each regional or provincial Attorney-General had the discretion to decide whether or not a witness needed to be protected or whether a witness qualified to be taken into protective custody.<sup>68</sup>

South Africa has had a number of different witness protection programmes over the years. However, very little is written on how witness protection has transformed or how different programmes developed over the years. For purposes of this chapter, a few protection programmes will be discussed.

Many South Africans participated in negotiations through mass political parties to end apartheid and to introduce a new Constitution.<sup>69</sup> In late 1991, the Goldstone Commission, a commission of inquiry aimed at investigating the ongoing violence as a component of the National Peace Accord was established.<sup>70</sup> The Goldstone Commission was in charge of its own witness protection programme from 1992 until the end of its operations in 1994.<sup>71</sup> The Commission's discoveries were partially dependant on witness testimony.<sup>72</sup>

The Goldstone Commission was often required to investigate violent occurrences that threatened to hinder the negotiations process.<sup>73</sup> The Commission, played a vital role in the country's transition by exposing the causes of violence and making recommendations to prevent ongoing violence.<sup>74</sup> The witness programme was to a large extent established to address major security problems certain key witnesses were facing.<sup>75</sup> Despite the efforts of the Commission to place witnesses in hotels under false names and at the expense of the

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67 Minaar (2002) 118.

68 Minaar (2002) 118.

69 Barnes C & De Klerk E 'South Africa's multi-party constitutional negotiation process' (2002), available at <https://www.c-r.org/accord/public-participation/south-africas-multi-party-constitutional-negotiation-process> (accessed 26 December 2021).

70 Lambert T 'The Goldstone Commission in South Africa one Commission in South Africa's Transition: Linking Gradual Institutional Change and Information-Gathering Institutions' (2020) 2-3.

71 Lambert (2020) 221.

72 Lambert (2020) 221.

73 Berat L & Shain Y 'Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase' (1995) 174.

74 Lambert (2020) 3.

75 Irish, Magadhla, Qhobosheane & Newham available at <http://www.csvr.org.za/docs/policing/testifyingwithoutfear.pdf> (accessed 16 November 2021).

Commission, it was not a great success because the programme was run by staff of the Commission, the majority of whom had no real experience in witness protection.<sup>76</sup>

In October 1994, two Goldstone Commission witnesses were shot in KwaZulu-Natal while being transported to a place of safety by police.<sup>77</sup> It was further reported that the two witnesses had received death threats after giving evidence before the Commission.<sup>78</sup> Incidents like these demonstrated how far offenders would go to escape criminal responsibility. Importantly, the killing of witnesses sent a message that the greatest care and skill ought to be employed to ensure the safety of witnesses. People involved in the creation and organisation of such programmes ought to be knowledgeable and skilled in the area of witness protection.

After the Goldstone Commission received proof of the existence of hit squads and covert operations operating within the South African Police, a special unit was formed under the Transvaal Attorney-General, Jan D'Oliviera.<sup>79</sup> The D'Oliviera Unit was associated with some prominent investigations into hit squad operatives and operations. This Unit protected three witnesses who had given testimony in the trial of Eugene De Kock, a commander of one of the Police hit squad units.<sup>80</sup> Some witnesses who were law enforcement officers were protected in Denmark and had to remain there for 18 months. This was necessary due to the risk that fellow police officers could threaten them in South Africa.<sup>81</sup> The majority of people who were at the time involved in the prosecution team agreed that the subsequent conviction of De Kock would have been jeopardised if the witnesses had stayed in South Africa.<sup>82</sup> From this one may

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- 76 Irish J, Magadhla W, Qhobosheane K & Newham G (2000), available at <http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf> (accessed 16 November 2021).
- 77 Mail & Guardian 'Killing sparks call for better witness care' (1994), available at <https://mg.co.za/article/1994-12-09-killing-sparks-call-for-better-witness-care/> (accessed 26 December 2021).
- 78 Mail & Guardian (1994), available at <https://mg.co.za/article/1994-12-09-killing-sparks-call-for-better-witness-care/> (accessed 26 December 2021).
- 79 Irish, Magadhla, Qhobosheane & Newham (2000), available at <http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf> (accessed 15 November 2021).
- 80 Irish, Magadhla, Qhobosheane & Newham (2000), available at <http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf> (accessed 15 November 2021).
- 81 Irish, Magadhla, Qhobosheane & Newham (2000), available at <http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf> (accessed 15 November 2021).
- 82 Irish, Magadhla, Qhobosheane & Newham (2000), available at <http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf> (accessed 15 November 2021).

deduce that in some cases the state may have to invest considerable resources over lengthy periods to ensure the safety of witnesses. This is particularly the case where the witnesses are instrumental to the successful prosecution of a case and where the perpetrators appear to be determined to escape criminal responsibility.

The formation of a Special Investigation Unit before the formation of the Commission, under the authority of Dr Jan D'Oliviera, Attorney-General of Gauteng, made the communication between Special Investigation Unit and the Commission's Investigation Unit necessary.<sup>83</sup> Tension began to manifest with regards to what was seen as interference in investigative work, poor collaboration regarding information or dockets available and seemingly slow progress in investigations.<sup>84</sup> The majority of the problems were experienced over numerous matters that were investigated by both the Commission and the D'Oliviera unit.<sup>85</sup>

Although the Investigation Task Unit ('ITU') and other similar structures partially dealt with problems relating to police investigations, their overall rate of success was very low, and the ITU was dissolved in 1997. There have not been initiatives of this nature established to deal with the problems that come about specifically due to inadequate prosecution.<sup>86</sup>

Another witness protection programme was run by the Truth and Reconciliation Commission ('TRC').<sup>87</sup> The TRC was formed after South Africa's establishment of democratic elections in 1994.<sup>88</sup> The task of the TRC was to determine the cause, nature and extent of the gross violation of human rights that took place in South Africa between 1 March 1960 and 6 December 1993.<sup>89</sup> The TRC can be considered as one of the symbols of South Africa's change liberty.<sup>90</sup> From the time the TRC was formed, there were leadership and operational issues such as 'lack of transparency and proper process in hiring staff, awarding contracts, and other fiscal matters.'<sup>91</sup> Consequently, in 2007 funds were suspended which led to the commission not being able to

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83 Tutu, Mkhize, Boraine (1998) 343.

84 Tutu, Mkhize, Boraine (1998) 343.

85 Tutu, Mkhize, Boraine (1998) 343.

86 Sarkin J 'The truth and reconciliation commission in South Africa' (1997) 538.

87 Minnaar A (2002) 120.

88 Koss T 'South Africa's truth and reconciliation commission: model for the future' (2002) 518.

89 Minnaar A (2002) 120.

90 Verdoolaege A 'Reconciliation discourse: The Case of the Truth and Reconciliation Commission' (2008) 1.

91 De Ycaza C 'A Search for Truth: A Critical Analysis of the Liberian Truth and Reconciliation Commission' (2013) 196.



collect credible evidence against accused persons.<sup>92</sup> In the view of some, the \$500,000 that was allocated for the witness protection fund was utilised for protecting more perpetrators than victims.<sup>93</sup>

A comprehensive Witness Protection Programme was introduced in 1995 when the Minister of Justice made the appointment of a Director of Witness Protection known to the public.<sup>94</sup> This was an effort by the Department of Justice to put in place an appropriate form of protection for witnesses.<sup>95</sup> Shockingly, there is not a lot of academic literature which addresses or discusses the South African witness protection programme.

In the Research report written for the Centre for the Study of Violence and Reconciliation in 1995, the importance of having well-organised national witness protection programmes was discussed.<sup>96</sup> It was also noted that an effective programme will time to achieve and would only be achieved through experimentation.<sup>97</sup>

In 1998, South Africa enacted the Witness Protection Act 112 of 1998 ('WPA').<sup>98</sup> It provides measures to protect witnesses and provides the application process and factors to be considered in deciding whether or not a witness should be placed under protection. Kenya followed South Africa's example and revised its Witness Protection Act of 2006, then again in 2010, thereby adopting witness protection legislation that establishes an independent agency tasked with protecting witnesses.<sup>99</sup> South Africa's witness protection programmes have come a long way, from holding witnesses in similar conditions as remand detainees to providing support services,

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92 De Ycaza (2013) 196.

93 De Ycaza (2013) 196.

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

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

96 Newham G 'keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa' (1995), available at <https://www.csvr.org.za/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa> (accessed 27 April 2021).

97 Newham G (1995), available at <https://www.csvr.org.za/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa> (accessed 27 April 2021).

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

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

to cater for psychological and physical needs of witnesses. These services extend to approved daily visits from doctors, legal practitioners and visitors, and safe accommodation at a secret location.<sup>100</sup>

In terms of section 7 of the WPA, a witness who is concerned about his safety or that of his family members can apply for witness protection.<sup>101</sup> Witness Protection is voluntary as a witness cannot be compelled to join or apply to a programme.<sup>102</sup> A witness who feels threatened must report his/her fears to the investigating officer (detective) in the case in which he/she is testifying, the station commander or anyone who is in charge at any police station, if he/she is in prison, then he/she must report to any person in charge of the prison or a registered social worker at the prison, or the public prosecutor in the case in which he/she is providing evidence or any member of the Witness Protection Unit.<sup>103</sup>

In 2016, Azania Mosaka of Radio 702 interviewed NPA spokesperson, Advocate Luvuyo Mfaku, about the witness protection programme.<sup>104</sup> According to Mfaku, the programme has been a success, and no witnesses have been threatened since the establishment of the programme.<sup>105</sup> Advocate Mfaku further mentioned that strict rules apply in respect to the programme, thus some witnesses have successfully been brought back into their respective communities once their lives are no longer at risk.<sup>106</sup> Considering the high rate of recidivism in South Africa, witnesses are also at risk of being attacked by the offenders once they return to the community. According to Murhula and Singh, a considerable number of offenders who are imprisoned leave South African prisons and go back to their families and communities yearly.<sup>107</sup> Amongst those offenders, very few of them effectively reintegrate into their

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100 Doorewaard C & Minnaar A 'Witness protection: A "hit-or-miss" situation' (2017) 34, available at [https://journals-co-za.ezproxy.uwc.ac.za/docserver/fulltext/servamus\\_v110\\_n3\\_a10.pdf?expires=1608415532&id=id&accname=58219&checksum=A14FB55BD7C2EC8A4DBAF4220E55B5EA](https://journals-co-za.ezproxy.uwc.ac.za/docserver/fulltext/servamus_v110_n3_a10.pdf?expires=1608415532&id=id&accname=58219&checksum=A14FB55BD7C2EC8A4DBAF4220E55B5EA) (accessed 20 December 2020).

101 Witness Protection Act, Section 7.

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

103 Witness Protection Act, Section 7.

104 Taunyane O 'How does South Africa's witness protection programme work?' (2016) <http://www.702.co.za/articles/233720/how-does-south-africa-s-witness-protection-programme-work> (accessed 27 April 2021).

105 Taunyane (2016) <http://www.702.co.za/articles/233720/how-does-south-africa-s-witness-protection-programme-work> (accessed 27 April 2021).

106 Taunyane (2016) <http://www.702.co.za/articles/233720/how-does-south-africa-s-witness-protection-programme-work> (accessed 27 April 2021).

107 Murhula P & Singh S 'A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature' (2019) 22.

communities, while a great number of offenders will commit new crimes and end up back in prison.<sup>108</sup>

According to May and Pitts, this shows that rehabilitation initiatives taking place in South African correctional institutions are insufficient and are considered to be amongst the reasons for repeated offences.<sup>109</sup> Schoeman stated that recidivism rates in South Africa are as high as 55% to 95%.<sup>110</sup> In October 2020, Lester Kiewit from the Cape Talk Radio station spoke to Betzi Pierce from the South African National Institute for Crime Prevention, and the Reintegration of Offenders who spoke about South Africa's high recidivism rate.<sup>111</sup> A good example of how offenders are likely to re-offend is the case of one of the men arrested for the murder of farm manager Brendin Horner, who had been arrested 16 times.<sup>112</sup> These statistics show that crime is rife in South Africa and that because offenders generally return to their communities of origin, they may retaliate against persons who gave evidence against them. This may be even worse for persons who were witnesses in ML cases.

To make matters worse, the majority of South Africa's population believe that 'most' or 'all' law enforcement officials are corrupt.<sup>113</sup> Police as law enforcement officers play a critical role in the investigation and prosecuting of ML cases. However, many studies have shown in several cases, police officers are part of the problem.<sup>114</sup> The image of the South African police is extremely tainted because of the reported cases of corruption amongst its rank and file.<sup>115</sup> Incidents such as the September 2020 murder of a former gang-unit officer, Lieutenant-Colonel Charl Kinnear may affect witnesses faith in witness protection programmes.<sup>116</sup> This follows after Kinnear had informed police superiors that some officers in the Western Cape who have

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108 Murhula & Singh (2019) 22.

109 Murhula & Singh (2019) 22.

110 Murhula & Singh (2019) 22.

111 King S 'How repeat offenders are pushing SA's crime rate up' (2020), available at <https://www.capetalk.co.za/articles/398661/how-repeat-offenders-are-pushing-sa-s-crime-rate-up> (accessed 15 November 2021).

112 King S (2020), available at <https://www.capetalk.co.za/articles/398661/how-repeat-offenders-are-pushing-sa-s-crime-rate-up> (accessed 15 November 2021).

113 Smit S 'Survey shows public trust in police is at record low' (2021), available at <https://mg.co.za/news/2021-10-08-survey-shows-public-trust-in-police-is-at-record-low/> (accessed 15 November 2021).

