



Tool 5.18 Witness protection during and after the prosecution and trial

Overview

In relation to the protection of witnesses during and after the prosecution and trial, this tool discusses:

- *Witness protection measures*
- *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*
- *The role of non-governmental organizations in witness protection*
- *Promising State practice*

Witness protection during the prosecution and trial

Witness protection measures

A number of measures must be taken at the trial stage to ensure that the case is successfully prosecuted and the trial process is not compromised. Some measures, such as video testimonies or the exclusion of the general public from a hearing, are aimed at protecting the witness's identity, privacy and dignity. Other measures, for example witness concealment or allowing witnesses to remain anonymous, are aimed at protecting their physical security.

Court witness protection measures are generally authorized and regulated under criminal (procedural) law. Such measures are intended to prevent the accused or his accomplices from violating the witness's physical integrity in the courtroom and, in some cases, from revealing the witness's identity. Other measures, which include anonymous witness statements or testimony behind screens, are not necessary in cases where the trafficker knows the identity of the witness. In other cases, however, the witness may have legitimate reasons to fear for her or his personal safety if the accused, or others present in the courtroom, are informed of her or his name and address. Courtroom-based witness protection measures such as video-link testimonies require technical equipment, well-trained personnel and adequate financial resources. Therefore, sufficient funding must be made available to the prosecutors and the courts to use them effectively.

Testimony via video-link

Video-link testimonies, or teleconferences as they are sometimes called, allow witnesses to testify in a location other than the courtroom. Their statement is transmitted in actual time via video-link to the courtroom, where the judge, the defendant, the defence counsel and the public prosecutor watch and listen to the transmission and can ask questions of the witness. The room where the witness is testifying can be a separate room in the court building or in a different location.

This method protects the witness from direct confrontation with and intimidation by the accused. It creates physical distance between the witness and the accused and thus an environment where the witness feels secure enough to testify. It does not, however, prevent the accused from recognizing the witness, as she or he is fully visible to the audience. In cases where it is necessary to guarantee the anonymity of the witness, video-link testimonies can be combined with techniques allowing for the distortion of the image or voice, or both, of the witness.

Witness concealment

In some cases, video-link testimonies may not be sufficient to guarantee effective protection for victims testifying against the traffickers. Additional measures may be necessary to avoid the witness being recognized by the trafficker. They could include video-linked testimonies combined with image- and/or voice-altering devices, or testimonies in the courtroom behind an opaque shield.

Some precautions must be taken to prevent such measures from interfering with the rights of the accused to a full defence and a fair trial. If the witnesses are not directly visible, the judge and the defendant may not be able to assess the witnesses' reactions to questions and consequently may not be able to assess their credibility fully. On the other hand, important evidence may be lost because witnesses may not be willing to testify when their image is visible and their identity revealed to the accused. It is necessary to balance carefully the rights and interests of the endangered witness and those of the accused.

Protection after the trial involves many different authorities, including law enforcement, the judiciary, immigration services, labour authorities, civil register authorities and prison services. After the trial, the role of non-governmental organizations providing victim support services is often crucial.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

(General Assembly resolution 40/34, annex)

The Declaration, adopted by the General Assembly in 1985, recognizes that the victims of crimes and often their families, witnesses and others who aid them, experience additional hardship where they assist in the prosecution of offenders. In order to ensure that they do not suffer unnecessary harm if they cooperate in proceedings, the Declaration outlines 21 principles for victim support and assistance. Guiding requirements which emerge are that victims:

- Should be adequately recognized and treated with respect for their dignity
- Are entitled to access to judicial mechanisms and prompt redress for the harm and loss they have suffered
- Are entitled to receive adequate specialized assistance in dealing with emotional trauma and other problems caused by their victimization

Paragraph 6 of the Declaration addresses the responsiveness of judicial and administrative processes to victims' needs, which should be facilitated by:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
- (c) Providing proper assistance to victims throughout the legal process;
- (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their family and witnesses on their behalf, from intimidation and retaliation;
- (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.



The Declaration can be accessed at:
www.un.org/documents/ga/res/40/a40r034.htm

Role of non-governmental organizations in witness protection

For various reasons, governmental witness protection programmes often cannot be applied to the protection of witnesses of trafficking. Firstly, they can be extremely expensive. Secondly, to ask the victim and her or his family to adopt a new identity, to relocate and to give up all social contacts places them under considerable additional strain and will very often seem disproportionate to the benefits obtained. Thirdly, the police are not the adequate institution to provide the support in the psychological recovery process that victims of trafficking require.

