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**Assistance, good practices and the comparison of national
legislation in the area of identifying and protecting victims
of and witnesses to organized crime**

Assistance, good practices and the comparison of national legislation in the areas of identifying and protecting victims of and witnesses to organized crime

Discussion paper by the Secretariat

I. Introduction

1. In its resolution 6/1, entitled “Ensuring the effective implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto” the Conference requested the United Nations Office on Drugs and Crime, inter alia, to continue providing technical assistance in order to support and complement national, regional and thematic programmes and activities based on the needs and priorities of Member States in combating transnational organized crime.

2. In its decision 3/4, entitled “Recommendations of the open-ended interim working group of government experts on technical assistance”, the Conference requested States parties to be guided by the recommendations of the Working Group in developing technical assistance activities for the implementation of Organized Crime Convention and the Protocols thereto, including, inter alia, by the recommendation 7(b) on assistance related to the implementation of the provisions on witness protection noting that it was an area covered not only by the Protocols, but also by the Convention.

3. The present discussion paper provides an overview of some of the general principles and forms of protection of victims of and witnesses to organized crime.

* CTOC/COP/WG.2/2013/1.



This paper also contains a review of a number of key issues with respect to legal frameworks as they pertain to witness protection.

4. In addition, the paper provides an overview of some of the tools developed by UNODC to support Member States in their efforts to enact or strengthen legislation and operational capabilities in this area and highlights some successful technical assistance activities carried out by UNODC.

II. Issues for discussion

5. The Working Group may wish to consider the following issues as a basis for their deliberations:

- Examples of legislation and good practices for the protection of victims in matters related to organized crime, including of those who agree to give testimony about criminal organizations to which they were associated, so called collaborating witnesses or “collaborators of justice”;
- Challenges encountered by States in establishing and/or developing witness protection programmes, including their funding;
- The importance of and challenges in international cooperation for the protection of witnesses related to organized crime, including the sharing of information.

III. Background and mandates

6. The topic of protection of victims and witnesses is an issue of importance in the investigation and prosecution of many types of crimes, including serious violations of human rights and of international humanitarian law where there exists a body of human rights law that provides for the right of victims and witnesses to protection.¹ At the same time, the issue of witness protection is particularly salient in the context of prosecutions of organized criminal and terrorist groups, who have the means and the motivation to silence and/or intimidate potential witnesses in order to prevent them from cooperating with law enforcement and judicial authorities. Organized crime, as well as corruption and fraud, are generally motivated by some economic or material benefit or gain and both thrive in secrecy. Penetrating organized crime requires informants, undercover law enforcement agents and insiders who decide to cooperate with authorities. The closed character of these groups makes the use of traditional investigative methods very difficult. Members of criminal organizations place themselves at considerable risk by cooperating with the authorities. While witness protection programmes are costly,

¹ The Office of the High Commissioner for Human Rights is preparing a tool on National Protection Measures for Witnesses and Victims in Investigations and Prosecutions of Gross Human Rights Violations in which the framework of international human rights law is set out.

these costs are deemed reasonable compared to the resources required for investigative measures such as infiltration or long term surveillance.²

7. In recognition of the importance of the testimony of victims and witnesses in relation to organized criminal activities, the Organized Crime Convention and the Protocols on Trafficking in Persons and the Smuggling of Migrants, contain provisions on the types of measures that States parties should take. For example, Article 24 of the Convention requires State parties to 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. Such protection measures may include: measures for physical protection, for relocation and for non-disclosure or limitation on the disclosure of information concerning the identity or whereabouts of such persons and providing evidentiary rules to permit witness testimony to be given in a manner that ensures their safety, such as, permitting the use of communications technology and video links or other adequate means.

8. Article 24 also notes that these measures shall also apply to victims, insofar as they are witnesses. The term “witness” is not defined in the Convention, but is commonly used to refer to persons who give evidence by oath or signature, or who make sworn oral testimony. A witness may include victims, innocent bystanders, experts, insider witnesses who cooperate with authorities, also referred to as collaborators of justice,³ as well as experts. For example, in Article 32 of the United Nations Convention against Corruption, it is specifically noted that protective measures should be afforded to experts, in addition to witnesses.

9. In Article 6 on assistance to and protection of victims of trafficking in persons of the Trafficking in Persons Protocol, States parties are requested to protect the privacy and identity of victims of trafficking in persons, inter alia, by making legal proceedings relating to such trafficking confidential. Furthermore, State parties shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within their territory.