114 Standing A & van Vuuren H 'The role of auditors: Research into organised crime and money laundering' (2003) 1, available at <https://media.africaportal.org/documents/73.pdf> (accessed 13 January 2022).

115 Yesufu S 'Police Corruption in South Africa' (2013) 1.

116 Dolley C 'A year after top cop Charl Kinnear's murder, the SA Police Service is more chaotic than ever' (2021), available at <https://www.dailymaverick.co.za/article/2021-09-20-a-year-after-top-cop-charl-kinnears-murder-the-sa-police-service-is-more-chaotic-than-ever/> (accessed 14 January 2022).

connections to the Crime Intelligence, were actively working against him and his colleagues, and in some cases are in cahoots with members of the underworld.<sup>117</sup> Some whistleblowers talked about police officers requesting bribes, while others also mentioned a sense of coercion or intimidation.<sup>118</sup> According to Yesufu, the unbreakable bond between the police and politicians is a serious concern in South Africa because researchers have argued that if the police are linked with the politicians, the police become less accountable to the citizens.<sup>119</sup> As a consequence, they may not be the most credible sources of information.<sup>120</sup>

The recent case of a fired policeman, Jeremy Vearey, best illustrates this corruption of the police. Vearey, investigated some of the country's most high-profile gang-related cases and believed other officers were conspiring with the criminals to have his protection removed.<sup>121</sup> At the time of writing, the protection services assigned to him were to be terminated shortly before he took the stand to give testimony in a very high-profile gang-related case. This also comes after his co-worker, Charl Kinnear, was murdered subsequent to the removal of his protection.<sup>122</sup>

### 3.3. CONCLUSION

Despite the positive feedback from Advocate Mfaku, the witness protection programme has undoubtedly failed to protect some witnesses. South Africa's witness protection is evidently not as successful as the advocate has asserted. It should also be a matter of concern that these programmes appear not to protect members of the police force properly, yet civilians are expected to have faith that it will afford them the necessary protection. There is no denying South Africa has come a long way in terms of witness protection, however, there is evidently

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117 Dolley C 'To serve and endanger: Corrupt cops are South Africa's greatest security threat' (2021), available at <https://www.dailymaverick.co.za/article/2021-07-29-to-serve-and-endanger-corrupt-cops-are-south-africas-greatest-security-threat/> (accessed 14 January 2022).

118 Motala S 'The terrible consequences of police corruption in South Africa' (2019), available at <https://voices.transparency.org/the-terrible-consequences-of-police-corruption-in-south-africa-294e6fd8922> (accessed 14 January 2022).

119 Yesufu (2013) 2.

120 Standing A & van Vuuren H 2003) 1, available at <https://media.africaportal.org/documents/73.pdf> (accessed 13 January 2022).

121 Dolley C 'Fired cop Jeremy Vearey's protection detail 'withdrawn' in a move he says will further endanger his life' (2021), available at <https://www.dailymaverick.co.za/article/2021-06-24-fired-cop-jeremy-veareys-protection-detail-withdrawn-in-a-move-he-says-will-further-endanger-his-life/> (accessed 30 June 2021).

122 Dolley C (2021), available at <https://www.dailymaverick.co.za/article/2021-06-24-fired-cop-jeremy-veareys-protection-detail-withdrawn-in-a-move-he-says-will-further-endanger-his-life/> (accessed 30 June 2021).

still a lot to be done to improve the existing witness protection programme. Much still needs to be done to protect witnesses in ML cases.



## CHAPTER 4

### A COMPARATIVE ANALYSIS OF CANADIAN, THE UNITED STATES OF AMERICA, AND AUSTRALIAN WITNESS PROTECTION PROGRAMMES

#### 4.1. INTRODUCTION

Witnesses play a pivotal role in the judicial process, as their testimonies directly impact the outcome of a case.<sup>1</sup> The safety of a witness is therefore important to combatting crime in general. In the United States of America ('USA'), witness security is considered one of the three essential tools for fighting organised crime. The other two essential tools are wiretaps and the Racketeer Influenced and Corrupt Organizations Act.<sup>2</sup> To encourage witnesses to testify, efforts have been made by the USA government to provide various protection services for witnesses.<sup>3</sup> All witness protection measures aim to facilitate cooperation between criminal justice agencies and witnesses and to encourage witnesses to testify about serious crimes.<sup>4</sup> In the USA, where witness protection programmes have existed since the 1970s, they are considered an effective way to resolve cases.<sup>5</sup> The USA, Australia, Canada, South Africa, and many other countries have enacted witness protection laws.<sup>6</sup>

This chapter examines jurisdictions that appear to have effective witness protection programmes, including the witness protection programme of the United States, the Australian programme, and the Canadian programme. As the South African programme has been discussed in Chapter 3, the description of the programme will not be duplicated here. Reference will, however, be made to it to highlight aspects which could be beneficial or relevant to South Africa. The legal systems, socioeconomic contexts, and crime landscapes of these countries are different from those of South Africa. These distinctions are acknowledged, and the goal of the discussion is not to suggest that we replicate any programme, but rather to identify what may assist South Africa in enhancing protection mechanisms consistent with our state's constitutional obligations. Additionally, factors or characteristics of the programmes which

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1 Verma S & Krishnakumar A 'Towards a witness centric approach: analysis of witness protection scheme, 2018' (2021) 434.

2 Demir M 'The Perceived Effect of a Witness Security Program on Willingness to Testify' (2018) 63.

3 Demir (2018) 63.

4 Demir (2018) 63.

5 Kaur S 'Potential Challenges in a Witness Protection Programme in Malaysia' (2011) 364.

6 Rahangdale P 'Witness Protection: A Comparative Analysis of Indian and Australian Legislation' (2019) 143.

pose a challenge to the safety of witnesses may also be highlighted. The aim is to glean lessons which may inform South Africa's response to the protection of witnesses in money-laundering cases.

## 4.2. WITNESS PROTECTION PROGRAMMES IN FOREIGN JURISDICTIONS

### 4.2.1. UNITED STATES OF AMERICA ('USA')

During the 1960s, the US Justice Department was unable to combat Italian-American organised crime due to the omerta code (the code of silence) that dictated that securing the testimony of 'the mob' was difficult.<sup>7</sup> This unspoken code may have affected officials' belief that the challenge in combatting organised crime was insurmountable. The statistics furthermore indicated that a substantial number of crimes remained unreported.<sup>8</sup> By the late 1960s, the US Department of Justice realised that victims' and witness' intimidation was a barrier to getting reliable testimony in organised crime cases.<sup>9</sup> Hence the silence of witnesses was key to getting away with organised crime. Witnesses needed protection to enable them to testify without being harmed by the perpetrators of organised crime. Consistent with this dire need, a formal witness protection programme was first implemented in the USA during the 1960s as a way to dismantle Italian American organized crime. The programme was aimed at overcoming the 'omerta' code.<sup>10</sup>

The *Valacchi* case in 1962 in the USA inspired the concept of witness protection we know today.<sup>11</sup> The first member to break the code of silence, Joseph Valachi, was an Italian-American Mafia figure.<sup>12</sup> His testimony on organized crime and the mafia's inner structure was given to a US congressional committee in 1963.<sup>13</sup> Joseph Valachi hit the news when he broke the omerta

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- 7 Fyfe N & Sheptycki J 'Facilitating witness co-operation in organised crime cases: an international review', available at [https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650\\_Facilitating\\_witness\\_co-operation\\_in\\_organised\\_crime\\_cases\\_an\\_international\\_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf](https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf) (accessed 13 February 2022).
- 8 Bhushan T & Pranati 'Witness Protection in India and United States: A Comparative Analysis' (2007) 18.
- 9 Bhushan & Pranati (2007) 18.
- 10 Oyakhire S 'Developing a Legal and Institutional Framework for Witness Protection in Nigeria: Reflections from International Perspectives' (2019) 1-2.
- 11 Office of the Police Integrity Victoria 'Review of The Victoria Police Witness Protection Program' (2005) 5.
- 12 Jusufspahić A 'The Witness Protection Program in Bosnia and Herzegovina in Cases of Organised Crime' (2013) 268.
- 13 Jusufspahić (2013) 268.

code and revealed its existence to the public.<sup>14</sup> Additionally, he named the heads of New York's La Cosa Nostra ('LCN') families, and people responsible for murders committed on behalf of LCN.<sup>15</sup> Due to the high probability that Valacchi would be murdered by his former associates before he could give evidence in court, the US government took him into protection.<sup>16</sup> This was a ground-breaking act. Valachi was guarded by 200 US Marshals while held in a Federal Court.<sup>17</sup> Additionally, Valachi cooked all his own meals while under protection to eliminate the possibility of being poisoned.

Despite Mr Valachi's high level of protection, in the course of 1960's and 1970s, the majority of proceedings dealing with organised crime figures were suspended indefinitely as key witnesses were killed before testifying.<sup>18</sup> Witnesses in those cases who were in danger usually were also collaborators who had turned against their syndicates and were willing to testify against them.<sup>19</sup> After years the federal government started its hostile efforts to fight against domestic organised crime and the American Congress enacted the Organized Crime Control Act of 1970 which led to the establishment of the Witness Security program ('WITSEC').<sup>20</sup> As per the U.S. Marshals fact sheet, the witness protection programme is run by the US Marshall Service.<sup>21</sup> WITSEC is implemented in the US by three organizations,<sup>22</sup> namely, US Marshal Service, the US Department of Justice and the Federal Bureau of Prisons. They each serve different purposes in the protection of witnesses. The US Marshal Service: is responsible for the safety and health of non-incarcerated witnesses; Provides psychological and legal advice to witnesses; Assists witnesses in obtaining employment; and helps them relocate to a new home, work, or study place in a timely manner. The US Department of Justice decides

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14 Dozier S. K. & O'Hearn D. 'The federal witness security program: retrospective look' (2020) 137.

15 Dozier & O'Hearn (2020) 137.

16 Office of the Police Integrity Victoria (2005) 5.

17 Atanasov S, Đukić M & Otašević B 'Witness Protection Programs For Justice Collaborators – Comparative Overview(Positive Legal Solutions in the Republic Of Serbia, The Republic of North Macedonia, Usa, England and Italy)' (2019) 500.

18 Demleitner N 'Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?' (1998) 644.

19 Demleitner (1998) 644.

20 Abdel-Monem T 'Foreign Nationals in the United States Witness Security Program: A Remedy for E A Remedy for Every Wrong?' (2003) 1237.

21 U.S. Marshals Service 'Fact Sheet Witness Security 2022' (2022), available at <https://www.usmarshals.gov/duties/factsheets/witsec.pdf> (accessed 11 July 2022).

22 Klevtsov K, Dolganova S & Umrikhina E 'Ensuring Human Rights in the Course Of Criminal Proceedings in the Russian Federation and in Common Law Countries' (2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3845569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3845569) (accessed 01 March 2022).



whether to admit, exclude, or grant citizenship to witnesses, and organised crime groups. The Federal Bureau of Prisons protects and provides custody for incarcerated witnesses.<sup>23</sup>

Since the 1920s, the La Cosa Nostra has operated as a collection of Italian-American organized crime ‘families’ in the USA under the name Mafia, the mob, or the outfit.<sup>24</sup> More than fifty judges, their families, and several Ministers of Justice have been killed or targeted by drug families. At one point, drug families announced that for every mafia member extradited to the USA, ten judges would be killed.<sup>25</sup> In the 1970s and 1980s, the La Cosa Nostra crime families reached their zenith of power, becoming the longest-surviving and most successful organized crime groups in US history.<sup>26</sup> The legislators established the WITSEC because of growing concern about the systematic intimidation of witnesses by organised crime families that became a prevalent feature in the justice system.<sup>27</sup>

The intention of the legislation was to incentivise organised crime participants who become informants and to recognise the moral obligation to repay citizens who risk their lives when they perform their civic duty to testify in these dangerous cases.<sup>28</sup> The programme was initially envisioned to provide housing for protected witnesses, but that approach was rejected.<sup>29</sup> The reason for this rejection is not evident from the extant literature. The final version of WITSEC is more elaborate than providing housing to victims. WITSEC is aimed at protecting vulnerable witnesses by providing them with a completely new identity if they were ‘threatened or are suspected to be in danger’.<sup>30</sup> The criteria to qualify for protection under the WITSEC programme is strict. It includes, *inter alia*, that an applicant must be involved in an extremely important case.<sup>31</sup> The applicant’s testimony must be important to the success of the prosecution, and there should be no alternative means of protecting the applicant.<sup>32</sup> The witness must be

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23 Klevtsov K, Dolganova S & Umrikhina E (2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3845569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3845569) (accessed 01 March 2022).

24 Finckenaue J.O ‘La Cosa Nostra In The United States’, available at <https://www.ojp.gov/pdffiles1/nij/218555.pdf> (accessed 13 August 2022).

25 Abdel-Monem, T ‘Foreign nationals in the united states witness security program: remedy for every wrong’ (2003) 1246.

26 Jacobs J.B ‘The Rise and Fall of Organized Crime in the United States’ (2019) 17, available at <https://www.journals.uchicago.edu/doi/pdf/10.1086/706895> (accessed 09 August 2022).

27 Abdel-Monem (2003) 1237.

28 Bhushan & Pranati (2007) 18.

29 Bhushan & Pranati (2007) 18.

30 Taylor A ‘How Does the Witness Protection Program Work?’ (2020), available at <https://www.mindbounce.com/448349/how-does-the-witness-protection-program-work/> (accessed 13 February 2022).

31 Kiprono W ‘Challenges Facing Implementation of Witness Protection Program in Kenya’ (2016) 4.

32 Kiprono (2016) 4.

psychologically fit and able to adhere to the programme's rules and restrictions.<sup>33</sup> However, no explanation of what qualifies as extremely important evidence is provided. This is problematic because potential witnesses never know whether they will be protected. As a result, the very purpose of witness protection, which is to encourage witnesses to come forward and testify, would be defeated.

