



SEEK WISDOM, ELEVATE YOUR INTELLECT AND SERVE HUMANITY!



**The Use of Anonymous Witness Vis-À-Vis the Right of the Accused to
Confrontation: The Law and the Practice at Ethiopian Federal High Court**

Illili Girma Bikila

Addis Ababa University

School of law

Advisor: Wondwossen Demissie (PhD)

September 2024

**The Use of Anonymous Witness Vis-À-Vis the Right of the Accused to
Confrontation: The Law and the Practice at Ethiopian Federal High Court**

**A Thesis Submitted In Partial Fulfillment of the Requirements for the Degree
of Master of Laws (LL.M in Human Rights Law) To the School Of Law, Addis
Ababa University**

By: Illili Girma Bikila

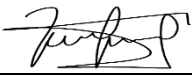
Advisor: Wondwossen Demissie (PhD)

**Addis Ababa, Ethiopia
September 2024**

DECLARATION

I, the undersigned, declare that this study entitled “*The Use of Anonymous Witness Vis-À-Vis the Right of the Accused to Confrontation: The Law and the Practice at Ethiopian Federal High Court*” is my own work. I have conducted the research independently with the guidance and support of my research advisor. This study has not been submitted for any degree at any other academic or research institution, and all sources of materials used for the thesis have been properly acknowledged and cited.

Name: **Ililli Girma**

Signature 

Date 07/10/2024

Advisor: **Wondwossen Demissie (PhD)**

Signature _____

Date _____

ADDIS ABABA UNIVERSITY

FACULTY OF LAW

SCHOOL OF GRADUATE STUDIES

**THE USE OF ANONYMOUS WITNESS VIS-À-VIS THE RIGHT OF THE ACCUSED
TO CONFRONTATION: THE LAW AND THE PRACTICE AT ETHIOPIAN FEDERAL
HIGH COURT**

*A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of
Master of Laws (LL.M in Human rights Law) to the School of Law, Addis Ababa
University*

Approved by Board of Examiners

Advisor's Name

Signature and Date

Wondwossen Demissie

Examiner's Name

Signature and Date

Examiner's Name

Signature and Date

ACKNOWLEDGEMENT

First and foremost, I would like to thank the Lord Jesus for his unending love and help throughout my life.

My sincere appreciation goes to my advisor, Dr. Wondwossen Demissie, for his constructive comments, guidance, and encouragement throughout the study and research work. Without his constructive comments, guidance, and patience follow-up, this paper would not have been realized. My sincere gratitude really should reach him.

I would take this opportunity to extend my heartfelt gratitude to my fiancée, Naol B. for his unwavering love and encouragement throughout the study and thesis work, as well as to my family for their unwavering support.

I owe special thanks to the Federal High Court Judges, Registrars, and Archive staffs for their guidance in the collection and sharing of cases in the process of conducting this research work. I would also like to extend my gratitude to the judges and prosecutors who took part in the interview.

My special appreciation goes to Mr. Sewbesew, Betemariam, Haftom, and Ermias for the unceasing support by providing important information throughout the thesis work.

ACRONYMY

CCI	Council of Constitutional Inquiry
CJP	Criminal Justice Policy
CPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FDRE	Federal Democratic Republic of Ethiopia
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MoJ	Ministry of Justice
PGRFTLA	Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
WWPP	Witnesses and Whistleblowers of Criminal Offenses Proclamation
UNCAC	United Nations Convention against Corruption
UNGA	United Nation General Assembly
UNHRC	United Nations Human Rights Commission
UNODC	United Nations Office on Drugs and Crime
USA	United States of America

Table of Contents

DECLARATION	Error! Bookmark not defined.
ACKNOWLEDGEMENT	i
ACRONYMY	ii
ABSTRACT.....	vi
CHAPTER ONE-INTRODUCTION.....	1
1.1 Background of the study	1
1.2 Statement of the Problem	3
1.3 Research Objective.....	5
1.3.1 General objective	5
1.3.2 Specific objectives	5
1.4 Research Questions	5
1.5 Scope of the Study.....	6
1.6 Significance of the Study	6
1.7 Research Methodology.....	6
1.7.1 Research Approach and Types of Data.....	6
1.7.2 Data Collection Tool.....	6
1.8 Limitation of the study	7
1.9 Ethical consideration	7
1.10 Literature Review	7
1.11 Organization of the Study	9
CHAPTER TWO	10
INTERPLAY BETWEEN THE RIGHT TO CONFRONTATION AND WITNESS ANONYMITY	10
2.1 Introduction	10
2.2 The Concept and General Overview of Witness and Witness Anonymity	10
2.3 The Concept and General Overview of Right to Confrontation	12
2.4 The Right to Confrontation and Witness Anonymity: Historical Perspective	13
2.4.1 The Right to confrontation: The International and national Historical Account	13

2.4.2	Anonymity of Witness: The International and the National Historical Account....	15
2.5	The Debate on the interplay between the right of the Accused to Confrontation and Witness Anonymity.....	17
2.5.1	Arguments in Favor of Witness Anonymity.....	17
2.5.2	Arguments against Witness Anonymity	19
2.6	Balancing witness anonymity and the right to confrontation: the international practice.....	21
2.6.1	The International Criminal Tribunal for the Former Yugoslavia	21
2.6.2	The European Court of Human Rights	23
2.6.3	The Inter -American Court of Human Rights	24
2.6.4	The African Commission on Human and People’s Rights	25
CHAPTER – THREE		26
THE LEGAL FRAMEWORK ON THE RIGHT TO CONFRONTATION AND WITNESS PROTECTION.....		26
3.1	Introduction	26
3.2	The Legal Frame Work on the Right of the Accused to Confrontation.....	26
3.2.1	The Right to confrontation under International Human Rights Law	26
3.2.2	The Right to Confrontation under the National Legal Framework.....	28
3.2.2.1	The FDRE Constitution	28
3.2.2.2	The Criminal Procedure Code	29
3.3	The Legal Framework for Witness Protection	29
3.3.1	The International Legal Framework on Witness Protection	30
3.3.1.1	The United Nations Convention against Transnational Organized Crime	30
3.3.1.2	The United Nations Convention against Corruption	31
3.4	Witness Protection Measures and their application under Different Legal frameworks	31
3.5	The National Legal and Policy Frameworks on Witness Protection	34
3.6	The Right to Confrontation vis-à-vis the Proclamation for Protection of Witnesses and Whistleblowers of Criminal Offenses	36
3.6.1	Scope of Application.....	36
3.6.2	Determining Types of Protection Measures under the Proclamation	36
3.6.3	The Power to Grant Protection	37

CHAPTER-FOUR	40
THE PRACTICAL IMPLEMENTATION OF WITNESS ANONYMITY VIS-A-VIS DEFENDANTS' RIGHT TO CONFRONTATION.....	40
4.1 Introduction.....	40
4.2 The Power to Grant Witness Anonymity: The Tension between the Courts and the Prosecutor.....	40
4.3 The Ruling of the Court on Witness Protection Measures.....	42
4.4 The Court’s Decision in Federal Prosecutor V Getachew Assefa: Absolute Anonymity and the Balancing act of Confrontation Right.....	47
4.5 Witness Anonymity: Why Not Other Measures of Protection?.....	51
CHAPTER FIVE	53
CONCLUSION AND RECOMMENDATIONS	53
5.1 Conclusion.....	53
5.2 Recommendations	54
REFERENCES	57

ABSTRACT

The right to accused to confrontation is one of the fundamental constitutional rights that protect the defendants. Its scope is interpreted narrowly by some, while others have seen it more widely. It is however, generally thought to consist of three key elements: the right to a face-to-face trial, the right to demand that witnesses who are testifying against him appear in person for the duration of their evidence, and the right to cross-examine unfavorable witnesses. While the right of the accused to confrontation has long been recognized, it is also true that witnesses' play a decisive role in the preservation of justice and thus, has to be provided with protection. However, in providing protection for witnesses, it is essential to adopt a balanced approach that safeguards the right of the accused to confrontation.

This study was aimed to assess the legal framework governing witness anonymity and examine the practices of the courts and prosecutors in applying witness anonymity in light of the accused's right to confront their accusers. In doing so, the mixed methodology of both doctrinal and empirical legal research has been employed. The study's key finding is that, in Ethiopia the legal frame works that deal witness protection, lacks to provide a proper delimitation of the application of witness anonymity. The WWPP that provides a number of protection measures to be provided to witnesses where they are prone to a serious danger fails to provide special justification or assessment mechanisms to grant these protection measures. It also creates complexity as to the power of granting protection measures, particularly those involving anonymity. From the practical stand point, benches yield different decisions regarding the application of witness anonymity, resulting in lack of uniformity in its implementation. While some benches require the application for witness anonymity be presented for them the others have ruled that the power to grant protective measure under the proclamation vests on the prosecutor. Additionally, the benches took different stand with regard to the criteria to be fulfilled in the process of granting witness anonymity. The lack of guidelines and common understanding of the application of witness anonymity in the judiciary, along with persistent challenges related to the power to grant such anonymity, and the gaps in the legal framework resulted to an imbalance that undermines the fundamental right of the accused to confrontation.

Keywords: *Right to Confrontation, Witness Anonymity, fair Trial, balancing competing interests*

CHAPTER ONE-INTRODUCTION

1.1 Background of the study

Criminal investigation and prosecution are indeed complex endeavors, particularly in the more serious and intricate forms of crime. Consequently, the criminal justice system has often been subject to debates on numerous controversial issues. Among these issues is the use of anonymous witnesses in criminal proceedings as a means of witness protection. It is undeniable that the role of witnesses in the criminal prosecution process is substantial, and they play a decisive role in upholding justice. However, it is also true that they have faced intimidation, violence, and retaliation, especially in light of the rise of terrorism and organized crime.¹ As a result, both nationally and internationally, the establishment of a witness protection framework has gained significant attention.² Consequently, various countries, including Ethiopia, have implemented different protective measures for witnesses within the context of criminal proceedings.

Witness protection was first established as a sanctioned practice in 1970 as part of a campaign to dismantle Mafia-style criminal organizations in the USA.³ It ensured the safety of witnesses who provided valuable testimony in organized crime cases, as it was challenging to persuade key witnesses to testify without protection.⁴ The Rome Statute, under paragraph 68, emphasizes the importance of protecting witnesses during their participation in the proceedings. It also states that “these measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”⁵ Furthermore, the United Nations General Assembly adopted a resolution addressing witness protection in transnational organized crime and encourages parties to the convention to implement appropriate measures within their capabilities to ensure effective protection from potential intimidation for witnesses who provide testimony.⁶ Other instruments related to witness protection in the international context include the United Nations Convention

¹ Yvon Dandurand, Kristin Farr, *A review of selected witness protection programs*, (Rn. 001, Research and National Coordination Organized Crime Division Law Enforcement and Policy Branch Public Safety Canada 2010.) 4.

² Ibid.

³ United Nations, Office for Drugs and Crime, ‘Good practices for the protection of witnesses in criminal proceedings involving organized crime’ New York 2008, 38, available at <https://www.unodc.org/documents/middleeastandnorthafrica/organisedcrime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf>>>>f> accessed on January 20

⁴ Ibid

⁵ Rome Statute of the International Criminal Court of 1998, Arts. 68 & 69 (2)

⁶ United Nations Convention against Transnational Organized Crime, Resolution 55/25 of November 2000, Art24(1) and (2)(a)

against Corruption,⁷ and the model law on witness protection, drafted by the United Nations Office on Drugs and Crime, which aims to safeguard witnesses and their relatives whose lives and safety are jeopardized due to their involvement in the justice system. At the national level, the proclamation for the prevention and suppression of terrorism crimes No. 1176/2020 under Article 16 provides the need for witness protection. A more comprehensive proclamation dedicated to the protection of witnesses is the “Protection of Witnesses and Whistleblowers of Criminal Offenses Proclamation No. 699/2010 (“WWPP” *hereinafter*.” This proclamation defines who qualifies as a "witness" and outlines the safety measures that must be implemented for them.

One aspect of witness protection is, witness anonymity, which conceals part or all of a witness's identity information from the prosecution and the public.⁸ However, this has been contentious and problematic in light of the accused's right to confront prosecutors and witnesses. The right to confrontation, as most scholars agree, is a fundamental component of the principle of a fair trial. This right is enshrined under Article 14 (3) (e) of the International Convention on Civil and Political Rights (ICCPR) and other international, regional, and national instruments.⁹ Elements of the right to confrontation are also recognized in Ethiopia by the FDRE Constitution¹⁰, and the Criminal Procedure Code of 1961.¹¹

The right to confrontation includes "the accused's right to know the real identity of his or her accusers, the right to be present during their testimony, and the right to examine the witnesses' testimony under cross-examination."¹² The right of the accused to know and confront prosecution witnesses, on the one hand, and the legal rules ensuring the protection of witnesses in the context of criminal proceedings, on the other hand, remain competing interests in the criminal justice system. The tension between these two rights has been a major cause of

⁷ United Nations Convention against Corruption General Assembly resolution 58/4 of 31 October 2003 Art. 32(1)(2)

⁸ United Nations, Office for Drugs and Crime (n3)

⁹ Ruth Costigan, Philip A Thomas, ‘anonymous witness’ (2000) vol.51 North Ireland legal quarterly, 328- European Convention on Human Rights 1950, Art 6(3)(d), American Convention on human rights 1969, Art 8(2)(f), African Commission on Human & Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003, DOC/OS(XXX)247 N 6(f), The Federal Democratic Republic of Ethiopia Constitution 1994, Art 20 (4)

¹⁰ Id, FDRE Constitution

¹¹ Criminal Procedure of Ethiopia, Proclamation No 185 of 1961, Articles 127 (1), 124(1), 125, and 137.

¹² David Lusty ‘Anonymous Accuser: An Historical and Comparative Analysis of Secret Witness in Criminal Trials’ (202) vol.24 Sydney Law Review. 361

contention among legal scholars concerning the laws intended to provide protection for witnesses as well as the application of anonymity in Ethiopian Federal Courts. Thus, it is crucial to conduct research to assess the laws and practices concerning the application of anonymity to witnesses on the one hand and the right of the accused to confrontation on the other.

1.2 Statement of the Problem

The right of the accused to a fair trial, in accordance with the human rights standards established in international and national instruments, generally includes a public hearing where the accused has the opportunity “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”¹³

Under the FDRE Constitution, accused persons have the right to full access to any evidence presented against them.¹⁴ This right significantly impacts the criminal litigation process, as it allows them to challenge the authenticity and reliability of the testimony against them, which is a key element in ensuring the fairness of the trial. The Constitution, however, does not explicitly address the interests of witnesses in general; nonetheless, witnesses, like any other individuals, have the right to protection against any harm that might infringe upon their fundamental rights, such as the right to life and security, as stated in FDRE Constitution Articles 14-16. Thus, one could argue that the interest in witness protection is also a component of constitutional principles. It is undeniable that the role of a witness in preserving justice is immense. However, this role has long been compromised due to intimidation against them. By intimidating witnesses and/or their families, a person under criminal investigation or prosecution seeks to disrupt the administration of justice and absolve themselves of responsibility, thereby endangering the criminal case. Therefore, the interest in the safety of witnesses is crucial; ensuring they are not intimidated so that they do not fear revealing the truth in court. The issue of witness protection is not solely about safeguarding witnesses or their relatives; it also pertains to the preservation of

¹³ International convention on civil and political rights (ICCPR) 1976, Art. 14(3) (e)

¹⁴ FDRE Constitution (n9)

the justice system and the broader public interest.¹⁵ Consequently, the concept of witness protection is now acknowledged at both international and national levels.¹⁶

However, the aspects of witness protection concerning anonymity have sparked controversy, and Ethiopia is no exception to the debates surrounding witness anonymity. The conflict between these two interests has arisen in court cases in Ethiopia and has also been referred to the Council of Constitutional Inquiry (CCI).¹⁷ This remains a challenge because the CCI's interpretation of Article 20(4) of the Constitution appears to impose a limitation on the accused's right to confrontation. The CCI has indicated that this article recognizes the accused's right to cross-examine witnesses but does not ensure that the accused will have access to witness information, such as the names and addresses of those testifying against them.¹⁸ The accused's right to confrontation has been restricted by this interpretation, which seems to serve as a pretext for employing anonymous witnesses. This may also pave the way for the implementation of witness anonymity at the expense of the accused's right to confrontation. Furthermore, under WWPP the executive branch is granted the authority to enforce protective measures, yet the judiciary's power to determine witness anonymity is not explicitly outlined. Consequently, the accused's right to confrontation could be undermined, leading to a violation of the principle of equality of arms. Additionally, the lack of exceptionally strict restrictions on the use of anonymity will permit its application as a general right accessible to all witnesses, while still posing a challenge to the accused's right to confrontation. Thus, the study aims to assess how effectively the laws and practices that ensure anonymity align with the accused's right to confrontation.

