



Tool 5.17 Witness protection

Overview

This tool presents the provisions of article 24 of the Organized Crime Convention relating to the protection of witnesses and article 23, subparagraphs (a) and (b) on obstruction of justice. The tool also introduces the United Nations model witness protection bill.

Principles of protection

The role of witnesses and the evidence they provide in criminal proceedings is often crucial in securing the conviction of offenders, especially in respect of organized crime such as human trafficking. The key principles to bear in mind with respect to witness protection are:

Physical protection

- This is particularly important when witnesses are testifying against organized criminal groups.
- It can range from simple and affordable measures (like giving witnesses a mobile phone) to more complicated resource-intensive measures (such as domestic or foreign relocation of witnesses or changing the identity of a witness).
- Criminal prosecution of offenders or their accomplices for intimidating or threatening witnesses is another means of protecting witnesses.
- Types of physical protection that should always be considered on the basis of individual circumstances are:

Police escorts from and to court

Security in the courtroom (including checking for weapons)

Keeping the victim informed of proceedings (especially where the accused person is released from custody)

Protection for the witness's family

Psychological protection

- This includes the stabilization of the victim's psychological situation and the avoidance of further stress (e.g. through revictimization or relapse into trauma as a consequence of legal proceedings).
- Many forms of psychological protection depend on national rules and proceedings.
- Types of psychological protection which should always be considered are:

Keeping the witness fully informed of what to expect in the courtroom

Allowing expert counsellors to accompany the witness to court

Utilizing judges, prosecutors and police who are specially trained and sensitive to the specific needs of witnesses

Making available a separate waiting room for witnesses at courtrooms to avoid the witness being confronted by the defendant or the defendant's associates out of the courtroom

Protection from unfair treatment

- It is essential to ensure that victims are treated in a manner that respects their rights and their dignity.
- Because of the value of witnesses in successfully prosecuting perpetrators, there is a danger that they will be regarded as tools in the process. This can lead to unfair treatment of witnesses, including repeated interrogation, invasive medical examination and incarceration. Fair treatment means treating witnesses primarily as individuals entitled to dignity and protection of their rights.
- The provision of adequate legal advice and services can assist in protecting witnesses from unfair treatment from an early stage, even before they have agreed to serve as witnesses.



In implementing witness protection measures, States must ensure that protection measures are implemented in a way that does not undermine the right of the defendant to a fair and open trial.

Article 24 of the Organized Crime Convention

Protection of witnesses

In accordance with article 24, paragraph 1, of the Organized Crime Convention, States parties must take appropriate measures within their means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and, as appropriate, for their relatives and other persons close to them.

Article 24, paragraph 2, provides that these measures may include:

(a) Establishing procedures for the physical protection of such persons, such as relocating them and permitting limitations on the disclosure of information concerning their identity and whereabouts;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.

These requirements are mandatory, but only “where appropriate” and “within the means” of the State party concerned.

In article 24, paragraph 3, States parties are also encouraged to enter into agreements or arrangements with other States for the relocation of witnesses. Article 23, paragraph 4, states that the article applies to victims of crime insofar as they are also witnesses.

This means that the obligation to provide effective protection for witnesses is limited to specific cases or prescribed conditions where, in the view of the implementing State party, such means are “appropriate”. Officials might be given discretion to assess the threat or risks in each case and only extend protection where justified by the assessment, for example. The obligation to provide protection also arises only where such protection is within the “means”, such as available resources and the technical capabilities, of the State party concerned.

The term “witnesses” is not defined, but article 24 limits the witnesses to whom the obligations apply to “witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, ... their relatives and other persons close to them”. Witnesses can be either simple observers of a crime or victims of the crime. Witnesses can also be individuals who belonged to an organized criminal group or who committed a crime and then decided to collaborate with the justice system.

Article 23 of the Organized Crime Convention

Criminalization of obstruction of justice

By virtue of article 23 of the Organized Crime Convention, States parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of States parties to have legislation that protects other categories of public officials.

This article requires States to address the question of “obstruction of justice” by creating an offence for situations where efforts are made to influence potential witnesses and others in a position to provide the authorities with relevant evidence. The obligation is to criminalize the use both of corrupt means, such as bribery, and of coercive means, such as the use or threat of violence.

In relation to the “use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention”, the use of force, threats and inducements to false testimony can occur at any time before the commencement of the trial, whether a formal “proceeding” is in progress or not. Therefore, the term “proceeding” must be interpreted broadly to cover all official governmental proceedings, including pretrial processes. States are required to apply this offence to all proceedings relating to offences “covered by the Convention” and the Protocols.

Interpreted narrowly, this would only apply where testimony is actually given, or when it is apparent that testimony will be given, although the requirement to protect witnesses from “potential” retaliation may lead to a broader interpretation.

Recommended resource

United Nations model witness protection bill

Legislation to establish a witness protection programme usually establishes the authority of the agency responsible for organizing and providing protection services. The United Nations model witness protection bill provides a starting point for the development of the required legislation.

The aim of the model witness protection bill is to ensure that investigation and prosecution of serious criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. Through a witness protection programme to be administered and maintained by a designated person or body, witnesses can be given protection and assistance to shield them from such recrimination. The disclosure of information relating to the programme or to witnesses participating in it is made an offence.