A key feature of the WITSEC is that it provides the witnesses and their families with a Memorandum of Understanding in total secrecy. The witness and his/her family are then relocated temporarily to a new location and are provided with temporary employment and money to survive.<sup>34</sup> The secrecy around the relocation of the witnesses and their families is vital to their successful protection. It is equally important that they are afforded adequate material support to survive while they are under protection as efforts to sustain themselves may also compromise their safety.

The legislation governing the WITSEC program in the United States, lays out what needs to be included in any Memorandum of Understanding ('MoU') between the Attorney-General and a prospective witness.<sup>35</sup> In a nutshell, this document clarifies both parties' responsibilities and expectations.<sup>36</sup> A MOU includes the following: A declaration of voluntary participation and that protection is not a reward for testifying; details of protection and assistance; measures to be taken to physically protect the witness; witness' obligations and sanctions for non-compliance; conditions governing termination.<sup>37</sup>

When witnesses are protected by the WITSEC, prosecutors are able to gather incriminating evidence against the leaders of these organisations.<sup>38</sup> Federal prosecutors and law enforcement agencies began to show increasing interest in the WITSEC almost immediately after the programme was established. Within a year after its establishment, the programme had become

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33 Kiprono (2016) 4.

34 Jaggi R 'Witness Protection' (2020), available at [https://heinonline.org/HOL/Page?handle=hein.journals/supami18&div=81&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/supami18&div=81&g_sent=1&casa_token=&collection=journals) (accessed 12 July 2022).

35 Dandurand Y & Farr K 'A Review of Selected Witness Protection Programs' (2010) 44.

36 Dandurand & Farr (2010) 44.

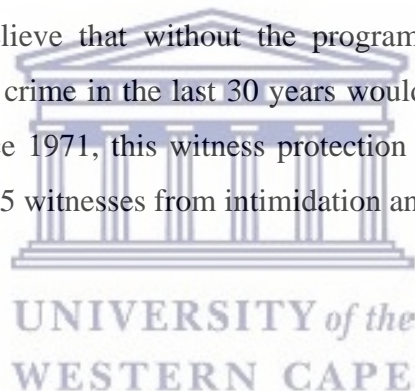
37 United Nations Office on Drugs and Crime 'Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime' (2008) 65, available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good\\_Practices\\_for\\_the\\_Protection\\_of\\_Witnesses\\_in\\_Criminal\\_Proceedings\\_Involving\\_Organized\\_Crime.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf) (accessed 14 August 2022).

38 Abdel-Monem (2003) 1237.

inundated with several hundred applications for witness protection.<sup>39</sup> WITSEC reportedly provided excellent security, relocation, and new identity to ‘mob witnesses’, and consequently WITSEC was able to penetrate the extreme form of loyalty and solidarity amongst the gang members.<sup>40</sup> In addition to receiving new identities and relocation, WITSEC participants were also provided with housing, living stipends, and assistance in finding employment from the Attorney General.<sup>41</sup> These incentives in all likelihood eased the fear harboured by many witnesses.

The results have been impressive, with an overall conviction rate of eighty-nine percent (89%) obtained as a result of testimony provided by protected witnesses.<sup>42</sup> This shows that witness protection programmes can be successful and that the combatting of organised crime is possible. Following a number of high-profile successful cases, some commentators regarded WITSEC as one of the most effective tools available for fighting organised crime.<sup>43</sup>

Cetin conducted interviews with practitioners in the USA as part of the research. Almost every interviewee was of the view that the WITSEC is an indispensable tool against organised crime.<sup>44</sup> Furthermore, they believe that without the programme, many of the successful prosecutions against organised crime in the last 30 years would not have been possible.<sup>45</sup> In 2021, it was reported that since 1971, this witness protection programme has succeeded in protecting approximately 18,865 witnesses from intimidation and retribution.<sup>46</sup>



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39 Cetin H ‘The Effectiveness of the Witness Security Program in the Fight Against Organized Crime and Terrorism: A Case Study of the United States and Turkey’ (2010) 3.

40 Fyfe N & Sheptycki J ‘Facilitating witness co-operation in organised crime cases: an international review’, available at [https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650\\_Facilitating\\_witness\\_co-operation\\_in\\_organised\\_crime\\_cases\\_an\\_international\\_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf](https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf) (accessed 13 February 2022).

41 Abdel-Monem T (2003) 1238.

42 Newham G ‘keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa’ (1995), available at <https://www.csvr.org.za/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa> (accessed 27 April 2021).

43 Fyfe N & Sheptycki J ‘Facilitating witness co-operation in organised crime cases: an international review’, available at [https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650\\_Facilitating\\_3witness\\_co-operation\\_in\\_organised\\_crime\\_cases\\_an\\_international\\_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf](https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650_Facilitating_3witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf) (accessed 15 January 2022).

44 Cetin (2010) 52.

45 Cetin (2010) 52.

46 Pahariya A & Katara S ‘Comparative Analysis of Witness Protection in Common Law Countries: Challenges and Their Potential Solutions’ (2021) 116.

Although the WITSEC programme has proven effective, it has encountered a few difficulties. One difficulty, is that programme participants often have criminal backgrounds of their own.<sup>47</sup> As a result of congressional concerns about WITSEC participants absolving debts or avoiding alimony payments, the 1984 amendments provided the Attorney-General the authority to terminate an individual's participation if he did not disclose information regarding such obligations.<sup>48</sup> The Attorney-General was thus empowered to terminate a witness's participation if he fails to disclose such information.<sup>49</sup> Additionally, the Reform Act requires that the Attorney-General not accept an individual into the programme if relocating him into a community would pose a greater threat than the value of his testimony.<sup>50</sup> The 18 US Code § 3521 provides that the Attorney-General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony.<sup>51</sup> Put plainly, the need for witness testimony must outweigh the potential threat of harm to the public and victims.

A further challenge is that witnesses cannot request protection directly, so the US attorneys or other federal agents must initiate the application process for individuals to be admitted to the program.<sup>52</sup> The beliefs of the witness regarding the threat to himself or his family thus become irrelevant to the question of being granted protection. Furthermore, the Attorney-General must determine how valuable the prospective witnesses' testimonies will be, the danger such witnesses could be in, and whether other sources of testimony might be available to help.<sup>53</sup> A witness must first be able to provide testimony that is essential to the success of the prosecution.<sup>54</sup> Protection is thus only offered in very high-profile cases and where the witnesses' testimony is vital to the successful prosecution of a case.

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47 Abdel-Monem T 'Foreign nationals in the United States witness security program: remedy for every wrong' (2003) 1239.

48 Abdel-Monem (2003) 1241.

49 Abdel-Monem (2003) 1241.

50 Abdel-Monem (2003) 1241.

51 Abdel-Monem (2003) 1241.

52 Abdel-Monem (2003) 1238.

53 Abdel-Monem (2003) 1238.

54 Taylor A ' (2020), available at <https://www.mindbounce.com/448349/how-does-the-witness-protection-program-work/> (accessed 13 February 2022).

The Victim and Witness Protection Act of 1982 ('VWPA') was passed by the US Congress to enhance federal witness protection.<sup>55</sup> VWPA came into force long after the establishment of WITSEC. Its three main purposes were to: (1) Increase and protect the role of victims and witnesses in the criminal justice process; (2), Ensure that government resources were used to assist victims without infringing on defendants' constitutional rights; and (3) Serve as a model for state and local legislation.<sup>56</sup> This means that while recognising and respecting the rights of victims and witnesses was a primary concern of the VWPA, it also put in place mechanisms to prevent defendants' rights from being infringed upon.<sup>57</sup> Despite these improvements, many victims did not receive adequate protection against intimidation and witness tampering.<sup>58</sup>

Congress recognised that witness cooperation and participation are essential to the success of the criminal justice system. Consequently, 18 United States Code § 1512 was added to then-existing federal witness tampering legislation and provided greater protection for a vast array of people to preserve the integrity of the legal system while encouraging witness involvement at every stage of federal investigations and proceedings.<sup>59</sup> A key reason for this was the lack of judicial consensus regarding how to proceed in cases of witness tampering.<sup>60</sup>

Witness protection was limited in scope as penalties were only imposed on people who intentionally tampered with actual witnesses.<sup>61</sup> Prior to 1982, the 18 United States Code § 1512 provided that an individual who knowingly uses intimidation, physical force, threats, or misleading behaviour toward another person with the intent of influencing anyone's testimony at an official proceeding, shall be fined not more than \$250,000 or imprisoned not more than ten years, or both.<sup>62</sup>

Initially, 18 United States Code § 1512(b) did not include the phrase corruptly persuades, thereby resulting in courts interpreting the statute as criminalising the manner of persuasion, such as bribery, rather than the intent or 'improper purpose' behind the persuasion, such as

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55 Bramlett T 'United States v. Tyler: Federal Witness Protection following the Limitations in Arthur Andersen LLP v. United States and Fowler v. United States' (2014) 677.

56 Cassell P 'Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act' (2005) 837.

57 Boateng F & Abess G 'Victims' role in the criminal justice system: A statutory analysis of victims' rights in U.S.' (2017) 223.

58 Hart P. E 'Falling through the cracks: the shortcomings of victim and witness protection under 1512 of the federal victim and witness protection act' (2009) 771.

59 Hart (2009) 775.

60 Pesce, T 'Defining witness tampering under 18 u.s.c. section 1512' (1986) 1419.

61 Pesce, (1986) 1418.

62 18 U.S.C. § 1512 (1982)

obstructing justice.<sup>63</sup> As a result of the omission of ‘corruptly persuades’, the Second Circuit Court of Appeals held in case of *United States v. King* that ‘non-misleading, non-threatening, non-intimidating attempts to induce a person to give false information to the government’ did not fall under §1512(b) and, as such, did not constitute witness tampering.<sup>64</sup> Consequently, the 18 United States Code § 1512(b) was extended to include the words ‘corruptly persuades’.

After the words ‘corruptly persuades’ were added, § 1512(b) now provides that it is unlawful for anyone knowingly to intimidate, threaten, corruptly persuade, or attempt to do so, or to engage in misleading conduct toward another person, to influence, delay, or prevent any person from giving testimony in an official proceeding. Thus, those who violate this provision will be fined or imprisoned for not more than twenty years or both.<sup>65</sup> Consequently, the Second and Eleventh Circuits have adopted an ‘improper purpose’ standard to implement 1512(b)’s ‘corruptly persuades’ prohibition.<sup>66</sup> This standard requires that a person act with the deliberate intent to do so, regardless of whether the means used to accomplish this are corrupt themselves.<sup>67</sup>

In *United States v. Everett W. Thompson, Jr.*, 76 F.3d 442 (2d Cir. case heard in 1996, the court dealt with the distribution of drugs in the Moravia, New York, primarily between 1987 and 1993, which was led by Charles Bergerstock, and Thompson was the participant.<sup>68</sup> Bergerstock sold marijuana to Thompson and others. Thompson resold the marijuana and some of his customers testified during the trial.<sup>69</sup> Upon learning that the federal government was investigating Thompson's narcotic distribution activities, Thompson contacted other people involved in the operation, potential witnesses requesting them not to mention him, to alter their memories, and to refuse to cooperate.<sup>70</sup>

Consequently, Thompson was found guilty of one count of witness tampering by a jury.<sup>71</sup> During his appeal, Thompson argued that § 1512(b) was unconstitutional because it shifted

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63 DeBeer J. W ‘Corruptly persuading privilege: the effect of united states v. doss on the marital privilege, the 5th amendment, and federal witness tampering statute sec. 1512(b)’ (2011) 594.

64 DeBeer (2011) 594.

65 18 United States Code § 1512(b)(1)

66 Ochoa J ‘Tweeting with purpose: interpreting "corrupt persuasion" in 18 u.s.c. sec. 1512(b)’ (2019) 67.

67 Ochoa (2019) 67-68.

68 *United States v. Everett W. Thompson, Jr.*, 76 F.3d 442 (2d Cir. 1996).

69 *United States v. Everett W. Thompson, Jr.*, 76 F.3d 442 (2d Cir. 1996).

70 Ochoa (2019) 68.

71 Ochoa (2019) 68.

responsibility for proving that his interactions with witnesses were not corrupt to him on appeal.<sup>72</sup> However, the Second Circuit relied on the common law definition of ‘corrupt’ in §1503 for its reasoning that an improper purpose can satisfy the element of ‘corrupt persuasion’ in witness tampering.<sup>73</sup> A court specifically cited *United States v. Fasolino*, where it was held that a defendant acted corruptly if she knew her actions would likely influence a witness’ testimony and sought to exploit that influence. Thus, the Second Circuit in *Thompson* defines ‘corrupt persuasion’ as an act with the ‘improper purpose’ of influencing, obstructing, or interfering with the administration of justice.<sup>74</sup>

Despite its long existence there are still challenges with the WPP. However, it is an essential programme that needs to be administered with utmost caution as human lives are involved.<sup>75</sup> The WITSEC, though it has some flaws, is a model to take cognisance of. There is much to be learned from both its successes and challenges. The most important point to be taken is that witnesses’ testimony is often key to prosecuting and in turn combatting organised crime such as ML. Loyalty to a criminal gang and/or fear of reprisal are some of the major obstacles to obtaining much-needed witness testimonies. These obstacles should however not be regarded as insurmountable. The code of silence can be broken. Incentives and a reasonable guarantee of safety are essential to gaining the cooperation and confidence of such witnesses.