¹⁵ Wakgari Dulume, 'Ethiopian Witness Protection System: Comparative Analysis with UNHCHR and Good Practices of Witness Protection Report' (2017) vol 6 Oromia Law Journal 138

¹⁶ United Nations Convention against Transnational Organized Crime (n6) Art 24, United Nations Convention against Corruption (n7), Art 32(2), the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005 article 38(2), Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020 article 12(2)

¹⁷ Mahdi, Alyi and others, file no 2356/2009, Council of Constitutional Inquiry, (2009 EC), cited in Tadesse Melaku, 'The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview', Mizan law review, Vol. 12, No.2 (2018), p.303

¹⁸ Ibid

1.3 Research Objective

1.3.1 General objective

The general objective of the paper is to assess how well Ethiopia's Federal High Courts' practices and the law governing witness anonymity comply with the accused's right to confrontation.

1.3.2 Specific objectives

Under the umbrella of the general objective, the thesis aims at the following specific objectives:

- To analyze international and national laws on the protection of witnesses and the right of the accused to confrontation.
- To identify and examine the main points of contention between the witness's anonymity and the accused's right to confrontation.
- To examine the law on witness protection and the use of witness anonymity under the Federal High Court.
- To assess the gap, if any, between the practice of application of witness anonymity and the law.

1.4 Research Questions

This paper endeavors to answer if the rule governing witnesses anonymity and the practice of the Federal High Court in Ethiopia compatible with the right of the accused to confrontation. In the context of this central theme, the following supplementary question will be addressed:

- What is the position of the witness and Whistleblowers' proclamation concerning the anonymity of witnesses?
- What justifications do the witness protection laws provide for using an anonymous witness?
- What difficulties do the accused encounter when an anonymous witness is called to testify in a court of law?
- What kinds of counter-balancing factors are made available to the defendant to ascertain consistency with the right of the accused to confrontation?
- How do the courts strike a practical balance between the witness's right to protection and the accused right to confrontation?

1.5 Scope of the Study

The study's scope is confined to an examination of the legal and practical safeguards for witnesses on one hand and the legal rights of the accused on the other, within the context of criminal proceedings in Ethiopian Federal Courts. It emphasizes witness anonymity and the accused's right to confrontation. The case law study is limited to terrorism-related and corruption crimes.

1.6 Significance of the Study

The study will examine the legal and practical aspects and challenges of the defendant's right to confrontation in the context of witness anonymity to determine whether there is a fair balance between the witness's interest in obtaining protection and the defendant's right to confront. It highlights the issues that arise regarding witness protection and the accused's right to confront in criminal proceedings. Consequently, it will significantly impact how effectively the Federal Courts, the Federal Attorney General (Currently Ministry of Justice), and other involved parties perform in the future in upholding trial fairness and ensuring the protection of defendants' right to confrontation. It also comments on the national legal framework governing witness protection in relation to the accused's right to confront. Additionally, it serves as a foundation for more in-depth study in this area.

1.7 Research Methodology

1.7.1 Research Approach and Types of Data

The study, to examine the legal and practical problems surrounding the right of the accused to confront and anonymity as a safeguard for witnesses, adopted a qualitative research technique. It used both primary and secondary sources relevant to the issue under study. International and regional conventions, national laws, court cases in which the issue of anonymous witnesses arose and decided, data generated from an interview, and other legal documents on the research problem is used as primary sources. There is also considerable reliance on secondary data such as books, scholarly research outputs.

1.7.2 Data Collection Tool

Data was acquired through interviews, court decisions, legal regulations, and literature. The interview was administered with a semi-structured interview, i.e. the researcher come up with a list of predetermined questions and had the freedom to ask follow-up questions to get a deeper

and more detailed understanding or explanation. The researcher has employed open-ended questions aimed at getting in-depth information regarding the issue under study. The participants were selected from directly concerned individuals and institutions as a source of data, taking into account the purpose of the study. Accordingly, defense lawyers, prosecutors, and criminal bench judges involved in court cases in which the issue of an anonymous witness has arisen was selected. Data from these sources enabled to meet the purpose of the study as they were able to give important data about the research problem. Thus, a purposive sampling technique is used in the study to interview the aforementioned informants.

1.8 Limitation of the study

This study encountered limitations, such as restricted access to court case files due to difficulties in locating some files in the database. Furthermore, efforts to conduct interviews with judges were significantly hindered by their demanding schedules. However, the researcher was able to analyze the cases, which facilitated an understanding of the judges' perspectives as reflected in their rulings.

1.9 Ethical consideration

The research has conducted the research by following the requirements stated in the Thesis Guidelines of the School of Law of Addis Ababa University. The literature, all the ideas, and scholarly publications taken from other scholars are acknowledged, and the rules on intellectual property, fabrication of data and plagiarism shall be duly adhered to. Based on the principles of informed consent, confidentiality, and respect, the researcher has considered the concerns of the people who took part in the study.

1.10 Literature Review

There are few articles addressing the concept of witness anonymity and the right to confront the accused in the Ethiopian context. Tadesse Melaku and Michael Tilahun authored “*The Right to Cross-Examination and Witness Protection in Ethiopia: A Comparative Perspective*” and “*The Two Competing Interests: Equality of Arms Versus Witness Anonymity; The Case of Ethiopia,*” respectively. Both articles evaluate the accused's right to cross-examine and witness protection within Ethiopia. In doing so, they focus on assessing the validity of the constitutional ruling by the Council of Constitutional Inquiry that favors withholding the identity of a prosecution

witness. Tadesse argues that this decision is likely to undermine fair trials and adversely affect the fundamental rights of those charged in Ethiopia, based on an evaluation of the CCI's decision and the experiences of other countries.¹⁹ Michael has also analyzed the CCI's decision alongside the two proclamations—Anti-Terrorism Proclamation No. 652/2009 and Witness and Whistleblower Proclamation No. 699/2010—in light of the constitution, concluding that these proclamations and the CCI's decision restrict defendants' rights to full access to evidence.²⁰ However, the articles are limited to evaluating the CCI's decision and the aforementioned proclamations concerning the constitution, and their study is confined to a single case presented before the CCI. Furthermore, the practical aspects of the court were beyond the scope of their assessment.

Another piece of literature related to this concept is a thesis titled “The Constitutionality of Non-Disclosure of a Witness’s Identity for the Criminal Defendant in Ethiopia.”²¹ This article assesses the legitimacy of the proclamations and practices that permit the non-disclosure of witnesses’ identities in light of the values of the FDRE constitution. After this assessment, it concludes that the proclamations and practices allowing for the non-disclosure of witnesses are unconstitutional. Consequently, this article is limited to investigating and analyzing the non-disclosure of witnesses’ identities concerning constitutionality. However, neither the legal framework of witness protection nor the interaction between the accused's rights to confrontation is addressed in this thesis. Another relevant article is authored by Alemu Meheretu & Awol Alemayehu, titled ‘*The Ethiopian Law on the Right to Confrontation.*’²² This article examines Ethiopia’s legal protection of the right to confrontation and its challenges, considering the FDRE constitution and pertinent international standards pledged by Ethiopia. Specifically, it focuses on how Ethiopian law addresses the three elements of the right to confrontation: the accused's right to be tried in person; the accused's right to require witnesses testifying against him to appear in person; and the accused's right to cross-examine adverse witnesses.

¹⁹Tadesse Melaku, ‘The Right to Cross-Examination and Witness Protection in Ethiopia: A Comparative Overview’, (2018), Mizan Law Review, Vol. 12, No. 2 p. 303

²⁰Michael Tilahun , ‘The Two Competing Interests: Equality of Arms vis-à-vis Anonymity of Witness; The Case of Ethiopia’ (Abyssinia law, 15,2017)

²¹Desta Mesfin, ‘The Constitutionality of Non-disclosure of Witness’s Identity for the Criminal Defendant in Ethiopia’ LLM Thesis, Addis Ababa University 2020.

²² Alemu Meheretu & Awol Alemayehu, 'The Ethiopian Law on the Right to Confrontation' (2019) 9 Bahir Dar U JL 157

The article concludes that, while not expressly mandated by the constitution, some laws restrict the right to protect other interests, and these laws exhibit several flaws, particularly regarding the rights of the accused on one hand and those of victims and witnesses on the other.²³ However, this paper primarily focuses on the right to confrontation; it does not provide a thorough analysis of the legal framework for witness protection or consider its practical implications. As a result, the paper will address the gaps that remain uncovered by using those literary masterpieces as a starting point.

1.11 Organization of the Study

The thesis is organized into five chapters. The first chapter introduces the thesis with a background note, a statement of the problem, research objectives and questions, the scope and limitations of the research, and the research methodology. The second chapter deals with the literature-based notion of the interplay between the right to confrontation and witness anonymity. Chapter three presents the international and national legal framework on the right of the accused and the anonymity of witnesses and analysis the national witness protection legal framework. Chapter four addresses the practical implementation of witness anonymity. The last chapter is devoted to the summary of the thesis and the recommendations.

²³ Ibid

CHAPTER TWO
INTERPLAY BETWEEN THE RIGHT TO CONFRONTATION AND WITNESS
ANONYMITY

2.1 Introduction

This chapter will present the background information about the essence of witness anonymity and right to confrontation. It also serves as an introduction to historical observations regarding the accused's right to confrontation and the use of anonymous witnesses at both national and international levels. The fundamental justifications for the right to confront and the necessity of protecting witnesses through anonymity will be examined, along with the interaction between these two interests. Additionally, it will discuss the jurisprudence of selected international and regional courts concerning the use of anonymous witnesses. The primary objective of this chapter is to illustrate the relationship between these two interests, as well as the arguments surrounding witness anonymity and the accused's right to confrontation.

2.2 The Concept and General Overview of Witness and Witness Anonymity

The definition for the term ‘witness’ is not provided under international law. However, it can generally be defined as ‘someone who testifies or provides evidence on facts that are pertinent to a judicial proceeding’. The international Criminal Court (ICC) for instance, provides types of witness who can testify before it and describes each witness. These witnesses include; fact witnesses; classified as having knowledge and testify about what happened, insider witnesses; known as having a direct connection with the accused, and expert witnesses; who testify about matters within the field of their expertise.²⁴ witnesses help establish facts about the context in which a conflict occurred, and these witnesses can be called, or asked to give testimony, by the office of the prosecutor, the defense, the legal representative of victims, or the judges themselves.²⁵ At national level, the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation puts the definition of ‘witness’ as ‘a person who has acted or agrees to act as a witness in the investigation or trial of an offence’.²⁶ Nevertheless this definition is unclear because it doesn’t clarify what the term ‘witness’ implies by itself.

²⁴ International Criminal Court, “Witnesses” <https://www.icc-cpi.int/about/witnesses> (last accesses in August, 2024)

²⁵ Ibid

²⁶ Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010, Art2(1)

The witnesses' role in maintaining justice and accountability within the criminal justice system is indispensable. On the other hand, it is also clear they may face intimidation and threats, especially in serious offenses such as terrorism and transnational organized crime.²⁷ Therefore, ensuring that witnesses receive support and protection from intimidation and harm those criminals may inflict upon them or their families to deter their cooperation have become essential.²⁸

There has been an increasing emphasis on the role of witnesses in criminal proceedings at both regional and national levels in the past 10 to 15 years.²⁹ This increased attention is largely attributed to two main factors: the marked increase in incidents of terrorism and organized crimes, and the rising recognition of victims' and witnesses' rights and their status within the justice system.³⁰ Protection measures for witnesses include provisions as straightforward as providing a police escort to the courtroom, offering provisional shelter in a safe home, or use of contemporary communication technologies (like videoconferencing) for testifying, as well as anonymous testimony.³¹ Witness Anonymity, in its most severe cases, refers to testimony given in a criminal trial by witnesses who testify without being seen, heard, or recognized by the accused, their legal representatives, or anyone else in the courtroom.³² According to Lusty, witness anonymity is 'permitting a witness to testify without disclosing his or her true identity to the opposing side before or during trial.'³³ It may involve additional measures such as disguises and testifying from behind a screen.³⁴ He further states that witness anonymity differs from merely concealing a witness's identity from the public or allowing the witness to testify under a pseudonym when their true identity is already known to the opposing side.³⁵

Although not all of these protective measures would breach the accused person's rights to confrontation, the utilization of witness anonymity does create reservations about how the accused person will be able to confront specific witnesses. Notwithstanding, this measure is used

²⁷Felföldi Enikő 'The Rising Importance on The Protection of Witnesses in The European Union' vol.77 International Review of Penal Law 314

²⁸ United Nations, Office for Drugs and Crime (n3)

²⁹ Felföldi Enikő (n27)

³⁰ Ibid

³¹ United Nations, Office for Drugs and Crime (n3)

³² Andra Le Roux-Kemp 'Witness Anonymity and The South African Criminal Justice System' vol. 23 South African Journal of Criminal Justice 353

³³ David Lusty (n12) 362

³⁴ Ibid

³⁵ Ibid

in order to protect witnesses who may suffer harassment, intimidation or threats from individuals or groups related to the most serious and dangerous cases. In addition, it empowers people to testify without fear of intimidation, which eventually results in more comprehensive evidence and ensuring that wrongdoers do not go unpunished. However, the balancing these two competing interest of protecting witnesses on one hand, and maintain the rights of the accused in cases involving witness anonymity, on the other hand remains a contentious issue, raising concerns about fairness of the trial.

2.3 The Concept and General Overview of Right to Confrontation

The right to confrontation is the fundamental element in criminal trials allowing a defendant to confront and cross-examine witnesses who are testifying against him/her. It is rooted in the notion of trial fairness and is designed to serve the purpose of ensuring that the accused has an opportunity to present strong defence for themselves. The nature and scope of the right to confrontation, however, has been subject to debate, with some treating it narrowly while others conceiving it broadly.³⁶ Yet, it appears to be widely acknowledged as part of the right to a fair trial and not a standalone right but rather as a bundle of related but separate rights.³⁷ The right to confrontation is generally believed to have three components, namely; the accused's right to be tried in person, the accused's right to require witnesses testifying against him to appear in person while giving their testimony, and the accused's right to cross-examine adverse witnesses.³⁸ The core tenet of the right to confrontation is that the testimony of prosecution witnesses cannot be used against an accused person unless it is given under oath or affirmation, in the accused person's presence, and subject to the accused person's cross-examination by them. Furthermore, it requires prosecution witnesses to give their testimony during the trial or, if required, at a pre-trial hearing, where the accused has the right to confront them, and the integrity of their testimony is scrutinized through cross-examination. This guarantees the accused person's opportunity to defend themselves by facing the prosecution witnesses and evaluate the veracity of their testimony. Furthermore, it allows the judge to observe the witnesses' demeanor and body language, which helps to assess how credible they are. In this way, it safeguards the accused

³⁶ Alemu Meheretu & Awol Alemayehu (n22)

³⁷ Ibid, citing Ian Dennis, The Right to Confront Witnesses: Meanings, Myth and Human Rights, Criminal Law Review, Issue 4, (2010) p.270

³⁸ Ibid

from the danger of conviction based on unexamined evidence.³⁹ Generally, it can be stated that the right to confrontation upholds two fundamental values: procedural values that ensure the defence's participation in the criminal process, and substantive values that guarantee the reliability of outcomes.⁴⁰ Moreover, in order to guarantee equality between the parties, the accused's right to confrontation in criminal proceedings is recognized as a crucial component of the right to fair trial.⁴¹ Consequently, this right has been incorporated into number of regional and international human rights instruments, as well as the statutes of international criminal tribunals.⁴²

2.4 The Right to Confrontation and Witness Anonymity: Historical Perspective

2.4.1 The Right to confrontation: The International and national Historical Account

The concept of confronting an accuser has been recognized for a very long time. According to a historical study, the practice of presenting accusing witnesses in front of the accused has been acknowledged for at least 1,500 years.⁴³ However, the concept of confrontation and the manner in which this right was exercised were not uniform throughout the years.

