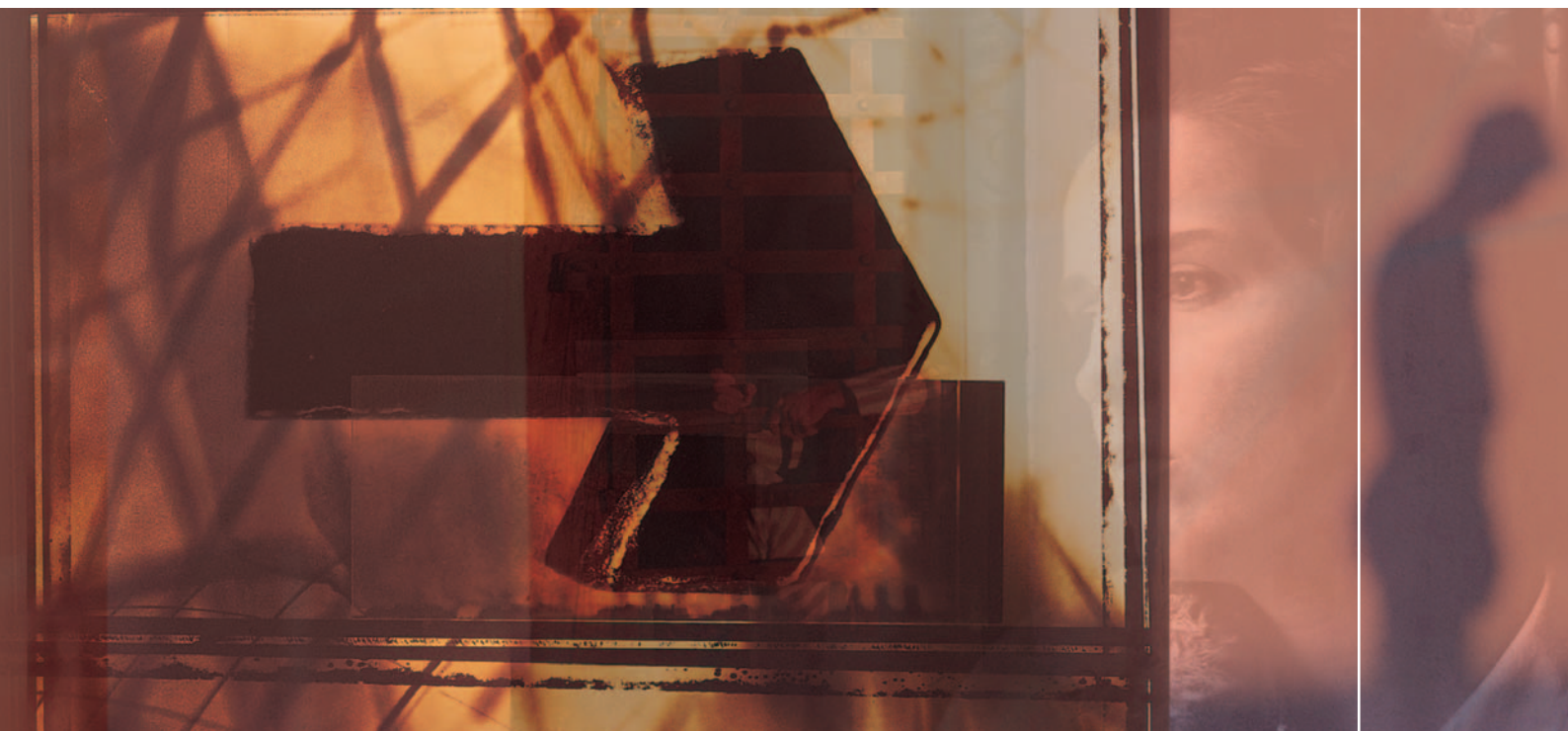




UNITED NATIONS  
*Office on Drugs and Crime*



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



United Nations Office on Drugs and Crime  
Vienna

**Good Practices for  
the Protection of  
Witnesses in Criminal  
Proceedings Involving  
Organized Crime**



UNITED NATIONS  
New York, 2008



## Foreword


In recent years transnational organized crime has grown. Criminal organizations are becoming stronger and more diverse. They are engaging more and more frequently in systematic forms of cooperation designed to further their criminal activities. In the investigation and prosecution of crime, particularly the more serious and complex forms of organized crime, it is essential that witnesses, the cornerstones for successful investigation and prosecution, have trust in criminal justice systems.

Witnesses need to have the confidence to come forward to assist law enforcement and prosecutorial authorities. They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups may seek to inflict upon them in attempts to discourage or punish them from cooperating.

The United Nations Convention against Transnational Organized Crime and its Protocols call upon State Parties to introduce appropriate measures to prevent witness intimidation, coercion, corruption or bodily injury, and to strengthen international cooperation in this regard. Often though, even where such measures have been legislated, implementation remains less than satisfactory and further progress is needed particularly with regard to cross-border cooperation especially regarding the change of identity and relocation of at-risk witnesses.

Experience has shown that in witness protection there are no easy solutions. However this publication, developed by the United Nations Office on Drugs and Crime following a series of regional meetings with expert representatives from law enforcement, prosecutorial and judicial authorities, has been designed to assist and support Member States in the establishment and operation of effective witness protection programs. It provides a useful account of available measures and offers practical options suitable for adaptation and incorporation in the legal system, operational procedures and particular social, political and economic circumstances of Member States.

I am confident that the publication should serve as a useful and valuable tool for policymakers, legislators, legal practitioners, senior law enforcement and justice officials involved in the protection of witnesses.



Antonio Maria Costa  
Executive Director

United Nations Office on Drugs and Crime  
Vienna – January 2008



## Preface

The compilation by the United Nations Office on Drugs and Crime (UNODC) of these good practices for the protection of witnesses in criminal proceedings involving organized crime was made possible thanks to the active support and contributions of dedicated professionals of Member States of the United Nations, international criminal tribunals and international organizations involved in this field. Their participation in the meetings of the UNODC expert groups and their thoughtful commentary during the drafting process were a source of inspiration and served to create a text that goes beyond the usual general theoretical approaches to witness protection and addresses the operational aspects of setting up and implementing witness protection programmes. For security reasons, it is not possible to publish the names of the contributing subject matter experts but UNODC extends to them its appreciation and gratitude.

The Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime were produced by the Anti-Trafficking Section of UNODC under the supervision of Brian Taylor. The text was prepared by Ilias Chatzis and revised by Karin Kramer. Silke Albert, Demosthenes Chryssikos, Stuart Gilman and Filipe De La Torre offered comments, and Nicole Maric and Tejal Jesrani conducted research.





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# I. Introduction

What is witness protection? What are its main elements? How is it used to strengthen criminal investigations and prosecutions? Are there any universally applicable lessons that are the secret to successful witness protection programmes? Can countries with limited human and financial resources afford programmes like the ones operated and prized by well-funded and well-resourced legal systems? These are some of the questions that the present publication seeks to answer. Some answers will come easily. In most cases, however, experience has shown that, in actuality, practice is complicated.

## A. The core issue

The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal is essential to maintaining the rule of law. Increasingly, countries are enacting legislation or adopting policies to protect witnesses whose cooperation with law enforcement authorities or testimony in a court of law would endanger their lives or those of their families.