10. Furthermore, the Economic and Social Council, in its Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, provides for the adoption

² See Council of Europe, Report on Witness Protection (Best Practice Survey), Strasbourg: European Committee on Crime problems, Committee of Experts on Criminal Law and Criminological Aspects of Organized Crime, March 24 1999, p. 26.

³ The Council of Europe defines collaborator of justice as, “any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organization of any kind, or in offences of organized crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organization, or about any offence connected with organized crime or other serious crimes, authorities, particularly by giving testimony about a criminal association or organization, or about any offence connected with organized crime or other serious crimes” the Council of Europe Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, adopted by the Committee of Ministers on 20 April 2005. See also, Handling and protection Witnesses and Collaborators of Justice, the European Experience, Dr. Fausto Zuccarelli.

of special measures to protect child victims and witnesses whose safety may be at risk.⁴

IV. Overview of the general principles on victim and witness protection

11. In all criminal justice systems, the process of investigating and prosecuting criminal offenses depends largely on the information and testimony of witnesses. While their cooperation is important, so is their reliability, as well the veracity, accuracy and completeness of their testimony. The participation of witnesses whose testimony can be accepted as truthful, accurate and complete in legal proceedings is of paramount importance. At the same time, the cooperation and reliability of witnesses can be diminished or compromised when they genuinely fear that, by making a statement to police or testifying in court, the person(s) about whom they are providing information may retaliate and cause harm to them or to people who are close to them. In such circumstances, physical protective measures may be required. There are different means of protection and the form required in each case will depend primarily on the level of threat or intimidation, as well as on the type of witness (victim, vulnerable witnesses, justice collaborator, etc.) and, the type of crime.⁵

12. In some jurisdictions protective measures are afforded to a wider class of people than to just those who will provide testimony and may include persons who have information pertaining to an investigation or police informants. And many jurisdictions provide protection to Government officials who participate in the criminal justice system, such as, judges, prosecutors, law enforcement officials and experts, may come under threat. It should be noted that that for Government officials, physical protection may be not the only measure available. Officials who are under threat of harm can also be reassigned to new positions or temporarily assigned to a different location until the threat dissipates. The laws of some States also mention journalists and human rights defenders as classes of persons who are entitled to protection when they become under serious threat due to the information they possess related to a criminal matter.

13. Victims may have different needs, compared to other witnesses, that should be addressed. Victims may have suffered physical and emotional trauma and certain groups of victims, including children, the disabled and the elderly, may require support, such as psychological, social and medical assistance.

⁴ ECOSOC resolution 2005/20 of 20 July 2005.

⁵ Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, page 93, United Nations, 2008.

14. While protection aims to ensure the physical security of persons, assistance measures aim to support victims and witnesses to overcome practical issues (transportation and child/elderly care), as well as dealing with psychological issues and stress of testifying and avoiding secondary victimization, especially for vulnerable witnesses. Ideally, support (assistance) and protective measures can and should be provided together. Such measures may include:

(a) The provision of information about the roles of the actors in the criminal proceeding in which the witnesses is involved as well as about their rights, and the resources that may be available to them, for example, for compensation/restitution and for medical and physco-social support;

(b) The provision of an advocate or person who can accompany a vulnerable or child witness during questioning and delivering testimony;

(c) The provision of a room or place where victims and other witnesses can wait before giving testimony so that they are not in close proximity to the accused or his family and friends; and

(d) The support of a person as needed to serve as an intermediary between the victim and other criminal justice officials and to help identify and address potential obstacles to the witness' participation in the proceedings.

15. The protection of witnesses is based on mutually supporting building blocks, which consist of methods and measures of support, police protection, procedural and in-court protection and the services offered by a covert witness protection programme to ensure the safety and security of witnesses in order to facilitate their cooperation and testimony. The measures adopted should be proportional to the threat and of limited duration.

16. It is likely that the most important element in determining the form of protection is the threat assessment which can be described as the investigative and operational techniques used by law enforcement authorities to identify, assess and manage the risk and potential perpetrators of targeted violence against a witness.⁶ The threat assessment may be conducted by the police or the investigating agency alone or in coordination with the witness protection unit. When conducting a threat assessment, the competent authority determines if the life of the witness is in serious danger and whether issues, such as the origin of the threat, any patterns of violence, the level of organization and culture of the threatening group (i.e. street gang, Mafia-type group, terrorist cell); or the group's ability to carry out threats, should be addressed.⁷

17. It should be emphasized that consent should always be obtained from a witness, as well as from others who are at risk, due to their relationship with the witness. As a practical matter, most protective measures will not be effective without a willing (consenting) witness.

