

## BRIEFING PAPER

# Witness Interference in Cases before the International Criminal Court

The Open Society Justice Initiative has conducted a comprehensive survey of publicly available information on witness interference in cases before the International Criminal Court (ICC). Our research suggests that witness interference has been alleged in nearly every case before the ICC. It is one of the most urgent challenges facing the court and international criminal justice.

NOVEMBER 2016

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Witness testimony has been the main form of evidence in all cases of grave international crimes before the ICC since it was established in 2002. Actions aimed at interfering with witnesses and their testimony impede due process, undermine the rule of law, put ICC cases in peril, and weaken the credibility of the institution.

### What is Witness Interference?

Witness interference—also known as “witness tampering” in certain legal systems—is the act of perverting, or attempting to pervert, the course of justice by altering the content of a witness’ (potential) testimony and/or preventing them from testifying. Witness interference occurs when a witness and/or their loved ones is subjected to threats, extortion, bribery, and/or other forms of coercion and/or bodily harm and/or death.

### Legal Framework

Witness interference can compromise the safety and well-being of witnesses and the integrity of their testimony. Article 68(1) of the Rome Statute states that the court has an obligation to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses...” Other provisions in the Rome Statute establish specific witness protection duties for the chambers (articles 57(3)(c) and 64(6)(e)), the Office of the Prosecutor (OTP) (articles 54(e)(f) and 68(5)), and the Registry (article 43(6)).

In addition, article 70 of the Rome Statute criminalizes the following conduct as offences against the administration of justice:

- a) Giving false testimony when under an obligation [...] to tell the truth;
- b) Presenting evidence that the party knows to be false or forged;
- c) Corruptly influencing a witness; obstructing or interfering with the attendance or testimony of a witness; retaliating against a witness for giving testimony; or destroying, tampering with, or interfering with the collection of evidence [...]

### Scale of Witness Interference<sup>1</sup>

The collapse of the ICC Kenya cases—against President Uhuru Kenyatta, Deputy President William Ruto, and Joseph arap Sang—was prominently covered by international media. The head of state and his deputy walked away from legal proceedings for the crimes against humanity of murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts committed during the 2007-8 post-election violence. Termination of the cases owing to insufficient evidence was due, at least in part, to witness interference. But the Kenya cases do not stand alone: ICC judges have recognized that witness interference may indeed have been committed across nearly all ICC cases that have moved to the trial phase.

The [OTP’s 2016-2018 Strategic Plan](#) notes that: “almost all cases in the confirmation of charges and trial phases have been or are confronted with incidents of obstruction of justice - in particular witness tampering.”

Out of the nine ICC cases involving charges of crimes against humanity and/or war crimes<sup>2</sup>

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<sup>1</sup> This factsheet is based on open-source research conducted by and for the Open Society Justice Initiative in 2015-2016. The research covered ICC public decisions and filings, public hearings/transcripts, policy documents, and other open source material such as reports from our monitoring program ([www.ijmonitor.org](http://www.ijmonitor.org)), and media articles. It examined all ICC cases, from the start of the first ICC trial (*Prosecutor v. Thomas Lubanga*) in January 2009, up until July 31, 2016. The Justice Initiative has neither the mandate nor the capacity to verify the allegations uncovered. This is the responsibility of the court and/or of national authorities.

that have reached the trial stage—which address crimes in the Democratic Republic of Congo (DRC), the Central African Republic (CAR), Kenya, Côte d’Ivoire, and Uganda—our research has found allegations of interference in at least eight: *Lubanga*, *Katanga & Ngudjolo*, *Bemba*, *Muthaura & Kenyatta*, *Ruto & Sang*, *Gbagbo & Blé Goudé*, *Ntaganda*, and *Ongwen*. The crimes charged in these cases affected hundreds of thousands of victims. The only case in which we found no public reference to witness interference allegations was *Al-Mahdi*, a unique case in which the accused, charged with destruction of cultural property in Mali, issued a guilty plea and underwent a subsequent speedy trial.

The prosecution has brought charges for witness interference in three cases: one, resulting in a conviction, relating to the prosecution of *Bemba* and two, related to the prosecution of *Ruto & Sang*, for which the accused remain at large. However, references to witness interference, including specific allegations and orders for preventive measures to avoid (further) tampering, can be found not only in those cases but across the eight cases mentioned above.