Scholars agree that the practice of confronting one's accuser, a fundamental right essential to a fair trial, has ancient roots in Roman law.⁴⁴ The early illustration of this right can be inferred from the biblical quote in the book of Acts, where Paul the Apostle stated, "To whom I answered, it is not the manner of the Romans to deliver any man to die, before that he who is accused has the accuser face to face and has been given a chance to defend himself against the charges."⁴⁵ The right of a defendant to be present at the trial and the right to directly confront an accuser in court, which are the other two aspects of the modern right of confrontation, appear to

³⁹ Alemu Meheretu & Awol Alemayehu, 'The Ethiopian Law on the Right to Confrontation' citing, Ian Dennis, *The Right to Confront Witnesses: Meanings, Myth and Human Rights*, *Criminal Law Review*, Issue 4, (2010) p.266

⁴⁰ Alemu Meheretu & Awol Alemayehu, 'The Ethiopian Law on the Right to Confrontation' citing Massaro, 'The Dignity Value of Face-to face Confrontations' *Fla.L.Rev.*, Vol.40, (1989) p.863;

⁴¹ *Ibid*

⁴² International Convention on Civil and Political Rights (n13), African Commission on Human & Peoples' Rights (n9) 6(f),

⁴³ Frank R. Herrmann and Brownlow M. Speer, 'Facing the Accuser: Ancient and Medieval Precursors of Confrontation' [1994] *Virginia Journal of International Law* p.481

⁴⁴ *Ibid*

⁴⁵ Holy bible, Acts 25:16

have been significant parts of the Roman criminal process.⁴⁶ By the end of the 12th century, however, a new method of witness examination was introduced. This method was conducted in private and solely by the judge, practiced in both secular and ecclesiastical courts throughout Europe.⁴⁷ Only the judge and a notary were present during these witness examinations. The accused had the option to submit questions for the judge to pose to the witnesses, but they would not be made aware of the responses until after all of the witnesses had been questioned and the court had heard a transcript of their testimony.⁴⁸ Although it did not eliminate it, this kind of secret examination technique severely curtailed the accused's right to confrontation because it allowed the accused to confirm the identity of the witnesses.⁴⁹

The notion of confronting accusers developed further in the legal system of medieval England, which is rooted in common law principles that emphasized the significance of allowing the defendants to question the evidence presented against them through cross-examination.⁵⁰ Moreover, the century-old practice of jury trials strengthened this right by allowing the accused to confront their accusers' face-to-face and requiring jurors to hear witnesses firsthand to reach well-informed verdicts.⁵¹ The Magna Carta of 1215 laid down essential principles regarding for individual rights and the fair trial process. Later, the English Bill of Rights (1689) emphasized and affirmed the need for direct cross-examination of witnesses in legal proceedings.⁵² This commitment to confrontation has also been a pillar of the American legal system; it is deeply enshrined in the U.S. Constitution's Sixth Amendment, which guarantees that those accused of crimes will have the chance to cross-examine and question witnesses against them during their trial.⁵³

At the national level, the criminal investigation and prosecution where the offender is unknown is referred to as *Afersata* and *lebashie*.⁵⁴ *Afersata* is a significant communal inquiry into crime

⁴⁶ Frank R. Herrmann and Brownlow M. Speer (n43)

⁴⁷ Frank R. Herrmann and Brownlow M. Speer (n43)

⁴⁸ David Lusty (n12) 361

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ *Ibid*

⁵⁴ Stanley Z. Fisher 'Traditional Procedure in Ethiopia' (1971) vol.19 *The American Journal of Comparative Law* 716

initiated by local officials in response to public disturbances or at the request of the victim.⁵⁵ Everyone who lives in the neighborhood where the crime occurred is placed under the lock-down until the perpetrator is identified through anonymous denunciations.⁵⁶ Lebashie, on the other hand, uses a drugged boy to identify thieves; no further proof is needed for conviction.⁵⁷ Conversely, when the offender is known, the case proceeds directly to litigation. Trials were informally held in public spaces under the shade of an old tree, involving open debate among the parties or their representatives. While conciliation efforts were made, the process primarily resembled arbitration.⁵⁸ Evidence was exclusively based on testimonies categorized as eyewitnesses, witnesses of relevant facts, and hearsay witnesses. The accused could object to witness testimonies.⁵⁹

Generally, traditional criminal proceedings in Ethiopia are characterized by informality, open debate, reliance on testimonial evidence, supernatural proof methods, and consensus judgments. Despite some elements of open debate and the existence of grounds for objection to witness testimonies, the presence of supernatural proof and secret witnesses has restricted the defendants' full rights to confront their accusers in traditional Ethiopia. The right to confrontation has evolved from antiquated legal practices into a cornerstone of contemporary judicial system. Its beginnings are a testament to a long-standing commitment to justice, transparency, and the protection of individual rights within the bounds of the law. In many legal systems across the globe today, the right to confrontation is recognized as an essential component of due process. It is considered essential for ensuring fair trials and safeguarding the rights of defendants.

2.4.2 Anonymity of Witness: The International and the National Historical Account

The exercise of the right to face-to-face confrontation has been relevant in the history of the international arena, as discussed above. However, this practice faced restrictions toward the end of the 12th century, when the examination of witnesses in secret by the judge alone was

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ ibid

⁵⁹ Ibid

introduced.⁶⁰ Subsequently, the rule of witness anonymity was established by Pope Innocent IV in 1254, justified, among other reasons, by the risks that witnesses could face.⁶¹ This measure was intended as an exception, applicable only in cases where there was a demonstrated risk to witnesses, and it was initially meant to be implemented on a case-by-case basis.⁶² This indicates that witness intimidation is by no means a recent phenomenon. Although the use of witness anonymity in traditional Ethiopia is not justified by the need to protect witnesses from potential harm, it is evident that anonymous testimony was permitted in traditional Ethiopia, as inferred from institutions such as the *afersata*, where anonymous witnesses were utilized. Therefore, it can be said that the practice of anonymous testimony has been accepted in Ethiopia.

The issue of witness intimidation started to garner attention in the last decades of the 20th century with the rise of organized crime, crimes against humanity, and terrorism, along with the subsequent expansion of undercover policing techniques.⁶³ Witness protection gained prominence after being adopted as a legal procedure in America during the 1970s.⁶⁴ Witness protection has also been a significant concern of the international criminal system since the establishment of international criminal tribunals; the ICTY and ICTR incorporated explicit provisions in their statutes for the protection of victims and witnesses, which include non-disclosure of the identity of any victim or witness who may be in danger or at risk until that person is placed under the tribunal's protection.⁶⁵ As a result of the growing concern over the safety of witnesses, witness protection is currently adopted in several states.⁶⁶ In the fight against organized crime and terrorism, there has been an increased emphasis on witness protection. As a result, several countries have developed witness protection programs, and Ethiopia is not an exception.⁶⁷

⁶⁰ Frank R. Herrmann and Brownlow M. Speer (n43)

⁶¹ Ibid

⁶² Ibid

⁶³ United Nations, office for drugs and crime (n3)

⁶⁴ Ibid

⁶⁵ General Assembly Resolution No 827 (1993) Security Council ICTY Art 21(2), and General Assembly Resolution 955 (1994) Security Council ICTR Art 22

⁶⁶ United Nations, Office for Drugs and Crime (n3)

⁶⁷ Ibid, Australia, Witness Protection Act (1994). Act No. 124. 18 October 1994, Canada, Witness Protection Programme Act. 1996, Kenya, Witness Protection Bill of (2006). 15 May 2006, South Africa, Witness Protection Act (1998). Act No. 112. 19 November 1998, Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation (n26)

2.5 The Debate on the interplay between the right of the Accused to Confrontation and Witness Anonymity

2.5.1 Arguments in Favor of Witness Anonymity

One of the most challenging tasks in the criminal justice system is getting witness testimony in cases involving serious crimes. People are hesitant to testify in court due to fear of intimidation and retaliation. Although witness intimidation is not a new phenomenon, it has intensified, and the criminal justice system has grown more complex due to the rise of organized crime and terrorism. Consequently, national and international witness protection programs have been formulated with the aim of ensuring that witnesses can testify in court or cooperate with investigators without fear of intimidation or reprisal.⁶⁸

Several measures under both international and domestic law are designed to protect witnesses in criminal litigation. However, among the protections afforded to witnesses, those concerning anonymity have been particularly contentious and problematic from the standpoint of the accused's right to confrontation. These issues have sparked debates over witness anonymity and the well-established right of the accused to confront their accusers. These arguments highlight that the fairness of the trial goes beyond the right of the defendant. They also emphasize that, from the standpoint of the criminal law objectives, witness protection can be considered as a crucial component in preserving fundamental human rights, and stress the state's obligation to uphold these rights,⁶⁹ all of which will be discussed below.

A. One of the key justifications in favor of witness protection is that the right to a fair trial protects the interests of the accused as well as those of other parties, such as witnesses, victims, and the general public. When discussing trial fairness is discussed, victims and witnesses are just as much as the defendant in terms of being treated with dignity and respect.⁷⁰ Although international human rights law mandates that the accused be granted a fair trial, certain rights may impact others involved in or affected by the trial process, such as

⁶⁸ United Nations, Office For Drugs And Crime (n3)

⁶⁹ Maille Brady Bates, 'A Balancing Act: The Rights of the Accused and Witness Protection Measures' (2014) 17 Trinity CL Rev 143, Andrew Trotter, 'Witness Intimidation in International Trials: Balancing the Need for Protection against the Rights of the Accused' (2012) 44 Geo Wash Int'l L Rev 521, Snezana Brkic, 'Witness Protection as a Subjective Right and its Elements' (2010) 2010 Annals Constantin Brancusi U Targu Jiu Juridical Sci Series 117

⁷⁰ Maille Brady Bates (n69) 143

victims, witnesses, and the general public.⁷¹ Unquestionably, the right of the accused to examine the witness and to know the witness's identity, which is integral to the concept of a fair trial, is articulated in several key regional and international human rights documents. Yet, scholars on this side of the debate agree that these rights must be balanced against all of the circumstances of the proceedings.⁷² Fair treatment encompasses not only the defendants but also requires that victims and witnesses be treated equally.⁷³

- B. Another argument put out by proponents of this viewpoint is that the objective of the criminal law necessitates the justification of witness protection. The criminal justice system aims to allow everyone to live their daily lives without fear of harm to themselves, their families, or their property. However, expose themselves to the possible threats by testifying and cooperating with the court; therefore, they must also be treated fairly by ensuring their security.⁷⁴ In addition, it is asserted that in order to avoid re-traumatization and emotional distress, vulnerable witnesses—such as victims—must be safeguarded.⁷⁵ Giving witness's security is one way to maintain the fairness of a trial because the problem of witness intimidation threatens not just their safety but also the interests of justice.⁷⁶ Scholars like Mike Redmayne assert that the value of confrontation cannot be denied; however, the failure to afford it to the accused should never impede a conviction.⁷⁷ Therefore, from the perspective of these scholars, it is reasonable to conclude that the accused do not hold the exclusive right to a fair trial.
- C. Another point in support of this stance is that the protection of witnesses should be viewed as being in harmony with the principle of upholding human rights. In criminal proceedings, the concept of human rights and freedoms is revealed through the defendant's position. It is only recently that this concept has been applied to examine witnesses, who also deserve adequate security in this context.⁷⁸ Witnesses, by virtue of their cooperation with the justice system, may face intimidation that endangers their fundamental human rights as proclaimed in major

⁷¹ Daniel Soto Betancourt, 'Anonymity as protective measure for victims and witnesses v. the rights of the accused'

⁷² Gray Kevin, Dominic Mcgoldrick, Peter Rowe, and Eric Donnelly, 'the Evidence Before the ICC Permanent International Criminal Court Legal and Policy Issues Hart Publishing vol.5 287

⁷³ Maille Brady Bates (n69)

⁷⁴ Ibid

⁷⁵ Gray Kevin, Dominic Mcgoldrick, Peter Rowe, and Eric Donnelly (n72) 308

⁷⁶ Andrew Trotter (n69)

⁷⁷ Mike Redmayne, "Confronting Confrontation" LSE Law, Society and Economy Working Papers 10/2010 London School of Economics and Political Science Law Department

⁷⁸ Snezana Brkic (n69)

international, regional, and constitutional documents.⁷⁹ The state must defend fundamental human rights against threats and infringements; thus, the right to witness protection is grounded in this requirement.⁸⁰ Because they are willing to cooperate with the justice system, witnesses should not have to risk losing their fundamental rights. Therefore, protecting witnesses, including ensuring their anonymity, is justified and recognized as a means of upholding fundamental human rights, including the rights to personal and property safety, inviolability of mental integrity, privacy, and dignity.⁸¹

2.5.2 Arguments against Witness Anonymity

There are a number of reasons why witness anonymity is opposed. The principal concerns are that providing anonymity to witnesses' compromise the accused's right to confrontation, especially the right to face the witness, and that it goes against the equality of arms. Those opposing the provision of anonymity to witnesses in criminal proceedings criticize the practice for multiple reasons. Even the idea of "finding a reasonable balance between these two interests" is challenged by scholars who oppose witness anonymity. Lusty argues that the phrase "finding a reasonable balance" is flawed, as it is not only superficially appealing but also unfairly biased against the accused from the outset.⁸² The use of anonymous witnesses in criminal proceedings violate the accused's right to confront adverse witnesses, but it also infringes the presumption of innocence and makes it difficult for the accused to adequately prepare by cutting into their time to investigate the witness's background, motives, or potential biases when the witness's identity is kept secret from them beforehand. Lastly, there is the principle of equality of arms. Prioritizing the use of anonymous witnesses, at the expense of the accused's right to confrontation, would negatively impact the fairness of the trial. The right to confrontation is widely regarded as a mechanism that allows the accused to demand that adverse witnesses testify in their presence, enabling them to exercise their right to cross-examine the witness.⁸³ This right is one of the most significant legal means for ensuring the factual accuracy of a judgment in criminal trials and is a

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Ibid

⁸² David Lusty (n12) 361

⁸³ Richard Friedman, ed. Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser 'The Confrontation Right' The Oxford Handbook of Criminal Process 2019 p 1, see also David Lusty (n12) 361, Ian Denis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" (2010) Criminal Law Review 255.

fundamental human right.⁸⁴ It is also considered a powerful tool to challenge the accuracy and credibility of the adverse witness. As previously indicated, this right encompasses the ability to confront and cross-examine adverse witnesses. Confronting the adverse witness not only enables the accused to discover the true identity of the witness but also allows the judges and the defendant to observe the witness's reactions, thereby assessing their reliability and credibility as a minor means of evaluating the testimony.⁸⁵ Knowing the witness's identity aids the defendant in determining whether there is any reason for the witness to hold a biased opinion of him or her, including the origin of the witness's information and personal details or circumstances that may jeopardize a witness's credibility. Thus, knowing the identity of the witness serves as a powerful tool when it comes to refuting the veracity and correctness of their testimony and running a successful cross-examination.⁸⁶ It also gives the defendant sufficient time to prepare the defence, conduct background check, and make the necessary arrangements for effective cross-examination.⁸⁷

According to the principle of equality of arms, the parties in a case should be permitted to present their case in a manner that does not disadvantage them compared to their opponent. In criminal court procedures, the prosecutor wields greater authority and resources than the defendant. As a result, permitting witness anonymity would be detrimental to the defendant's interests. It is easy to foresee the possible outcomes for an unprepared defence given that the public prosecutor has greater power and resources than the defendant in the litigation process.⁸⁸ Thus, the proponents of this position contend that witness anonymity undercuts the principle of equality of arms and compromise the right to confrontation by giving the defense unfair advantage over the prosecution. Access to the evidence required for a strong defense in order to avoid any injustice to the defendant, who might feel threatened by the prosecutor's power and the evidence gathered against them.⁸⁹

⁸⁴ M. Biral, 'The Right to Examine or Have Examined Witnesses as a Minimum Right for a Fair Trial' (2014) 22 Eur J Crime Crim L & Crim Just 331

⁸⁵ Robert B. McKay, 'The Right of Confrontation' (1959) 2 Washington University Law Review 122

⁸⁶ Jason M. Swergold, 'Taking Blind Shots at a Hidden Target: Witness Anonymity in the United Kingdom' (2009) 32 B C Int'l & Comp L Rev 471

⁸⁷ Ibid

⁸⁸ Shajeda Akather, Rohaida Nordin 'Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments' <[\(PDF\) Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments \(researchgate.net\)](#)> last accessed on August, 20,2024

⁸⁹ Michael Tilahun (n20)

2.6 Balancing witness anonymity and the right to confrontation: The International Practice

2.6.1 The International Criminal Tribunal for the Former Yugoslavia

One fundamental tenet of criminal justice system is the right to confront one's accuser; however, witnesses run a serious risk of facing dire consequences if they reveal their identities to the defendant, their associates, or the public, especially in cases involving organized crime and terrorism. Therefore, while this principle upholds fairness in legal proceedings, it may inadvertently create barriers that deter individuals from providing crucial testimony, thereby undermining the justice it aims to protect. As a result, the use of anonymous witnesses has been adopted at the international level. This practice is grounded in the principle of maintaining a balance between these two concerns to ensure that the use of anonymity aligns with the accused's right to confrontation.

