

## **The dangerous lives of ICC's witnesses**

The new year started with the shocking news that a Kenyan witness, linked to a case before the International Criminal Court (ICC), had been abducted and found dead floating in a river in Kenya early morning the 2<sup>nd</sup> January 2015. Mr. Meshak Yebei was brutally killed. 'His eyes had been gouged out, his genitals chopped off, his tongue cut out and he had been shot in the head,' The Guardian wrote. Yebei was last seen on 28 December 2014 in the town of Turbo, Rift Valley, taking care of his child who had fallen ill, when he was kidnapped, went missing and was found back savagely murdered. He was known to the ICC. The Registrar sent out a statement on the 6<sup>th</sup> of January explaining Yebei was however 'not on the prosecutions witness list nor was he in contact with prosecution staff at the time of his abduction.'

### **Withdrawal of charges**

His mysterious death is the latest in a series of many serious incidents involving witnesses related to the ICC, which is investigating international crimes in eight African countries. In Kenya, where the court originally was prosecuting six Kenyans suspected of crimes against humanity for organising violence after the 2007 elections, the level of intimidation against people willing to testify seems to have risen to alarming levels, according to prosecutor Fatou Bensouda. She linked her painful decision to withdraw charges against Kenyan top official Francis Muthaura largely to witness interference. In her statement on 11 March 2013 she explained her choice by referring to:

- The fact several people who may have provided important evidence regarding Mr Muthaura's actions, have died, while others are too afraid to testify for the Prosecution.
- The disappointing fact that the Government of Kenya failed to provide my Office with important evidence, and failed to facilitate our access to critical witnesses who may have shed light on the Muthaura case.
- The fact that we have decided to drop the key witness against Mr. Muthaura after this witness recanted a crucial part of his evidence, and admitted to us that he had accepted bribes.

She repeated this list of facts, in almost the same words, when she withdrew the charges against the Kenyan president Uhuru Kenyatta on the 5<sup>th</sup> of December 2014. The prosecutor admitted she did not have enough evidence against these two suspects after crucial insider witnesses, who allegedly were part of the criminal network behind the violence, admitted they had lied to the investigators, while other witnesses had withdrawn and recanted their stories

and the Kenyan State obstructed the search for information that might have led to other evidence. For years though defence lawyers have been claiming that the Office of the Prosecutor (OTP) simply had not done its work, had put faith in the wrong persons - witnesses who were untrustworthy and who had produced lies. (In 2012 the judges already decided there was not enough evidence against two other Kenyan suspects). The cases that had started as 'Ocampo Six' (named after the first ICC's prosecutor Luis Moreno-Ocampo) has by now dwindled to 'Bensouda Two.'

### **Courage**

In general the court is highly dependent on witnesses, who are willing to talk about what they saw, heard and knew. It takes immense courage and patience to be a witness. Often many years pass between the moment a person speaks for the first time with OTP-investigators and intermediaries, the lawyers for the defence or the legal representatives of victims, and that historic moment when a witness actually appears in court to testify. Because of the nature of the cases before the ICC – focussed on international crimes organised by networks of powerful persons – a daunting task rests on witnesses' shoulders, a daunting responsibility and quite often a daunting risk as well. Lots of efforts are undertaken to make sure witnesses stay physically and emotionally unharmed and indeed leave the court relieved. But that is not always the case. The general public saw a glimpse of what tactics are applied to influence and pressurise people when the first witness in the trial against the Kenyan vice-president William Ruto and broadcaster Joshua Sang was giving evidence. The woman testified anonymously with her identity kept secret. Her name was not made public and instead a pseudonym was used. Her face and voice were distorted when transmitted to screens and headphones in the public gallery. The next day however her name proved to be leaked and publicized by (social) media. The woman and her family were receiving all kind of threats. Indeed, a quick search on the internet reveals the publication of (false) names of other Kenyan witnesses as well.

### **Security Measures**

The court has a special section, the Victims and Witnesses Unit (VWU), that looks after the safety and wellbeing of witnesses. Since not all witnesses run the same risk, the VWU has developed a set of levels of security measures. One VWU official once explained in an interview there is one simple golden rule that often works to protect witnesses: 'Don't tell anyone you are testifying at the ICC, because when nobody knows, the risk is most reduced.' Clearly that solution does not apply to all. Witnesses' fears and concerns are sometimes death

with by protecting their houses with for instance an extra lock, or by extra patrols by specially appointed police units. If there is a serious risk, the ICC can decide to ‘an assisted move’ in which a witness and family-members are relocated to another place, usually in their home country. The highest level is admittance to the ICC’s Protection Programme, which means the court is taking full care of the witness (providing housing, work, health care, education) and relocation abroad. For a long time the ICC claimed that just a ‘dozen’ witnesses were benefitting from this highest form of protection. But the ICC recently disclosed that ‘currently, more than 650 witnesses, victims and families’ members are provided with protective measures by the Court.’ (The flipside however is that persons might find the prospect of protection so appealing that they are willing to present themselves as witnesses, though in reality they are not.) In its public statement the court explained that Yebei was offered ‘security measures, including a safe residency in a new location’, without being able to explain why he had left de protection programme and ‘returned to Eldoret where the incident reportedly took place.’