Protection may be as simple as providing a police escort to the courtroom, offering temporary residence in a safe house or using modern communications technology (such as videoconferencing) for testimony. There are other cases, though, where cooperation by a witness is critical to successful prosecution but the reach and strength of the threatening criminal group is so powerful that extraordinary measures are required to ensure the witness's safety. In such cases, resettlement of the witness under a new identity in a new, undisclosed place of residence in the same country or even abroad may be the only viable alternative.

## B. Mandate of the United Nations Office on Drugs and Crime

Under article 24 of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I), States parties are to take appropriate measures to provide effective protection from retaliation or intimidation for witnesses who give testimony in cases involving transnational organized crime. The measures envisaged include physical protection, the relocation and non-disclosure or limitations on the disclosure of the identity and whereabouts of the witness and the introduction of evidentiary rules to permit testimony to be given in a manner that ensures the witness's safety. States parties are to consider entering into agreements or arrangements with other States for the relocation of witnesses (para. 3). The provisions of the article apply also to victims insofar as they are witnesses (para. 4).

Under article 26 of the Organized Crime Convention, States parties are required to take appropriate measures to encourage persons who participate or have participated in organized criminal groups to cooperate with law enforcement authorities for investigative and evidentiary purposes. Pursuant to paragraph 4 of that article, such persons are to be afforded protection in accordance with the provisions of article 24.

The protection of victims and/or witnesses is also explicitly addressed in the protocols to the Organized Crime Convention, specifically in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex II, articles 6 and 7) and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex III, articles 5 and 16).

The Conference of the Parties to the United Nations Convention against Transnational Organized Crime, at its second session, held in Vienna from 10 to 21 October 2005, identified witness protection as one of the areas that would be used to periodically review the status of implementation of the Convention and its related Protocols (CTOC/COP/2005/8, para. 1, decisions 2/1, 2/3 and 2/4). An overview of the responses of States parties is included in the analytical reports submitted to the Conference at its third session, held in Vienna from 9 to 18 October 2006 (CTOC/COP/2006/2, paras. 64-75; CTOC/COP/2006/6, paras. 12-38; and CTOC/COP/2006/7, paras. 11-18).

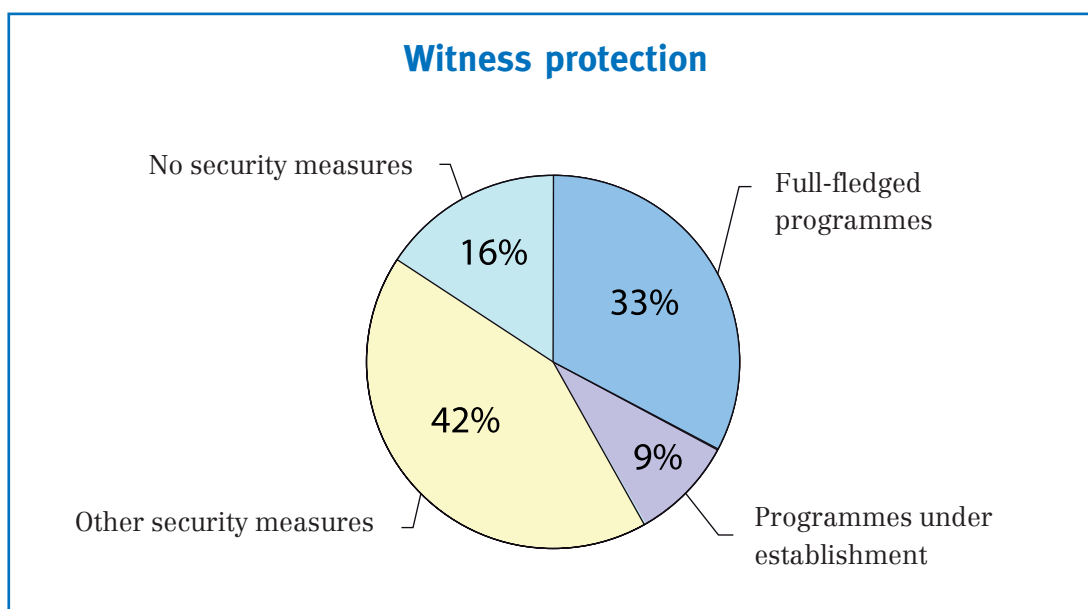
At its third session, the Conference requested its secretariat to collect and make available to States parties successful practices in the investigation of offences covered by the Protocols and in the protection and assistance measures offered to victims of trafficking in persons and smuggled migrants. It also identified witness protection as an area in which technical assistance could be provided to support the implementation of the two Protocols and as a cross-cutting issue for both the Organized Crime Convention and the Protocols thereto (CTOC/COP/2006/14, para. 1, decisions 3/3 and 3/4).

In addition, in the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice (General Assembly resolution 60/177, annex), adopted by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Member States recognized the importance of giving special attention to the need to protect witnesses and victims of crime and terrorism and committed themselves to strengthening, where needed, the legal and financial framework for providing support to such victims, taking into account, inter alia, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Assembly resolution 40/34, annex).

On the recommendation of the Commission on Crime Prevention and Criminal Justice, the Economic and Social Council, in its resolution 2005/16, encouraged Member States to exchange their experiences with and information on action taken to provide effective protection for witnesses in criminal proceedings involving transnational and national organized crime and for their relatives and all other persons close to them.

## C. The process

Moving to implement those mandates, the United Nations Office on Drugs and Crime (UNODC) commenced a series of regional workshops in 2005 with the active participation of expert representatives from law enforcement, prosecutorial and judicial authorities of Member States to develop a set of internationally recognized good practices in the establishment and operation of witness protection programmes. The workshops were attended by officials from different geographical regions with varying degrees of exposure to organized crime and from different socio-political circumstances and legal systems. International organizations and agencies with an active engagement in the field of witness protection also made valuable contributions. Authorities from more than 40 countries, 8 international organizations and 3 legal institutes participated in the consultation process (see annex I). Existing literature was also taken into account (see annex II)



Of the 43 systems examined in the consultation process for the development of the Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime: 14 jurisdictions had full-fledged witness protection programmes that were able to relocate and change the identity of threatened witnesses; 4 jurisdictions had enacted new legislation providing for the establishment of witness protection programmes but the programmes were not yet operational; 18 jurisdictions had no established programmes but had provided for some form of security measures, such as police measures or procedural in-court protection; and 7 jurisdictions had no witness protection measures at all.

## D. Objectives of the good practices

This compendium of good practices is intended as a useful reference tool that draws upon the experience of Member States in setting up effective and sustainable programmes for the protection of witnesses. As experience varies from one country to the next, the good practices presented here do not advocate for any particular model of witness protection. Instead, they aspire:

- (a) To enhance understanding of the issues surrounding this sensitive field;
- (b) To provide an account of the challenges that countries face in their efforts to address the threat posed to witnesses by criminal groups, the measures and practices that have produced positive results and those that have proved ineffective, and the conditions and criteria for the establishment of covert programmes the sole purpose of which is to ensure the safety of threatened witnesses, mostly through relocation and change of identity;
- (c) To facilitate the gradual emergence of a common international approach to witness protection.