Though not all witnesses may qualify for protection, the impact of ML on South Africa warrants a different approach to witness protection. Not many ML cases are successfully prosecuted in South Africa. The consequences of not effectively combatting ML are dire. The South African Constitution guarantees the right to life<sup>76</sup> and safety and security of all persons,<sup>77</sup> hence witnesses must be protected by the state, regardless of the impact of their testimony on the outcome of a case. Put differently, witnesses who face a reasonable risk of danger, have a right to protection by the state. If their testimony will not contribute significantly to the successful prosecution of a ML case, they should be absolved from testifying in the first place to avert the danger.

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72 Ochoa (2019) 68.

73 Ochoa (2019) 68.

74 Ochoa (2019) 68.

75 Kaur (2011) 367.

76 Constitution of the Republic of South Africa, Section 11.

77 Constitution of the Republic of South Africa, section 1.

#### 4.2.2. AUSTRALIA

In Australia, a study was conducted to explore how witness protection officers ought to be selected. The Australian study is the first of its type in the world and is informative for South Africa, where law enforcement officials are often mistrusted and accused of corruption<sup>78</sup> The study found that the following three factors play an important role in the selection of law enforcement officers: (1) the cost of poor selection to the agency financially; (2) the cost of poor selection to the agency in terms of reputation; and (3) the fairness and transparency of discriminating between applicant officers.<sup>79</sup>

Witness protection is not a novel idea in Australia. In 1981, the Australian Federal Police ('AFP') provided witness protection to Australians.<sup>80</sup> The Australian Royal Commission in 1983 emphasised the importance of empowering lower-level players to assist in the fight against organised crime, and those lower-level players should be offered incentives.<sup>81</sup> This approach is different from the USA, where only witnesses in 'extremely important' cases may be offered protection. However, in the Australian context, there was no uniform approach to the protection afforded to witnesses. During the 1980s, it was the responsibility of each police force to arrange witness protection for its jurisdiction, and approaches varied, with some police forces requiring 24-hour protection, while others preferred the relocation of witnesses under new identities.<sup>82</sup> The level of protection and therefore the safety of a witness thus depended on the jurisdiction under which they fell.

An investigation into witness protection in Australia was undertaken by the Parliamentary Joint Committee on the National Crime Authority in 1988.<sup>83</sup> The literature does not indicate what occasioned this investigation, but it is the government that initiates all inquiries and reviews into witness protection programs.<sup>84</sup> As previously discussed, witness intimidation is a major problem as it deprives investigators and prosecutors of vital evidence and Australia is not an

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- 78 Semrad M, Vanags T & Bhullar N 'Selecting witness protection officers: developing a test battery for Australian police' (2014) 6.
- 79 Semrad, Vanags & Bhullar (2014) 6.
- 80 Clifton S 'The Law on Witness Protection in Kenya: Whistleblower's refuge or just pipe-dream?' (2020) 90.
- 81 Jayasankar K 'Right of Witness Protection: A Comparative Overview' (2012) 75.
- 82 Jayasankar (2012) 75.
- 83 Australian Federal Police 'Witness Protection' (2012) 2, available at <https://www.afp.gov.au/sites/default/files/PDF/Reports/witness-protection-annual-report-2011-12.pdf> (accessed 18 March 2022).
- 84 Neil K.P 'A critical examination of witness protection in Australia' (2014) 84.



exception. Despite Australia's recognition of witnesses' importance in its judicial system, there are few scholarly works on this subject; however, whistleblower protection literature appears to be common.

For the purpose of protecting witnesses in criminal proceedings, the Australian Parliament enacted the Witness Protection Act ('WPA'), of 1991.<sup>85</sup> According to section 3(1) of the WPA, 1991, a witness is someone who has offered or will offer testimony for the Crown in proceedings before various authorities and is in need of state protection or assistance.<sup>86</sup> This definition alone gives the impression that witness protection may be available to anyone who is at risk of harm. Furthermore, section 3A of the Act establishes the Victorian Witness Protection Programme ('VWPP'), wherein the Chief Commissioner of Police is empowered to protect witnesses and their families.<sup>87</sup> Protection may include providing a new identity to the witness, relocating the witness to another location, and providing new housing and transportation facilities to him or his family.<sup>88</sup> Section 3B of the Act further empowers the Chief Commissioner of Police to decide whether or not a witness will be protected under the VWPP.

Furthermore, section 5 of the Act also provides that the Chief Commissioner of Police enters into a MOU with the witness for the purpose of providing protection and assistance.<sup>89</sup> As part of the Victorian Witness Protection Program, the witness will be required to sign the MOU.<sup>90</sup> The MOU outlines all the necessary information regarding the reason for the witness to be admitted into the witness protection programme, the scope of protection, and should any terms of the MOU be violated, assistance will be terminated.<sup>91</sup> Assistance provided to the witness will be terminated in accordance with section 16 of the WPA, which provides that assistance and protection may cease if the witness breaches the terms of the MOU.<sup>92</sup> Furthermore, the obvious requirement of the MOU between participants and the Programme's administrators

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85 Rahangdale P 'Witness Protection: A Comparative Analysis of Indian and Australian Legislation' (2019) 146.

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

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

88 Rahangdale (2019) 146.

89 Witness Protection Act 15 of 1991, Section 16.

90 Rahangdale (2019) 146.

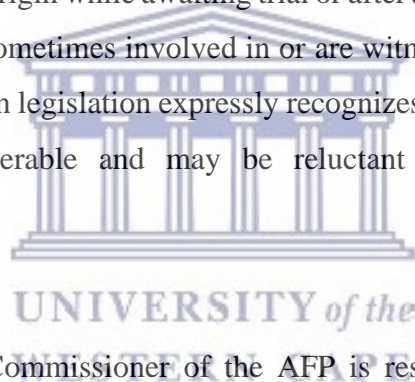
91 Singh, R., & Biswas, S 'Witness Protection: Under Aegis of the Law' (2021) 5139.

92 Section 16 of the Witness Protection Act 15 of 1991.

ensures there are no misunderstandings.<sup>93</sup> This eliminates any confusion as to the responsibilities and obligations of either party.

Subsequent to the Witness Protection Act, 1991, the Witness Protection Act 1994 ('WPA') was drafted in response to the recommendation of the Parliamentary Joint Committee on the National Crime Authority that the Australian Federal Police ('AFP') perform an expanded national witness protection role.<sup>94</sup> Prior to the implementation of the Australian Government's Witness Protection Act in 1994, the AFP and state police provided witness protection, including 24-hour protection, routine police attention, relocation, and identity changes for witnesses, but there was no uniform approach to the level and type of protection that witnesses could expect across the different states.<sup>95</sup>

Witness Protection Act 1994 ('WPA') established the National Witness Protection Program ('NWPP').<sup>96</sup> Foreign witnesses may be eligible for inclusion in the NWPP, but they may have to live outside their country of origin while awaiting trial or afterward.<sup>97</sup> This is a critical feature because foreign nationals are sometimes involved in or are witnesses to organized crime. It is thus encouraging that Australian legislation expressly recognizes this. Foreign nationals would otherwise be extremely vulnerable and may be reluctant to testify against powerful perpetrators.



According to the WPA, the Commissioner of the AFP is responsible for maintaining the NWPP<sup>98</sup> and is further authorised to expel and put witnesses under the NWPP, and the Act further required that a registry of current or former NWPP participants must be created.<sup>99</sup> It is common for NWPP participants to be accepted into the programme, because they have previously testified in investigations into organised crime, drugs, or corruption.<sup>100</sup> To be

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93 Parliament of Australia 'Chapter 2: Efficiency of the National Witness Protection Program', available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/acc/completed\\_inquiries/1999-02/witness/report/c02](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/acc/completed_inquiries/1999-02/witness/report/c02) (accessed 03 September 2022).

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

95 Clifton (2020) 91.

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

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

98 Australian Federal Police (2012) 6.

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

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

admitted to the programme, the witness needs to reveal a great deal about him/herself. Among the information included are his outstanding legal obligations, criminal history, financial liability, and asset information.<sup>101</sup> These details are considered when deciding whether to include a witness in the NWPP.<sup>102</sup> The commissioner is solely responsible for determining if a witness will be included in the programme.<sup>103</sup> It is also the responsibility of the police to use the Witness Protection Act 1991 primarily to protect a person. For example, putting someone under the witness protection program for the purpose of obtaining suppression orders would undermine the purpose of the scheme and, would breach the state's duty to protect.<sup>104</sup>

The Federal government in Australia has state and territory governments in the driving seat for many aspects of law making, including those related to law and order. Due to the constitutional division of law-making power in Australia, the Commonwealth along with the states and territories established nine separate witness protection programmes.<sup>105</sup> The Crime and Misconduct Commission administers the witness protection programme in Queensland, Australia, which also investigates and protects public sector integrity.<sup>106</sup> It has been submitted that it is typical that the, legislation-based Witness Protection Programmes have comprehensive management guidelines.<sup>107</sup> While witness protection schemes in Australia are generally consistent, they are not always managed the same way. The State Police in Victoria, South Australia, and Western Australia provide witness protection, with the Chief Commissioners acting as the 'approved authority' for witness protection.<sup>108</sup> A witness protection programme in Queensland, on the other hand, is governed by the chairperson of the Crime and Misconduct Commission. It should be noted, however, that these officers are normally police officers trained in witness protection.<sup>109</sup>

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

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

103 Chhatwani (2020) 8.

104 Victoria State Government 'Review of the Witness Protection Act 1991' (2016) 9, available at [https://files.justice.vic.gov.au/2021-06/review\\_of\\_witness\\_protection\\_act\\_1991.pdf](https://files.justice.vic.gov.au/2021-06/review_of_witness_protection_act_1991.pdf) (accessed 20 July 2022).

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

106 Dandurand (2010) 15.

107 Dandurand (2010) 38-39.

108 Dandurand (2010) 37.

109 Dandurand (2010) 37.

Due to the division of power mandated by the Australian Constitution, witness protection has become increasingly problematic across different jurisdictions, contributing to both a lack of consistency and vulnerabilities in domestic witness protection as a result.<sup>110</sup> As a consequence of the diverse witness protection legislation enacted by the Commonwealth and states and territories, there are inconsistencies between these jurisdictions as it pertains to witness protection programming and legislation.<sup>111</sup> As a result of the lack of uniformity, the witness protection regime in Australia is uneven and vulnerable.<sup>112</sup>

On the contrary, according to the AFP Annual report of 2011-12, although there has been some intimidation attempted within the precincts of the court in the past, no instances of direct physical assault were reported against NWPP participants during the period of reporting.<sup>113</sup> Furthermore, according to the AFP Annual report of 2017-18 report, a single avoidable incident was recorded, but no one was injured.<sup>114</sup>

One of the key lessons that South Africa can learn from the Australian witness protection programme is the importance of having a MOU signed by a witness and the Chief Commissioner of Police, to ensure that they understand their rights and obligations in relation to the witness protection programme. It is also worth noting that Australian witness protection extends to foreign nationals; this is yet another lesson South Africa can learn. It is also clear from the preceding discussion that it is critical to ensure that witness protection laws are consistently applied to avoid discouraging witnesses from testifying.

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- 110 Monterosso S ‘Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?’ (2022), available at <https://link.springer.com/content/pdf/10.1007/s10609-022-09438-4.pdf> (accessed 13 July 2022).
- 111 Monterosso S ‘Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?’ (2022), available at <https://link.springer.com/content/pdf/10.1007/s10609-022-09438-4.pdf> (accessed 13 July 2022).
- 112 Monterosso S ‘Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?’ (2022), available at <https://link.springer.com/content/pdf/10.1007/s10609-022-09438-4.pdf> (accessed 13 July 2022).
- 113 Australian Federal Police (2012) 4.
- 114 Australian Federal Police ‘witness Annual Report 2017-18’ (2018) 38.

### 4.2.3. CANADA

Canada acknowledges the critical role played by witnesses in criminal proceedings. It has taken several actions to protect vulnerable witnesses.<sup>115</sup> The Canadian government operates witness protection units throughout the country that work with local police to coordinate the programme.<sup>116</sup> In Canada, the Commissioner of the Royal Canadian Mounted Police (‘RCMP’) operates witness protection at the federal level, while a few provinces have a more integrated witness protection programme, such as British Columbia, which involves the RCMP, Police Services, and municipal police.<sup>117</sup> Canadian law prescribes that the RCMP co-ordinate the relocation of endangered witnesses.<sup>118</sup>

The Witness Protection Program Act (‘WPPA’) was passed in Canada in 1996 to facilitate the protection of people who are directly or indirectly involved in law enforcement, as well as national security, national defence, and public safety.<sup>119</sup> By providing assistance to federal security, defense, or safety organizations, the ambit of protection is extended to those who are directly or indirectly involved in law enforcement matters.<sup>120</sup> There is a problem and limitation to this objective since family members or anyone close to the witness may be targeted. For purposes of this discussion, it is important to note that the WPPA in Canada refers to these witnesses as ‘protectees’.<sup>121</sup>

Furthermore, Canada's WPP statute takes a factor-based approach to admissibility that considers the nature of the inquiry, investigation, or prosecution, and the significance of the witness in the prosecution of the case.<sup>122</sup> Section 7 of the WPPA provides when determining whether a witness should be admitted into the programme, the Commissioner will take into account the following factors: the nature of the risk faced by the witness; danger to the

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115 Casavant L & Morris C ‘Bill C-15: An Act to amend the Witness Protection Program Act and to make a consequential amendment to another Act’ (2013) 2, available at <https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/4-1-1/c51-e.pdf> (accessed 27 September 2022).