### **Officials and intermediaries**

Risks can come from all sides. One of the biggest scandals took place in the Democratic Republic of Congo where an ICC-official sexually assaulted four victims/witnesses, while others had shown inappropriate behaviour in this specific case as well. In the trial against Congolese warlord Thomas Lubanga Dyilo the judges blamed three Congolese intermediaries, investigating on behalf of the OTP, of pressuring nine witnesses – mostly child-soldiers – to give false testimony. The chamber concluded these intermediaries might have committed crimes themselves, but two years later the OTP concluded there was no reason to prosecute them. Another dubious person linked to OTP was Walter Barasa – a Kenyan journalist working with ICC-investigators to contact witnesses in Kenya. In 2013 Bensouda accused and charged him with offenses against the administration of justice for bribing and influencing three prosecution witnesses in the trial against Ruto&Sang. Until now Kenya hasn’t transferred him to The Hague.

### **Defence witnesses**

It would be a mistake however to think that only OTP-witnesses are under pressure. The former vice-president of the DRC, Jean-Pierre Bemba Gombo, has been on trial since 2010 for international crimes allegedly committed by his militia in the Central African Republic (Bemba Main case). But in 2013 he was also charged – with two of his lawyers, a Congolese

politician and a CAR-witness - with bribing his defence witnesses. A very controversial case in which the OTP has been investigating its legal opponents in the main case.

How about Mr. Yebei? Mr. Karim Khan, lead counsel for the Kenyan vice-president Ruto, has disclosed he was a 'critical' defence witness. In the meantime the blame-game has started. Kenyan politicians have accused a human rights activist being behind the savage killing of Yebei. The OTP saw itself forced to release a press statement to end 'recent speculation' suggesting the prosecution played a role in his death. 'Any suggestion that the Office of the Prosecutor was involved in Mr. Yebei's alleged abduction and murder is both outrageous and utterly false. Nothing could be further from the truth,' the OTP wrote on the 9<sup>th</sup> of January 2015. During its investigations in Kenya, the statement explained, the OTP had contacted 'numerous individuals' and Yebei was one of them. In a new dramatic twist the prosecution revealed why he was not included in the witness list. One of the reasons was that Yebei was 'deeply implicated' in the scheme to corrupt prosecution witnesses in the case against Ruto and Mr. Sang. The OTP added that 'prosecution witnesses in this case have been under siege. The Office of the Prosecutor has identified a network of individuals who have been working together to sabotage the prosecution's case against Messrs. Ruto and Sang, by using bribes and/or threats to either dissuade witnesses from testifying in this case or influence prosecution witnesses to recant their testimony.'

### **Confusion**

Many questions in this tragedy are waiting for an answer. Who killed defence witness Yebei and why? When did Yebei start getting involved in witness interference, as the OTP claims? Why was the ICC providing Yebei with security measures while they knew he was sabotaging its high profile trial against Ruto&Sang? Why had Bensouda never sought an arrest warrant against him?

When Mr. Khan learned about the allegations against Yebei on 9 January by the OTP and had found out that certain of his confidential communications to Kenyan authorities were leaked to the media, the defence counsel felt compelled to issue a public statement about his witness. He accused the OTP of carrying out 'a gratuitous character assassination of an individual not available to defend himself and without regard to the dignity of the family of the deceased.' He disclosed Yebei's first contact with his defence team was in July 2013, and told them about 'a cabal of prosecution witnesses who had deliberately concocted false accounts against H.E. William Ruto for financial and other benefits.' After Yebei had become a defence witness, the prosecution interviewed him ('without the knowledge of the defence,' Khan

writes) concerning allegations that he was involved in witness interference activities. During that interview, apparently in a third country, Yebei denied the accusations.

In his statement Khan reveals that Yebei was actually threatened with abduction by one of the OTP witnesses and that Bensouda's team knew about the threats which started months ago. It was Khan himself who alerted the VWU that his witnesses needed to be brought into safety. 'Mr Yebei was referred to the ICC witness protection programme by me,' the lawyer writes. About Yebei he said: 'I commend him as a courageous man who cooperated with the Defence and the ICC-VWU, despite knowing that elements exist that do not wish the truth about the case against H.E. William Ruto to emerge.' He added: 'Everyone should refrain from unnecessary public speculation and inflammatory comments at this time. The attack on Mr. Yebei was an attack on H.E. William Ruto and the fabric of justice itself.'

While the Kenyan authorities are tasked to investigate this terrible murder, media carry reports suggesting that fingerprints retrieved of the mutilated body are not those of Yebei and that another four witnesses related to the ICC have gone missing. Their names are on the internet.