The good practices are directed at policymakers, legislators, legal practitioners and senior law enforcement and justice officials. The intention is to provide those professionals with a comprehensive picture of the measures and options available for incorporation into their legal systems and operational procedures, subject to the specific social, political and economic circumstances of their countries.

## E. Scope of the good practices

The good practices that follow take a holistic approach to witness protection. They identify a series of measures that may be adopted to safeguard from intimidation and threats against their lives the physical integrity of people who give testimony in criminal proceedings. These measures provide for a continuum of protection that starts with the early identification of vulnerable or intimidated witnesses, continues with the management of witnesses by the police and the enactment of measures to protect the witness's identity during courtroom testimony, and culminates with the adoption – in extreme cases – of measures for permanent change of identity and relocation.

## F. Definitions

For purposes of the Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime, the following definitions apply:

- (a) “*Witness*” or “*participant*”: any person, irrespective of his or her legal status (informant, witness, judicial official, undercover agent or other), who is eligible, under the legislation or policy of the country involved, to be considered for admission to a witness protection programme;

- (b) “*Procedural measures*”: action taken by the court during testimony to ensure that witnesses may testify free of intimidation or fear for their life; such measures include, but are not limited to, videoconferencing, voice and face distortion techniques and the withholding of details of a witness’s identity;
- (c) “*Witness protection programme*”: a formally established covert programme 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;
- (d) “*Witness protection authority*”: a government, police, prosecutorial or judicial authority overseeing and coordinating implementation of the witness protection programme and making decisions on such matters as admittance, duration of protection, measures to be applied, operational policies and procedures;
- (e) “*Witness protection unit*”: a covert unit authorized to implement a witness protection programme and responsible for the physical security, relocation to a new place of residence and change of identity of programme participants.





## II. Witness protection: origins and selected approaches

### A. Origins: United States of America

Witness protection first came into prominence in the United States of America, in the 1970s, as a legally sanctioned procedure to be used in conjunction with a programme for dismantling Mafia-style criminal organizations. Until that time, the unwritten “code of silence” among members of the Mafia – known as *omertà* – held unchallenged sway, threatening death to anyone who broke ranks and cooperated with the police. Important witnesses could not be persuaded to testify for the state and key witnesses were lost to the concerted efforts of crime bosses targeted for prosecution. That early experience convinced the United States Department of Justice that a programme for the protection of witnesses had to be instituted.<sup>1</sup>

Joseph Valachi was the first member of the Italian-American Mafia to break with *omertà*, the code of silence. In 1963, he testified before a United States congressional committee about the inner structure of the Mafia and organized crime. His cooperation was driven by the fear that he would be murdered by Vito Genovese, a powerful Mafia family boss. When Valachi appeared before the committee, he was guarded by 200 United States marshals. There were rumours that the Mafia had placed on his head a price tag of US\$ 100,000. He was the first person in the United States to be offered protection for testimony prior to the establishment of a formal witness protection programme. Valachi entered protective custody and remained in prison until the end of his natural life. He was kept isolated from other inmates and his contacts were limited to agents of the Federal Bureau of Investigation and staff of the Federal Bureau of Prisons. Valachi was so terrified of the Mafia’s revenge that he insisted on preparing his own food in prison, out of fear that they would try to poison him. He died of a heart attack in 1971, having outlived Vito Genovese by two years.

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<sup>1</sup>Fred Montanino, “Unintended victims of organized crime witness protection”, *Criminal Justice Policy Review*, vol. 2, No. 4 (1987), pp. 392–408.

In 1970, the Organized Crime Control Act empowered the United States Attorney General to provide for the security of witnesses who had agreed to testify truthfully in cases involving organized crime and other forms of serious crime. Under the Attorney General's authority, the Witness Security (WITSEC) Program of the United States ensures the physical security of at-risk witnesses predominantly through their resettlement to a new, undisclosed place of residence under a changed name and new identity details.

In 1984, after more than a decade of operations, a number of shortcomings that the WITSEC Program had experienced were addressed by the Witness Security Reform Act. The issues dealt with under the Act are still considered to lie at the heart of all witness protection programmes, namely:

- (a) Strict admission criteria, including an assessment of the risks that relocated former criminals may pose to the public;
- (b) Creation of a fund to compensate victims of crimes committed by participants after their admission to the programme;
- (c) Signature of a memorandum of understanding outlining the witness's obligations upon admission to the programme;
- (d) Development of procedures to be followed in case the memorandum is breached by the participant;
- (e) Establishment of procedures for the disclosure of information regarding programme participants and penalties for the unauthorized disclosure of such information;
- (f) Protection of the rights of third parties, especially the honouring of the witness's debts and any non-relocated parent's custody or visitation rights.

For a witness to qualify for the WITSEC Program, the case in question must be extremely significant, the witness's testimony must be crucial to the success of the prosecution and there must be no alternative way of securing the witness's physical safety. There are also other conditions, such as the witness's psychological profile and ability to abide by the rules and restrictions imposed by the programme. Over the years, eligibility for coverage under the WITSEC Program has been extended from witnesses to Mafia-style crimes to include witnesses to other types of organized crime, such as those perpetrated by drug cartels, motorcycle gangs, prison gangs and violent street gangs.

## **B. Witness protection in various countries**

Today, witness protection is viewed as a crucial tool in combating organized crime, and a large number of countries around the world have established such specialized programmes or have legislated their creation.

Examples from different jurisdictions that have decided to establish witness protection programmes and their main elements are provided below.

## 1. Australia

In 1983, a royal commission highlighted the need in Australia for better use to be made of informers in the fight against organized crime and, accordingly, for lower-level players to be given an incentive to inform on organizers. At that time, arrangements for witness protection were a matter for individual police forces and approaches differed, with some placing emphasis on 24-hour protection and others preferring relocation of witnesses under new identities. In 1988, a joint parliamentary committee conducted a comprehensive inquiry into the issue of witness protection and its report<sup>2</sup> led directly to the introduction at the Commonwealth level of the Witness Protection Act 1994 and the enactment of mirror legislation in several states and the Australian Capital Territory. The Act:

- (a) Establishes the National Witness Protection Program (NWPP) and sets threshold criteria for a person to be considered a witness eligible for inclusion in NWPP. A witness becomes a “participant” once accepted into the programme;
- (b) Vests the Australian Federal Police with the authority to govern the placement of witnesses under and their removal from NWPP, including the signing of memorandums of understanding, the creation of new identities and the restoration of former identities;
- (c) Mandates the establishment of a register of participants currently or previously under NWPP, which must contain information such as the person’s name and new identity and details of offences of which the participant has been convicted;
- (d) Safeguards the integrity of Commonwealth identity documents (tax file numbers, passports) by providing that identity documents for participants in subnational witness protection programmes may not be issued unless complementary legislation and ministerial arrangements are in place in the state or territory relating to the issue of identity documents;
- (e) Provides mechanisms to ensure that participants do not use their new identity to evade civil or criminal liability and stipulates that witnesses may not be included in NWPP as a means of encouraging or rewarding them for giving evidence or making a statement;
- (f) Creates offences relating to the unlawful divulging of information about participants and creates offences for participants who disclose information related to NWPP.