The International Criminal Tribunal for the Former Yugoslavia has established a crucial point of reference for international law regarding the protection of witnesses in criminal proceedings.⁹⁰ In the case of *Prosecutor vs. Dusko Tadic*, the trial chamber emphasized that it is within the chamber's jurisdiction to order protective measures for victims and witnesses.⁹¹ In this case, the prosecutor requested the non-disclosure of the name, address, image, voice, and other identifying information of some witnesses from the defence, as well as protecting the current address and whereabouts of one witness and their relatives from the defence. Furthermore, the Prosecutor requested that the identity of this same witness and her complete statement be released to the defence no later than one month prior to the firm trial date⁹². In deciding this matter, the trial chamber recognized that the accused's right to know the identity of the witness is essential because, if the defence does not know the identity of the person it wishes to question, it may lack the necessary details to demonstrate that this individual is biased, antagonistic, or untrustworthy. Statements or testimonies that implicate the accused could be intentionally false or merely mistaken, and the defence will struggle to reveal this if it does not have the information needed to assess the reliability of the source or challenge their credibility.⁹³ It also acknowledged the statement from the European Court of Human Rights regarding the case of *Kostovski v. the*

⁹⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia of 2009, art. 20 (1) & art. 22

⁹¹ *Prosecutor v. Dusko Tadic*, The International Tribunal for the former Yugoslavia, par. 13

⁹² *Ibid* par. 53

⁹³ *Ibid* par. 54

Netherlands, which recognized the general principle that all evidence must be produced in the presence of the accused at a public hearing to facilitate adversarial argument.⁹⁴ Yet, the chamber also views that the defendant's interest in establishing facts must be weighed against the interest in the anonymity of the witness, and balancing these interests is inherent in the notion of a "fair trial."⁹⁵ Accordingly, it stated that a fair trial means not only fair treatment for the defendant but also for the victims and witnesses.⁹⁶ The statute of the ICTY under Article 20 lays out the balancing interest by recognizing full respect for the rights of the accused and due regard for the protection of victims and witnesses to ensure a fair trial.⁹⁷

Accordingly, it took note of the factors that must be considered while allowing witness anonymity. The first condition listed is the existence of genuine fear for the safety of the witness or their family: "[T]here must be real grounds for being fearful of the consequences if the evidence is given and the identity of the witness is revealed."⁹⁸ The second condition is that the testimony of the particular witness must be significant to the Prosecutor's case: "[t]he evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it."⁹⁹ The third condition is that the Trial Chamber must be satisfied that there is no prima facie evidence indicating that the witness is untrustworthy.¹⁰⁰ To achieve this, the prosecutor must have thoroughly examined the witness's background, ensuring there is no reason to believe the witness is biased or holds a personal grudge.¹⁰¹ Additionally, the identification of an accomplice or a witness with an extensive criminal history cannot be kept confidential. In such situations, granting anonymity would unduly harm the defense's perspective. The report by the Prosecutor on the reliability of the witness must be disclosed to the defense to the extent consistent with the anonymity sought.¹⁰² Fourthly, the ineffectiveness or non-existence of a witness protection program is another factor that significantly influences any decision to grant anonymity.¹⁰³ The chamber, in conclusion, has noted that any measures taken

⁹⁴ Ibid

⁹⁵ Ibid 55

⁹⁶ Ibid

⁹⁷ Statute of the International Criminal Tribunal for The Former Yugoslavia of 2009 (n90) art. 20

⁹⁸ *Prosecutor v. Dusko Tadic* (n91) par. 62

⁹⁹ Ibid par. 63

¹⁰⁰ Ibid par.64

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid par.65

should be strictly necessary, and if a less restrictive measure can provide the required protection, that measure should be applied.¹⁰⁴ It also stated that the International Tribunal must ensure that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable.¹⁰⁵

In addition to these conditions, the chamber also stated that certain guidelines must be established for the effective balance between the accused's right to confrontation and the need to protect witnesses. These include the judges' ability to observe the demeanor of the witness, the necessity for judges to know the identity of the witness, and the requirement that the defense be given ample opportunity to question the witness on matters unrelated to his or her identity or current whereabouts, such as how the witness obtained the incriminating information, while still excluding details that would make the true name traceable.¹⁰⁶

2.6.2 The European Court of Human Rights

According to Article 6 of the European Convention on Human Rights (ECHR), everyone has the right to a fair trial, which includes the right to examine prosecution witnesses by either the defendant or a legal representative (Article 6(3)(d)). The primary aim of this right is to enable the accused in a criminal case to question a witness's credibility or reliability. However, the ECHR does not grant the accused an unrestricted right to call and question witnesses. The relevant principles can be found in the case law of the European Court of Human Rights (ECtHR). In any criminal proceedings, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals. In some instances, it may be necessary to withhold certain evidence from the defense to preserve the fundamental rights of another individual or to safeguard an important public interest.¹⁰⁷ According to a decision by the ECtHR, "the use of statements made by anonymous witnesses to base a conviction is not always incompatible with the Convention."¹⁰⁸ The court noted that, in principle, having anonymous witnesses could pose a potential disadvantage to the defendant and necessitate a rigorous balancing test to determine whether a trial can proceed fairly under these conditions.¹⁰⁹ However, the court stressed that the application of witness anonymity must adhere to specific conditions. In the case of *Rowe and*

¹⁰⁴ Ibid par.66

¹⁰⁵ Ibid

¹⁰⁶ Ibid par.71

¹⁰⁷ *Rowe and Davis v United Kingdom* [1995] ECtHR

¹⁰⁸ *Van Mechelen And Others vs. The Netherlands* [1997] ECtHR [52] see also *Doorson V. The Netherlands* [1996] ECtHR [69]

¹⁰⁹ *Al-Khawaja v. United Kingdom* [2011] ECtHR [127] See also *Asani v. Macedonia* [2018] ECtHR [33]

Davis v. United Kingdom, for instance, the prosecution made the decision to withhold the relevant evidence from disclosure without the knowledge or approval of the judge. The court stated that, the prosecution must provide the defense with access to all relevant evidence in its possession, whether it be in support of the defense or against it, in light of the requirements of Article 6 of the ECHR. Therefore, if there is a non-disclosure the court has to be aware and the difficulties caused to the defence must be sufficiently counterbalanced by the procedures followed by the court.¹¹⁰ The ECtHR has ruled that the balancing procedures must ensure that a defendant "should not be barred from verifying the trustworthiness of the anonymous witness," along with the remark that "no conviction should be based either solely or to a decisive extent on anonymous statements."¹¹¹

Additionally, the recommendation of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice acknowledges that the protection of witnesses and those close to them should be organized, when necessary, before, during, and after the trial while respecting the rights of the defence.¹¹² However, the recommendation states that anonymity will only be beneficial when certain conditions are met and should always be considered an exceptional measure.¹¹³ One of the conditions to be fulfilled in the application of witness anonymity is that any decision to grant anonymity should only be made when the competent judicial authority finds that the person involved, or those close to him or her, is seriously threatened, the evidence appears to be significant, and the person seems credible.¹¹⁴ Furthermore, when anonymity has been granted, the conviction should not be based solely, or to a decisive extent, on the evidence provided by anonymous witnesses.¹¹⁵

2.6.3 The Inter -American Court of Human Rights

Similar to the European Court, the Inter-American Court has ruled that while anonymous witness testimony is not always dismissed, it must be used with "great discretion."¹¹⁶ The Inter-American Court evaluates whether the employment of counterbalancing measures ensured the trial's overall

¹¹⁰ *Rowe and Devis v United Kingdom* (n107)

¹¹¹ *Krasniki v. Czech Republic* [2006] ECtHR [76] See also *Van Mechelen vs. Netherlands* (n108) [52–55]

¹¹² The Committee of Ministers to member States on the protection of witnesses and collaborators of justice, Recommendation CM/Rec (2022)9, 30, March, 2022 available at < <https://rm.coe.int/0900001680a5fe33>> last accessed on Augst, 2024

¹¹³ Ibid

¹¹⁴ ibid

¹¹⁵ Ibid

¹¹⁶ *Norín Catrimán v. Chile* [2014] IACtHR [1–175]

fairness, similar to how the European Court does. The Inter-American Court assesses whether the implementation of counterbalancing measures ensured the trial's overall fairness, akin to the approach of the European Court. These measures can include ensuring that the judge or jury is aware of the witness's identity and has had the opportunity to observe the witness's demeanor,¹¹⁷ as well as guaranteeing that "the defense has an adequate chance to cross-examine the witness at some stage of the proceedings on subjects that are not related to his identification or residency."¹¹⁸ The Inter-American Court has based its decision on Art. 8(2) (f) of the American Convention on Human Rights and emphasized, like its European counterpart, that a conviction should "not be based either solely or to a decisive amount on anonymous statements even when counterbalancing processes have been adopted that appear to be sufficient."¹¹⁹

2.6.4 The African Commission on Human and People's Rights

The African charter on human and people's right, under Art 7 provides the fair trial rights elements, yet it doesn't clearly acknowledge the right of the accused to be tried in person. However, the African Commission on Human and Peoples' Rights has issued Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (PGRFTLA) pursuant to its mandate under Article 45(c) of the African Charter on Human and Peoples' Rights. The commission has issued these principles and guidelines in order to strengthen and supplement the provisions relating to the charter and to reflect international standard.¹²⁰ Accordingly, PGRFTLA has adopted detailed principles and guidelines of the fair trial right and the right of the accused to be present while witnesses give their testimony. According to the African Commission, "the testimony of anonymous witnesses during a trial will be allowed only in exceptional circumstances, taking into account the nature and circumstances of the offence and the protection of the witness's security, and if it is determined to be in the interests of justice as it is stated under P.N 6(F) of the PGRFTLA."¹²¹

¹¹⁷ Ibid

¹¹⁸ Ibid [246] See also *Pollo Rivera v. Peru* [2016] IACtHR [205]

¹¹⁹ Ibid [247]

¹²⁰ African Commission on Human & Peoples' Rights (n9)

¹²¹ Ibid N 6(f)(vi)

CHAPTER – THREE
THE LEGAL FRAMEWORK ON THE RIGHT TO CONFRONTATION AND WITNESS
PROTECTION

3.1 Introduction

This chapter is dedicated to outlining the legal instruments related to the right of an accused person to confrontation, as well as those established for witness protection. The ICCPR, UNGA-adopted conventions and declarations, and general statements from the UN Human Rights Committee will also be examined. Legislation concerning the rights of the accused and laws safeguarding witnesses are considered at the national level, with a focus on the Protection of Witnesses and Whistleblowers of Criminal Offenses Proclamation No. 699/2010. Therefore, this chapter aims to present legal documents regarding the defendant's right to confront and witness protection.

3.2 The Legal Frame Work on the Right of the Accused to Confrontation

3.2.1 The Right to confrontation under International Human Rights Law

The right to confrontation is a fundamental aspect of legal systems worldwide. This right enables defendants to challenge the evidence presented against them by confronting witnesses, thereby reinforcing the principles of a fair trial and justice. The theoretical justification for this right includes promoting accurate fact-finding and safeguarding the dignity of the accused.

As discussed above, the right to confrontation encompasses the accused's right to be tried in person, the right to know the true identity of their accuser, and the right to examine the witness's testimony through cross-examination. The right of the accused to be present at their trial is crucial for ensuring a fair trial, allowing them to actively engage in the trial process by presenting their own evidence and contesting the evidence against them. It enables them to directly face and cross-examine witnesses who testify against them. The ICCPR under Article 14(3)(d) guarantees this right of the accused. This right is also articulated under Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(f) of the American Convention on Human Rights. The African Charter on Human and Peoples' Rights, under Article 7, provides elements of fair trial rights, yet it does not explicitly acknowledge the right of the accused to be tried in person. However, the African Commission on Human and Peoples' Rights has issued Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (PGRFTLA) pursuant to its mandate under Article

45(c) of the African Charter on Human and Peoples' Rights. The Commission has issued these principles and guidelines to strengthen and supplement the provisions relating to the Charter and to reflect international standards.¹²² Accordingly, the guideline has adopted detailed principles and standards regarding the right to a fair trial. Subsequently, the PGRFTLA has granted the accused the right to be present while witnesses provide their testimony.¹²³ It also enshrined the right of the accused to examine, or have examined, witnesses against him or her and to secure the attendance and examination of witnesses on his or her behalf under the same conditions as those for witnesses against him or her.¹²⁴ From the reading of the aforementioned legal provisions, the requirement of the right to confrontation generally includes a public hearing in which the accused has the opportunity "[t]o examine, or have examined, the witness against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as a witness against him.

The right to know the true identity of their accuser, which is another aspect of the right to confrontation, allows the defendant to request that the prosecution's witnesses appear in person before the court. This upholds the principles of orality and immediacy, which aim to provide a fact-finder with firsthand information.

Another fundamental aspect of the accused's right to confrontation recognized by international and regional human rights frameworks is the accused's ability to cross-examine prosecution witnesses. The accused is legally entitled to cross-examine, and challenge any available witnesses, as well as to compel the presence of adverse witnesses under Article 14 of the ICCPR. Article 14 of the ICCPR, as outlined by the UNHRC, seeks to ensure the proper administration of justice and, to this end, guarantees a series of specific rights.¹²⁵ The right to confrontation is a crucial component, according to the committee, for enabling the accused and their attorney to mount a robust defense. Consequently, the right to confrontation affords the accused to require the attendance of witnesses and to cross-examine any witnesses. The committee also asserts that

¹²² African Commission on Human & Peoples' Rights (n9)

¹²³ Ibid para-N 22(a)

¹²⁴ Ibid par. 6(f)

¹²⁵ UN Human Rights Committee (HRC) General Comment No.32, Art 14, Right to Equality Before Courts and Tribunals and To Fair Trial, 23 August 2007, CCPR/C/GC/32 Available at <<https://www.refworld.org/docid/478b2b2f2.ht+ml>>

this right is an inherent aspect of the principle of ‘equality of arms.’¹²⁶ According to the Human Rights Committee, defendants must ‘be given a proper opportunity to question and challenge witnesses against them.’¹²⁷ The right may be violated not only if the defense had no opportunity to examine the witness at all but also if there were undue restrictions on its ability to do so. Restrictions concerning the timing, scope, or conditions of the questioning can thus lead to a violation of the right to confrontation.¹²⁸

In principle, a defendant should be given the opportunity to examine any witness against him; it is required by international law to have a prosecution witness testify in person, and the defendant or his counsel should be able to confront each witness with questions in open court. However, the human rights committee has acknowledged that this right is not “unlimited” but must be ‘given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings’.¹²⁹ Similarly, the European Court has confirmed that in evaluating the defendant’s right to examine witnesses, the Court will ‘consider the fairness of the proceedings as a whole, including the manner in which the evidence was obtained, taking into account the rights of the defense but also the interests of the public and the victims in seeing crime properly prosecuted’ and ‘where necessary, the rights of witnesses.’¹³⁰

3.2.2 The Right to Confrontation under the National Legal Framework

3.2.2.1 The FDRE Constitution

As discussed above, the right to confront the accused encompasses the accused’s right to be tried in person, the right to know the true identity of their accuser, and the right to cross-examine the witness’s testimony. The FDRE Constitution, under Article 20, enumerates the fair trial rights guaranteed to the accused; however, the right to be tried in their presence is not explicitly recognized in the FDRE Constitution. Nonetheless, the Constitution guarantees the accused the right to a public trial, the right to have full access to any evidence presented against them, and the right to examine witnesses testifying against them under Article 20(4). Furthermore, pursuant to Article 9(4) of the Constitution, international instruments ratified by the Constitution

¹²⁶ Ibid

¹²⁷ Ibid [39]

¹²⁸ Ibid [6]

¹²⁹ Ibid

¹³⁰ Amal Clooney, Philippa webb, *The Right to Fair Trial in International Law*, Oxford Public International Law. Citing *Schatschaschwili v. Germany* [2015] ECtHR [100–101].

are an integral part of it, and Article 13(2) of the Constitution stipulates that ‘the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner consistent with the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, and international instruments adopted by Ethiopia.’ Therefore, this specific article must be interpreted in accordance with paragraph 3(e) of Article 14 of the ICCPR, as Ethiopia is a signatory member state of the ICCPR.

3.2.2.2 The Criminal Procedure Code

The defendant's right to confrontation can also be inferred from the provisions of the CPC under articles 127(1) and 123, which state that trials must be conducted in the presence of the accused, allowing him not only to present his own case but also to exercise his right to confrontation. This includes observing any adverse testimony and confronting the opponent, which is essential for ascertaining the veracity and accuracy of any material presented prior to trial.¹³¹ Article 124(1) of the same Code mandates the prosecution to submit a register listing its witnesses to be summoned. The presence of witnesses in court, along with the provision of a witness list, enables defendants to access the evidence presented against them and effectively examine those witnesses. The CPC, under articles 136 and 137(3), also stipulates that witnesses and experts, if any, may be cross-examined by the accused or his advocate.¹³² Although the right to confrontation is rooted in international law and is one of the fundamental rights of the defendant, it may be restricted under certain circumstances. Common grounds for restriction include (1) when witnesses are unavailable at trial for valid reasons; (2) the intention to protect witnesses, including safeguarding their anonymity; and (3) protecting vulnerable victims and witnesses from re-traumatization. Such limitations are based on the value of safeguarding legitimate interests of witnesses.¹³³

3.3 The Legal Framework for Witness Protection

The vital role of witnesses in ensuring offenders are brought to justice is fundamental to any modern criminal justice system, as the successful progression of each stage in criminal proceedings, from the initial crime report to the trial itself, typically relies on the cooperation of

¹³¹ Alemu Meheretu & Awol Alemayehu, (n22)

¹³² Criminal Procedure of Ethiopia (n11) Art 136

¹³³ Alemu Meheretu & Awol Alemayehu, (n22)

witnesses.¹³⁴ However, witnesses often face intimidation, sometimes leading to life-threatening situations due to their testimony. It is, therefore, essential to recognize the insecurity and vulnerability of witnesses in general while acknowledging that certain witnesses may require specific protective measures. Today, witness protection programs and various mechanisms have been implemented globally, as witness protection is regarded as a vital tool for upholding justice while safeguarding the witness. Consequently, it is crucial to examine the legal foundations at both international and national levels.