⁶ Ibid., page 61.

⁷ Ibid., page 62.

A. Police, procedural and in-court protective measures

18. Police protection measures include those measures, which are undertaken or coordinated by the police and/or relevant investigating or prosecuting agencies. They may include, inter alia, police transportation to and from court; the use of a safe house or facilitating temporary relocation; close protection, regular patrolling around the witness's house; and the installation of security devices at the places of residence and work- doors, locks, alarms and video cameras.

19. Procedural or in-court protections are actions aimed primarily at diminishing the fear of intimidation of especially victim witnesses, that can be taken by the court *sua sponte* or at the request of the prosecutor or investigating officials. Measures to reduce fear through avoidance of face-to-face confrontation with the defendant or the public may include the use of pre-trial statements in lieu of in-court testimony; having the witness testify behind a screen or two-way mirror; or having the defendant view the witness' testimony via a video link in an adjacent room or having the witness provide testimony via audio visual links.⁸

20. It is important to bear in mind that, whatever procedural measures are used, due consideration should be given to balancing the witness's legitimate expectation of physical safety against the defendant's rights to a fair trial, which, in some jurisdictions, includes constitutional guarantees to the right of confrontation. Many States have difficulty to permit procedural measures due to constitutional or other legal provisions.

21. Although the use of remote testimony via videoconferencing⁹ is primarily used in the context of mutual legal assistance between States,¹⁰ it is also increasingly used to take the testimony of protected witnesses.¹¹ In this regard, it can be used either to avoid direct contact between the witness and the defendant, which has value for some vulnerable witnesses. It can be also used when the physical security of a witness at a particular court or jurisdiction cannot be adequately ensured or when the costs to provide physical security to the witness would be otherwise too great.

B. Witness protection programmes

22. In some cases, the threat to a witness will be too significant to keep him/her safe by merely police and procedural measures. The goal of witness protection programmes is to ensure the safety of a small number of important witnesses in

⁸ Ibid., pages 31-33.

⁹ Videoconferencing refers to the real-time transmission of video and audio transmission between two locations. It allows the virtual presence of a person in the territory over which the State or entity has jurisdiction. This technology allows for witnesses to testify from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location. In the courtroom setting, it means that a judge, the defendant, the defense counsel and the prosecutor can ask questions of the witness and see and hear the witness's answers and demeanor in real time transmission.

¹⁰ See also, CTOC/COP/2010/CRP.8 and CTOC/COP/2010/CRP.2.

¹¹ The practice of the International Criminal Court, the Tribunal for the Former Yugoslavia and other Special Tribunals and Courts demonstrates the practical need for the use of such technology.

cases of serious threat of harm, which cannot be addressed by other protection measures. This will often entail relocation and, sometimes, providing a different or new identity.

23. The UNODC Good Practices for the Protection of Witnesses defines a witness protection programme as “[a] formally established covert program, subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.”¹²

24. The Council of Europe defines a witness protection programme as “[a] standard or tailor-made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice.”¹³

25. Vetting of staff is also mandatory because the human element poses the greatest risk of compromising a witness protection programme. Therefore, all staff, including administrative personnel, must be vetted to ensure that the highest possible level of security is maintained. In addition, due to the stresses associated with working in a covert environment with witnesses and families, psychological support and assessment for protection personnel is also required.

26. To a large extent, witness protection programmes have been developed in order to protect insider witnesses/collaborators of justice who can provide crucial information/evidence about the leaders of these organizations, which cannot be obtained by usual law enforcement measures (surveillance, wiretaps, informants and others) but who will, in exchange, require protection.

27. In some States, for example, the United States of America, witnesses can be offered immunity from prosecution, which can be granted in exchange for testimony about a certain event.¹⁴ Normally, the witness must enter a plea of guilty before providing testimony. This plea agreement will require that the witness testify fully and truthfully or otherwise any promised made by the government can be withdrawn. After the testimony is provided, the prosecutor can recommend to the judge a reduction in sentence, which the judge may or may not follow.

¹² “Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime”, pages 31-33, United Nations, 2008.

¹³ Council of Europe Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers’ Deputies.

¹⁴ There are two kind of immunity. “Use immunity” prevents the prosecution only from using the witness’s own testimony or any evidence derived from the testimony against the witness, while allowing the prosecution of the witness using evidence obtained independently of the witness’s immunized testimony. The government should be required to provide that the evidence is based upon an independent and legitimate source apart from the immunized testimony. “Transactional (or total/blanket) immunity” completely protects the witness from future prosecution for crimes related to his or her testimony. For example, if the witness testified about participating in a drug sale, s/he could not thereafter be charged for a crime that stemmed from her immunized testimony. Governments rarely grant this kind of immunity.