In 1997, the Act was amended to allow NWPP participants to make disclosures for the purpose of filing a complaint or providing information to the Commonwealth Ombudsman. In 2002, the Act was further amended to permit the inclusion of persons in NWPP at the request of the International Criminal Court. The process for considering a person nominated by the Court for admission to NWPP is similar to the process for the inclusion of foreign nationals or residents in NWPP.

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<sup>2</sup>Australia Parliamentary Joint Committee on the National Crime Authority, *Witness Protection: Report by the Parliamentary Joint Committee on the National Crime Authority*, Parliamentary paper No. 193/88 (Canberra, Australian Government Publishing Service, 1988).

As of this writing, the following states and territories of Australia had enacted regional witness protection schemes complementary to NWPP:

- Australian Capital Territory: Witness Protection Act 1996
- New South Wales: Witness Protection Act 1995
- Northern Territory: Witness Protection (Northern Territory) Act 2002
- Queensland: Witness Protection Act 2000
- South Australia: Witness Protection Act 1996
- Tasmania: Witness Protection Act 2000
- Victoria: Witness Protection Act 1999
- Western Australia: Witness Protection (Western Australia) Act 1996

## **2. China: Hong Kong Special Administrative Region**

In response to a call from the police for reform in 1994, the Hong Kong Police Force set up an ad hoc witness protection programme. A similar programme was set up in 1998 under the Independent Commission against Corruption (ICAC). In 2000, the Witness Protection Ordinance was enacted to provide the basis for protection and other assistance to witnesses and persons associated with witnesses. This single piece of legislation provides uniform criteria for the operation of the witness protection programmes established by the Hong Kong Police Force and ICAC. The Ordinance:

- (a) *Establishes a witness protection programme to provide protection and other assistance to persons whose personal safety or well-being may be at risk as a result of their being witnesses. The programme is implemented, at the Police Force, by the Witness Protection Unit and, at ICAC, by the Witness Protection and Firearms Section. A third unit is currently being established by the Customs and Excise Department;*
- (b) *Stipulates that the person authorized to make decisions on the management of the programme and the inclusion or removal of witnesses is to be designated in writing by the Police Commissioner and the ICAC Commissioner. As of this writing, that authority lay with the Director of Crime and Security at the Police Force and with the Director of Investigation (Government Sector) at ICAC;*
- (c) *Defines the criteria for admission to the programme and the grounds for early termination, outlining the obligations of witnesses;*
- (d) *Authorizes the officer with approval authority to take necessary and reasonable action to protect the safety and welfare of witnesses who have been assessed or are being assessed for admission to the programme, including changing their identity details;*
- (e) *Establishes an appeals procedure against decisions that disallow inclusion of a witness in the programme, terminate protection or determine that a change of identity would not be among the applicable measures. The appeal is reviewed by a special*

board having the power to confirm or reverse the original decision. Nothing in the legislation prevents a witness from challenging further a decision of the original authority or the review board by means of judicial review;

- (f) *Penalizes the disclosure of information about the identity and location of a witness who is or has been a participant in the programme or information that may compromise the security of a witness.*

### 3. Colombia

Colombia's witness protection programme has its origins in the Constitution of 1991, which listed among the main functions of the Office of the Attorney General the obligation to provide protection for witnesses, victims and other parties to criminal proceedings. Law No. 418 of 1997 established three distinct witness protection programmes accessible upon application to the Office of the Attorney General. The first provides witnesses with information and recommendations for their own safety; the second provides limited monitoring of witnesses situations; and the third involves a change of identity and covers victims, witnesses, parties to proceedings and officials of the Office of the Attorney General.

The third programme is managed by a special directorate headquartered in Bogotá and with regional offices in Barranquilla, Cali, Cúcuta and Medellín. There are two divisions: one for operations and one for administrative matters. A special team of investigators is responsible for evaluating criminal investigations, studying witness participation in proceedings and ultimately assessing the level of risk and threat that arises as a direct consequence of such participation. In addition, there is an assistance group (made up of physicians and dentists), a support network with administrative responsibility for persons already covered by the programme, and a security group responsible for implementing all the protection measures ordered by the Directorate following the threat assessment.

The third programme is open only to witnesses in cases involving kidnapping, terrorism and drug trafficking and provides for the permanent relocation inside Colombia and change of identity for witnesses at risk. Witnesses receive financial assistance to start a new life, together with psychological support, medical care, counselling and assistance with resettlement and the issuance of new personal documents.

Under the law, participants may be removed from the protection programme for any of the following reasons:

- (a) Unjustified refusal to submit to judicial procedure;
- (b) Refusal to accept plans or programmes for their resettlement;
- (c) Commission of wrongful acts that seriously affect the protection procedure;
- (d) Voluntary withdrawal.

## 4. Germany

Witness protection programmes have been in place in Germany since the mid-1980s. They were first used in Hamburg in connection with crimes related to motorcycle gangs. In the following years, they were systematically implemented by other German states and the Federal Criminal Police Office.

In 1998, the Witness Protection Act was promulgated. The Act included provisions that regulated criminal proceedings, with a focus on:

- (a) Use of video technology for interviewing at-risk witnesses (especially children testifying as victims);
- (b) Improved possibilities for ensuring the confidentiality of personal data of witnesses at all stages of criminal proceedings;
- (c) Provision of legal assistance for victims and witnesses.

Also in 1998, the Criminal Police Task Force developed a witness protection concept outlining for the first time the objectives and measures to be implemented by agencies involved in witness protection. That led to the issuance of general guidelines for the protection of at-risk witnesses by the federal and state ministries of the interior and justice. Until the adoption in 2001 of the Act to Harmonize the Protection of Witnesses at Risk, the guidelines served as the main basis for Germany's witness protection programme. In May 2003, the guidelines were aligned with the legal provisions of that act and now serve as the implementing provisions of the Act for all witness protection offices in Germany.

The 2001 Act was introduced to harmonize legal conditions and criteria for witness protection at the federal and state levels. Its main provisions cover the following areas:

- (a) *Categories of witnesses entitled to be considered for inclusion in the programme and the respective admission and removal criteria.* Under the Act, admission may be granted to persons who are in danger because of their willingness to testify in cases involving serious crime or organized crime. Participants must be both suited and willing to enter the programme;
- (b) *Decision-making and implementing authority.* While the Act provides that the protection unit and public prosecutor should take decisions on admission jointly, it also recognizes that witness protection units should hold decision-making authority on measures to be applied independently, using for that purpose such criteria as the gravity of the offence, the extent of the risk, the rights of the accused and the impact of the measures;
- (c) *Confidentiality of information relating to the personal data of protected witnesses within witness protection units and other government and non-state agencies.* The files on protected witnesses are maintained by the protection units and are not included in the investigation files, but they are made available to the prosecution on request;

- (d) *Conditions for the issuance of a cover identity and supporting personal documentation and the allowances to be provided for the duration of protection.*

Germany's witness protection programme consists of witness protection offices established at the federal level and in each state. The Federal Criminal Police Office is responsible for the protection of witnesses in federal cases and for coordinating functions at the national and international levels, including:

- (a) Preparation of an annual report on the witness protection programme;
- (b) Organization and conduct of training and continuing education;
- (c) Organization of regular conferences involving the directors of federal and state witness protection offices;
- (d) Cooperation between states, federal agencies and offices located abroad;
- (e) International cooperation.