116 Sayyed H & Kaushal A (2022) 2332.

117 Monterosso S (2022), available at <https://link.springer.com/content/pdf/10.1007/s10609-022-09438-4.pdf> (accessed 14 July 2022).

118 Fyfe N & McKay H ‘Police protection of intimidated witnesses: A study of the strathclyde police witness protection programme’ (2010) 279-280.

119 Sayyed H & Kaushal A ‘Witness Protection in Contemporary Society’ (2022) 2332.

120 Sagar, S ‘Statutory witness protection in India: cardinal urgency’ (2018) 129.

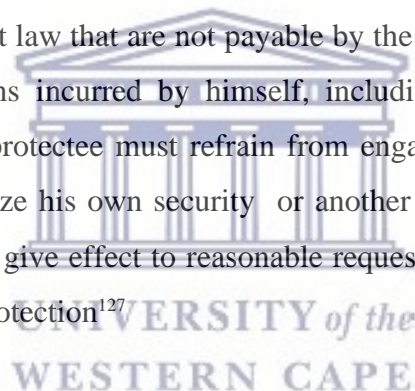
121 Dandurand Y & Farr K (2010) 7.

122 Mack R ‘The federal witness protection revisited and compared: reshaping an old weapon to meet new challenges in the global crime fighting effort’ (2014) 215.

community if the witness is granted acceptance; the aid given to the witness and the importance of the witness in the matter; the likelihood of the witness to adjust to the programme based on factors such as their maturity and family life; the cost of maintaining the witness; and any other factor the Commissioner deems relevant.<sup>123</sup>

To ensure that foreign witnesses are also protected by Canada's WPP, the Canadian statute expressly provides reciprocal agreements with foreign jurisdictions.<sup>124</sup> Witnesses who testify in international criminal trials or courts also benefit from the extraterritorial effect of the WPP statute in Canada.<sup>125</sup>

In Canada's WPP statute, there is a clause that resembles an MOU known as the "Deemed Terms of Protection Agreement".<sup>126</sup> Section 8 of the WPPA, provides that there is an obligation on the Commissioner and the protectee. The Commissioner's must take reasonable steps to provide the protection specified in the agreement to the protectee. The protectee must provide information to participate in any investigation or prosecution or assist the federal security, defense, or safety organization that is covered by the agreement. The protectee must meet all financial obligations incurred at law that are not payable by the Commissioner. The protectee is to meet all legal obligations incurred by himself, including custody and maintenance obligations for children. The protectee must refrain from engaging in activities that violate Parliamentary Acts or jeopardize his own security or another protectee, or the programme. The protectee must accept and give effect to reasonable requests and directions made by the Commissioner regarding his protection<sup>127</sup>



To safeguard witnesses in Canada, if the terms of the protection agreement are not violated, the protection is deemed perpetual.<sup>128</sup> This is important as a witness may still face a real risk of danger at the conclusion of a case. Generally, witness protection would be enhanced by such a measure. Witnesses who participate in the federal programme sign a formal contract with the government, each of which is individually negotiated and explains what the government will do to support them and protection in exchange for their testimony.<sup>129</sup> This too

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123 Witness Protection Program Act, section 7.

124 Mack (2014) 215-216.

125 Mack (2014) 216.

126 Mack, R.L 'The Federal Witness Protection Program Revisited and Compared: Reshaping an Old Weapon To Meet New Challenges in the Global Crime Fighting Effort' (2013) 229.

127 Witness Protection Program Act, section 8.

128 Dandurand & Farr (2010) 47.

129 Dandurand & Farr (2010) 43.

is a positive measure towards the protection of a witness. The witness will have clarity as to how the state will assist them and what they cannot expect. This may also inform the witness' conduct to ensure that they do not lose the protection as they understand what is expected of them. The Commissioner of Witness Protection is authorized by section 9 of the WPPA to terminate witness protection unilaterally if a witness fails to disclose information or breaches the protection agreement in a deliberate and material manner.<sup>130</sup>

Whilst it is known that the witness must enter into a contract with the government, the details of what such contracts may contain are not widely accessible. Issues that may arise in terms of such contracts may thus remain below the radar. Questions around accountability may thus also remain unaddressed. In a study, it was found that few empirical studies had been conducted on witness protection and intimidation and most studies focused on witnesses of severe crimes.<sup>131</sup> There have been concerns raised regarding the lack of autonomy between the management of investigations and witness protection in Canada, based on a review of witness protection.<sup>132</sup> The programme was especially widely criticized for its lack of accountability and the administration was less than satisfactory, even though no witnesses perished during their participation in the programme.<sup>133</sup> Due to these concerns, a reform of the system was implemented, which established complete separation between witness protection and the investigation functions of the RCMP.<sup>134</sup>

Furthermore, Canada follows a similar organizational structure and reporting relationship to Australia. This is in accordance with section 16 of the WPPA that requires a programme report to be submitted annually to ensure transparency without compromising the safety of witnesses.<sup>135</sup> The public annual report is required to be submitted annually to the Minister of Public Safety by the Commissioner of the RCMP by June 30th each year, and the report is prepared and tabled in Parliament.<sup>136</sup> It is reported that no individuals were physically injured or killed by the WPP's protective services during the 2017-18 reporting period and that the

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130 R., K. K. 'A missed opportunity to reform witness protection' (2013) 441-442.

131 Dandurand & Farr (2010) 11.

132 Oyakhire (2019) 158.

133 Lacko G 'The Protection of Witnesses' (2004) 27, available at <https://rune.une.edu.au/web/bitstream/1959.11/16839/7/open/SOURCE04.pdf> (accessed 18 July 2022).

134 Oyakhire (2019) 158.

135 Dandurand & Farr (2010) 39.

136 Royal Canadian Mounted Police 'Federal Witness Protection Program - Annual report: 2020-2021' (2021), available at <https://www.rcmp-grc.gc.ca/en/witness-protection-program-annual-report-2020-2021> (accessed 18 July 2022).

Programme continues to contribute to the overall mandate of ensuring that Canada is a safe and secure place to live through the protection of key witnesses in serious criminal cases.<sup>137</sup> Furthermore, improvements have been made to the Programme in recent years. The improvements include improving accountability, ensuring operations are standard-based, and focusing actions on protectees, such as increasing research capacity to better support future initiatives.<sup>138</sup>

According to the Witness Protection Program - Annual report: 2019-2020, the protection of key witnesses in cases involving serious criminality, means that the Programme continues to contribute to Canada's overall safety and security.<sup>139</sup> Though it may be of concern that only key witnesses are afforded protection in cases involving serious crime, it is still necessary to consider some of the features of the programme which accounts for its success. As part of the Programme's ongoing modernisation and transformation, a variety of initiatives have been implemented to further enhance service to protected individuals.<sup>140</sup> As a result of the legal provisions embedded in Canada's legal system, the importance of having a properly functioning legal system is highly emphasised.<sup>141</sup>

Finally, as part of the Programme's commitment to service delivery and productivity, the Programme implemented measures to ensure the health and safety of its employees and those it supports and protects.<sup>142</sup> The Programme continued to offer services and maintain productivity during the COVID-19 pandemic while safeguarding the health and safety of Programme staff, as well as the individuals it supports and protects.<sup>143</sup> Operationally, the

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137 Public Safety Canada 'Witness Protection Program – Annual Report: 2017-2018' (2018), available at <https://www.securitepublique.gc.ca/cnt/rsrscs/pblctns/wtss-prctn-rprt-2017-18/index-en.aspx> (accessed 18 July 2022).

138 Public Safety Canada 'Witness Protection Program – Annual Report: 2017-2018' (2018), available at <https://www.securitepublique.gc.ca/cnt/rsrscs/pblctns/wtss-prctn-rprt-2017-18/index-en.aspx> (accessed 18 July 2022).

139 Royal Canadian Mounted Police 'Witness Protection Program - Annual report: 2019-2020' (2020), available at <https://www.rcmp-grc.gc.ca/en/witness-protection-program-annual-report-2019-2020> (accessed 20 February 2022).

140 Royal Canadian Mounted Police (2020), available at <https://www.rcmp-grc.gc.ca/en/witness-protection-program-annual-report-2019-2020> (accessed 20 February 2022).

141 Clifton (2020) 79.

142 Public Safety Canada 'Witness Protection Program – Annual Report: 2017-2018' (2018), available at <https://www.securitepublique.gc.ca/cnt/rsrscs/pblctns/wtss-prctn-rprt-2017-18/index-en.aspx> (accessed 18 July 2022).

143 Royal Canadian Mounted Police 'Federal Witness Protection Program - Annual report: 2020-2021'

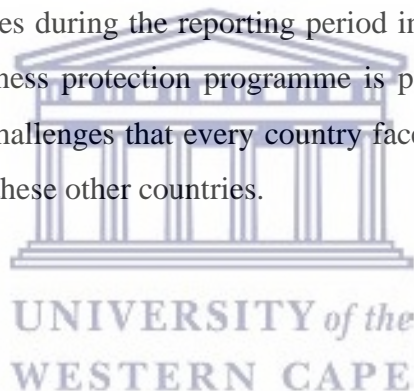


Programme continued to implement significant structural and operational changes, including updating an array of policies and procedures, conducting research, analysing data, providing enhanced services to protectees, and hiring additional staff to meet expanding and specialized demands.<sup>144</sup>

As seen in the discussion above, the factors to be considered in determining whether a witness should be admitted to the programme are clearly defined in Canadian law. Furthermore, the law provides for the termination of a protection agreement if the witness discloses information or breaches the protection agreement in a material way.

### 4.3. CONCLUSION

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



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144 (2021), available at <https://www.rcmp-grc.gc.ca/en/witness-protection-program-annual-report-2020-2021> (accessed 18 July 2022).  
Royal Canadian Mounted Police 'Federal Witness Protection Program - Annual report: 2020-2021' (2021), available at <https://www.rcmp-grc.gc.ca/en/witness-protection-program-annual-report-2020-2021> (accessed 18 July 2022).

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. CONCLUSION

The intimidation of witnesses in ML cases is endemic. This problem erodes public trust in the government while also undermining the effectiveness of the justice system by denying law enforcement and prosecutors critical evidence.<sup>1</sup> This thesis shows that witnesses - especially in ML cases - are vulnerable since prominent members of the community usually play key roles in these cases. Threats or violence can be used to discourage a victim or witness from testifying in a specific case, or they can be used to instil fear or non-co-operation among members of a community where gangs or organized crime operate.<sup>2</sup> Witness protection legislation has been enacted in South Africa, but it is evident that it fails to adequately protect witnesses. In addition, citizens are untrusting of the SAPS and NPA, which are perceived as corrupt and lacking independence. It is essential to make recommendations and implement changes to the existing witness protection laws in order to enhance the efficiency of the programme and to ensure that witnesses are better protected.

The recommendations discussed below, are intended to enhance the current and existing South African witness protection.



#### 5.2. RECOMMENDATIONS

Developing common standards and guidelines is critical to ensuring that the authority makes a fair and uniform assessment of the need to confer witness protection.<sup>3</sup> There are a number of factors that can be considered, including the witness's position or importance in the case, the nature of the investigation, threats to the witness's or a relative's safety, the witness's background check, the value of the deposition, and such other factors as deemed necessary and

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1 Browning J '#Snitches Get Stitches: Witness Intimidation in the Age of Facebook and Twitter' (2014) 192.

2 Browning (2014) 192.

3 Sapar, S. (2018) 'Statutory witness protection in india: cardinal urgency' (2018) 130.

relevant, but not exhaustive.<sup>4</sup> This would ensure that there is a level of predictability and that witnesses are provided with clarity.

In ML cases, extra care should be taken to protect witnesses. A generic slate of factors can, therefore, not suffice in determining the need for protection from the state. Every case involving ML must be regarded as serious and should be dealt with on its own merits.

Furthermore, as soon as a witness is regarded as eligible for protection and a protection agreement is signed in accordance with the WPA, the witness needs to be made aware that their protection will be terminated if they fail to comply or disclose sensitive information. The duties of the witness ought to be made clear from the outset.

There must be a detailed description of all the reasons for which a witness's protection can be terminated. This is to ensure that the protected witness complies. In this way, a witness will be aware of the importance of cooperating with law enforcement, providing truthful testimony in court, fulfilling all legal obligations, and not divulging information about the case to others.

In spite of the right of the accused to challenge the evidence against him or her, it is important to recognise that there are times when a witness might be better off testifying anonymously. Witnesses may sometimes be identified by the accused, which can pose a threat to them or their families. The introduction of anonymity orders may often be necessary in complex and serious ML cases. The risk of harm, and public interest in the successful prosecution of the case are all to be weighed against the accused right to challenge the evidence against them.

In ML cases, the identity and relocation details of participants should not be disclosed to those not involved in police functions and should also be kept secret, along with the identity of police officers and operating procedures. Furthermore, there is a glaring need for the development of expertise and for the training of professionals involved in witness protection. In ML cases, in particular, provision should be made for protection beyond the conclusion of the case.

If identity changes were implemented, several government departments must collaborate with or provide support to the Office for Witness Protection to support the affected persons. The

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4      Sapar (2018) 130.

Department of Social Development, the Department of Health, the Department of Human Settlement, the Department of Education, and the Department of Employment and Labour, are to provide witnesses with efficient and coordinated services. Through a collaboration of this kind, it will be possible to improve the provision of skills and rehabilitation of witnesses, better access to medical care, and provision of decent housing after witnesses have exited from the programme, in addition to providing aftercare services to them. Cosmetic surgery can be considered in extreme circumstances if a person wants to alter their physical appearance for the purpose of avoiding danger.

Witnesses may be terrified during the testimony process. It is therefore critical for witnesses to receive the support they need. Social workers at the Office for Witness Protection need to be trained in trauma and anxiety to help witnesses.