3.3.1 The International Legal Framework on Witness Protection

Witness protection in the international arena first gained prominence in the United States of America in 1970 as a legally sanctioned procedure designed to support a program aimed at dismantling Mafia-style criminal organizations.¹³⁵ The Statutes for the International Criminal Tribunals for the former Yugoslavia and Rwanda imply that the rights of the accused are not absolute but rather that the rights of both the accused and victims should be balanced and mutually respected.¹³⁶ The Rome Statute also establishes the “protection of the victims and witnesses and their participation in the proceedings.” Additionally, it imposes an obligation on the Court to take appropriate measures to safeguard the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.¹³⁷ However, it also stipulates that this right “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

3.3.1.1 The United Nations Convention against Transnational Organized Crime

The resolution passed by the United Nations General Assembly addresses witness protection in cases of transnational organized crime. Under this resolution, all parties to the convention are encouraged to take appropriate measures within their means to ensure effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who provide testimony regarding offenses...[Including], as appropriate, their relatives and other individuals close to

¹³⁴Mark Mackarel, Fiona Raitt, and Susan Moody, Briefing Paper on Legal Issues and Witness Protection in Criminal Cases, The Scottish Executive Central Research Unit 2001 1-46

¹³⁵ Ibid. (n3) p 7

¹³⁶UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia(as amended on 17 May 2002) article 22 available at <<https://www.refworld.org/docid/3dda28414.html>> <<https://www.ohchr.org/en/professionalinterest/pages/statuteinternationalcriminaltribunalforrwanda.aspx>>

¹³⁷ Rome Statute of the international Criminal Court (n5) Art 68

them.” Specifically, it calls for the establishment of procedures “for the physical protection of such individuals, such as, to the extent necessary and feasible, relocating them and allowing, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such individuals.¹³⁸ The protection of witnesses is also explicitly addressed in the Protocol against the Smuggling of Migrants by Land, Sea and Air, which supplements the United Nations Convention against Transnational Organized Crime under articles 5 and 16.

3.3.1.2 The United Nations Convention against Corruption

The United Nations Convention against Corruption recognizes witness protection under Article 32 and obliges each state party to take appropriate measures according to its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses. However, it also indicates that the measures taken for witness protection should not prejudice the rights of the defendant, including the right to due process.¹³⁹

In general terms, a variety of actions can be implemented based on a risk assessment, ranging from basic and cost-effective security measures to more comprehensive witness protection programs that involve relocation and identity changes.¹⁴⁰ Additionally, pursuing criminal charges against those who intimidate witnesses can serve as a protective measure.¹⁴¹ The United Nations Convention against Corruption (UNCAC) outlines protection measures such as physical security, relocation (either domestically or internationally), maintaining the confidentiality of a witness's identity or location, and special provisions for providing testimony.

3.4 Witness Protection Measures and Their Application under Different Legal Frameworks

According to Karen Kramer, witness protection measures can be classified into three categories: i) police protection/target hardening and effective operational practices, ii) judicial and

¹³⁸ United Nations Convention against Transnational Organized Crime (n6) Art 24

¹³⁹ United Nations Convention against Corruption (n7) Art 32(2)

¹⁴⁰ Transparency international, good practice in witness protection legislation. Available at <<https://www.sia.eurosocialii.eu/files/docs/1386926957102%20Good%20practice%20in%20witness%20protection%20legislation.pdf>> last accessed on August 2, 2024

¹⁴¹ Ibid

procedural measures, and iii) covert witness protection programs.¹⁴² Witness protection thus encompasses a variety of methods and measures that can be implemented at all stages of criminal proceedings to ensure the safety and security of witnesses, thereby facilitating their cooperation and testimony. He further notes that the measures taken should be proportional to the threat and of limited duration.¹⁴³ The judicial and procedural measures refer to actions taken at the request of the prosecutor and may include: (a) anonymous testimony; (b) the presence of an accompanying person for psychological support; (c) shields, disguises, or voice distortion; (d) the use of a witness's pre-trial statement instead of in-court testimony; (e) testimony via closed-circuit television or videoconferencing; and (f) removal of the defendant or the public from the courtroom.¹⁴⁴ One of the more intricate procedural measures is anonymous testimony. Anonymity involves concealing some or all details of the witness's identity from the defense, which must be applicable in rare instances where the content of the testimony does not reveal the witness's identity to the defense and can be supported by additional evidence and in crucial cases where securing witness testimony through alternative means is not feasible.¹⁴⁵ Thus, the practice of implementing witness anonymity requires a special attention and should be applicable by balancing with the right of the accused. Accordingly, the courts in various jurisdictions evaluate the need for witness anonymity against the accused's right to confrontation, and the power to grant witness protection, particularly protection measures that involve anonymity is vested on courts. The researcher has looked in to the legal frameworks on witness protection of UK, New Zealand, and Kenya in order to assess the application of witness anonymity. In the UK, the youth justice and criminal Evidence act under section 19 provides that the courts hold a power to grant special protection measures and the application for protection measure is directly submitted to the court, thus the court based on the application or on its own motion could provide protection measures after being satisfied with the eligibility of the witnesses.¹⁴⁶ In addition to this the Coroners Act of Justice under section 86 provides that the courts are vested with the power to order witness anonymity and it defines a witness anonymity order as an order that mandates certain actions to protect the identity of a witness in criminal proceedings, as deemed

¹⁴² Karen Kramer, '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 accessed on August 2, 2024

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Youth Justice and Criminal Evidence Act of 1999, sec. 19

suitable by the court. These protective measures may include keeping the witness's name confidential, allowing the witness to use a pseudonym, placing the witness behind a screen, altering the witness's voice, or preventing questions that could reveal their identity.¹⁴⁷

The New Zealand Evidence Act, incorporate witness anonymity to making protection to all witnesses if their lives were likely to be endangered.¹⁴⁸ It also provides detailed procedure for the court to follow; under section 13C (4), accordingly, the court may make an anonymity order if it is satisfied that [t]he safety of witness or of any other person is likely to be endangered, or there is likely to be serious damage to the property, if the witness identity is disclosed, and either there is no reason to believe that the witness has a motive or tendency to be untruthful.¹⁴⁹ having regard (where applicable) to the witness's previous conviction or the witness's relationship with the accused or any associates of the accused, or the witness credibility can be tested properly without the disclosure of witness's identity ; and the making of the anonymity would not deprive the accused a fair trial.¹⁵⁰ Moreover, Section 13(g) of the act clearly empowers the courts to direct screening or the appointment of an independent counsel to assist the court.¹⁵¹ The Kenyan Witness Protection Act empowers the court to apply witness protection measures such as conducting hearings in camera or closed sessions, utilizing pseudonyms, minimizing the disclosure of identifying information, employing video links for testimony, and implementing techniques designed to obscure or distort the witness's identity.¹⁵² Furthermore, the witness protection rule vests the power to issue protection either on its own motion or upon application from the Witness Protection Agency or the prosecution.¹⁵³ Such orders are to be given on the prerequisite of the fulfillment of criteria listed under this rule and the court must rigorously evaluate the totality of circumstances present in each individual case and this evaluation is guided by the eligibility criteria articulated in the Act, alongside a consideration of whether the imposition of the protection order could potentially obstruct the effective examination of evidence by any party involved in the proceedings or contravene the interests of justice.¹⁵⁴ The

¹⁴⁷ Coroners and Justice Act of 2009, sec. 86

¹⁴⁸ Evidence Act of New Zealand, 1908 amended by the Evidence Amendment Act of 1997

¹⁴⁹ Ibid, sec 13 C (4)

¹⁵⁰ Ibid

¹⁵¹ Ibid sec. 13(g)

¹⁵² Witness protection Act of Kenya no. 16, 2006 Art.

¹⁵³ Witness Protection Rules of Kenya, 2015 Sec. 4(2)

¹⁵⁴ Ibid sec. 4(4)

rule further states that any measure allowed by the court for the protection of a witness shall not prejudice the rights of an accused person¹⁵⁵ which entails the court to carefully balance the protection measures with the rights of the accused to ensure a fair trial.

Therefore, in the modern criminal justice system witness's protection is crucial part of the criminal proceedings. Unless witnesses are adequately protected, they might be prone to intimidation and eventually hamper the justice system. On the other hand, the defendant has the right to access to all evidence resented against them and to confront adverse witnesses. Thus, as discussed herein above different jurisdictions try to balance these two interests by giving broad discretionary powers to courts to assess the necessity of witness protection and without overriding disclosure right of defendants. The courts are also empowered to appoint independent counsel to assist them. Additionally, they are empowered to develop guidelines of balancing mechanism either through legislation or case law that used as precedents that depends on context of the legal system.

3.5 The National Legal and Policy Frameworks on Witness Protection

The concern regarding witness intimidation and the growing interest in witness safety is a global phenomenon in modern criminal proceedings, and Ethiopia is no exception. The concept of witness protection was first introduced by the Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 235/2001 under Article 7(16). However, the proclamation, while imposing a duty on the Commission to provide physical and job security for witnesses and whistleblowers did not include a list of protection measures or procedures for safeguarding them.

The introduction of the Ethiopian Criminal Justice Policy (CJP) in 2011 marked a significant advancement in witness protection. The CJP, under number 3.19, emphasizes the necessity of protecting witnesses, as criminal justice often fails due to a lack of witnesses stemming from intimidation and fear of retaliation. The policy outlines mechanisms for witness protection, including physical and property protection, identity changes, and the option to give testimony via camera.¹⁵⁶ These measures begin at the crime investigation stage, continue throughout the proceedings, and may extend post-conviction. The policy directs that provisions for witness

¹⁵⁵ Ibid sec. 5(2)

¹⁵⁶ Criminal policy of Ethiopia 2011, sec. 3.19 (b)

protection should be incorporated into laws such as the criminal procedure code and other relevant legislations.

Witness protection is also addressed in the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005. Article 53(1) of this proclamation states: ‘Any reprisal taken against a whistleblower or witness for making or attempting to make a disclosure or testimony shall be illegal.’ It further indicates that a witness's identity may be kept anonymous during a preparatory hearing if the prosecutor requests it and the court grants authorization.¹⁵⁷ However, there is no indication of how long the witness's identity may remain undisclosed, whether this could extend to a standard hearing, or on what grounds anonymity will be granted.

The Proclamation to Provide for the Prevention and Suppression of Terrorism Crimes (No. 1176/2020) is another instrument within the national framework that offers witness protection. It has criminalized acts of assault, threats, suppression, or harm against an individual or someone closely associated with that individual, who has provided information or evidence to justice authorities, or who has testified as a witness in an investigation or judicial proceeding of a crime.¹⁵⁸ The proclamation, under Article 16, specifically states that if the life, well-being, or property of any person or their family is jeopardized due to their role as a witness or whistleblower of a terrorist crime, they shall receive protection in accordance with the Witnesses and Whistleblowers of Criminal Offences Proclamation.

❖ **The Proclamation for Protection of Witnesses and Whistleblowers of Criminal Offences**

The Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010 (PWW) is the sole law that offers comprehensive coverage of witness safety measures and programs within the Ethiopian legal framework. As indicated in the preamble of the proclamation, it was enacted to safeguard witnesses and whistleblowers of criminal offenses from direct or indirect threats and attacks they may encounter as a result, thereby ensuring their safety.¹⁵⁹ Additionally, it aims to create conducive environment for the safety and security of the public by facilitating the prosecution of criminal offenders and upholding appropriate penalties. The proclamation applies to witnesses and whistleblowers involved in the prosecution of

¹⁵⁷ The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation (n16)

¹⁵⁸ Prevention and Suppression of Terrorism Crimes Proclamation (n16)

¹⁵⁹ Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation (n26) Preamble Para. 3

suspects facing punishments of ten or more years of rigorous imprisonment or death. It comprises five parts, including sections addressing who qualifies for protection, the types of protective measures that may be implemented, and the criteria used to determine the necessary protection measures.

3.6 The Right to Confrontation vis-à-vis the Proclamation for Protection of Witnesses and Whistleblowers of Criminal Offenses

3.6.1 Scope of Application

As indicated in Article 3, the Proclamation for Protection of Witnesses and Whistleblowers of Criminal Offenses applies to testimony or information provided during an investigation involving a suspect punishable by rigorous imprisonment for ten years or more, or by death.¹⁶⁰

There are two additional prerequisites for seeking protection under the proclamation. One is the existence of a serious threat to the life, physical security, freedom, or property of the witness or a family member of the witness, and the other is that the offense cannot be revealed or established through any means other than the testimony of the witness or the information provided by the whistleblower.¹⁶¹

However, the proclamation does not define what constitutes a “serious threat,” how to assess such a threat, or who is qualified to evaluate the existence of a serious threat. Furthermore, fairness concerns arise from the suggestion in Article 3(1) (b) of the proclamation that witnesses providing decisive testimony may be eligible for protection, including anonymity. If witness anonymity is granted and the conviction relies either solely or significantly on the anonymous statement, it is crucial to recognize that the fairness of the trial may be compromised due to the substantial harm inflicted on the defendant's right to confrontation.

3.6.2 Determining Types of Protection Measures under the Proclamation

When determining the type of protection measures to offer a protected person, there are various criteria to consider under the proclamation. While most of these measures intend to undertake the interest of the protected person, Article 5(3) which states that “the damage that the intended protection measure may cause to the rights and lawful benefits of another person” can be understood to also include the interest of the accused. Even if it is not clearly indicated, a

¹⁶⁰ Ibid, Art 3 (1)

¹⁶¹ Ibid Art 3(1)(a) & (b)

convincing argument could be made to consider, among others, the accused's right to confrontation before granting a certain protection measure. Article 5(9) of the Proclamation provides for other similar appropriate considerations to be taken into account during assessment of protection measures. According to Art. 7 (2) of the Proclamation, the MoJ is vested with the power of receiving application for protection measures and to make a decision of such application within 30 days of its receipt. Thus, it is in view of the researcher that there may be a conflict of interest when determining whether a particular measure impairs the legitimate rights of the accused even where the MoJ construes this provision to include the interest of the accused; however, these considerations are left to the discretion of the MoJ which still raise a question as to the consideration of the interest of the accused in determining protection measures.

3.6.3 The Power to Grant Protection

The Proclamation under Art 7(2) provides that the MoJ receives applications for protection and makes decisions regarding witness protection. Furthermore, according to Article 25 of the proclamation, the MoJ's decision regarding any grievance related to witness protection is final and not subject to judicial review. However, despite mentioning several witness protection measures under Article 4, it does not provide which protection measure are to be granted, only indicating the authority to do so. Among the protection measures listed under Art.4 of the WWPP, the application of some of the measures, such as not disclosing the identity of a witness until the trial process begins and the witness testifies, hearing testimony in camera, and hearing testimony behind screen or by disguising identity interferes with the right of the accused to confrontation. On the other hand, under part five of the proclamation which states responsibilities of organs of justice Art 23 (1) delineates the court's responsibility to ensure that the protection measures specified in sub-article (1) from (g) to (k) of Article 4 are implemented as deemed appropriate. However, the provision lacks clarity; notably, the literal understanding of the provision indicates that the authority to grant these protective measures may lie with MoJ, while the court's role appears primarily focused on ensuring compliance with these measures. Therefore, the power to grant witness protection measures remains to be one of the contentious issues.

Two primary lines of argument exist concerning the power to grant witness protection measures. The first line of argument is that as per Arts. 6(e), 7(2) and 25 of the proclamation, the power to grant witness protection measures lies on MoJ and Art, 23(1) of the WWPP is only there because

those protection measures are procedural protections that requires the involvement of the court since they took place in the court room. It is only in relation to protection measures for minors that the Proclamation provides clear power of the court. Art. 9(2) of the WWPP requires protection agreement entered with a minor to be presented, for approval, to the Federal High Court within ten days from the date of signature and this application shall contain the reasons justifying the protection and the special protection agreement entered into with the minor.