Our research on witness interference has involved reviewing and linking information contained in over 200 ICC public documents, including filings, decisions, and transcripts, some of which were redacted. The research indicates that witness interference at the ICC has been widespread, as evinced by: a) the allegations across eight cases (see above); b) the extent of litigation on witness interference related matters; c) the impact on cases (see below); and d) the measures adopted to either prevent or investigate violations.

In some cases—particularly *Bemba*, *Ruto & Sang*, and *Kenyatta*—we have been able to quantify the exact number of witnesses whose testimony may have been interfered with (see below). But that has not been possible in all eight cases, partly because certain information remains confidential, but also because accusations in some cases (e.g., *Ntaganda*, *Ongwen*) refer in a general manner to attempts to reach out to witnesses and/or instructions for payment to witnesses, without mentioning specific victims. In this respect, it is important to note that the nature of the allegations and extent to which the allegations have been proven vary greatly across cases. In the *Bemba* case there was a conviction for witness interference and the allegations were proved beyond reasonable doubt. In the *Ruto & Sang* case, arrest warrants were issued on the basis of allegations proven on the “reasonable grounds to believe” standard. In other cases, there have been accusations by both the prosecution and the defense, some of which have led to orders for preventive measures (e.g., restrictions on the accused’s communications; order to cease and disclose payments to witnesses) which indicate a certain level of assessment of the evidence, although the standard remains unclear. Other allegations have not been acted upon.<sup>3</sup>

### Types of Reported Interference

- **Murder**, in at least one case.
- **Intimidation**, including generating a hostile climate for those willing to testify.
- **Bribery**, to persuade witnesses to either provide false testimony or desist from testifying.

<sup>2</sup> This does not include cases which charge exclusively offences against the administration of justice.

<sup>3</sup> The term “allegations” as used in this document encompasses all such types of accusations.

- **Coaching** witnesses to provide false testimony, often in relation to bribery and/or false promises about (financial) compensation or a better future.
- **Disclosing and publicizing the identities of protected witnesses**, either by the accused to their contacts interfering with witnesses on their behalf, or by other actors. This has led to the publication of witnesses' names in the press and social media.

### Patterns of Witness Interference

Witness interference at the ICC appears not to be spontaneous or opportunistic; rather, patterns indicate well-coordinated and **broad “schemes” or “networks”** of perpetrators. At times, the networks have involved offenders working together from several countries. Witness tampering perpetrators need significant resources, connections, and influence to carry out their aims. These networks have often sought to **interfere with numerous witnesses**, in a clear attempt to undermine cases. For example, in the *Lubanga* case, the judges found that it was likely that three prosecution intermediaries had coached prosecution witnesses to lie about their identities and stories in court. As a consequence, the chamber found that nine witnesses (out of a total of 36 prosecution witnesses in the case) were not credible. In the *Bemba* case, the court found that the accused, Jean-Pierre Bemba, members of his defense team, and others orchestrated and implemented a plan to corruptly influence 14 out of 34 defense witnesses to provide false testimony. In addition, the ICC has issued arrest warrants against three persons for alleged interference with at least eight prosecution witnesses in the *Ruto & Sang* case.<sup>4</sup> Finally, the prosecution withdrew seven witnesses in the *Muthaura & Kenyatta* case because they feared for their safety, no longer wanted to testify, provided false testimony, or had recanted their evidence.

### Who Has Been the Object of Witness Interference Allegations?

- Prosecution and defense intermediaries aware of who is a witness before the ICC.
- The accused themselves (or their associates or relatives), including through coded communications from the ICC detention center.
- Members of the defense team other than the accused; this was proven in the *Bemba* case, which led to a conviction for offences against the administration of justice.
- Prosecution staff members: The defense in the Kenya cases has made such allegations based on the extent of reported false testimony and recanted testimony. These allegations however have not led to further inquiry and/or determination by the court.

### Implications for the Court and Its Cases

Witness interference on this scale has major implications for the ICC and its cases:

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<sup>4</sup> Significantly, the prosecution indicated that during the course of its case, 16 of its 42 original witnesses withdrew their cooperation with the OTP or refused to testify, most citing threats, intimidation and/or fears of reprisals.

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The failure to adequately protect ICC witnesses and their testimony can cause further grave criminal and human rights violations, costing the lives and destroying the families and communities of those already grievously victimized.