Under South African witness protection, relocation services are already offered; however, simply moving a witness to another part of the country is not sufficient. The programme must also help witnesses find employment in their new locations.

There are more foreign nationals in South Africa than in any other African country, so it would be prudent to cater to them as well, since they may have witnessed some organized crimes, especially ML.



## **BIBLIOGRAPHY**

### **BOOKS**

Ferguson G *Global Corruption: Law, Theory & Practice* (2018) Victoria: University of Victoria.

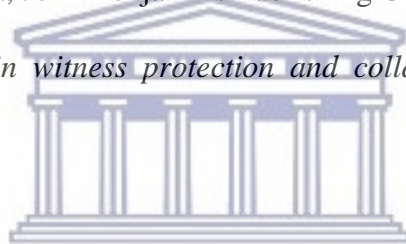
Mahony C *The justice sector afterthought: Witness protection in Africa* (2010) Pretoria: Institute for Security Studies.

Reuter P & Truman E.M *Chasing dirty money: The Fight Against Money Laundering* (2004) Washington, DC: Institute for International Economics.

Unger B & van de Linder D *Research Handbook on Money Laundering* (2013) Massachusetts, USA: Edward Elgar Publishing Inc.

Verdoolaege A *Reconciliation discourse: The Case of the Truth and Reconciliation Commission* (2008) Philadelphia, John Benjamins Publishing Company.

Vermeulen G *EU standards in witness protection and collaboration with justice* (2005) Netherlands: Maklu Publishers.



**CASE LAW**  
UNIVERSITY of the

*Minister of Police and Others v Kunjana* [2016] ZACC 21 PE

*United States v. Everett W. Thompson, Jr.*, 76 F.3d 442 (2d Cir. 1996).

### **INTERNET REFERENCE**

‘6AMLD: 22 Predicate Offenses For Money Laundering’, available at <https://complyadvantage.com/knowledgebase/adverse-media/6aml-22-predicate-offenses-money-laundering/> (accessed 30 August 2020).

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

Barnes C & De Klerk E ‘South Africa’s multi-party constitutional negotiation process’ (2002), available at <https://www.c-r.org/accord/public-participation/south-africas-multi-party-constitutional-negotiation-process> (accessed 26 December 2021).

Bernstein D, Manilal K & Lopes R ‘South Africa: Amendments to the Financial Intelligence Centre Act Become Effective’ (2019), available <https://globalcompliancenews.com/south-africa-amendments-financial-intelligence-centre-act-become-effective-20190506/> (accessed 03 November 2020).

Clark, P ‘Testifying to Genocide: Victim and Witness Protection in Rwanda’ (2012), available at <https://www.refworld.org/pdfid/50a3a9002.pdf> (accessed 15 November 2022).

Casavant L & Morris C ‘Bill C-51: An Act to amend the Witness Protection Program Act and to make a consequential amendment to another Act’ (2013) 2, available at <https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-1/c51-e.pdf> (accessed 16 March 2022).

Chitimira H ‘An exploration of the current regulatory aspects of money laundering in South Africa’ (2021), available at [https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm\\_source=TrendMD&utm\\_medium=cpc&utm\\_campaign=Journal\\_of\\_Money\\_Laundering\\_Control\\_TrendMD\\_0&WT.mc\\_id=Emerald\\_TrendMD\\_0](https://www.emerald.com/insight/content/doi/10.1108/JMLC-10-2020-0120/full/html?skipTracking=true&utm_source=TrendMD&utm_medium=cpc&utm_campaign=Journal_of_Money_Laundering_Control_TrendMD_0&WT.mc_id=Emerald_TrendMD_0) (accessed 14 August 2021).

Chohan U.W ‘The FATF in the Global Financial Architecture: Challenges and Implications’ (2019) 5 available at <https://poseidon01.ssrn.com/delivery.php?ID=059127068100112070104116085016090066097054010027075048118120110099111069006064012103010024035061107029062021089123096000101011016081075008087124083083093107098020006033059024126081030088126026084085001115066023013082112118076019029083029095089119105082&EXT=pdf> (accessed 08 November 2020).

Cruywagen V ‘Cape lawyer acquitted of 51 charges as witnesses were afraid to testify’ (2019), available at <https://www.iol.co.za/capeargus/news/cape-lawyer-acquitted-of-51-charges-as-witnesses-were-afraid-to-testify-37404703> (accessed 29 September 2020).

Cruywagen V ‘Witnesses ‘too scared to testify’ against city lawyer Anthony Broadway’ (2019), available at <https://www.iol.co.za/capeargus/news/witnesses-too-scared-to-testify-against-city-lawyer-anthony-broadway-37118438> (accessed 29 September 2020).

Dalby D ‘Maltese police arrest former prime minister’s chief of staff in money laundering probe’ (2020), available at <https://www.icij.org/investigations/panama-papers/maltese-police-arrest-former-prime-ministers-chief-of-staff-in-money-laundering-probe/> (accessed 30 January 2021).

De Koker L ‘Money laundering in South Africa’ (2002) 3, available at <https://media.africaportal.org/documents/IDEKOKERPROJECTPAPER.pdf> (accessed 24 October 2020).

Dolley C ‘A year after top cop Charl Kinnear’s murder, the SA Police Service is more chaotic than ever’ (2021), available at <https://www.dailymaverick.co.za/article/2021-09-20-a-year-after-top-cop-charl-kinnears-murder-the-sa-police-service-is-more-chaotic-than-ever/> (accessed 14 January 2022).

Dolley C ‘Fired cop Jeremy Vearey’s protection detail ‘withdrawn’ in a move he says will further endanger his life’ (2021), available at <https://www.dailymaverick.co.za/article/2021-06-24-fired-cop-jeremy-veareys-protection-detail-withdrawn-in-a-move-he-says-will-further-endanger-his-life/> (accessed 30 June 2021).

Dolley C ‘To serve and endanger: Corrupt cops are South Africa’s greatest security threat’ (2021), available at <https://www.dailymaverick.co.za/article/2021-07-29-to-serve-and-endanger-corrupt-cops-are-south-africas-greatest-security-threat/> (accessed 14 January 2022).

Doorewaard C & Minnaar A ‘Witness protection: A “hit-or-miss” situation’ (2017) 34, available at [https://journals-co-za.ezproxy.uwc.ac.za/docserver/fulltext/servamus\\_v110\\_n3\\_a10.pdf?expires=1608415532&iid=id&accname=58219&checksum=A14FB55BD7C2EC8A4DBAF4220E55B5EA](https://journals-co-za.ezproxy.uwc.ac.za/docserver/fulltext/servamus_v110_n3_a10.pdf?expires=1608415532&iid=id&accname=58219&checksum=A14FB55BD7C2EC8A4DBAF4220E55B5EA) (accessed 20 December 2020).

Erasmus D ‘Murder of three witnesses over the years leads to trial being held in camera’ (2019), available at <https://www.dailymaverick.co.za/article/2019-09-03-murder-of-three-witnesses-over-the-years-leads-to-trial-being-held-in-camera/> (accessed 17 October 2020).

Falcon G 'Inside the witness protection program' (2013), available at <https://edition.cnn.com/2013/02/16/justice/witness-protection-program/index.html> (accessed 19 July 2022).

'FIC Amendment Bill' (2015), available <https://www.masthead.co.za/newsletter/fic-amendment-bill/> (accessed 03 November 2020).

FATF 'Anti-money laundering and counter-terrorist financing measures South Africa' (2021) 8, available at <http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf> (accessed 23 December 2021).

Finckenauer J.O 'La Cosa Nostra In The United States', available at <https://www.ojp.gov/pdffiles1/nij/218555.pdf> (accessed 13 August 2022).

'Financial Intelligence Centre Guidance Note 3A Guidance for accountable institutions on client identification and verification and related matters' 1, available at <https://www.fic.gov.za/Documents/130328%20GUIDANCE%20NOTE%203A.pdf> (accessed 4 February 2022).

Fyfe N & Sheptycki J 'Facilitating witness co-operation in organised crime cases: an international review', available at [https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650\\_Facilitating\\_witness\\_co-operation\\_in\\_organised\\_crime\\_cases\\_an\\_international\\_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf](https://www.researchgate.net/profile/Nicholas-Fyfe-2/publication/237321650_Facilitating_witness_co-operation_in_organised_crime_cases_an_international_review/links/548970020cf268d28f0a04e4/Facilitating-witness-co-operation-in-organised-crime-cases-an-international-review.pdf) (accessed 13 February 2022).

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

Hackl v Financial Intelligence Unit (2010) SLR 98, available at <https://seylli.org/sc/judgment/constitutional-court/2010/1/Hackl%20v%20Financial%20Intelligence%20Unit%20%282010%29%20SLR%2098.pdf> (accessed 28 July 2021).

Jacobs J.B 'The Rise and Fall of Organized Crime in the United States' (2019) 17, available at <https://www.journals.uchicago.edu/doi/pdf/10.1086/706895> (accessed 09 August 2022).



Jaggi R 'Witness Protection' (2020), available at [https://heinonline.org/HOL/Page?handle=hein.journals/supami18&div=81&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/supami18&div=81&g_sent=1&casa_token=&collection=journals) (accessed 12 July 2022).

Klevtsov K, Dolganova S & Umrikhina E 'Ensuring Human Rights in the Course Of Criminal Proceedings in the Russian Federation and in Common Law Countries' (2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3845569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3845569) (accessed 01 March 2022).

Koren E 'Witness Protection Programs in Selected Countries' (2014), available at <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rgnzd-crm-brf-43/rgnzd-crm-brf-43-eng.pdf> (accessed 08 December 2020).

Lacko G 'The Protection of Witnesses' (2004) 27, available at <https://rune.une.edu.au/web/bitstream/1959.11/16839/7/open/SOURCE04.pdf> (accessed 18 July 2022).

Layton J & Curran O 'How Money Laundering Works' (2018), available at <https://money.howstuffworks.com/money-laundering.htm> (accessed 02 October 2020).

'Money laundering poses serious threat to integrity of country: Court' (2019), available at [https://www.business-standard.com/article/pti-stories/money-laundering-poses-serious-threat-to-integrity-of-country-court-119092000729\\_1.html](https://www.business-standard.com/article/pti-stories/money-laundering-poses-serious-threat-to-integrity-of-country-court-119092000729_1.html) (accessed 30 September 2020).

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

Newham G 'keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa' (1995), available at <https://www.csvr.org.za/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa> (accessed 27 April 2021).

Njeri J.K 'Formalised and effective witness protection programmes remain underdeveloped in many African states. It is time for this to change, says Jemima Njeri' (2014), available at <https://issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-african-criminal-justice-systems> (accessed 06 October 2022).

Njeri J ‘Witness protection: the missing cornerstone in Africa's criminal justice systems’, available at <https://issafrica.org/amp/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems> (accessed 17 October 2020).

Njeri J & Salifu U ‘Witness protection’ (2016), available at <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/ISS%20Africa%20Witness%20Protection.pdf> (accessed 19 October 2020).

Nombembe P ‘Lawyer on abalone poaching charges after syndicate heads pay R5m’ (2018), available at <https://www.timeslive.co.za/news/south-africa/2018-12-18-lawyer-on-abalone-poaching-charges-after-syndicate-heads-pay-r5m/> (accessed 30 September 2020).

‘NPA drops corruption charges against Zuma’, available at <https://mg.co.za/article/2009-04-06-npa-drops-corruption-charges-against-zuma/> (accessed 20 October 2020).

Parliament of Australia ‘Chapter 2: Efficiency of the National Witness Protection Program’, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/acc/completed\\_inquiries/1999-02/witness/report/c02](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/acc/completed_inquiries/1999-02/witness/report/c02) (accessed 03 September 2022).

Planting S ‘SA’s anti-money laundering measures under global spotlight’ (2019), available at <https://www.dailymaverick.co.za/article/2019-10-27-sas-anti-money-laundering-measures-under-global-spotlight/> (accessed 28 July 2020).

Public Safety Canada ‘Witness Protection Program – Annual Report: 2017-2018’ (2018), available at <https://www.securitepublique.gc.ca/cnt/rsracs/pblctns/wtnss-prtctn-rprt-2017-18/index-en.aspx> (accessed 18 July 2022).

Royal Canadian Mounted Police ‘Federal Witness Protection Program - Annual report: 2020-2021’ (2021), available at <https://www.rcmp-grc.gc.ca/en/witness-protection-program-annual-report-2020-2021> (accessed 18 July 2022).

Royal Canadian Mounted Police ‘Witness Protection Program - Annual report: 2019-2020’ (2020), available at <https://www.rcmp-grc.gc.ca/en/witness-protection-program-annual-report-2019-2020> (accessed 20 February 2022).

Sharma V ‘Complex ownership structures and money laundering’ (2014), available at <https://www.moneylife.in/article/complex-ownership-structures-and-money-laundering/37311.html> (accessed 01 October 2020).

‘South Africa crime stats 2020: everything you need to know’ (2020), available at <https://businesstech.co.za/news/government/421424/south-africa-crime-stats-2020-everything-you-need-to-know/> (accessed 24 October 2020).

‘Taking the Proceeds From Crime: The Story Of Arinsa’ (2019) 37, available at [https://www.unodc.org/documents/southernafrica/The\\_story\\_of\\_ARINSA.pdf](https://www.unodc.org/documents/southernafrica/The_story_of_ARINSA.pdf) (accessed 24 October 2020).

Taylor A ‘How Does the Witness Protection Program Work?’ (2020), available at <https://www.mindbounce.com/448349/how-does-the-witness-protection-program-work/> (accessed 13 February 2022).