Therefore, the protection of witnesses and victims of trafficking in general calls for tailor-made solutions that are implemented in the closest possible cooperation between law enforcement, the judiciary, immigration services, labour authorities, civil register authorities, prison services and non-governmental organizations that provide victim support services. The aim of these programmes is to empower the victim and to enable him or her to overcome victimization; ultimately the victim will live his or her life in safety without depending on protection measures of State institutions. Therefore, the final goal of such a programme should be safety, not protection, meaning that the victim is in a position to look after his or her security needs in autonomy.

Effective cooperation between the authorities and non-governmental organizations providing victim support services requires a common understanding of the problem, agreed aims for the cooperation, a clear understanding of the distinct roles of the players, and respect for and a sufficient understanding of the other players and the way they work.

Means to foster the basis for cooperation among these different authorities and non-governmental organizations include:

- The establishment of a coordination group or a task force that meets regularly
- The organization of joint training involving the professional groups mentioned above
- The joint development of common strategies and procedures
- The signing of a memorandum of understanding between the organizations represented in the coordination group or a similar body, which spells out in detail the roles and functions of all players at the different stages of the proceedings
- The ability of non-governmental organizations to understand the work of the judiciary and to cooperate improves when their staff include members with a legal background who can function as intermediaries between the non-governmental organization and the judiciary

State actors in particular have to keep in mind that victim support agencies are not created to help the State but the victim or witness. Full solidarity with and confidentiality for the victim are basic principles governing the entire work of victim support agencies, just as impartiality and transparency are principles governing public authorities, and especially the judiciary. Victim support agencies should not, therefore, be required to perform any kind of monitoring of the witness as they are not performing law enforcement functions.

Promising Practice

Italy

Under Italian law, the main way of protecting the trafficked person's safety when she or he gives testimony is through using the *incidente probatorio* (special evidence pretrial hearing). It is a closed hearing and generally used in cases where there is a danger that evidence may be interfered with. It may also be used in cases where witnesses may be pressured not to testify or if there is a risk of them leaving the country before the trial starts.

Portugal

The witness protection act in Portugal provides for witness concealment or testimony via teleconference, if the information provided by the witness poses a serious risk to the witness or her or his family members. However, victims may participate in the criminal process not only as witnesses, but also as injured persons claiming compensation from the trafficker. In such cases, protective measures might also be necessary.

In Portugal, video-linked testimonies or statements are admissible upon request by the public prosecutor, the defendant or the witness. The location from which the testimony is transmitted has to be a public building, preferably a court, police station or prison, which offers the appropriate conditions for the use of the necessary technical devices. The court can restrict access to this location to technical staff, officials or security personnel deemed strictly indispensable. During the testimony, an escort judge must be present.

Bosnia and Herzegovina

The purpose of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses is to regulate the measures to provide for the protection of witnesses under threat and vulnerable witnesses in criminal proceedings conducted by the Court of Bosnia and

Herzegovina or the Chief Prosecutor of Bosnia and Herzegovina in criminal offences over which the Court has jurisdiction. Article 8 of that law discusses the examination of witnesses deemed to be under threat and vulnerable, and provides for measures to protect them from harassment and confusion. Article 9 states that testimony may be given using technical means to permit the parties and the defence attorney to ask questions although not in the same room as the witness. Article 10 allows for the removal of the accused where there is concern that the presence of the accused will affect the ability of the witness to testify fully and correctly.



www.anti-trafficking.gov.ba/fajlovi/BIH_Law_on_Protection_of_Witnesses.doc-44.doc

Germany

Under article 247 of the German Code of Criminal Procedure, the exclusion of the defendant is provided for where it is feared that, in his or her presence, the witness may not tell the truth; that a considerable burden would be placed on witnesses under 16 years of age; or that there is an extreme danger of grave detriment to the health of witnesses. In such cases, the defendant is removed from the courtroom for the duration of the examination of the witness and readmitted thereafter, and informed of the essential substance of the examination by the presiding judge. The German Code of Criminal Procedure also allows for other protective measures under certain circumstances, including:

- The exclusion of the public from proceedings (art. 171)
- The attendance of expert counsellors (art. 175)
- The exclusion of the media (art. 169)
- Examination of witnesses by video (art. 247)

Recommended resources

Regional Victim/Witness Protection Protocol to Combat Trafficking, Commercial Exploitation and Sexual Abuse of Women and Children in South Asia

South Asia Regional Initiative/Equity Support Program

This Protocol is an attempt by the Regional Action Forum on Improving the Implementation of Laws Protecting Women and Children to establish norms for victim/witness protection in Bangladesh, India, Nepal and Sri Lanka. Although the laws (penal codes, criminal procedure codes and Constitutions) of those countries refer to witness protection, the drafters of the Protocol believe that the existing laws are insufficient to adequately protect women and child victim-witnesses who have been trafficked for sexual exploitation. In response,

the Protocol is rights-based and regionally specific to protect and promote the rights of victims and witnesses of crimes in proceedings where their lives, psychological and physical security and property are endangered through their participation in the criminal justice system. The Protocol is a response to the need for a common approach and for common principles to guide the protection of victims and witnesses.



The Regional Victim/Witness Protection Protocol to Combat Trafficking, Commercial Exploitation and Sexual Abuse of Women and Children in South Asia is available at:

www.sariq.org/downloads/10_59_17RVWPP%20-%20Final.pdf

Witness protection after the prosecution and trial

Extended protection

The experience of States that have established witness protection schemes suggests that a broader approach to implementing this requirement may be needed to afford effective protection to witnesses and ensure their cooperation with investigations and prosecutions. Witness protection schemes should consider extending protection in the following cases: (a) to all persons who cooperate with or assist in investigations until it becomes apparent that they will not be called upon to testify; and (b) to persons who provide information that is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons.

Legislators may therefore wish to make witness protection provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of an offence covered by the Organized Crime Convention, whether this is produced as evidence or not.

Protection programmes

Police witness protection programmes are intended to prevent offenders or their accomplices from approaching and intimidating witnesses. In some cases, the participation of witnesses in a witness protection programme will be absolutely necessary to guarantee their safety. In other cases, protection measures may not be necessary at all. Police witness protection programmes require an enormous personal and psychological adjustment on the part of participants. Wherever possible, effective psychosocial support should also be provided to them. Given the costs and the implication of such programmes for the daily lives of the witnesses involved, such programmes are usually restricted to cases involving serious crime, including organized crime.

Witness protection measures include relocation of witnesses, change of identity, police escorts and financial and social assistance. Relocation involves the removal of witnesses, possibly together with the families, from the place where they live to a place where they are not easily recognized. Depending on the seriousness of the risk involved, relocation may be on a long-term basis or of a temporary nature, for example during criminal proceedings. Further, relocation might be necessary more than once, for example, if the witness or a

family member makes a mistake that could lead to a heightened security risk, or if a family member wants to leave the programme. Additional measures to prevent the tracing of protected witnesses through population registers, telephone books or vehicle registers might also be useful.

Witness protection programmes are expensive, involving costs for protection services, removals, temporary residences, economic subsistence, housing and medical services. In order to maintain effective witness protection programmes, States need to ensure that sufficient funding is available. Witnesses for the programme must be assessed for suitability and selected carefully. In many instances, the provision of other measures, such as the installation of panic alarms in the home or place of business of witnesses and the provision of mobile telephones, supplemented by daily contact by law enforcement officials or police escorts, may be considered appropriate.

Persons close to witnesses, such as their family members or the staff of non-governmental organizations specializing in victim support, may also face threats to their security. States should therefore ensure that witness protection programmes can be extended to such persons.

Witnesses usually enter a witness protection programme by signing a written agreement, often called a memorandum of understanding or memorandum of agreement, which defines the obligations of the protected witness and of the protecting agency. Such agreements are codes of conduct rather than legally binding contracts.

The course and duration of witness protection programmes is substantially influenced by the progress of criminal investigations and court proceedings. In some instances (for example, in Germany, Italy and the Netherlands), the protection can be extended through every phase of the investigation, prosecution and trial, and continue even after a conviction has been obtained. The termination of a person's participation in the programme is typically determined by means of regular assessment of the danger that exists for the witness.