The model witness protection bill and commentary can be found on the UNODC website, at:

www.unodc.org/unodc/en/legal-tools/Model.html

Good practices for the protection of witnesses in criminal proceedings involving organized crime

In 2005, UNODC commenced a series of regional meetings with the active participation of expert representatives of law enforcement, prosecutorial and judicial authorities of Member States, to develop a set of internationally recognized good practices for use in the establishment and operation of witness protection programmes. Workshops were held at UNODC, Vienna in September 2005, Mexico City in November 2005, Bangkok in June 2006 and again in Vienna in November 2006. The product of these events are guidelines that reflect experience from different geographical regions and legal systems, as well as existing literature, and previous and ongoing work by UNODC and other international and regional organizations. The good practices identified reflect a holistic approach to witness protection. The guidelines examine a series of measures that may be undertaken to safeguard the physical integrity of people who give testimony in criminal proceedings from threats against their life and intimidation. These measures provide for a continuum of protection, starting with the early identification of vulnerable and intimidated witnesses, moving through the management of witnesses by the police and the enactment of measures to protect their identity during court testimony and culminating with the adoption of the exceptionally severe measures of permanent relocation and change of identity.



These guidelines are forthcoming in 2008, at:

www.unodc.org

Promising practice

Witness Protection, Security and Benefit Act of the Philippines

The Witness Protection, Security and Benefit Act of the Philippines provides protection, including relocation and limited disclosure or non-disclosure of information concerning the identity and whereabouts of protected persons, to witnesses and, as appropriate, their family members.



For more information, see:

www.doj.gov.ph/faqs_witness.html and

www.chanrobles.com/republicactno6981.htm

Lesson from experience in the Philippines

In the Philippines, the Department of Justice is in charge of coordinating the national witness protection programme. Other governmental agencies are also involved, depending on their respective mandates and responsibilities, in several aspects of the programme. An inter-departmental memorandum of understanding was developed to delineate the respective responsibilities of the various departments: the Health Department is to assist the Justice Department in providing witnesses with medical treatment and hospitalization; the Department of Labour and Employment helps witnesses to secure employment and obtain a means of livelihood; the Department of Social Welfare and Development provides assistance to witnesses with respect to skills training services, crisis intervention and help in dealing with traumatic reactions; and the National Bureau of Investigation and the National Police are responsible for providing personal safety for the witness and her or his family. This coordinated approach involves all relevant governmental actors and thereby covers the many aspects of witness protection programmes over and above physical protection.

Lesson from experience in South Africa

Experience in South Africa reveals that a centralized, single witness protection agency in a Government ministry (for example the Ministry of Justice) can offer a greater guarantee of effective witness protection and help prevent failures resulting from incompetence or corruption. Such a centrally organized and administered agency should have its own budget, adequate funding, a central secure database, including data on the witnesses participating in protection programmes nationwide, and safe houses. It is also advisable to set up a specialized police unit responsible for carrying out the protection measures, because the use of normal police units on an ad hoc basis can compromise the integrity of the programme and prevent it from accumulating the necessary expertise.

Sarajevo Declaration of the Ministers of Interior or Public Order and State Representatives from South Eastern Europe concerning the fight against organized crime, regarding in particular data protection and processing, as well as witness protection

The signatories to the Declaration agreed to the following:

1. To be a party to the relevant legislation on data protection as a condition for the exchange of information with the aim to create trust among international, European and regional law enforcement agencies;
2. To develop mechanisms in line with European Union standards to ensure cooperation between national ministries, judicial bodies, various crime-fighting agencies, including police, customs, border police, prosecutor's offices, etc;
3. To share expertise and best practices on the implementation of protection and processing of personal data with those countries that already have legislation corresponding to European Union standards;
4. To promote tools designed to guarantee the personal right to privacy with regard to the processing of personal data, as well as to improve the legislation and enforcement applying to the collection, storage, use and disclosure of personal data for law enforcement purposes;
5. To create appropriate institutional infrastructure for the implementation and enforcement of the legislation and ensure that it is adequately resourced;
6. To be a party to the relevant legislation on witness protection as one of the crucial tools for the successful investigation and prosecution of organized crime offences;
7. To respect the integrity and freedom of witnesses who have or are willing to offer crucial information to law enforcement and judicial bodies regarding the perpetration of an organized crime offence;
8. To draft and adopt witness protection law and secondary legislation in line with European Union standards;
9. To share expertise and best practices on the implementation of witness protection for the South-Eastern European countries that already have legislation corresponding to European Union standards;
10. To create the appropriate institutional infrastructure for the enforcement of the legislation and ensure that it is adequately resourced;
11. To be conducive to interregional cooperation, particularly among police forces;
12. To grant a reflection period to the victim to decide to act as a witness;
13. To recognize that victim-witnesses have unique characteristics and are subject to unusual risks which require special protective measures;
14. To generate best assistance practices for victims/witnesses before, during but also after court proceedings, and after return to the country of origin or third country.



The Sarajevo Declaration is available at:
www.stabilitypact.org/org-crime/030619-sarajevo.asp