Versluis J and de Lange J ‘Rising crime, low prosecution rates: How law enforcement in SA has all but collapsed’ (2019), available at <https://www.news24.com/citypress/news/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021> (accessed 25 September 2020).

Willman D ‘Taking The Profit Out Of Crime – The Asset Forfeiture Unit’, available at <https://www.npa.gov.za/sites/default/files/files/FAQs%20on%20AFU.pdf> (accessed 24 October 2020).

Anderson J ‘Gang-Related Witness Intimidation’ (2007), available at <https://www.nationalgangcenter.gov/content/documents/gang-related-witness-intimidation.pdf> (accessed 10 October 2020).

Dedel K ‘Witness Intimidation’ (2006) 2, available at <https://biblioteca.cejamericas.org/bitstream/handle/2015/3729/e07063407.pdf?sequence=1&isAllowed=y> (accessed 11 October 2020).

Ehlers S & Zagaris B ‘Drug Trafficking & Money Laundering’ (2005), available at [https://ips-dc.org/drug\\_trafficking\\_money\\_laundering/](https://ips-dc.org/drug_trafficking_money_laundering/) (visited 17 April 2020).

‘Good practices for the protection of witnesses in criminal proceedings involving organised crime’ (2008), available at <https://www.unodc.org/documents/middleeastandnorthafrica/organised->

[crime/Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime.pdf](#) (accessed 26 July 2020).

Goredema C ‘Confronting money laundering in South Africa: An overview of challenges and milestones’ (2007) 74, available at <https://media.africaportal.org/documents/M132FULL.pdf> (accessed 30 September 2020).

Irish J, Magadhla W, Qhobosheane K & Newham G ‘Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa’ (2000), available at <http://www.csvr.org.za/docs/policing/testiyingwithoutfear.pdf> (accessed 24 July 2020).

King S ‘How repeat offenders are pushing SA's crime rate up’ (2020), available at <https://www.capetalk.co.za/articles/398661/how-repeat-offenders-are-pushing-sa-s-crime-rate-up> (accessed 15 November 2021).

Kramer K ‘witness protection as a key tool in addressing serious and organised crime’, available at [https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_P3-19.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf) (accessed 17 July 2020).

Mail & Guardian ‘Killing sparks call for better witness care’ (1994), available at <https://mg.co.za/article/1994-12-09-killing-sparks-call-for-better-witness-care/> (accessed 26 December 2021).

‘Manual on Asian Development Bank March 2003 Countering Money Laundering and the Financing of Terrorism’ (2003), available at <https://www.adb.org/sites/default/files/publication/27932/countering-money-laundering.pdf> (accessed 13 January 2022).

‘Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors’ (2009) at 9, available at <http://www.oecd.org/ctp/crime/money-laundering-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf> (accessed 20 August 2020).

Motala S ‘The terrible consequences of police corruption in South Africa’ (2019), available at <https://voices.transparency.org/the-terrible-consequences-of-police-corruption-in-south-africa-294e6fd8922> (accessed 14 January 2022).

'New FICA requirements for accountable institutions' (2017), available at <https://www.nea.co.za/NewsResources/NewsArticle.aspx?ArticleID=2044> (accessed 04 November 2020).

Newham G 'keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa' (1995), available at <https://www.csvr.org.za/publications/1720-keeping-the-wolves-at-bay-issues-and-concerns-in-establishing-a-witness-protection-programme-in-south-africa> (accessed 27 April 2021).

Nijboer J.F 'Children and Young Persons in the Criminal Justice system: The Council of Europe Recommendation On witness Protection And Rights Of The Defence' (1999) 443, available at [file:///C:/Users/dell/AppData/Local/Temp/Nijboer1999\\_Article\\_ChildrenAndYoungPersonsInTheCr.pdf](file:///C:/Users/dell/AppData/Local/Temp/Nijboer1999_Article_ChildrenAndYoungPersonsInTheCr.pdf) (accessed 07 December 2020).

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

Patel H and Thakkar B.S 'Money Laundering Among Globalized World' (2012), available at <https://www.intechopen.com/books/globalization-approaches-to-diversity/money-laundering-among-globalized-world> (accessed 20 August 2020).

Poonyarith S 'The Effectiveness Enhancement in Enforcing Financial Crime: A Case Study of Witness and Evidence Measure' (2014) available at <file:///C:/Users/dell/AppData/Local/Temp/40753-Article%20Text-93536-1-10-20151009.pdf> (accessed 05 November 2020).

Prophet v National Director of Public Prosecutions (CCT56/05) para 62, available at <https://collections.concourt.org.za/bitstream/handle/20.500.12144/2491/Respondent%27s%20Heads%20of%20Argument-5905.pdf?sequence=6&isAllowed=y> (accessed 20 July 2021).

Smit S 'Survey shows public trust in police is at record low' (2021), available at <https://mg.co.za/news/2021-10-08-survey-shows-public-trust-in-police-is-at-record-low/> (accessed 15 November 2021).

Standing A & van Vuuren H ‘The role of auditors: Research into organised crime and money laundering’ (2003), available at <https://media.africaportal.org/documents/73.pdf> (accessed 13 January 2022).

Taunyane O ‘How does South Africa’s witness protection programme work?’ (2016) <http://www.702.co.za/articles/233720/how-does-south-africa-s-witness-protection-programme-work> (accessed 27 April 2021).

The Guardian ‘Maltese journalist was killed over reporting on power plant, say police’, available at <https://www.theguardian.com/world/2020/aug/31/police-maltese-journalist-killed-power-station-reporting-daphne-caruana-galizia> (accessed 30 January 2021).

Ukawa H ‘Securing Protection and Cooperation Of Witnesses And Whistle-Blowers’ (2011), available at [https://www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_all.pdf](https://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_all.pdf) (accessed 10 October 2020).

United Nations Office on Drugs and Crime ‘Good practices for the protection of witnesses in criminal proceedings involving organized crime’ (2008), available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good\\_Practices\\_for\\_the\\_Protection\\_of\\_Witnesses\\_in\\_Criminal\\_Proceedings\\_Involving\\_Organized\\_Crime.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf) (accessed 08 February 2020).

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

United Nations Office on Drugs and Crime ‘South Asia: The importance of witness protection in criminal proceedings’, available at <https://www.unodc.org/southasia/en/frontpage/2013/Oct/south-asia-the-importance-of-witness-protection-in-criminal-proceedings.html> (accessed 08 December 2020).

United Nations Office on Drugs and Crime ‘UNODC Launches Witness Protection Manual’, available at <https://www.unodc.org/unodc/en/press/releases/2008-02-13-2.html> (accessed 30 January 2021).

United Nations Office on Drugs and Crime ‘Victim Assistance and Witness Protection’, available at <https://www.unodc.org/unodc/en/organized-crime/witness-protection.html> (accessed 28 July 2020).

U.S. Marshals Service ‘Fact Sheet Witness Security 2022’ (2022), available at <https://www.usmarshals.gov/duties/factsheets/witsec.pdf> (accessed 11 July 2022).

Victoria State Government ‘Review of the Witness Protection Act 1991’ (2016) 9, available at [https://files.justice.vic.gov.au/2021-06/review\\_of\\_witness\\_protection\\_act\\_1991.pdf](https://files.justice.vic.gov.au/2021-06/review_of_witness_protection_act_1991.pdf) (accessed 20 July 2022).

Vlassis D ‘Overview of the Provisions of the United Nations Convention Against Transnational Organized Crime And Its Protocols’ (2000) 456, available at [https://www.unafei.or.jp/publications/pdf/RS\\_No59/No59\\_32VE\\_Vlassis1.pdf](https://www.unafei.or.jp/publications/pdf/RS_No59/No59_32VE_Vlassis1.pdf) (accessed 30 November 2020).

‘Victim and Witness Protection and Support’, available at <https://www.hrw.org/reports/2008/icc0708/9.htm> (accessed 03 December 2020).



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

‘Witness Intimidation: Meeting the Challenge’ (2013) 7, available at <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/Witness%20Intimidation-Meeting%20the%20Challenge.pdf> (accessed 11 October 2020).

‘Witness protection during and after the prosecution and trial’, available at [https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296\\_tool\\_5-18.pdf](https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-18.pdf) (accessed 26 July 2020).

### **JOURNAL ARTICLES**

Abdel-Monem T ‘Foreign Nationals in the United States Witness Security Program: A Remedy for E A Remedy for Every Wrong?’ (2003) *American Criminal Law Review*, 40(3), 1235-1269.

Atanasov S, Đukić M & Otašević B 'Witness Protection Programs For Justice Collaborators – Comparative Overview(Positive Legal Solutions in the Republic Of Serbia, The Republic of North Macedonia, Usa, England and Italy)' (2019) *Proceedings of the International Scientific Conference "Social Changes in the Global World"*, 493-508.

Barbot L.A.' Money Laundering: An International Challenge' (1995) *Tulane Journal of International and Comparative Law*, 3, 161-202.

Basdeo V 'The legal challenges of criminal and civil asset forfeiture in South Africa: A comparative analysis' (2013) *21(3) Afr. J. Int'l & Comp. L.* 303, 302-326.

Bates M 'Balancing Act: The Rights of the Accused and Witness Protection Measures' (2014) *Trinity College Law Review*, 143-164.

Bell R.E 'Proving the Criminal Origin of Property in Money-Laundering Prosecutions' (2000) *Journal of Money Laundering Control Vol 4, No 1*, 12-25.

Berat L & Shain Y 'Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase' (1995) *Law & Social Inquiry Vol. 20, No. 10*, 163-189.

Bhushan T & Pranati 'Witness Protection in India and United States: A Comparative Analysis' (2007) *International Journal of Criminal Justice Sciences Vol 2*, 13-26.

Boateng F & Abess G 'Victims' role in the criminal justice system: A statutory analysis of victims' rights in U.S.' (2017) *International Journal of Police Science & Management 19(4)*, 221-228.

Boles J.R 'Anti-Money Laundering Initiatives for the South African Real Estate Market Estate Market' (2017) *Journal of Comparative Urban Law and Policy, Vol. 1*, 197-202.

Bourne J 'Money laundering: What is being done to combat it a comparative analysis of the laws in the united states of America, the United Kingdom and South Africa' (2002) *South African Mercantile Law Journal*, 14(3), 475-490.

Bramlett T 'United States v. Tyler: Federal Witness Protection following the Limitations in Arthur Andersen LLP v. United States and Fowler v. United States' (2014) *American Journal of Trial Advocacy*, 37(3), 677-698.

Browning, J' #Snitches get stitches: Witness intimidation in the age of Facebook and twitter' (2014) *Pace Law Review*, 35(1), 192-214.



Buchanan B 'Money laundering—a global obstacle' (2004) *Research in International Business and Finance*, 117-127.

Cassell P 'Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act' (2005) *BYU Law Review*, 835-926.

Chen E.Y 'Victim and Witness Intimidation' (2009) *Santa Clara University Scholar Commons*, 837-840.

Chhatwani N 'Witness protection in india' (2020) 8. Chhatwani, N. (2020) *Law Essentials Journal*, 1(2), 2-15.

De Beer, J. W. 'Corruptly persuading privilege: the effect of united states v. doss on the marital privilege, the 5th amendment, and federal witness tampering statute sec. 1512(b)' (2011) *University of Cincinnati Law Review*, 80(2), 591-616.

Demir M 'The Perceived Effect of a Witness Security Program on Willingness to Testify' (2018) *International Criminal Justice Review*, Vol. 28(1), 62-81.

Demleitner, N. V. 'Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options' (1998) *American Journal of Comparative Law Supplement*, 46, 641-664.

De Pascalis F 'Financial crime prevention and control: The Reforms of Unique Jurisdiction under EU law and international standards' (2015) *European Journal of Law Reform*, 17(4), 528-551.

De Ycaza C 'A Search for Truth: A Critical Analysis of the Liberian Truth and Reconciliation Commission' (2013) *Hum Rights Rev*, 189–212.

Dhondge P 'Australia's Witness Protection Law: Analytical Analysis' (2020) *Aayushi International Interdisciplinary Research Journal*, 96-99.

Dobrowolski Z and Sułkowski Ł 'Implementing a Sustainable Model for Anti-Money Laundering in the United Nations Development Goals' (2019) *Sustainability*, 1-23.

Dozier S. K. & O'Hearn D. 'The federal witness security program: retrospective look' (2020) *Department of Justice Journal of Federal Law and Practice*, 68(5), 135-154.

Enikö F 'The Rising Importance on The Protection of witnesses In The European Union' (2006) *International Review of Penal Law Vol. 77*, 313-322.

Dulume W 'Ethiopian Witness Protection System: Comparative Analysis with UNHCHR and Good Practices Of Witness Protection Report' (2017).

Eikel M 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice' (2012) *Criminal Law Forum*, 97-133.

Enikö F 'The Rising Importance on the Protection of witnesses In The European Union' (2006) *International Review of Penal Law*, 313-322.

Fambasayi R & Koraan R 'Intermediaries and the International Obligation to Protect Child Witnesses in South Africa' (2018) *PER / PELJ*, 2-30.

Fyfe N & McKay H 'Police protection of intimidated witnesses: A study of the strathclyde police witness protection programme' (2010) *An International Journal of Research and Policy Volume 10*, 277-299.

Gilad M 'Who will protect the children: The untold story of unaccompanied minors in witness protection programs' (2012) *Whittier Journal of Child and Family Advocacy*, 43-80.

Hamin Z, Omar N & Kamaruddin S 'FATF and Lawyers obligations under the AML/AFT Regime in the Malaysia' (2015) *Procedia Economics and Finance*, 759 – 765.