V. Institutionalization of protection programmes

28. Witness protection programmes can be institutionalized in different ways. “For some countries, the police force is the programme’s natural environment, as out-of-court protection of witnesses is seen primarily as a police function. For others, separating protection from the investigation is of higher value in order to ensure objectivity and minimize the risk that admission to the programme unwittingly may become an incentive for witnesses to give false testimony, that they believe the police or prosecution wants or needs. Where witness protection is essentially a police function, responsibility for management of the programmes is vested in the chief executive of the police force.”¹⁵ However, “isolation and autonomy (organizational, administrative and operational) of the covert unit responsible for the implementation of the programme from the rest of the police force is of paramount importance.”¹⁶ This is not just to maintain independence from the investigating functions of the police but also to safeguard the integrity of the programme. Police are naturally inquisitive and officials outside the programme may try to seek information, which could jeopardize a witness’s security or the integrity of the programme. Countries where witness protection is led by the police include Australia, Austria, Canada, Germany, Hong Kong Special Administrative Region of China, Latvia, New Zealand, Norway, the Russian Federation, Slovakia, Sweden and the United Kingdom.¹⁷

29. In other countries, programmes are organizationally separated from the police and are located under the equivalent of the Ministry of Justice, the Ministry of the Interior or the State Prosecutor, such as Bulgaria, Columbia, the Netherlands, the Philippines, South Africa and the United States.¹⁸

30. In some countries where the programmes fall under the Ministry of Justice, there is a multidisciplinary oversight body consisting of high-level representatives of the law enforcement, prosecutorial, judicial and government authorities and sometimes from civil society. That body may take decisions on such matters as admission and termination of the programme. It may also exercise some oversight over implementation of the programme and make budgetary submission to the Government. Italy and Serbia have such models.

31. In 2010, the Government of Kenya amended its Witness Protection Bill of 2006 and created a witness protection agency that is independent from both the police and from the prosecuting authorities which also has an “Advisory Board”. The Board consists of the Minister of Justice, the Minister of Finance, the head of the National Security Service, the Commissioner of Police, the Commissioner of Prisons, the Director of Public Prosecutions and the Chairperson of the Kenyan National Commission on Human Rights. The principle function of the Board is to advise the Agency generally on the exercise of its powers and the performance of its functions under the Act, particularly as to the formulation of witness protection

¹⁵ Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, page 45, United Nations 2008.

¹⁶ Good Practices, page 46.

¹⁷ Ibid., page 46.

¹⁸ Ibid., page 46.

policies, general administrative oversight, approval of budgetary submissions and other functions as may be required under the Act or other law.

32. Within these categories, witness protection programmes can be organized into sections dealing with victims and other types of witnesses, such as collaborators of justice. They may also divide according to responsibilities, such as administration, operations, logistics and so forth.

33. It should be noted that providing for the relocation and change of identity of witnesses and family members is a complex and cost intensive undertaking from the point of view of a protection programme. For protected persons, especially for family members, the changes to one's life and the rules to be followed may be very difficult and may result in depression, as well as other psychological disorders. Moreover, if the security of a witness is even accidentally compromised, s/he and any family members will have to be relocated and begin again the process of adjustment and reintegration. Given the impact on the lives of the protected persons, as well as the financial expense of the programmes, relocation and identity change are measures of last resort suitable for only a small number of witnesses.

34. To summarize, the location of the programme is not as important as the need for it to be consistent with existing government structures and functions and that it meets with the principles of separation from investigative agencies, operational autonomy from the police and confidentiality of operations. Other important considerations are the ability to share confidential information with other national agencies and also with the protection programmes of other countries. Finally, operational staff should have the ability to carry and use firearms.

VI. International cooperation for the purpose of relocation

35. The increasing importance of internationally relocating witnesses and other protected persons stems from the growing threat of transnational organized crime and the difficulties encountered by States at the national level. As a result, more countries are finding it necessary to establish covert witness protection programmes for the purpose of coordinating and providing all the services required in order to relocate witnesses and change their identity. This, however, requires the cooperation of requested States to provide support and protection for the witnesses of requesting States. Hence, there is a strong need for regional and wider international standards and cooperation in this field.