In addition, the Federal State Project Group on Quality Assurance in the Field of Witness Protection – comprised of the directors of seven state witness protection offices and chaired by the Federal Criminal Police Office – ensures effective cooperation through the development of a uniform nationwide procedure for admission to the programme, creation of a standardized catalogue of requirements for witness protection caseworkers and common concepts for training and continuing education.

## 5. Italy

As far back as 1930, the Italian Criminal Code provided for partial or total immunity from punishment if the offender made reparations for criminal damage or cooperated with authorities in cases of political conspiracy or gang-related activities.

In the 1970s, the violent rise of the Red Brigades, a Marxist-Leninist terrorist group, propelled the enactment of a series of laws to encourage dissociation from terrorist groups and collaboration with the authorities. Although those measures are considered to have been instrumental in the dismantling of the Red Brigades, none of those laws provided collaborators with formal witness protection per se.

It was not until 1984, when the Sicilian Mafioso Tommaso Buscetta turned against the Mafia and started his career as a justice collaborator, that witness protection became formalized. Buscetta was the star witness in the so-called Maxi-Trial, which led to almost 350 Mafia members being sent to prison. In exchange for his help, he was relocated under a new identity. Those events spurred more Mafia members to cooperate, with the result that by the end of the 1990s the Italian authorities had benefited from the services of more than 1,000 justice collaborators.

At the same time, the Italian process was increasingly being criticized for the questionable credibility of witnesses and their motivations, and there were allegations of disorganization



and mismanagement of the witness protection programme. In response, a comprehensive revision to Decree-Law No. 82 of 15 March 1991 was undertaken and entered into force in January 2001. One of the main components of the revised legislation was to create within the witness protection programme a separate structure for justice collaborators.

The main provisions of Decree-Law No. 82, as amended in 2001, are as follows:

- (a) Persons eligible for protection:
  - (i) Witnesses and informants in drug-related, Mafia or murder cases;
  - (ii) Witnesses to any offence carrying a sentence of between 5 and 20 years;
  - (iii) Individuals close to collaborators who are in danger;
- (b) Types of protection:
  - (i) A “temporary plan” involving relocation and subsistence for 180 days;
  - (ii) “Special measures” involving protection and social reintegration plans for relocated individuals;
  - (iii) A “special protection programme” which provides relocation, provisional identity documentation, financial assistance and (as a last resort) new legal identities;
- (c) Justice collaborators who receive prison sentences must serve at least a quarter of their sentence or, if they have a life sentence, 10 years in prison before they are admitted into the protection programme;
- (d) Decisions on admission are taken by a central commission comprised of:
  - (i) The Under-Secretary of State at the Ministry of the Interior;
  - (ii) Two judges or prosecutors;
  - (iii) Five experts in the field of organized crime;
- (e) Changes in identity must be authorized by the Central Protection Service, which is responsible for the implementation and enforcement of protection measures.

## **6. South Africa**

Prior to the adoption of the 1996 National Crime Prevention Strategy, witness protection in South Africa was governed by section 185A of the Criminal Procedure Act of 1977. The relevant provisions were repressive in nature and were used during the apartheid regime as a means to coerce witnesses to give evidence. The 1996 strategy recognized witness protection as a key tool in securing evidence from vulnerable and intimidated witnesses in judicial proceedings and acknowledged that witness protection was, at the time, a weak link in the criminal justice system.



In 2000, Witness Protection Act 112 of 1998 was promulgated, replacing the old system. The new law:

- (a) *Established the national Office for Witness Protection under the authority of the Minister of Justice and Constitutional Development.* The Office is headed by a national director at the country level and has branch offices in South Africa's nine provinces. Although legislative amendments have yet to be made, in 2001 the Office was provisionally reorganized as part of the National Prosecuting Authority and has since been known as the Witness Protection Unit;
- (b) *Regulates the functions and duties of the Director, including the power to decide on admission to the programme.* The Director's decision is based on the recommendations of the branch office head and the relevant officials from law enforcement agencies and the National Prosecuting Authority. The Director's decision to refuse an application or to discharge a person from protection may be reviewed by the Minister of Justice and Constitutional Development;
- (c) *Defines the types of crimes for which witnesses may request protection, the procedure to be followed and the persons eligible to apply.* The list of offences is not exclusive as the Director has the discretion to approve protection for a witness in respect of any other proceedings if satisfied that the safety of the witness warrants it;
- (d) *Provides that civil proceedings pending against a protected witness may be suspended by a judge in chambers, under an ex parte application, to prevent disclosure of the identity or whereabouts of the witness or to achieve the objectives of the Act.* The Office for Witness Protection is the address at which legal proceedings may be instituted with regard to such a witness;
- (e) *Defines offences and severe penalties for any disclosure or publication of information regarding persons admitted to the programme or officials of the Office for Witness Protection so as to ensure the safety of protected witnesses and programme officials.* The decision whether any information is to be disclosed lies with the Director, after consideration of representations and without prejudice to any other applicable law;
- (f) *Provides that the Minister of Justice and Constitutional Development may enter into agreements with other countries or international organizations regulating the conditions and criteria for the relocation of foreign witnesses to South Africa and their admission to South Africa's witness protection programme.* Any such relocation requires ministerial approval.

### **C. Witness protection at the permanent and ad hoc international criminal courts**

The establishment by the Security Council in the 1990s of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Law Committed in the Territory of Rwanda and Rwandan

Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994<sup>3</sup> and the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991<sup>4</sup> was a major step towards ensuring that serious violations of international humanitarian law, such as genocide, war crimes and crimes against humanity, would not go unpunished. The organization, practice and jurisprudence of those courts in the protection of the victims and witnesses of such horrific crimes have been ground-breaking and are largely reflected in the witness protection provisions of the Rome Statute establishing the International Criminal Court.<sup>5</sup> They have also influenced similar tribunals established in agreement with the United Nations, such as the Special Court for Sierra Leone<sup>6</sup> and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

The main elements of the protection programmes of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are similar and can be summarized as follows:

- (a) Special units are established under the authority of the court registrar to provide support and protection services to witnesses. The units are not only responsible for physical protection and security arrangements but are required to provide counselling, medical and psychosocial care and other appropriate assistance to victims and witnesses who appear before the court and to others who are at risk because of testimony given by such witnesses. At the International Criminal Court, the Victim and Witness Unit is mandated to provide certain services to victims who do not have the status of witness but present their views and observations to the Court and are entitled, where appropriate, to some form of reparation;
- (b) The units are responsible for the effective implementation of witness protection measures under the authority of the registrar (non-procedural measures) or the chambers (procedural measures). At the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda the units are neutral, independent bodies that autonomously decide on the needs of witnesses and on the measures to be applied, while at the International Criminal Court, the unit provides its services in consultation with the Office of the Prosecutor;
- (c) Because of the unique character of the crimes covered by the statutes of the courts, protection measures are equally available to prosecution and defence witnesses alike. To ensure impartiality, the unit at the International Criminal Tribunal for Rwanda is subdivided into two distinct teams: one for prosecution witnesses and one for defence witnesses;

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<sup>3</sup>Security Council resolutions 955 (1994) and 1717 (2006).