Hart P. E 'Falling through the cracks: the shortcomings of victim and witness protection under 1512 of the federal victim and witness protection act' (2009) *Valparaiso University Law Review*, 43(2), 771-814.

Irving E 'Protecting Witnesses at the International Criminal Court from Refoulement' (2015) *Journal of International Criminal Justice*, 1-23.

Itzikowitz A 'The prevention and control of money laundering in South Africa' (1999) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)*, 88-107.

Ivkovic, S. 'Justice by the international criminal tribunal for the former yugoslavia' (2001) *Stanford Journal of International Law*, 37(2), 255-346.

Jayasankar K 'Right of Witness Protection: A Comparative Overview' (2012) *Bharati Law Review*, 73-87.

Jusufspahić A 'The Witness Protection Program in Bosnia and Herzegovina in Cases of Organised Crime' (2013) *Journal of Criminal Justice and Security*, 261–276.

Kaur S 'Potential Challenges in a Witness Protection Programme in Malaysia' (2011) *Pertanika J. Soc. Sci. & Hum.* 19 (2), 363 – 368.

Kayunia S.W and Jamub E 'Failing witnesses in serious and organised crimes: policy perspectives for witness protective measures in Malawi' (2015) *Commonwealth Law Bulletin Vol. 41, No. 3*, 422–438.

Kayuni S. 'The ICC's witness protection measures through the lens of policy-oriented jurisprudence' (2015) *UCL Journal of Law and Jurisprudence*, 4(2), 271-298.

Koss T 'South Africa's truth and reconciliation commission: model for the future' (2002) *Florida Journal of International Law*, 14(3), 517-526.

Lawack V 'The Legal and Regulatory Aspects of International Remittances and their Impact on Migrant Workers and Asylum Seekers In South Africa' (2014) *Obiter*, 357-370.

Le Nguyen C 'The International Anti-Money Laundering Regime and Its Adoption by Vietnam' (2014) *Asian Journal of International Law*, 197–225.

Levi M' Money Laundering and Its Regulation' (2002) *The ANNALS of the American Academy of Political and Social Science*, 181-194.

Levi M & Reuter P 'Money Laundering' (2006) *Crime and Justice: Review of Research*, 34, 289-376.

Le Roux-Kemp' anonymity and the South African Criminal Justice System' (2010) *SACJ*, 351-370.

Mack, R. L 'The Federal Witness Protection Revisited and Compared: Reshaping an Old Weapon to Meet New Challenges in the Global Crime Fighting Effort' (2013) *University of Miami International and Comparative Law Review*, 21, 191-239.

McDonough K. M. 'Combating gang-perpetuated witness intimidation with forfeiture by wrongdoing' (2013) *Seton Hall Law Review*, 43(4), 1283-1324.

McDowell J 'The Consequences of Money Laundering and Financial Crime' (2001) *Economic Perspectives Volume:6 Issue:2*, 6-8.

Minnaar A 'Witness Protection Programmes – Some Lessons From The South African Experience' (2002) *Acta Criminologica: Southern African Journal of Criminology*, Vol. 15 No. 3, 118-133.

Moshi H 'Fighting money laundering: The challenges in Africa' (2007) *Institute for Security Studies Papers*, 1-12.

Mphaphuli L.N & Botha P 'Experiences and Coping Strategies of Protected Witnesses In South Africa: A Social Work Perspective' (2021) *Acta Criminologica: African Journal of Criminology & Victimology*, 34(2), 158-170.

Mujuzi J 'Ten Years of The South African Prevention of Organised Crime Act (1999–2009)' (2010) *Research Gate*, 1-13.

Murhula P & Singh S 'A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature' (2019) *African Journal of Criminology and Justice Studies* Vol.12, 21-43.

Naheem M.A. 'Anti-money laundering/trade-based money laundering risk assessment strategies – action or re-action focused?' (2019) *Journal of Money Laundering Control*, Vol. 22 No. 4, 721-733.

Nandi S 'From the Desk of the Chief Editor: Global Money Laundering -The Silent Flow of Money' (2009) *Metamorphosis*, 2-6.

Nelken D 'Whose Best Practices? The Significance of Context in and for Transnational Criminal Justice Indicators' (2019) *Journal of Law and Society* Volume 46, 31-50.

Ngane, S 'Witnesses before the international criminal court' (2009) *Law and Practice of International Courts and Tribunals*, 431-458.

Njotini M 'The Transaction or Activity Monitoring Process: An Analysis of The Customer Due Diligence Systems of The United Kingdom And South Africa' (2010) *Research Gate*, 556-573.

Ochoa, J 'Tweeting with purpose: interpreting "corrupt persuasion" in 18 u.s.c. sec. 1512(b)' (2019) *American University Journal of Gender, Social Policy & the Law*, 28(1), 63-90.

Okoli C A & Arishe G 'The Operation of the Escape Clauses In The Rome Convention, Rome I Regulation And Rome II Regulation' (2012) *Journal of Private International Law*, 513-545.

Pahariya A & Katara S 'Comparative Analysis of Witness Protection in Common Law Countries: Challenges and Their Potential Solutions' (2021) *Nirma University Law Journal*, 10(2), 107-124.

Pesce, T. 'Defining witness tampering under 18 u.s.c. section 1512' (1986) *Columbia Law Review*, 86(7), 1417-1435.

Pozen, J. 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials' (2005) *New York University Journal of International Law and Politics*, 38(1 & 2), 281-322.

Ratliff R 'Third-party money laundering: Problems of proof and prosecutorial discretion' (1996) *Stanford Law & Policy Review*, 7(2), 173-188.

Rahangdale P 'Witness Protection: A Comparative Analysis of Indian and Australian Legislation' (2019) *Journal of the Gujarat Research Society*, 141-149.

Rydberg A 'Case analysis: The protection of the interests of witnesses the ICTY in comparison to the future ICC' (1999) *Leiden Journal of International Law*, 12(2), 455-478.

R, K. K. 'A missed opportunity to reform witness protection' (2013) *Criminal Law Quarterly*, 59(4), 441-443.

Saiful I.M, Akter E.S & Zahed H.M 'Predicate Offences of Money Laundering and Anti Money Laundering Practices In Bangladesh Among South Asian Countries' (2017) *Studies in Business and Economics no. 12(3)*, 63-75.

Sapar, S. 'Statutory witness protection in India: cardinal urgency' (2018) *International Journal of Law Management & Humanities*, 1(3), 116-134.

Sayyed H & Kaushal A 'Witness Protection in Contemporary Society' (2022) *Journal of Positive School Psychology Vol. 6*, 2329 – 2334.

Sarkin J 'The truth and reconciliation commission in South Africa' (1997) *Commonwealth Law Bulletin Vol.23*, 538-542.

Schneider F & Windischbauer U 'Money laundering: some facts' (2008) *Eur J Law Econ*, 387–404.

Semrad M, Vanags T & Bhullar N 'Selecting witness protection officers: developing a test battery for Australian police' (2014) *Police Practice and Research*, 6-16.

Sharman J.C & Chaikin D ‘Corruption and Anti-Money-Laundering Systems: Putting a Luxury Good to Work’ (2008) *An International Journal of Policy, Administration, and Institutions*, 27-45.

Sharman J.C ‘Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States’(2008) *International Studies Quarterly*, Volume 52, 635–656.

Shraga D and Zacklin R ‘Symposium Towards an International Criminal Court: The International Criminal Tribunal for Rwanda’ (1996) *7 EJIL*, 501-518.

Simon J ‘Pre-Recorded Videotaped Evidence of Child Witnesses’ (2006) *South African Journal of Criminal Justice*, 56-78.

Singh, R., & Biswas, S. ‘Witness Protection: Under Aegis of the Law’ (2021) *International Journal of Law Management & Humanities*, 4, 5124-5140.

Stanica N & Coman F ‘European standards in witness protection’ (2014) *Public Security Studies Studii de Securitate Publica*, 3(4), 276-286.

Tuba D ‘Prosecuting money laundering the FATF way: an analysis of gaps and challenges in South African legislation from a comparative perspective’ (2012) *Acta Criminologica: African Journal of Criminology & Victimology*, 103 – 122.

Urziceanu, R. ‘Money Laundering’ (2008) *AGORA International Journal of Juridical Sciences*, 305-311.

Van Lent Y ‘Legal Regulation of Witness Protection in the European Union’ (2018) *Public Security and Public Order*, 139-148.

Vegvari R ‘Shifts in thinking concerning law of criminal procedure in witness protection’ (2007) *Acta Juridica Hungarica*, 48(4), 361-372.

Veng Mei Leong, A ‘Chasing dirty money: domestic and international measures against money laundering’ (2007) *Journal of Money Laundering Control*, Vol. 10 No. 2, 140-156.

Verma S & Krishnakumar A ‘Towards a witness centric approach: analysis of witness protection scheme, 2018’ (2021) *Crime Law Soc Change* 75, 433–444.

Wald, P. M. ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court’ (2001) *Washington University Journal of Law & Policy*, 5, 87-118.

Webb P ‘The United Nations Convention Against Corruption: Global achievement or missed opportunity?’ (2005) *Journal of International Economic Law*, Volume 8, Issue 1, Pages 191–229.

Yesufu S ‘Police Corruption in South Africa’ (2013) *Journal of Commonwealth Law and Legal Education*, 1-27.

Zali M & Maulidi A ‘Fighting Against Money Laundering’ (2018) 41 *BRICS LAW JOURNAL Volume V (2018) Issue 3*, 40-63.

Zgaga S ‘Witness protection in European and Slovenian law’ (2007) *Revista de Stiinte Juridice*, 51-60.

Zvobgo K, Sandholtz W & Mulesky S ‘Reserving Rights: Explaining Human Rights Treaty Reservations’ (2020) *International Studies Quarterly*, 785–797.

#### **LEGISLATION**

18 United States Code

Constitution of the Republic of South Africa, 1996.

Drugs and Drug Trafficking Act 140 of 1992.

Financial Intelligence Centre Act 38 of 2001.

Prevention of Organized Crime Act 121 of 1998.

Witness Protection Act 15 of 1991.

Witness Protection Act 112 of 1998.

#### **REPORTS AND POLICIES OF GOVERNMENTAL BODIES**

Australian Federal Police *witness Annual Report 2011-12* (2012) 1-8.

Australian Federal Police *witness Annual Report 2018-19* (2019) 1-216.

Dandurand Y & Farr K *Report No. 001: A Review of Selected Witness Protection Programs* (2010) 1-91.

February J *Southern Africa Report 31: Protecting the public or politically compromised?* (2019) 1-19.

International Monetary Fund *IMF Country Report No. 15/51 Anti-Money Laundering and Combating The Financing Of Terrorism (AML/CFT)—Technical Note* (2015) 1-22.

Mackarel M, Raitt F and Moody S 'Briefing Paper on Legal Issues and Witness protection in criminal Cases' (2001).

Office of the Police Integrity Victoria *Report of the Director, Police Integrity 'Review of The Victoria Police Witness Protection Program* (2005) 1-58.

Tutu D, Mkhize H, Boraine A *Volume one: Truth and Reconciliation Commission of South Africa Report* (1998) 1-509.

### **Theses**

Ahlers C *The South African anti-money laundering regulatory framework relevant to politically exposed persons* (unpublished MPhil in Fraud Risk Management, University Of Pretoria, 2013).

Bekink M *The Protection of Child Victims and Witnesses in a Post-Constitutional Criminal Justice System With Specific Reference to the Role of an Intermediary: A Comparative Study* (published thesis in the he degree of Doctor of Laws, 2016).

Cetin H *The Effectiveness of the Witness Security Program in the Fight Against Organized Crime and Terrorism: A Case Study of the United States and Turkey* (published thesis in Doctor of Philosophy, 2010).

Cliffton S *The Law on Witness Protection in Kenya: Whistleblower's refuge or just pipe-dream?* (Published Thesis in Master of Laws, 2020).

De Jagar M.J *A Comparative Study Between Anti-Money Laundering Legislation of South Africa And International Standards* (unpublished thesis in the Degree of LLM, 2018).

Kiprono W *Challenges Facing Implementation of Witness Protection Program in Kenya* (Published Thesis in Doctor of Philosophy in Sociology, 2016).



Lambert T *The Goldstone Commission in South Africa one Commission in South Africa's Transition: Linking Gradual Institutional Change and Information-Gathering Institutions* (unpublished thesis in Doctor of Philosophy, 2020).

Mphaphuli L *Experiences and Challenges of Witnesses in The Witness Protection Programme In South Africa: Guidelines For Coordinated Service Delivery Developed From A Social Work Perspective* (unpublished thesis in Doctor of Philosophy, 2020).

Neil K.P *A critical examination of witness protection in Australia* (Published Doctoral Thesis, 2014).

Oyakhire S.O *Developing a Legal and Institutional Framework for Witness Protection in Nigeria: Reflections from International Perspectives* (Unpublished thesis in Doctor of Philosophy, 2019).

Selabe B.C *The Independence of the National Prosecution Authority of South Africa: Fact or Fiction?* (unpublished thesis M Phil, University Of The Western Cape, 2015).

Shirali, A.M *A Critical Study of Impact of Hostile Witness on Administration of Criminal Justice System In India- With Special Reference to the State of GOA* (Published Thesis in Doctor of Philosophy, 2020).

Van Jaarsveld I.L *Aspects of Money Laundering in South Africa* (unpublished thesis in Doctor of Laws, 2011).



### **Treaties and Conventions**

African Commission on Human & Peoples' Rights: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

FATF Recommendations.

Rome Statute of the International Criminal Court.

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

United Nations Convention against Transnational Organized Crime 2000

United Nations Convention Against Corruption.