36. There are countries large enough geographically (i.e. Canada or the Russian Federation) or in terms of population (i.e. Italy or the United States), where witnesses can be safely relocated within national borders. However, for most States, relocation within their territory will not be viable and they must relocate witnesses to another State that is willing and able to provide an acceptable level of protection. For this reason, international cooperation in this regard is of crucial importance.

37. International cooperation for the protection of witnesses can be achieved by formal and informal means. An agreement on witness protection formalizes that mode of international assistance and can help widen the options that a country has in contrast to only nationally applied measures. Existing agreements on mutual assistance in criminal matters between States do not, in most cases, address the

issue of witness relocation or international cooperation for protection but may include less specialized aspects of witness protection like hearing and testimony in foreign courts.

38. States have taken different approaches to formalizing such cooperation. Article 24 of the Organized Crime Convention provides that States parties shall consider entering into agreements or arrangements with other States for the international relocation of protected witnesses. Cooperation among most States may be formalized in legislation or Memorandums of Understanding, and it may also take place on an informal basis, which allows for flexibility.

39. Furthermore, the Organized Crime Convention can be used as a legal basis for relocation cooperation, as was the case for Slovenia, which used the Convention, while it was amending its protection law to add a provision that gave the protection authority the ability to engage directly with other protection authorities in this regard. It should be noted that States can also provide third party cooperation without being directly involved in the protection or relocation of a particular witness.

40. Whatever form is chosen or dictated by national legislation, it should be emphasized that the international relocation of persons and the protection measures applied to them will be unique and therefore will likely be determined on a case by case basis.

41. Perhaps the most important element in international cooperation is trust between the protection authorities and an understanding of each other's capabilities and requirements. In this connection, one of the most useful ways to build trust in the establishment of new programmes is to make contacts with programmes in other States, including by asking for advice and training.

42. Another way of building confidence and contacts is through regional or subregional networks. In Europe, for example, there is a network of European protection programmes overseen by the Europe's law enforcement agency (Europol) that meets on a regular basis. Europol serves as a focal point for significant developments that have an impact on witness protection programmes within Europe and maintains a database of witness protection legislation. It also offers a means of secure communications among witness protection programmes. Once a year, Europol holds a conference that is open to all established witness protection programmes which can be an important networking opportunity. The United States Marshals Service has also held a number of international witness protection conferences, which helped to generate cooperation and broader discussion on this issue. In addition, UNODC has organized a number of regional meetings on this topic in South America in 2007, Eastern Europe and the Caucasus in 2008 and Eastern Africa in 2009.

VII. Technical assistance provided by the United Nations Office on Drugs and Crime

43. In 2005, UNODC began an initiative to support Member States to strengthen legal frameworks and operational capacities for the protection of victims and

witnesses.¹⁹ In addition, UNODC provides support in enhancing the capabilities of Member States to prevent and address Trafficking in Persons and the Smuggling of Migrants. To this end, UNODC has developed a number of tools, including the Good Practices for the Protection of Witnesses in Criminal Proceeding Involving Organized Crime,²⁰ a Toolkit to Combat Trafficking in Persons, which contains a chapter relating to witness protection;²¹ the In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants, the Manual on The Criminal Justice Response to Support Victims of Acts of Terrorism, the Handbook on Justice in matters involving child victims and witnesses of crime,²² as well as model legislative guidelines, and standard operational procedures.

44. Furthermore, UNODC conducts legal and institutional assessments and provides assistance to States in drafting or strengthening laws and regulations. UNODC has also raised awareness of the importance of witness protection and its many dimensions to criminal justice actors. Most recently, UNODC reviewed the Uganda Legislation on the protection of victims and witnesses. In 2013, UNODC has presented information on good practices in the protection of victims and witnesses in several training workshops organized for African States in cooperation with the International Criminal Court.

45. UNODC provides technical assistance, mentorship and specialized support to States in the establishment of witness protection capabilities and supports regional and international cooperation in this area. In 2013, training delivered was delivered to the Uganda Human Rights Council on working with witnesses and victims and their protection; to officials from the Botswana Directorate on Corruption and Economic Crimes, at a meeting organized by the Institute for Security Studies.

46. For example, in 2008, UNODC began to support the Government of Kenya to develop a witness protection programme. UNODC recruited an advisor who worked with Government officials to revise their legal framework, which was subsequently passed by the Kenyan Parliament. In addition, the advisor provided support towards the establishment of a new witness protection agency. This involved among other activities, developing and delivering training, developing of a structure, staffing arrangements, operational procedures, equipment and a budget. The advisor also facilitated cooperation with the witness protection units of other countries, including South Africa, who also provided advice and training. As a result, Kenya is now able to provide protection to witnesses in cases of organized and serious crime, in accordance with good practices.