The other line of argument is that, even if primarily the MoJ is the one with the power to receive applications for protection requests and decides over the matter, Art. 23(1) & 23(2, (b)) of the WWPP indicate that the courts have a role in deciding on witness protection measures too. This side of the argument further indicates that those measures listed under this provision require the court's assessment since their application infringe the right of the accused. Thus, this specific Article should be interpreted in this manner. The researcher endorses the second line of argument since the protection measures outlined in this provision hinder the accused's right to confrontation and if the decision is left for the prosecutor, which is part of the proceeding, especially, where the Proclamation has not provided a clear method of thereat assessment violates the principle of equality of arms, undermines the accused's right to confrontation, and denies the opportunity to contest the alleged need for witness anonymity. The minutes of the WWPP acknowledge the potential impact of witness protection measures on the rights of the accused. In particular, it highlights that the right of the accused, as enshrined in Article 20(4) of the constitution, could be compromised by certain protective provisions, such as permitting witnesses to provide testimony behind screens. Thus, it acknowledges that this context necessitates a careful balancing of the rights of the accused with the overarching public interests. While the minutes of the WWPP do not offer definitive guidance on how such a balance should be struck, the inclusion of Art 23(1) implies that judicial authorities are responsible for implementing protective measures that affect the rights of the accused, Thus, the intention of the lawmakers could be understood as aiming to empower the courts to facilitate a balanced approach that not only prioritizes the safety and security of witnesses but also safeguards the rights of the accused.¹⁶²

However, the lack of explicit provisions granting broad discretionary powers to the courts to evaluate the necessity of witness protection and balancing this interest of the witnesses with the

¹⁶² Minutes of Protection of Witnesses and Whistleblowers of Criminal Offenses Proclamation No. 699/2010

right of the accused presents significant challenges. Additionally, the absence of established guidelines for balancing the competing interests involved, unlike the experience of other jurisdictions discussed herein above, complicates the implementation of witness anonymity measures. This gap in the legal framework makes the court impotent regarding adoption of clear balancing mechanism for these two competing interests and also adversely affects the rights of defendants, who may encounter difficulties in adequately challenging evidence presented under conditions of anonymity. Consequently, the current deficiencies in both judicial discretion and procedural guidelines potentially compromise the fairness of trials and the rights of the accused.

CHAPTER-FOUR

THE PRACTICAL IMPLEMENTATION OF WITNESS ANONYMITY VIS-A-VIS DEFENDANTS' RIGHT TO CONFRONTATION

4.1 Introduction

There are a variety of witness protection mechanisms that could be applied to witnesses in fear of intimidation by the defendant. However, the most contentious protection mechanism is witness anonymity. Therefore, it is important to assess application of witness anonymity in light of the defendant's right to confrontation. Thus, this chapter evaluates the practical application of witness anonymity in Federal High Courts through an analysis of eight court cases in which the question of anonymous witnesses was raised and resolved, as well as through key informant interviews. To do this, the method of providing witness protection in particular, witness anonymity as well as the organs involved in the process and the steps the courts take to grant witness anonymity are discussed.

4.2 The Power to Grant Witness Anonymity: The Tension between the Court and the Prosecutor

When it comes to witness protection, especially concerning anonymity, the tension between the Court and MoJ lies in the power to grant the protection to the witness. The Ministry strongly argues that the power to grant protection whatsoever is given to the attorney general by the PWW proclamation.¹⁶³ Determining the type of protection of the witness is the sole authority of the MoJ, thus, it argues that the court cannot enter into the merits of the protection offered.¹⁶⁴ The decision regarding the kind of protection to be given to the witness must be made by the prosecutor. Because only the public prosecutor is close enough to identify and comprehend the potential harm that witnesses and victims may experience.¹⁶⁵ According to *Beweketu*, “the responsibility given to the court under art 23(1) of WWPP is only because those protections take place in the courtroom and the court has to collaborate for the application of such protections.”

¹⁶³Interview with, Bewketu Temesgen, Federal Public Prosecutor in the Federal Attorney General, Sep. 8, 2023; Interview with Tadele Beredad, Directorate of Organized and Cross-Border Crimes, Organized Terrorism and Conflict Crimes Coordinator, Sep. 6, 2023

¹⁶⁴ Ibid

¹⁶⁵ Ibid

The prosecutor argues that providing protection after receiving an application from the witness or where the witness is unable to apply, according to Art.6 (b) by investigator, a public prosecutor or any interested person on behalf of such person is exclusively, left to the MoJ.¹⁶⁶ Thus, the prosecutor has the power to provide any of the protection measures listed under Art. 4 after looking in to the danger they may face because of their involvement as a witness.¹⁶⁷ As a result, it is common practice of the Prosecutor to file charges, particularly in cases involving Terrorism and corruption, noting briefly on the charge document that the prosecutor's witnesses are granted protection. These protection measures mostly involves, concealing the identity of the witness before the identity of a witness until the trial process begins and the witness testifies, hearing testimony in camera, and hearing testimony behind screen or by disguising identity. In *Federal Prosecutor V Nebiyu Siraj et al*¹⁶⁸, *Federal Prosecutor V Abebe Temesgen et al*¹⁶⁹, *Federal Prosecutor V Debretsion Gebremichael et al*¹⁷⁰, *Federal Prosecutor V Wondwossen Assefa et al*¹⁷¹, *Federal Prosecutor V Mehadi Aliyu et al*, the prosecutor provided on the charge that the witnesses are provided with protection according to Art 4(1(h)) of the WWPP. The prosecutor neither requested the court for the application of these protection measures nor provided the reason for granting the protection except for a brief indication of the protection measure. In other cases; *Federal Prosecutor V Eskender Nega et al*¹⁷², *Federal Prosecutor V Jawar Siraj et al*¹⁷³, and *Federal Prosecutor V Getachew Assefa et al*¹⁷⁴, the prosecutor provided a brief note on the charge that indicate the prosecutor witnesses are granted protection as per Art 4(1 (h, i &j)) of the WWPP, again the prosecutor granted the protection not to disclose the identity of a witness until the trial process begins and the witness testifies, hearing testimony in

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ *Federal Prosecutor vs. Nebyu Siraj et al 7 Defendants*, Federal Hight Court, Lideta Division 1st Terrorism Bench, File Number 17165

¹⁶⁹ *Federal Prosecutor vs. Abebe Temesegen et al 8 Defendants*, Federal Hight Court, Lideta Division Terrorism Bench, File Number 171419)

¹⁷⁰ *Federal prosecutor vs. Dr. Debretsion Gebremichael et al 61 Defendants*, Federal Hight Court, Lideta Division 1st Terrorism Bench, File Number 272802

¹⁷¹ *Public Prosecutor vs. Dr. Wondowessen Aseffa et al 27 defendants*, Federal High Court, Lideta Constitution and Terrorism Crimes Bench 30/ 09/2015 E.C Prosecution File No. 610/15)

¹⁷² *Federal Public Prosecutor vs. Eskender Nega Fenta et al. 7 defendants* (Federal High Court, Lideta 1st Anti-Terrorism and Constitutional Bench, File No. 260175) (unpublished)

¹⁷³ *Federal Public Prosecutor vs. Jawar Siraj Mohammed et al., 24 defendants*, Federal High Court, Lideta 1st Anti-Terrorism and Constitutional Bench, file No. 260215 (unpublished)

¹⁷⁴ *Federal Prosecutor vs. Getachew Assefa et al. 26 defendants*, Federal High Court, Lideta 1st Corruption crime Bench, March 16, 2014, E.C. File No. 238040 (unpublished)

camera, and hearing testimony behind screen or by disguising identity without providing the need as to why this protection measures were needed. The decision was made by the Prosecutor without requesting the court to take these protection measures.

4.3 The Ruling of the Court on Witness Protection Measures

There have been instances where the prosecutor's providing witness protection measures under Article 4 of the WWPP, is challenged by defendants and defendant attorneys. When this objection is raised the interpretation of the law and ruling on witness protection measure varies among judges. Some of the benches denied the protection measures upon non-fulfillment of the elements under Art. 3 of the WWPP. In *Federal Prosecutor V Eskender Nega et al* and *Federal Prosecutor V Jawar Siraj et al*, the prosecutor granted his witnesses the protection not to disclose their identity until the trial process begins and the witness testifies, to testify in camera, and behind screen. However, in the case of *Federal Prosecutor V Eskender Nega et al*¹⁷⁵, defendants raised objection that the prosecutor cannot by himself decide upon witness protection measures without the court's involvement pursuant to Art. 23(1) of the WWPP and that the court should not provide these protection measures since the prosecutor has not provided any evidence as to the existence of a danger against the witnesses or their families. Furthermore, they objected that the application of these protection measures affects the right of the accused to full access to the evidence presented against them which is acknowledged under the Constitution and international conventions and consequently affects the ability to conduct an effective cross-examination. On the other hand, the prosecutor argued that the power to grant witness protection is vested on the MoJ, and it is the prosecutor who have the ability to assesses the danger/treat against the witnesses because providing an information on the threat the witness faced is almost revealing the identity of the witnesses thus, the court cannot make a decision as to protection measures. The court ruled that this argument of the prosecutor is not valid and the court as per Art. 23(1) of the WWPP has the responsibility to assess whether those protection measures are taken as may appropriate. Thus, the prosecutor should request the court to take protection measures and provide the reason as to the need for the protection. Unsatisfied by this ruling of the court, the prosecutor took a petition to the cassation bench and finally, the bench, by remanding the case to the High Court, ruled that the protection measures have to be submitted to the court as per

¹⁷⁵ *Federal Public Prosecutor vs. Eskender Nega Fenta et al. 7 defendants* (n172)

Article 23(1) of WWPP and the court has to render these protections based on the fulfillment of the requirements under Article 3 of the proclamation to an eligible witness.¹⁷⁶ The High Court rejected all three protection measures provided by the prosecutor on the bases of failure of the prosecutor to present evidence as to the existence of a threat of serious danger that existed against the life, physical security, freedom or property of the witness, or a family member of the witness and the absence of mechanism to assess the existence of such threat by the Court.¹⁷⁷ In an interview conducted with Etefwork, explained that it is the court that has the authority to interpret the laws; and the public prosecutor cannot give order to the court, but can only submit their application to the court as per article 23(2) (b) of the PWW, leaving the decision to the court."¹⁷⁸ She further explained that the court must decide after hearing from all sides and taking into account the justification for the witness's protection.¹⁷⁹ The interpretation of Art. 23(1) & 23(2, b) of the WWPP and the precedent set by the cassation bench on this specific case provide the decisive role of the courts to protect the right of the defendant from arbitrary decisions on witness protection measures, even if the prosecutor argues and incessantly tries to provide these protection measures by himself. Nevertheless, the failure of the WWPP in providing a mechanism on which the Court assesses the existence of a threat of serious danger poses challenges to the court in exercising their power to grant witness anonymity.

In the case of *Prosecutor vs. Jawar Siraj et al*¹⁸⁰, the Federal High Court indicated that it is the power of the court to provide a decision over the protection measures that are listed under sub article1(g-k) of article 4 as per Art. 23(1) of the WWPP. In this case, the defendants objected to the application of anonymity by the prosecutor and stated that not knowing the identity of the witnesses beforehand affects their right to an effective cross-examination, therefore, requested the court to deny the application of this measure to the prosecution witnesses. The court, in its analysis, recognized the right of the accused to confrontation is one of the fundamental rights provided by the constitution under Art. 20 and also international instruments such as the ICCPR and further included that the prosecutor except for the mentioning of the protection measure that has been applied; has not provided evidence demonstrating the presence of a significant threat to

¹⁷⁶ *Federal Prosecutor vs. Eskender Nega Fenta et al. 7 defendants* (Federal Supreme Court Cassation Bench, 10/06/2013 E.C., File No. 200520) (unpublished)

¹⁷⁷ *Federal Public Prosecutor vs. Eskender Nega Fenta et al. 7 defendants* (n172)

¹⁷⁸ Interview with Etefwork Bereda, Federal High Court Judge, October 12, 2023

¹⁷⁹ Ibid

¹⁸⁰ *Federal Public Prosecutor vs. Jawar Siraj Mohammed et al., 24 defendants* (n173)

the life, physical safety, freedom, or property of the witness or their family member. Thus, the court denied the two protection measures (in camera proceeding and giving testimony behind the curtain).¹⁸¹ However, the court approved the protection provided to conceal the witness's identity without requesting the prosecutor to present the justification for the application of this measure. The court provided its reasoning for the rejection of the defendant's argument not to provide the witness this protection measure as follows;

“ተከላሾች የተከሰሱበት የወንጀል አንቀጽ የሚያስቀጣው ቅጣት ከባድ በመሆኑ ምስክሮች የምስክርነት ቃላቸውን ከመስጠታቸው በፊት ቢያውቁቸው ምስክሮች እንዳይመሰክሩባቸው ሊያደርጉ የሚችሉ በመሆኑ እና ምስክሮች በችሎት ቀርበው የምስክርነት ቃላቸውን ባይሰጡ ፍ/ቤቶች ሊሰጡ የሚገባቸው ፍትህ የመስጠትና የህግ የበላይነት ማስፈን ግዴታ መወጣት የማይችሉ ስለሆነ ፍትህ ካልሰፈነና የህግ የባላይነት ካልተረጋገጠ የህዝብ ደህንነትና ብሄራዊ ጸጥታ ስጋት ላይ ይወድቃል። ስለሆነም ዓ/ህግ አለኝ ያላቸውን ምስክሮች የምስክርነት ቃላቸውን አስከሰጡ ድረስ የምስክሮች ማንነት አንዳይገለጽ በማለት በሙሉ ድምጽ ብይን ሰጥቷል”¹⁸²

The reasoning provided by the court for the rejection of the defendant's argument is flawed as except for mentioning that the witnesses will not be able to provide their testimony before the court if the witness is made known to the defendants, it has not indicated why or how they will be unable to do so. It has not requested the prosecutor to present any evidence as to fear of intimidation or reprisal nor assessed the existence of serious risk and the fulfillment of the requirements under Article 3 of the WWPP.

Knowing the identity of the witness prior to the trial serves the right of the accused to have an effective cross-examination which is enshrined under Art. 14 of the ICCPR and Art. 20(4) of the constitution. Therefore, if the court is rendering a decision that interferes with this right of the accused in the interest of witness protection, it should make sure that there is a necessity of granting this protection. The protection measures under the WWPP shall be applicable when the three requirements under Art. 3 of the WWPP are met, however the court in this specific case ruled for the concealment of the identity of witnesses' solely on the bases of the nature of the crime. Even if one of the requirements for the application of these measures is in respect to testimony on a suspect punishable with rigorous imprisonment for ten or more years or with death without having regard to the minimum period of rigorous imprisonment as per Art 3(1) of the WWPP, this requirement alone cannot be a base for granting protection measures, the court

¹⁸¹ Ibid

¹⁸² ibid

has to make sure the existence of risk before granting the protection measure. Furthermore, it is the perspective of the researcher that, in order to safeguard the rights of the accused from undue interference, the court should critically examine the reasons why alternative witness protection measures cannot be implemented by the prosecutor. This inquiry is essential to ensure that the accused's rights are not compromised and that justice is administered fairly by contributing to a more balanced approach, mitigating potential biases while upholding the principles of due process. Similarly in the case *Federal Prosecutor V Wondwossen Assefa et al*, the court permitted the concealment of witnesses' identities despite a clear indication of potential danger faced by these witnesses. The prosecutor sought to conceal the witnesses' identities from the defendants, and the court also did not receive the names or pertinent details regarding the witnesses intended to testify against the defendants. The defense attorneys raised objections regarding the application of the protection measures, arguing that the prosecutor failed to provide a sufficient justification for the need for such protection. They contended that even if protection were deemed necessary, the court must be aware of the witnesses' identities. In response to these objections, the court ruled in favor of granting the protection measure based solely on the prosecutor's assertion of danger faced by the witnesses and without taking steps to order alternative protection measures. Furthermore, addressing the second objection, the court ordered the prosecutor to submit a list of the witnesses. Subsequently, the list was presented to the court; however, it was returned to the prosecutor without being attached to the case file. The defense attorneys again objected, requesting that the court retain the list of witnesses for its records. Nonetheless, the court dismissed this objection, arguing that the names of the witnesses could be disclosed since the file is accessible to other support staff within the court.¹⁸³ According to *Feyera and Etefwork* the prosecutor doesn't want to reveal the name of the witnesses to the court because "the prosecutors consider themselves as secret keepers,"¹⁸⁴ and according to them this happens due to the lack of a defined set of rules or guidelines dictating that judges must be aware of the identities of the witnesses.¹⁸⁵ In the case of *public prosecutor V Abdi Mohammed*, accused of terrorism and violation of constitutional order, a contentious issue arose regarding the concealment of witnesses' identities. The prosecutor made a brief notice stating the witnesses are

¹⁸³ *Federal Prosecutor vs. Getachew Assefa et al. 26 defendants* (174). Interview with Betemariyam Alemayehu, Attorney at Federal Courts, January 4, 2024

¹⁸⁴ Interview with Feyera Teresa, Federal High Court Judge and Inspection Director, December. 12, 2023

¹⁸⁵ Ibid

provided with protection measure according to Art. 4(h) of the WWPP thus, their names and other information will not be provided. Conversely, the defendants' lawyer contested this decision, arguing that withholding witness identities contravened the defendants' right to confrontation. However, the court accepted the protection measure applied by the prosecutor without ordering the prosecutor to establish the existence of a real danger to witness security.