<sup>4</sup>Security Council resolutions 827 (1993) and 1660 (2006).

<sup>5</sup>United Nations, *Treaty Series*, vol. 2187, No. 38544.

<sup>6</sup>Security Council resolution 1315 (2000).

- (d) In the course of judicial proceedings, a judge or a chamber can grant special procedural measures before, during or after the trial, such as temporary disclosure restrictions, redaction of identifying information from materials disclosed to the opposing party, pseudonyms, facial and voice distortion, closed session testimony or testimony via video link, to protect witnesses who are at risk because of their testimony. The special measures ordered by the court usually involve concealing the witness's identity from the public or the media;
- (e) As the tribunals do not have territorial jurisdiction or their own law enforcement capacity, the units rely on the cooperation of States, including their host countries, to ensure close protection measures in out-of-court situations. If the registrar decides that a witness's concerns about his or her safety after testifying are founded, then the unit arranges for the witness's resettlement within the country of residence or relocation to a third country. The tribunals seek to create a network of countries willing to consider accepting witnesses through the conclusion of framework agreements. The agreements outline the procedure to be followed when relocation is requested and the benefits that the receiving State will offer to the witness. As in inter-State cooperation though, the final decision on whether to accept the witness lies with the receiving State.



## III. Key elements

### A. Participants

#### 1. *The witness*

The definition of “witness” may differ according to the legal system under review. For protection purposes, it is the function of the witness – as a person in possession of information important to the judicial or criminal proceedings – that is relevant rather than his or her status or the form of testimony. With regard to the procedural moment at which a person is considered to be a witness, the judge or prosecutor does not need to formally declare such status in order for protection measures to apply.

Witnesses can be classified into three main categories:

- (a) Justice collaborators;
- (b) Victim-witnesses;
- (c) Other types of witness (innocent bystanders, expert witnesses and others).

#### (a) **Justice collaborators**

A person who has taken part in an offence connected with a criminal organization possesses important knowledge about the organization’s structure, method of operation, activities and links with other local or foreign groups. An increasing number of countries have introduced legislation or policies to facilitate cooperation by such people in the investigation of cases involving organized crime. These individuals are known by a variety of names, including cooperating witnesses, crown witnesses, witness collaborators, justice collaborators, state witnesses, “supergrasses” and *pentiti* (Italian for “those who have repented”). There is no moral element involved in their motivation to cooperate. Many of them cooperate with the expectation of receiving immunity or at least a reduced prison sentence and physical protection for themselves and their families. They are among the main participants in witness protection programmes.

The combination of lenience in (or even immunity from) prosecution with witness protection is considered a powerful tool in the successful prosecution of organized crime

cases.<sup>7</sup> However, the practice can raise ethical issues as it may be perceived as rewarding criminals with impunity for their crimes.<sup>8</sup> To address those concerns, a growing number of legal systems provide that the “benefit” to collaborators is not complete immunity for their involvement in criminal activities but rather a sentence reduction that may be granted only at the end of their full cooperation in the trial process.

Legislation and policy in a number of countries clearly separate admission to a witness protection programme from any benefits that participants may be granted by the prosecution or court with respect to past criminal behaviour, and they provide that justice collaborators must serve some prison time for their crimes.

In Italy, a legislative amendment was introduced in 2001 whereby justice collaborators would be eligible for witness protection upon meeting specific criteria, such as a deadline (180 days) to give full testimony that cannot be subsequently altered. Advantages (not immunity, but parole, leave or home imprisonment) may also be granted on the condition that the witness has served a significant part of the sentence, cooperates fully, does not pose any danger to the public and has demonstrated good behaviour and signs of reform.

Within the penitentiary system, special measures are required to protect the life of justice collaborators. A special branch of the prison administration usually administers them in coordination with the protection unit. They include:

- (a) Separation from the general prison population;
- (b) Use of a different name for the prisoner-witness;
- (c) Special transportation arrangements for in-court testimony;
- (d) Isolation in separate detention units at the prison or even in special prisons.

In the Hong Kong Special Administrative Region of China and the Netherlands, to ensure the safety of high-risk witnesses who are serving prisoners or are being remanded to prison, special security units have been created in the prison system. Incarceration is usually in isolation from other prisoners, especially from those who will testify as witnesses in the same case.

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<sup>7</sup>The United States Department of Justice claims a successful conviction rate of 89 per cent when a protected witness testifies (“U.S. Marshals Service talks WitSec to the world”, *America’s Star: FYI*, vol. 1, No. 1 (August 2006), available at [http://www.usdoj.gov/marshals/witsec/americas\\_star.pdf](http://www.usdoj.gov/marshals/witsec/americas_star.pdf)).

<sup>8</sup>Nicholas Fyfe and James Sheptycki, “International trends in the facilitation of witness co-operation in organized crime cases”, *European Journal of Criminology*, vol. 3, No. 3 (2006), pp. 347–349.

Following their release from prison, justice collaborators may be resettled to a new, secret location under a different identity if the threat to their life persists and other conditions are also fulfilled. Family members of justice collaborators, however, may be admitted to the programme while the witness is still in custody.

Sometimes prisoner-witnesses commit new crimes after their release from prison and admission to the programme and are subsequently terminated from witness protection. To ensure that their return to prison would not endanger their lives because of their previous cooperation, the prison administration may place them in an inmate monitoring programme and house them separately from other prisoners who are known to pose a danger to them.

## **(b) Victim-witnesses**

In accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex), “victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws proscribing the criminal abuse of power.

Victims play a central role in the criminal process. They may be the complainant initiating the proceedings or they may be witnesses for the prosecution. Because of the victims’ vulnerability, there is general agreement that they should receive assistance before, during and after their participation in a trial. To ensure their physical safety, general police and in-court protection measures may be applied (for instance, testimony via videoconferencing, safe houses, use of shields). Victim-witnesses may also be included in a witness protection programme if all other conditions are fulfilled (value of testimony, absence of other effective means of protection, existence of serious threat, personality of the witness).

Recognizing the need to provide for the well-being of victim-witnesses and aware that the admission criteria of witness protection programmes are overly rigid, a number of countries have introduced special witness assistance or support schemes that are distinct from witness protection. Implemented in close cooperation with law enforcement, judiciary and immigration authorities and civil society, such schemes aim to create the conditions that would allow vulnerable witnesses not only to testify in physical security but to avoid revictimization as well. They include:

- (a) Police protection;
- (b) Temporary relocation in safe areas;
- (c) Evidentiary rules of protection measures when testifying in court (anonymity, shielding, videoconferencing);
- (d) Moderate financial assistance.

Pursuant to section 208 of the Criminal Procedure Act of Namibia, the Prosecutor-General is authorized to apply to the judge in chambers to remove the witness to a place of safety if, in the opinion of the Prosecutor-General, the personal safety of the witness is in danger or the witness may be intimidated or prevented from giving evidence. A witness placed under protection pursuant to section 208 is entitled to a prescribed allowance by the State for the duration of that protection.