47. A crucial element in the technical assistance work of UNODC has been the support and cooperation of Europol, and particularly of those States whose experts have provided lessons learned from their national experiences during assessments

¹⁹ This initiative was begun through what is now the UNODC Global Programme to Assist States to Strengthen Capacities to Prevent and Combat Organized and Serious Crime (GLOT/32). In addition, victim assistance and victim and witness protection are dealt with by the UNODC Global Programmes on the Trafficking in Persons and Smuggling of Migrants.

²⁰ The Guide was developed from information obtained through a series of regional meetings UNODC held with the active participation of expert representatives of more than 60 countries and 15 international organizations.

²¹ Toolkit to Combat Trafficking in Persons (2nd edition, October 2008).

²² Additional information is available at www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuside.

and training workshops, such as, Austria, Australia, Germany, Italy, the Netherlands, the United Kingdom, and the United States.

48. UNODC collaborates with the United Nations Office of the High Commissioner for Human Rights (OHCHR) in order to support awareness raising and good practices for the protection of victims and witnesses. In 2013, UNODC has collaborated with the OHCHR to support the Governments of Rwanda and Uganda.

49. UNODC also collaborates with the International Criminal Court in building national capacities on witness and victim protection on the basis of the principle of complementarity and has collaborated with other Special Courts and Tribunals.

50. In addition, UNODC has participated in workshops and seminars, such as the 149th International Training Course on “Securing Protection and Cooperation of Witnesses and Whistle-blowers” (2011) and the Fourth Regional Seminar on Good Governance for Southeast Asian Countries on “Securing Protection and Cooperation of Witnesses and Whistle-blowers” (2010) hosted by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders.

VIII. Recommendations on strengthening and/or enacting legal frameworks for the protection of victims and witnesses

51. Protection measures may affect the rights of a defendant and potentially influence the right to a fair trial or hearing. They may also have serious implications for protected persons and third parties. In addition, the need for States to cooperate and share confidential information for the purposes of protecting witnesses requires a degree of central/national coordination. Therefore, witness “protection programmes should be well grounded in either legislation or policy.”²³ In most States, general provisions providing for the protection of victims and witness can be found in criminal procedure codes, police laws, rules of court and in special legislation.

52. Not all States that have already established witness protection programmes have done so through legislation and “the absence of a detailed legal framework has not prevented the successful application of a full range of protection measures”.²⁴

53. However, for the establishment of covert witness protection programmes, the recent trend is for States to enact special legislation to create witness protection programmes and then review and revise any existing provisions, as required.

54. When States are reviewing existing legislation or have decided to enact a legal framework for witness protection, it may be useful for the Government to convene an interagency working group of officials who may have a stake in its establishment, including the judiciary, the Ministry of Justice and/or prosecuting authorities, such as officials of specialized units for trafficking in persons, smuggling of migrants, and others, as well as all relevant law enforcement agencies, including immigration and border services, and the prison service.

²³ Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, United Nations 2008, page 43.

²⁴ Ibid., page 44.

55. Furthermore, while by no means an exhaustive list, the following recommendations are provided for States undertaking to strengthen or enact new laws which are based on the UNODC Model Law on Witness Protection:²⁵

(a) Define what is the witness protection programme, the witness protection authority and what is the unit that will carry out the functions of the protection authority;

(b) Set forth the responsibilities of the protection authority, such as, (i) deciding on the type of protection measures to be applied taking in consideration recommendations of the protection unit; (ii) making budgetary submissions for the programme's financing; (iii) preparing annual performance reports; and (iv) performing any other activity necessary for the implementation of the programme;²⁶

(c) Ensure that the protection authority is independent in adopting decisions about witnesses admitted into the programme and in applying protection measures;

(d) Define who may be a protected person under the law. In this regard it is recommended that, at a minimum, family members or other persons whose life or safety is at risk because of his/her relationship or close associate to the protected person can be included.²⁷ States should consider that protection measures can be applied to a wide number of persons and so some flexibility in this regard may be appropriate;

(e) As to confidentiality, provide that all matters relating to the programme should be handled with the highest level of confidentiality and that disclosure of any information relating to the programme or the protection measures shall be punishable as a serious crime except as authorized and necessary to provide protection to the person;²⁸

(f) Ensure that admission to the programme can be initiated by a request from the investigator, prosecutor, or investigative judge and that requests are forwarded without delay to the Protection Authority with all the required information and a detailed opinion on the need or the lack thereof of admission to the programme;²⁹

(g) Set out the factors to determine admission to a protection programme;³⁰

(h) Set out the general types of protection measures that may be afforded, such as physical protection; relocation; change of identity; and any other measure necessary to ensure the safety of the protected person; and highlight that all measures should be proportional to the level of risk;³¹

²⁵ These recommendations are based on the provisions of the Model Law on Witness Protection, developed by UNODC in 2008. The full text of the Model Law is contained in Annex I and it is also available on the UNODC website.