In other instances, when the prosecutor provides protections and made known this to the court but the defendants has not raised an objection as to the application of the protection measure, the court will not question the prosecutor why the protection was granted. In the case *public prosecutor V Abebe Temesgen*, an objection was not raised by the defendants on the decision of the prosecutor providing witness identity concealment as per Art 4(h) of the WWPP. Consequently, the court has not questioned why the protection was granted. According to *Etefework*, "There is no situation in which the court, by its motion, raises the question as to why the protection of non-disclosure is given when the prosecutor says he has given protection for his witnesses unless the defense lawyers object."¹⁸⁶ She also added that "there are differences among the judges on this issue, and no uniform application exists".¹⁸⁷ Additionally an interview conducted with defense lawyers revealed a concerning lack of uniformity in the court's practice regarding the application of these protective measures. Specifically, while the public prosecutor frequently provides the withholding of witness identities as a standard procedure, the court's responses have been inconsistent. In certain instances, the court requests explanations for the necessity of such protection, yet in other cases, it neglects to seek any justification. This inconsistency undermines upholding the rights of all parties involved in the judicial process for these reasons.¹⁸⁸ These rulings highlight significant concerns regarding the handling of witness protection on one hand and the safeguarding of the right of the accused to confrontation. while the court's decision may have been motivated by a desire to safeguard witnesses, the failure to a clear and evidence-based assessment of danger on the security of witnesses, uniform application and lack of the inability of the court to raise the question as to why the prosecutor doesn't make use of other protection measures listed in the WWPP raises concerns about the balancing of witness protection with that of defendants right to confrontation.

¹⁸⁶ Interview with Etefework Bereda(n178)

¹⁸⁷ Ibid

¹⁸⁸ Interview with Betemariyam Alemayehu (n183), Interview with Sewbesew Ademasu, Attorney at Federal Courts, January 5, 2024, Interview with Haftom Kesete, Attorney at Federal Courts, September 10, 2023

4.4 The Court's Decision in Federal Prosecutor V Getachew Assefa: Absolute Anonymity and the Balancing act of Confrontation Right¹⁸⁹

The Federal Prosecutor accused Getachew Assefa and other 26 defendants charges before the Federal High Court, the prosecutor's charge can be summed up as: "The defendants established an unlawful structure within a government office, misusing their authority and causing harm." The prosecutor listed the name of 131 witnesses, including 29 whose identities are protected and won't be disclosed. In a petition submitted on May 08, 2019 and July 26, 2019, the prosecutor presented that, MoJ has decided to provide 29 witnesses with protection measures listed under Article 4(1) (h & j) of the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010, so that their identities should not be revealed until they appear in court and that their testimony be heard without being seen. As a result, requested the court to ensure the anonymity of these protected witnesses.

The accused's objected this application among others, on the grounds of the petition not meeting the criteria mentioned in the percolation; they mentioned the main purpose of the need for protection according to the proclamation is to expose crimes that may cause great danger to the society and to protect those who give testimony by protecting them from direct or indirect danger and violence. And according to article 3 of the proclamation where the act of the crime cannot be proven in any other way without the testimony of the witnesses and it is believed that there will be a serious danger to the life, body, freedom or property of the witnesses/their families. Thus, leaving the matters whether the crime of abuse of power is a type of crime that can cause great danger to the society or not? What high risk mean? For the interpretations of the law to the court, the elements outlined in Article 3 of the proclamation have not been met, as the prosecutor has only referenced the protection measures without providing any reasoning or evidence in the petition as to why they need the protection. They also argued that in this process, the witnesses whose protection is being requested by the prosecutor are not because they need protection, but because they are security personnel, however, there is no doubt that the defendants know these witnesses based on the essence of what they are testifying about since they used to work together. Therefore, it is not appropriate to ask for the implementation of a proclamation issued for another purpose. Another point of objection raised by the defendants is even if the court

¹⁸⁹ *Federal Prosecutor vs. Getachew Assefa et al. 26 defendants (n174)*

accepts the prosecutor's request, it should not be allowed in the manner in which it was requested. Therefore, at least the lists of these witnesses have to be submitted to the court. The other line of defendants' is that the protection measures imposed by the prosecutor violate Constitutional stipulations regarding the right to access to all evidence presented against them. Accordingly, the court on its own motion referred the case to the CCI to check constitutionality of Art 4 (1) (h & j) of Proclamation No. 699/2010, however the CCI has provided that this matter doesn't need constitutional interpretation, Accordingly, the court, continued to look in to the other objections to give decision.

❖ **The Court's Ruling and Its Implication**

The determination of protective measure in legal proceedings is a critical issue that can significantly impact the right of the accused and ultimately the fairness of the trial. In order reach to its decision, the court identified two paramount issues based on the objection raised by the defendants: first whether the authority to grant protection measures resides with the court or the MoJ, and second the role of the court if such authority is vested on the prosecutor. To answer these questions the court's analysis grounded in the legislative framework of the WWPP. Accordingly, the court in its analysis stated that according to Art. 7(2) of the WWPP, the MoJ is bestowed with the authority to decide on protection applications within 30 days of receipt. In addition to this provision Art 24(1) of this same proclamation, stipulates that all records and information pertaining to protected individuals should remain confidential. The analysis also indicated that concurrently, Article 23(1) delineates the court's responsibility to ensure the implementation of protection measures specified in Article 4 of the Proclamation. However, the court interpreted these articles to mean that while the MoJ holds the decisive power over the initial issuance of protective measures, the court's function is primarily to oversee the effective execution of these measures. As a consequence, the court concluded that it does not possess the authority to evaluate the compliance of protective measures with the legal standards set forth in the Proclamation. Furthermore, the court ruled that applications submitted by witnesses for protective measures, the MoJ's decisions regarding these measures and the agreements between the MoJ and witnesses are not mandated to be presented in court and the court cannot compel the prosecutor for the submission of such details. In its ruling, the court emphasized that the prosecutor had asserted the necessity of concealing the witness's identity until the trial commenced, with the testimony to be delivered behind a curtain in accordance to Art (1) (h& j)

of the WWPP. Consequently, the court rejected the defendants' argument that the protection measures were granted without fulfilling the necessary requirements of the Proclamation, by stating that this issue was beyond the court's authority. Accordingly, the court ensured witnesses to remain anonymous until they provide their testimony and passed a verdict that the Court Management Office of the Federal High Court, the registrar or relevant court officials, to create a hearing arrangement or to provide essential equipment that enables witnesses to testify behind a curtain.¹⁹⁰

However, this ruling raises substantial concerns regarding the balance between witness protection and the rights of the accused to confrontation. The Court's interpretation of Art.23(1) of the WWPP is far from what have been understood by other benches as discussed hereinabove. It is the view of the researcher that the tension between witness protection and the rights of the accused to confrontation underscores a vital need for the involvement of the court in the application of protective measures in particular, when granting anonymity. Unless there is an involvement of the court it is evident that a fair balance between safeguarding witnesses from genuine threats while simultaneously upholding the constitutional rights of defendants to confront and challenge the testimony against them will not be achievable. *Sewbesew Admasu*, one of the defendant's lawyers explains:

“In our country’s situation, where most of the prosecution relies on oral evidence because of the absence of scientific collection of documentary evidence, granting such protection measures adversely affects the defendant by taking away their right to confrontation. When allowing these protection measures to take place in the litigation process, the defendant's ability to conduct an effective cross-examination is infringed, as the defendants can't know the identity of the witnesses so they can question their reliability and credibility, and they will also not be able to view the witness's reaction and assess their reliability. When a person is brought in as a prosecution witness, for the defendant to have an effective cross-examination, it is very important to know the relationship that person has with the case. However, let alone for the defendant, there is no mechanism for the court to assess the credibility of the witnesses. Therefore, such an approach to allowing witness anonymity has affected the fairness of the trial.”¹⁹¹

¹⁹⁰ *Federal Prosecutor vs. Getachew Assefa et al. 26 defendants (n174)*

¹⁹¹ Interview with Sewbesew (n188)

If the defense is unaware of the identity of the person he/she seeks to question, they may be deprived of the very particulars that enable them to demonstrate that the witness is prejudiced, hostile, or unreliable.¹⁹² Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous, and the defense will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. In principle, all the evidence must be produced in the presence of the accused.¹⁹³ And granting anonymity has to be exercised exceptionally and only when other protective mechanisms are not sufficient enough to protect the witness. Therefore, while applying this protection measure it is important to have a scrutinizing approach to ensure that it aligns with the overarching principle of fairness in the legal proceedings. The court, have the responsibility of keeping the trail fair and making sure that the right of the parties in the proceeding is observed. However, in this particular case when allowing witness anonymity, the court has not considered the right of the accused to confrontation and the court's interpretation of Art. 23(1) of the WWPP not only affects the right of the accused to confrontation but also raises a question on the fairness of the trial. As discussed in chapter three, Art. 23(1) of the PWW aims to give the power to assess whether the protection measures listed under sub-Art 1(g-K) of Art.4 are taken appropriately, the very purpose of giving this responsibility to courts according to the researchers' view is because this protection measures affects the right of the accused to confrontation, thus the court has to make sure that this protection measures are inevitable as a result of a real danger and the defendant had the chance to object the application of such measures. Additionally, "serious danger" as a prerequisite for granting protective measures as per Art 3(2) of the WWPP is particularly noteworthy. The requirement for demonstrating a concrete threat to a witness's life, physical security, freedom, or property is paramount to uphold the integrity of the judicial process. However, according to *Sewbesew*, in this particular case, the witnesses were granted anonymity not due to an imminent risk, but rather because they were members of the National Intelligence Security Administration.¹⁹⁴ This raises critical questions about the underlying rationale for the application of witness anonymity, especially when contrasted against the purpose of the WWPP, which is to safeguard witnesses from genuine threats they may encounter as a result of their testimony. The other concern in this regard is the

¹⁹² *Kostovski v. The Netherlands*, ECtHR [1989] [par. 42 and 41].

¹⁹³ *Ibid*

¹⁹⁴ Interview with Sewbesew Ademasu (n188)

non-observance of the principle of equality of arms. This principle is an important component of a fair trial which requires each party not to be placed at a substantial disadvantage vis-à-vis his opponent in the trial process.¹⁹⁵ According to *Betemariam and Sewbesew*, the concealment of the identity of witnesses without any good cause, i.e., without an explanation as to why the protection is granted, is against the right to confrontation of the defendant. Moreover, the fact that the court itself is sometimes not able to obtain the witness list will put the defendant at a disadvantage, as it is impossible to be sure about the existence of the said witness, and the prosecutor might be buying time to get witnesses.¹⁹⁶ Additionally, there is no way to determine whether there has been a witness substitution.¹⁹⁷ Therefore, particularly, in this case the principle of equality of arms remains in question.

4.5 Witness Anonymity: Why Not Other Measures of Protection?

Under Art. 4 of the WWPP, a number of protection measures are listed and the application of some of the measures such as physical protection of person and property, provision of a secure residence including relocation, and provision of self-defense weapon will not affect the right to confrontation. However, despite the existence of such protection measures the prosecutor repeatedly invokes the protection measure of anonymity of witnesses, particularly in terrorism and high-profile cases. Witness Protection measures in general and witness anonymity in particular has to be granted upon the fulfillment of the requirements listed under Article 3 of the WWPP. Among these requirements one is the existence of a threat of serious danger to the life, physical security, freedom or property of the witness, or a family member of the witness as per Art.3 (1, b) of the WWPP. However, the problem lies with the absence of a clear mechanism of danger assessment and a clear procedural path of granting this protection measures. The Directorate of Whistleblowers of Criminal Offenses and Witness Protection was established in July 2010 by the authority given to the MOJ (previously Attorney General) as per Article 7 of Proclamation No. 943/2008 to enforce the powers granted by WWPP and Proclamation on Corruption Crimes.¹⁹⁸ The purpose of its establishment is to fully implement the protections set

¹⁹⁵ *Dombo Beheer BV v. the Netherlands*, ECtHR [1993] par. 33

¹⁹⁶ Interview with Betemariam Alemayehu(n183), interview with Sewbesew Admasu (n188)

¹⁹⁷ Ibid

¹⁹⁸ FDRE Ministry of Justice Facebook page (interview with Wubet Gashaw, Director of the Directorate of Whistleblowers of Criminal Offenses and Witness Protection in the Attorney General's Department of the Ministry

by law to ensure that witnesses and indicators of crime are protected from the attacks or threats they may face due to their indicating or testifying and helping the justice system.¹⁹⁹ Duties and Responsibilities of the Directorate, among others, include receiving applications for protection and making decisions upon fulfillment of the criterias set under the proclamation, examining the issues that should be considered in determining the type of protection measure, drafting a protection agreement, and, upon the minister's approval, entering into an agreement with the protection beneficiary to provide the protection.²⁰⁰ However, according to *Ermiyas'* response, the directorate is devoid of competent and experienced staffs that are capable of assessing threats and implementing appropriate protection measures.²⁰¹ Before choosing the appropriate measure of protection, he asserts that threat assessments call for psychological, physical, and financial assessments. Unfortunately, it is challenging to provide a scientific assessment of threat due to the directorate's lack of multidisciplinary staff.²⁰² Furthermore, the directorate lacks the financial resources to implement other protective measures which have no effect to the right of the accused to confrontation. In addition, the lack of cooperation from various organs makes it difficult to apply other protective measures, which is why witness anonymity is thought to be the easiest option. An interview *with Bewketu, Tadele, and Seid* indicates that the prosecutor's practice of choosing witness anonymity over other protective measures stems from a fear of administrative bureaucracy and due to a concern of leak of information.²⁰³ Thus, Anonymity, which has to be only applied as an exceptional measure, has now become routine. Nevertheless, the intention of the law is not to let the prosecutors pick the easiest method of witness protection mechanism but only to provide protection to witnesses who are prone to serious danger. Such practice is against the intent of protection, general trial fairness, and the defendant's right to confrontation. Therefore, if a witness protection application is being considered, it must be to serve the purpose of justice and the application of witness anonymity has to be understood as an exceptional protection mechanism to be applied only if other protection measures cannot suffice.

of Justice). Available at < <https://www.facebook.com/MinistryofjusticeEthiopia>, Interview with Ermias Tadesse, Federal Public Prosecutor at Federal Attorney General, September 9, 2023.

¹⁹⁹ Ibid, Interview with Ermias Tadesse

²⁰⁰ Ibid

²⁰¹ Ibid

²⁰² Ibid

²⁰³ Interview with Bewketu Temesgen ,Tadele Beredad (n163), Interview with Seid Kemal, Public Prosecutor Ministry of justice, Department of Organized and Cross-Border Crimes, September 6, 2023

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The criminal justice system's proceedings are made more difficult by the complexity of the issue relating to accused's right to confrontation and witness protection in particular anonymous testimony. In principle, having anonymous witnesses could result in a potential disadvantage against the defendant and necessitate a rigorous balancing test to determine whether a trial can proceed fairly under these conditions. To achieve this, international human rights bodies have acknowledged the importance of witnesses in fair trials, highlighting the need for their protection while also weighing their interests against those of the defendant. As a result, the concept of "finding a reasonable balance between these two interests" have been developed in order to maintain the need for the protection of vulnerable witnesses from intimidation and potential risk and to compensate the difficulties that may arise because of the application of witness anonymity. This concept has been used by the ICTY in the case *Prosecutor V Dusko Tadic* and by the European court of Human Rights and other courts as well.

At national level, the WWPP is enacted to address the issues of witness protection. Yet, the WWPP fails to observe the right of the accused to confrontation in that it put dilemma as to the power of granting witness protection between the prosecutor and the courts. While other witness protection measures could be provided by the prosecutor; the ones which interfere with the right of the accused to confrontation, such as witness anonymity requires to be decided by the court after making a thorough investigation as to the necessity of the protection. The proclamation fails to provides what constitutes a "serious threat," how to evaluate a threat, or who can evaluate the existence of threat. Despite the precedent set by the cassation bench in bringing clarity to the law regarding the power of court in granting the witness anonymity, the failure of the WWPP in providing a mechanism on which the Court assesses the existence of a threat of serious danger poses challenges to the court in exercising their power to grant witness anonymity.

Furthermore, Article 3(1) (b) of WWPP poses a question of fairness by including that witnesses giving decisive testimony may be eligible for protection, including anonymity protection. Again, witness protection measure involving anonymity is not treated separately rather the WWPP provides identical justification for the use of every protection measures and, such uniform

treatment of witness anonymity with other protection measures will hamper the defendant's right to confrontation thereby compromising fairness of the trial. It also fails to provide the application of witness anonymity as exceptional and last resort of witness protection mechanism.