Witness interference can undermine the rule of law, obstruct the court's truth-finding function, and **distort case outcomes**, leading to wrongful convictions or acquittals, or unfair termination of cases for other reasons. Our research suggests that the outcomes of the *Lubanga*, *Ngudjolo*, *Ruto & Sang*, and *Muthaura & Kenyatta* cases could have been affected by witness interference. In the *Lubanga* case, the chamber found unreliable the testimony of nine child soldiers due to witness coaching by three OTP intermediaries. In the *Ngudjolo* case, the prosecution was not allowed to use reports on the accused's communications to cross-examine witnesses, despite a reasonable suspicion that Ngudjolo may have attempted to influence witness testimonies. The prosecution raised this matter during its appeal against the acquittal, but the appeals chamber stated that, while the trial chamber had erred in denying the prosecutor the opportunity to use those reports to cross-examine witnesses, it concluded that the error had not materially affected the outcome of the trial. The cases against Ruto, Sang, Muthaura, and Kenyatta were terminated due to insufficient evidence following alleged witness tampering.

Witness interference on this scale undermines the court's commitment to due process and legal accountability and impedes the fight against impunity; it also imposes significant institutional and financial costs.

A **resource drain** results from the need to investigate and prosecute article 70 offences, and because every organ of the court must monitor and enquire into actual or potential interference and adopt preventive measures. The demonstrated risk of witness interference could increase the demand for witness protection resources, and may lead to further litigation, to the detriment of the effectiveness and efficiency of ICC proceedings.

Over time, **the ICC's legitimacy could be eroded** by repeated patterns of witness interference, as cases fall apart, witnesses are harmed or killed, potential witnesses decline to come forward or withdraw their testimony, and ICC proceedings become increasingly protracted or suffer other ill-effects. The inability to adequately protect witnesses affects the court's credibility as an institution.

### Deterring Witness Interference

In addressing witness interference, the following matters should be considered:

**Links between witness interference and witness protection.** Attempts to disrupt witness testimony put witnesses at risk. The ICC has a responsibility to ensure witnesses' safety and well-being. Many witnesses are weak, traumatized, and impoverished, including as a consequence of the crimes that they have suffered or witnessed. They are therefore vulnerable to interference. In several cases, malign attempts to contact witnesses were made shortly after the identity or other information regarding the witness was shared with the defense. Effective witness protection programs are essential. However, it sometimes takes months, or even years, for ICC witnesses who are granted relocation to be permanently relocated. They and

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their families often spend a lengthy period of time in a temporary location while the court tries to find a State willing to host them. **State cooperation for witness relocation must be strengthened**, including by conclusion of standard or ad-hoc witness relocation agreements and by speeding up the process of responding to the court's requests for relocation.

**Preventive measures and investigation.** In the first ICC cases (*Lubanga* and *Katanga & Ngudjolo*), the court and the prosecution appear to have been slow in identifying patterns of witness interference and using this analysis to inform preventive measures and safeguards. In light of the broad interference schemes in the *Bemba* case and witness intimidation challenges in the Kenya cases, the court has begun to address witness interference earlier in the proceedings and in a more systematic manner, including through measures at the ICC detention center. Such measures include steps to monitor the accused's communications from the ICC detention center and possible access to privileged information in possession of the defense. The court has also ordered restrictions on the publicity of proceedings. All these measures present **challenges to the rights of the accused**. Some defense teams have objected to the OTP's access to privileged information on the defense strategy, and noted the lack of opportunities for the accused to be heard before judges order restrictions to their communications. The court should ensure that the rights of the accused are respected at all times and afford the defense an opportunity to be heard in relation to preventive measures, to the extent that such steps do not further expose witnesses or affect ongoing investigations.

**Ensuring witness anonymity.** In a well-known incident in early 2016, in the case of *Gbagbo & Blé Goudé*, the names of a number of protected prosecution witnesses were accidentally revealed to the public during what was meant to be (but was not) a closed hearing. The information was relayed to the public gallery and the recordings were then spread on social media and appeared on YouTube. The incident appears attributable to human error. Greater efforts must be undertaken to ensure that ICC staff whose responsibilities involve handling confidential information follow regular security trainings, have a reasonable workload, and are adequately supervised.

**Article 70 cases.** Investigation and prosecution of offences against the administration of justice are essential to punish those who have interfered with witnesses. Investigation and prosecution can send a strong message that these acts will not be tolerated. However, the OTP has made clear that it lacks the capacity and resources for systematic investigations and prosecutions of these offences. The OTP has indicated its intention to consider whether the competent national authorities, under the principle of complementarity, may address the allegations, before embarking on article 70 cases. To fill the impunity gap and ensure deterrence, **States Parties must also investigate and prosecute** witness interference acts that amount to **offences against the administration of justice in relation to ICC cases**.

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The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.

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