²⁶ See Annex I, Article 2.

²⁷ Ibid., Article 3.

²⁸ Ibid., Article 4.

²⁹ Ibid., Article 6.

³⁰ Ibid., Article 7.

³¹ Ibid., Article 9.

(i) Provide that protected persons should be admitted to a protection programme upon the signing of a Memorandum of Understanding (MOU) with the Protection Authority that details the voluntary conditions and obligations of both the protection programme and of the witness;³²

(j) Indicate the conditions under which the Protection Authority would be required to remove a protected person from the programme and those under which it has discretion to remove;³³

(k) Set out provisions to allow the Protection Authority to adopt protection measures in the case of an imminent threat or danger to a person;³⁴

(l) Establish a (confidential) procedure for filing and resolving grievances for protected persons and staff of the protection;³⁵

(m) Consider the issue of liability for officials of The Protection Authority, Protection Unit, and for officials cooperating with the protection programme whose acts are done in good faith;

(n) Provide that the Protection Authority or the Protection Unit is authorized to enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or international entities relating to the relocation of protected persons and other protection measures;³⁶

(o) Ensure that the necessary allocations for funding of the programmes are addressed.³⁷

³² See Annex I, Article 10.

³³ See Annex I, Article 11.

³⁴ Ibid., Article 12.

³⁵ Ibid., Article 15.

³⁶ Ibid., Article 12.

³⁷ Ibid., Article 14.

Annex I

Model legal provisions in relation to the establishment of a witness protection programme

Article 1

Scope

(1) The Purpose of the law is to provide the conditions and procedures for ensuring special protection on behalf of the state to persons in possession of important information, who are facing potential risk or intimidation arising from their cooperation with prosecution.

Article 2

Witness Protection Authority and Protection Unit

(1) A Witness Protection Program is hereby established (hereby: the Program). The Program shall be administered by the Witness Protection Authority (hereby: Protection Authority).

(2) A specialized covert protection unit shall be established to provide protection to persons included in the Program (hereby: the Protection Unit).

(3) The Protection Authority, among other responsibilities, shall:

(a) Decide on admissions to and removals from the Program;

(b) Decide on the type of protection measures to be applied taking into consideration any recommendation of the Protection Unit;

(c) Make budgetary submissions for the Program's financing;

(d) Prepare an annual report on the Program's general operations, performance and effectiveness in a manner which does not prejudice the effectiveness or security of the Program;

(e) Perform any other activity necessary for the implementation of the Program.

(4) The Protection authority shall be independent in adopting appropriate decisions and applying protection measures.

Article 3

Other Protected Persons

(1) In addition to persons protected under Art.1, this law also applies to family members or other persons whose life or safety is at risk because of his/her relationship or close association to the protected person.

Article 4
Confidentiality

- (1) All aspects relating to the Program shall be handled with the highest level of confidentiality.
- (2) The Protection Authority, Protection Unit and any other agency or individual, who possesses knowledge of the protection measures or has participated in the preparation, issuance, or execution thereof, shall keep the records confidential. This includes the restriction of information transfers to other public or private bodies.
- (3) Disclosure of any information relating to the program or the protection measures shall be punishable as a serious crime except as authorized and necessary to provide protection to the person.

Article 5
Cooperation with Institutions

- (1) State institutions shall cooperate with the Protection Authority about any matter relating to implementing and administering the Program and are obligated to afford the Protection Authority the most expeditious and effective cooperation for the Program's establishment and execution.
- (2) In implementing the Program, the Protection Authority may enter into agreements with individuals, the private sector, private institutions and non-governmental organizations to make use of their services.

Article 6
Admission Procedure

- (1) Admission to the Program is initiated by a request from the investigator, prosecutor, or investigative judge.
- (2) The request shall be forwarded without delay to the Protection Authority with all the information required under Art. 7 and a detailed opinion on the need or the lack thereof of admission to the Program.
- (3) The Protection Authority shall process the request and reach a decision without undue delay.