Additionally, the challenges associated with the practical application of witness protection are compounded by the existing dilemmas within the legal framework. Despite the precedent set by the cassation bench regarding the court's authority to grant witness anonymity, inconsistencies persist across different benches. Notably, while courts typically mandate the submission of an application by the prosecutor for certain protective measures such as in camera proceedings and testimony provided behind the curtain there remains a notable lack of requirement for such applications when it comes to concealing a witness's identity prior to their testimony. This disparity not only raises concerns about the uniformity of judicial practices but may also affect the right of the accused to confrontation and also raises a concern about the fairness of the trial.

The court's practice of granting witness protection, particularly in the instance where witnesses are permitted to testify behind a curtain, exhibits significant shortcomings. A critical flaw in the court's ruling lies in its failure to question the prosecutor for provision of a comprehensive assessment of the necessity for protection and the eligibility of the witnesses for such provisions. For instance, in cases where witnesses associated with the National Intelligence Security Administration were afforded the privilege of anonymity, the justification for their protection was rooted primarily in their professional affiliation rather than a demonstrable threat to their life, physical safety, freedom, or property, or that of their families. The inability to scrutinize the basis of such testimony not only undermines the defendant's right to a fair trial but also contravenes the stipulations outlined in Article 3 of the WWPP.

Moreover, this practice diverges from standards observed in other judicial systems, such as those upheld by the European Court of Human Rights, where the credibility of witnesses is subject to rigorous evaluation. In the reviewed cases, the court did not undertake adequate measures to verify the credibility and intentions of these anonymous witnesses. Consequently, the court lacked the opportunity to assess the demeanor of the witnesses during testimony, a crucial factor in evaluating reliability and truthfulness. Additionally, the procedural shortcomings surrounding witness anonymity significantly impede the defendants' rights, specifically their ability to question the sources of the witnesses' knowledge pertaining to their testimony. The lack of robust

procedural safeguards further exacerbates challenges in the exercise of the defendant's right to confrontation. This absence of clear frameworks restricts the defendant's ability to effectively challenge the credibility of anonymous witnesses, which is fundamental to ensuring a balanced judicial process. Moreover, the current practice concerning the implementation of witness anonymity as a protective measure fails to consider it as a last resort. An alternative protection method that may impose less or no adverse effect on the accused's fundamental right to confront witnesses is disregarded. This failure is also attributed to the financial incompetence of the Directorate of Whistleblowers of Criminal Offenses and Witness Protection and the lack of cooperation from various stake holders to use alternative protection measures. Thus, the failure to rigorously evaluate the use of less intrusive alternatives and lack of financial competence to implement other protective measures also compromises the accused's right to confrontation. Consequently, the current practices do not provide adequate counterbalancing mechanisms for defendants seeking to exercise their right to confrontation. This shortage hampers the right of the defendants to confrontation and also raises concerns regarding the fundamental principles of justice and fairness.

5.2 Recommendations

Based on the research findings, the following recommendations are proposed:

- ❖ Explicit provisions pertaining to the implementation of witness anonymity must be incorporated into WWPP. An explicit statement that witness anonymity would only be granted in exceptional circumstances and as a last resort should be at the center of this amendment. The rights of defendants would be protected, and the integrity of the legal system would be maintained, by including a clause that would define the conditions under which anonymity may be acceptable.
- ❖ The Proclamation must undergo amendments to include a comprehensive list of witness anonymity decision-making criteria, as well as to clearly articulate the roles of each relevant organ involved in this process. This delineation of responsibilities is crucial to ensuring a coherent and accountable framework for the application of witness anonymity.
- ❖ The proclamation must explicitly allow the courts the sole authority to confer anonymity to witnesses. This sole authority safeguards witnesses in addition to improving the rights of defendants. Therefore, the proposed revision is necessary to provide a fair and balanced

approach to witness protection that upholds justice and encourages confidence in the legal system.

- ❖ The Proclamation has to incorporate a well-defined threat assessment process in order to determining the legitimacy and extent of any risk faced by witnesses, as well as identifying appropriate protective measures that may be necessary.
- ❖ The Proclamation should mandate a requirement for the prosecutor to establish or provide proof of a serious threat of danger in any application for witness anonymity. The obligation to substantiate claims of threat serves multiple purposes: it fosters a rigorous examination of the necessity for anonymity and promotes transparency in the application process.
- ❖ To improve the financial capacity of the Directorate of Whistleblowers of Criminal Offenses and Witness Protection. A greater allocation of resources will enable the Directorate to apply protective measures to the specific needs of witnesses without affecting the rights of defendant.
- ❖ Enhancing cooperation among various organs which could involve the establishment of joint task forces or working groups comprising representatives from law enforcement, the judiciary, social services, and legal advocacy organizations is essential for the effective implementation of protective measures that do not infringe upon the accused's right to confrontation.
- ❖ Providing trainings; The interplay between the defendant's right to confrontation and the interests of witness protection presents a complex challenge that necessitates ongoing training and capacity building for all parties involved in the witness protection process, including courts, prosecutors, and other stakeholder groups.

REFERENCES

A. BOOKS

- ❖ Chris Mahony 'Witness Protection in Africa' (1st Ed.) Institute for Security (2010)
- ❖ Gray K, Dominic M, Peter R, and Eric D *The Evidence Before the ICC Permanent International Criminal Court Legal and Policy Issues* (Hart publishing 2004)
- ❖ Jeremy McBride, *Human Rights and Criminal Procedure the Case Law of The European Court of Human Rights* (Council of Europe publishing 2009)
- ❖ Richard Friedman, ed. Darryl KB, Jenia IT, and Bettina Weisser, *The Confrontation Right* (The Oxford Handbook of Criminal Process 2019)
- ❖ Simeneh Kiros, *Criminal Procedure Law Principles, Rules and Practices* (2009)

B. JOURNALS

- ❖ Alemu M and Awol A, 'The Ethiopian Law on the Right to Confrontation' (2019) 9 Bahir Dar U JL 157
- ❖ Andra Le Roux-Kemp 'Witness Anonymity and The South African Criminal Justice System' (2010) 23 SAJ CJ 353
- ❖ Andrew Trotter, 'Witness Intimidation in International Trials: Balancing the Need for Protection against the Rights of the Accused' (2012) 44 GWLR 521
- ❖ Chalmers J and Leverick F, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217
- ❖ David Lusty 'Anonymous Accuser: An Historical and Comparative Analysis of Secret Witness in Criminal Trials' (2002) 24 SLR 361
- ❖ Felföldi ENIKÖ 'The Rising Importance on The Protection of Witnesses in The European Union' (2006) 77 IRL 314
- ❖ Frank R. and Brownlow M, 'Facing the Accuser: Ancient and Medieval Precursors of Confrontation' (1994) VJIL 481
- ❖ Jason M. Swergold, 'Taking Blind Shots at a Hidden Target: Witness Anonymity in the United Kingdom' (2009) 32 B ICLR 471
- ❖ M. Biral, 'The Right to Examine or Have Examined Witnesses as a Minimum Right for a Fair Trial' (2014) 22 EJCCL 331
- ❖ Maille Brady, 'A Balancing Act: The Rights of the Accused and Witness Protection Measures' (2014) 17 TCLR 143

- ❖ Michael Tilahun, ‘The Two Competing Interests: Equality of Arms vis-à-vis Anonymity of Witness; The Case of Ethiopia’ (2017) AL1
- ❖ Mike Redmayne, “Confronting Confrontation” (2010) 10 LSEWP 1
- ❖ Robert B. McKay, ‘The Right of Confrontation’ (1959) 2 WULR 122
- ❖ Ruth C and Philip A, ‘Anonymous witness’ (2000) 51 NILQ 328
- ❖ Snezana Brkic, 'Witness Protection as a Subjective Right and its Elements' (2010) 1 AJSS 117
- ❖ Stanley Z. Fisher ‘Traditional Procedure in Ethiopia’ (1971) 19 AJCL 716
- ❖ Tadesse Melaku, ‘The Right to Cross-Examination and Witness Protection in Ethiopia: A Comparative Overview’, (2018),12 MLR 303
- ❖ Wakgari Dulume, ‘Ethiopian Witness Protection System: Comparative Analysis with UNHCHR and Good Practices of Witness Protection Report’ (2017) 6 OLJ138

C. RESEARCH PAPERS

- ❖ Daniel Soto Betancourt, ‘Anonymity as protective measure for victims and witnesses v. the rights of the accused’ LLM Thesis, Tilburg University 2010
- ❖ Desta Mesfin, ‘The Constitutionality of Non-disclosure of Witness’s Identity for the Criminal Defendant in Ethiopia’ LLM Thesis, Addis Ababa University 2020.

D. NATIONAL LAWS AND POLICIES

- ❖ Constitution of the Federal Democratic Republic of Ethiopia constitution, Proclamation No. 1/1995, Federal Negarit Gazette, 1st year No. 1 Addis Ababa 21st August 1994
- ❖ Criminal Procedure Code Of Ethiopia, Proclamation No.185, 1961
- ❖ Federal Attorney General Establishment Proclamation no.943/2016, Federal Negarit Gazette, 22nd year No. 62 Addis Ababa, 2nd May, 2016
- ❖ Federal Democratic Republic of Ethiopia, Criminal Justice Policy, (2011)
- ❖ Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, Federal Negarit Gazette, 26th year No. 20 Addis Ababa 25th, March 2020
- ❖ Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010, Federal Negarit Gazette, 17th year No. 16 Addis Ababa, 11th February, 2011
- ❖ Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/2005, Federal Negarit Gazette, 11th year No.1 9 Addis Ababa, 2nd February, 2005

E. REGIONAL AND INTERNATIONAL INSTRUMENTS

- ❖ African Charter on Human and Peoples' Rights, 1981.
- ❖ African Commission on Human & Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003
- ❖ American Convention on human rights 1969
- ❖ Australia Witness Protection Act (1994). Act No. 124
- ❖ Canada Witness Protection Programme Act. 1996,
- ❖ European Convention on Human Rights 1950,
- ❖ European Convention on Human Rights, 1951
- ❖ General Assembly Resolution No 827 (1993) Security Council ICTY Art 21(2),
- ❖ General Assembly Resolution No 955 (1994) Security Council ICTR Art 22
- ❖ International Covenant on Civil and Political Right, 1966.
- ❖ Kenya Witness Protection Bill of 15 May 2006,
- ❖ Rome Statute of the International Criminal Court of 1998
- ❖ South Africa Witness Protection Act November 1998
- ❖ Statute of the International Criminal Tribunal for the Former Yugoslavia of 2009
- ❖ United Nations Convention against Corruption (Assembly resolution 58/4 of 14 December 2003
- ❖ United Nations Convention against Transnational Organized Crime, Resolution 55/25 of November 2000
- ❖ Universal Declaration of Human Rights, 1948
- ❖ Statute of the International Criminal Tribunal for The Former Yugoslavia of 2009
- ❖ Rome Statute of the international Criminal Court, 17 July 1998

F. LIST OF CASES

- ❖ *Al-Khawaja v. United Kingdom* [2011] ECtHR [127]
- ❖ *Asani v. Macedonia* [2018] ECtHR [33]
- ❖ *Doorson V. The Netherlands* [1996] ECtHR [69]
- ❖ *Federal Prosecutor v Abebe Temesegen et al 8 defendants*, Federal Hight Court, Lideta Division Terrorism Bench, file number 171419)
- ❖ *Federal prosecutor v Dr.debretsion Gebremichael et al 61defendants*, Federal Hight Court, Lideta Division 1st Terrorism Bench, file number 272802)

- ❖ *Federal Prosecutor v Nebyu Siraj et al 7 defendants*, Federal High Court, Lideta Division 1st Terrorism Bench, file number 17165)
- ❖ *Federal Public Prosecutor vs. Eskender Nega Fenta et al., 5 defendants*, Federal Supreme Court, 2nd Criminal Appellate Bench, 04/09/2013 E.C., File No. 199376)
- ❖ *Federal Public Prosecutor vs. Jawar Siraj Mohammed et al., 24 defendants*, Federal High Court, Lideta 1st Anti-Terrorism and Constitutional Issues, file No. 260215) (unpublished)
- ❖ *Kostovski v. The Netherlands*, ECtHR [1989]
- ❖ *Krasniki v. Czech Republic* [2006] ECtHR [76]
- ❖ Mahdi Aliyi and others, file no 2356/2009, Council of Constitutional Inquiry, (2009 EC)
- ❖ *Norín Catrimán v. Chile* [2014] ECtHR [1–175]
- ❖ *Prosecutor v. Dusko Tadic*, The International Tribunal for the former Yugoslavia
- ❖ *Prosecutor vs. Getachew Assefa et al. 26 defendants*, Federal High Court, Lideta 1st Corruption crime bench, March 16, 2014, E.C. File No. 238040) (unpublished)
- ❖ *Public Prosecutor vs Dr. Wondowessen H/mariam et al 27 defendants*, Federal High Court, Lideta Constitution and Terrorism Crime Bench 30/ 09/2015 E.C fn. 610/15)
- ❖ *Rowe and Davis v United Kingdom* [1995] ECtHR
- ❖ *Van Mechelen And Others V. The Netherlands* [1997] ECtHR [52]
- ❖ *Van Mechelen v. Netherlands* [1997] ECtHR, [52–55]

G. INTERVIEWS

- ❖ Interview with Sewbesew Ademasu, Attorney at Federal Courts, January 5, 2024
- ❖ Interview with Betemariyam Alemayehu, Attorney at Federal Courts, January 4, 2024
- ❖ Interview with Haftom Kesete, Attorney at Federal Courts, September 10, 2023
- ❖ Interview with Feyera Teresa, Federal High Court Judge and Inspection Director, December 12, 2023
- ❖ Interview with, Bewketu Temesgen, Federal Public Prosecutor at Ministry of Justice, September. 8, 2023;
- ❖ Interview with Tadele Beredad, Directorate of Organized and Cross-Border Crimes, Organized Terrorism and Conflict Crimes Coordinator, Ministry of Justice, September. 6, 2023
- ❖ Interview with Etefwork Bereda, Federal High Court Judge, October 12, 2023

- ❖ Interview with Seid Kemal, Public Prosecutor at Ministry of justice, Department of Organized and Cross-Border Crimes, September 6, 2023
- ❖ Interview with, Ermias Tadesse, Federal Public Prosecutor at Ministry of Justice, September 9, 2023.

H. INTERNET SOURCES

- ❖ International Criminal Court, “Witnesses” <https://www.icc-cpi.int/about/witnesses> accessed in August, 2024
- ❖ United Nations, Office for Drugs and Crime, ‘Good practices for the protection of witnesses in criminal proceedings involving organized crime’ New York 2008, 38, 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)>>>f> accessed on January 20
- ❖ UN Human Rights Committee (HRC) General Comment No.32, Art 14, Right to Equality Before Courts and Tribunals and To Fair Trial, 23 August 2007, CCPR/C/GC/32 Available at < <https://www.refworld.org/docid/478b2b2f2.ht+ml>>
- ❖ The Committee of Ministers to member States on the protection of witnesses and collaborators of justice, Recommendation CM/Rec (2022)9, 30, March, 2022 available at < <https://rm.coe.int/0900001680a5fe33>> last accessed on August, 2024
- ❖ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia(as amended on 17 May 2002) article 22 available at <<https://www.refworld.org/docid/3dda28414.html>>
<<https://www.ohchr.org/en/professionalinterest/pages/statuteinternationalcriminaltribunalforrwanda.aspx>>
- ❖ Transparency international, good practice in witness protection legislation. Available at <<https://www.sia.eurosocialii.eu/files/docs/1386926957102%20Good%20practice%20in%20witness%20protection%20legislation.pdf>> last accessed on August, 2024

I. OTHER SOURCES

- ❖ Yvon D and Kristin F, “*A review of selected witness protection programs*, (Rn. 001, Research and National Coordination Organized Crime Division Law Enforcement and Policy Branch Public Safety Canada 2010.)

- ❖ Shajeda Akather, Rohaida Nordin ‘Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments’ <[\(PDF\) Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments \(researchgate.net\)](#)> last accessed on August, 20,2024
- ❖ Amal Clooney, Philippa webb, *The Right to Fair Trial in International Law*, Oxford Public International Law. Citing Schatschaschwili v. Germany [2015] ECtHR [100–101].
- ❖ Mark Mackarel, Fiona Raitt, and Susan Moody, Briefing Paper on Legal Issues and Witness Protection in Criminal Cases, The Scottish Executive Central Research Unit 2001 1-46
- ❖ FDRE Ministry of Justice Facebook page (interview with Wubet Gashaw, Director of the Directorate of Whistleblowers of Criminal Offenses and Witness Protection in the Attorney General's Department of the Ministry of Justice). Availabe at<<https://www.facebook.com/MinistryofjusticeEthiopia>>.
- ❖ Holy bible, Acts 25:16