## **2. Other participants**

Some countries consider for inclusion in witness protection programmes not only witnesses but also other categories of people whose relation to a criminal case may put their lives in danger, such as judges, prosecutors, undercover agents, interpreters and informants.

The use of informants and intelligence providers by the police is an important element in the investigation and prevention of crimes. Their role is different from that of witnesses, however, as they are not called to testify in court and, in some countries, it is not necessary to disclose the assistance they provide.

In Australia, Austria, Canada, Latvia, the Netherlands, Norway and the United Kingdom of Great Britain and Northern Ireland, informants can be admitted to witness protection programmes. The situation is different in Germany, Slovakia and the United States, where only those witnesses who enter the criminal procedure and testify may be eligible for witness protection. Police officers who use informants as sources keep their names and identification details confidential and, under certain conditions, provide them with physical protection on an ad hoc basis. Informants admitted to a protection programme should discontinue their relationship with investigation and intelligence agencies.

In most countries, it is only in exceptional circumstances that judges, prosecutors, undercover agents, expert witnesses and interpreters are included in witness protection programmes. Intimidation or threats against their lives are considered to relate to their posts and the performance of their duties. They can qualify for special police protection, job transfers or early retirement, but their protection differs in nature from the protection measures intended for at-risk witnesses.

## **B. The crime**

### **1. Organized crime**

Witness intimidation has become such a common feature of criminal investigations and prosecution that protection measures for witnesses are considered an essential element of a country's arsenal against organized crime. The growing tendency of inquisitorial legal



systems to adopt elements once exclusive to adversarial systems – such as the greater value given to oral testimony and lesser weight to pretrial statements – has increased the importance of witnesses in criminal proceedings involving serious crimes and, accordingly, the obligation to preserve their evidence.

The United Nations Convention against Transnational Organized Crime provides that States parties should take appropriate measures to protect witnesses in criminal proceedings related to crimes covered by the Convention and its Protocols. Those crimes include:

- (a) Participation in an organized criminal group;
- (b) Money-laundering;
- (c) Corruption in the public sector;<sup>9</sup>
- (d) Obstruction of justice;
- (e) Trafficking in persons (see below);
- (f) Illicit manufacturing of and trafficking in firearms, their parts and components and ammunition;
- (g) Smuggling of migrants (see below);
- (h) Other serious crimes as defined in the Convention, encompassing the elements of transnationality and involvement of an organized criminal group.

### **(a) Trafficking in persons**

The Trafficking in Persons Protocol includes a specific provision (article 6) that stipulates a series of protective measures for victims of trafficking and has to be interpreted and applied in conjunction with the aforementioned provisions of the Organized Crime Convention on the protection of victim-witnesses. In addition, article 7 of the Protocol – which addresses the status of victims of trafficking in receiving States – enables the granting of residence status to victims of trafficking as a means of encouraging them to come forward and cooperate with authorities in the prosecution of traffickers by testifying as witnesses. Thus, States parties to the Protocol are called upon to consider adopting legislative or other measures that would permit victims of trafficking to remain in their territories, either temporarily or permanently, in appropriate cases.

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<sup>9</sup>During the negotiation of the Organized Crime Convention, the provision on establishing corruption as an offence was the subject of extensive debate, mainly because it was deemed a limited effort against a much broader phenomenon. As corruption is one of the methods and activities that organized criminal groups engaged in, the approach finally selected was to include a provision in the Convention targeting corruption in the public sector. That was done on the understanding that, to cover corruption in a comprehensive manner, a separate instrument would be needed. Subsequent negotiations among Member States led to the adoption by the General Assembly of the United Nations Convention against Corruption (Assembly resolution 58/4, annex).

## **(b) Smuggling of migrants**

The Migrants Protocol stipulates that migrants shall not become liable to criminal prosecution under the Protocol for the fact of having been smuggled (article 5). That basic provision offers guarantees encouraging such persons to testify and provide evidence against their smugglers in related proceedings in the receiving State. Furthermore, article 16 of the Protocol lays down specific obligations for States parties to take all appropriate measures with a view to, among other things:

- (a) Protecting the internationally recognized rights of smuggled immigrants, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (para. 1);
- (b) Affording migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups (para. 2);
- (c) Offering assistance to those whose life or safety is endangered by reason of having been smuggled (para. 3).

UNODC has prepared the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2). The *Guides* aim to assist Member States in seeking the ratification and implementation of the Organized Crime Convention and its Protocols. They are available in all six official languages of the United Nations on the UNODC website ([www.unodc.org](http://www.unodc.org)).

## **2. Terrorism**

Witness protection has been particularly important in combating terrorism. The closed nature of terrorist groups makes it difficult to use traditional investigative methods with any degree of success and often requires exceptional measures. In some countries,

In Germany, the use of witness protection and justice collaborators evolved out of experience with the prosecution of terrorist groups in the early 1970s. One particularly well-known case was the prosecution of members of Baader-Meinhof, a German terrorist group founded on Marxist ideology. Gerhard Müller, associated with the group, was arrested on 15 June 1972 for the murder of a police officer. Following his arrest, Müller started cooperating with the prosecution and, in 1975, he turned state witness. He testified about the operational structure of the group and was instrumental in the prosecution of many of his former comrades. Although he was originally sentenced to 10 years of imprisonment, Müller was released after six and a half years and given a new identity.

counter-terrorism rather than organized crime was the primary consideration in introducing witness protection measures.

The resurgence of international terrorism at the beginning of the new millennium has changed the environment of witness protection, especially with regard to the protection of personal data. An uncomfortable relationship has developed between witness protection authorities and counter-terrorism agencies, as the former have come under increased pressure to share information relating to protected witnesses. Experience has been mixed. In some countries, for instance the Philippines, a large percentage of witnesses under protection are involved in terrorism-related cases. Elsewhere, the use of witness protection in terrorism cases has not been the rule. Terrorism investigations are generally handled by special counter-terrorism or intelligence agencies and their objective is most often prevention rather than prosecution.

### **3. Corruption**

In the United Nations Convention against Corruption (General Assembly resolution 58/4, annex), States parties are called upon to take appropriate measures for the protection of witnesses against retaliation or intimidation for their testimony (articles 32, 33 and 37, para. 4). Under the Convention, protection should be granted not just to witness collaborators but also to victims who become witnesses, and it can extend to family members or persons close to the witness. The measures envisaged include:

- (a) Physical security procedures, such as relocation and non-disclosure of information about the witness's identity details and whereabouts;
- (b) Evidentiary rules to ensure the witness's safety during courtroom testimony;
- (c) Signing of agreements among States parties to facilitate the international relocation of witnesses.

A number of countries include corruption among the crimes to be covered by witness protection programmes. Under that approach, the same criteria are used for the consideration of witnesses in cases involving corruption or organized crime. Although witnesses in serious corruption cases may occasionally face a threat to their lives, they are more often subjected to harassment at work, covert threats of retaliation, demotion or similar action. As a result, the criteria used for assessing the level of threat against witnesses in the majority of corruption cases are less exclusive than in organized crime cases, where the threat to the witness's life that would give cause for inclusion in the witness protection programme is likely to be much higher. To address those problems and ensure that corruption is tackled effectively, a number of countries have chosen to establish separate protection programmes for witnesses in corruption cases.