Article 7
Admission Criteria

- (1) Admission to the program shall be based on the following factors:
 - (a) The seriousness of the crime for which the cooperation of the protected person is solicited;
 - (b) The importance of the protected person's testimony where there is no alternative source of that evidence for the investigation or prosecution of the crime;
 - (c) The gravity of the threat to the security of the protected person;

(d) The protected person's ability to adjust to the Program having regard to his or her maturity, judgement, other personal characteristics and the family relationships of the protected person.

Article 8 Decision for Admission

- (1) Admission to the Program shall be decided solely by the Protection Authority and requires the informed consent of the witness.
- (2) Admission to the Program shall not be used to reward the protected person's cooperation in criminal investigations and prosecutions or to obtain financial benefits.

Article 9 Protection Measures

- (1) Protection measures decided by the Protection Authority shall be proportional to the level of risk and may include:
 - (a) Physical protection;
 - (b) Relocation;
 - (c) Change of identity;
 - (d) Any other measure necessary to ensure the safety of the protected person.
- (2) In support of the program, the Protection Authority may request the courts to implement protection measures during court testimony such as closed sessions, use of pseudonym, and videoconference to allow the witness to testify from a more secure location or to obscure or distort the witness's face or voice.
- (3) The Protection Authority may also decide on the provision of support measures to enable the witness integrate in the Program.

Article 10 Memorandum of Understanding

- (1) Protected Persons shall be admitted to the Program upon signing a Memorandum of Understanding with the Protection Authority.
- (2) The Memorandum of Understanding is not a legally binding contract and cannot be challenged in judicial proceedings.
- (3) The memorandum provides notice of voluntary conditions that will apply at the Program and shall detail at a minimum:
 - (a) The terms and/or conditions for inclusion to the Program;
 - (b) All the general categories of protection measures described in Art.9 (1) that are authorized;
 - (c) Financial and other material support;

- (d) An agreement by the witness to comply with all directions given by the Protection Authority, including physical and psychological examinations;
- (e) An agreement by the protected person not to compromise the Program's integrity or security;
- (f) An agreement by the protected person to disclose all legal liabilities and financial obligations along with an agreement by the protected person as to how those obligations and liabilities shall be satisfied;
- (g) An agreement by the protected person to disclose to the Protection Authority any prior or pending criminal, civil, or bankruptcy proceedings, as well as knowledge of any such proceedings that may arise once he or she is accepted into the Program;
- (h) The conditions allowing the Protection Authority to remove the protected person from the Program.

Article 11 Removal from the Program

- (1) The Protection Authority shall remove the protected person from the Program under the following conditions:
 - (a) The protected person renounces in writing any further protection;
 - (b) The need for protection measures ceases to exist.
- (2) The Protection Authority may remove the witness/protected person from the Program under the following conditions:
 - (a) The protected person has violated the terms of the Memorandum of Understanding;
 - (b) The protected person has knowingly given false or misleading information to the investigation, prosecution or Protection Authority;
 - (c) The protected person engages in conduct that jeopardizes the Program's integrity, fails to follow the program's rules or comply with all reasonable requests and instructions of the protection unit, i.e. requests and instructions of officers and employees of the government who are providing protection to the protected person;
 - (d) The protected person commits a crime;
 - (e) The protected person refuses to cooperate with the judicial process and publicly testify, whenever required, completely and truthfully.

Article 12 Emergency Measures

- (1) In the case of an imminent threat or danger to the protected person, the Protection Authority may adopt the measures described in Article 9 on a provisional basis. The urgent character of a case needs to be substantiated.

(2) These measures shall cease after the cessation of the emergency or a decision by the Protection Authority that the witness is ineligible for admission to the Program.

(3) The adoption of emergency measures does not imply admission to the Program.

Article 13
International Cooperation

(1) The Protection Authority or the Protection Unit is authorized to enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or international entities relating to the relocation of protected persons and other protection measures.

Article 14
Budget

(1) The State shall include in the national budget the necessary allocations for funding and operating the Program.

Article 15
Grievance Procedure

(1) A confidential procedure for filing and resolving grievances of protected persons and staff of the protection unit shall be instituted.

Article 16
Non- Liability

(1) The Protection Authority, Protection Unit or any institution provided under Art.5 or its employees shall not be liable for any action, suit or proceedings in respect of an act done or omitted to be done in good faith in the exercise of a power conferred by this law.