In Thailand, the Witness Protection Act B.E. 2546/2003 provides that special protection measures such as close protection, relocation and change of identity can be applied in the following categories of serious criminal offences:

- (a) Drug trafficking;
- (b) Threats to national security;
- (c) Organized crime;
- (d) Corruption;
- (e) Money-laundering;
- (f) Customs violations;
- (g) Trafficking in humans;
- (h) Offences subject to a minimum term of imprisonment of 10 years.

#### **4. Other crimes**

Certain criminal offences that cannot be classified as serious crimes under article 2, paragraph (b), of the Organized Crime Convention (in other words, offences punishable by a maximum deprivation of liberty of a least four years or a more serious penalty) may still have considerable social impact, or they may be of such a violent nature as to necessitate protection measures for witnesses. That is the case, for example, in crimes within the family, where vulnerable witnesses (children, women, the elderly) are often subjected to intimidation or threats not to report abuse against them by other members of the family.<sup>10</sup>

In Guatemala, violence against women is a growing social problem. More than 1,200 women were murdered in that country between 2001 and 2004. Protection measures there are mostly applied to victim-witnesses in cases of domestic violence.

In South Africa, dealing with violence against women and children is regarded as a national priority. Victims and witnesses in such cases are eligible to apply for admission to the witness protection programme.

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<sup>10</sup>See in this regard the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex).

## IV. Meeting the threat

Experience has shown that assistance and protection measures yield positive results, instilling confidence in witnesses to come forward and testify. In many cases, concerns about a witness's security may be efficiently addressed through:

- (a) Assistance before and during the trial, which enables them to cope with the psychological and practical implications of testifying in a court of law;
- (b) Police measures to enhance physical security;
- (c) Court procedures to ensure the witness's safety during the giving of testimony.

As inclusion in a witness protection programme is the solution of last resort of a protection service, it is essential that – in conjunction with the development of (or in the absence of) such a programme – due consideration be given to developing a plan for undertaking risk treatments of witnesses, especially for those who do not meet the predetermined selection criteria for admission to the programme.

### A. Witness assistance

Participation in a trial as a witness can be a source of great anxiety for many people and may seriously affect the quality of their deposition. In a number of countries, police, prosecutors and justice authorities have institutionalized regular, early meetings with prosecution witnesses to determine their psychological well-being. Such meetings are particularly helpful in the case of child or juvenile witnesses and when witnesses suffer from significant impairment of intelligence, social functioning or a physical disability or disorder affecting the quality of the delivery of their evidence.

The first task is the identification of vulnerable witnesses and any adults who need special consideration during their contact with the criminal justice process. It is usually the police who first come in contact with these individuals. The focus should be on interviewing techniques, discussion about court arrangements and familiarization with trial procedures. If the case goes ahead, support will also be required during the court hearing and in the period immediately afterwards. In a typical criminal case, those activities would probably span many months.

Witness assistance should be distinguished from witness protection, as the purpose of the former is not to protect the physical security of people but to achieve efficient prosecution

and avoid secondary victimization or revictimization of the witness in the trial process (in other words, victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim). Witness assistance includes measures ranging from briefing witnesses on what to expect and the basic aspects of a criminal trial to psychological support to minimize the stress from participating in a trial and financial assistance for transportation, accommodation and childcare, among others. Support is appropriate at all stages of a case but should not involve discussing or rehearsing witnesses' evidence or otherwise coaching witnesses before trial.

Assistance services should be administered and delivered by professionals who are independent from the investigation and prosecution services. Their competencies and functions should be clearly defined and integrated within State welfare support networks, paying special attention to such aspects as confidentiality of shared information and suitability of persons directly or indirectly involved in the case. Personnel engaged in providing assistance to witnesses should be trained and acquire skills in:

- (a) Knowledge and skills for working with witnesses who may be vulnerable but without discussing the case or coaching them in any way;
- (b) Knowledge and understanding of criminal legislation, police procedures and court rules;
- (c) Ability to liaise with family members and agencies likely to be associated with the judicial process (for instance, social welfare agencies, non-governmental organizations and others).

Non-governmental organizations can prove valuable partners in this process, as they possess wide experience in dealing with vulnerable categories of the population (such as victims, young people and children). To ensure the quality of services provided in this sensitive field, it is important that non-governmental organizations participating in any assistance scheme are recognized, assessed and approved by the government.

In the United Kingdom, the national charity Victim Support has established the Witness Service, which is available to witnesses in Crown centres and magistrate courts in England and Wales. The Service offers:

- (a) General information on criminal proceedings;
- (b) Psychological support;
- (c) Accompanying the witness to court and the use of a side entrance to enter and leave the court building;
- (d) Arrangements for appropriate waiting facilities separating witnesses for the prosecution from defence witnesses and the public;
- (e) Parking and drop-off arrangements;
- (f) Communicating additional witness requirements on the day of the trial.

In South Africa, the National Prosecuting Authority has a special unit – the Sexual Offences and Community Affairs Unit – that provides assistance to victims and witnesses of crime in coordination with a number of stakeholders, including non-governmental organizations. The Department of Justice and Constitutional Development has also enacted the Victim Charter to ensure access to justice for victim-witnesses.

## **B. Alternative measures**

Even though all witnesses should receive assistance and support, witness protection programmes are essentially reserved for those extraordinarily important cases where the threat against the witness is so serious that protection and support cannot be ensured by other means. To bridge this gap, a number of countries have developed schemes that are distinct from witness protection programmes but are still based on the principle of making it more difficult to trace at-risk and intimidated witnesses. Those schemes apply to cases that do not warrant the permanent relocation and change of identity of the witness. They may be ordered in the pretrial or trial phase and provide either for a series of physical security measures implemented by the regular police or for evidentiary rules enacted by the courts. Such schemes are often referred to as “alternative measures” to witness protection programmes.

### **1. Target hardening**

Security measures should be considered in all instances where witnesses genuinely believe that there is an imminent threat or danger against their lives as a result of their involvement in assisting the police in investigating a criminal case.

In the majority of cases, witnesses do not face a life-threatening situation. Instead, they suffer verbal threats, intimidation, harassment, assault, property damage or simply fear of reprisal as a result of their cooperation with the police. To provide support and security to such witnesses, the police may put a security programme in place. Depending on the legal system of the country involved, the programme may be established either by law or as a policy. It would generally provide for a series of “enhanced” police measures to discourage criminals wanting to harm the witness. The measures taken would be proportional to the threat and of limited duration. They could include:

- (a) Temporary change of residence to a relative’s house or a nearby town;
- (b) Close protection, regular patrolling around the witness’s house, escort to and from the court and provision of emergency contacts;
- (c) Arrangement with the telephone company to change the witness’s telephone number or assign him or her an unlisted telephone number;

- (d) Monitoring of mail and telephone calls;
- (e) Installation of security devices in the witness's home (such as security doors, alarms or fencing);
- (f) Provision of electronic warning devices and mobile telephones with emergency numbers;
- (g) Minimizing of public contacts with uniformed police;
- (h) Use of discreet premises to interview and brief the witness.

The arrangement of temporary accommodation in safe houses for victim-witnesses is among the measures widely used. In some cases the accommodation is located in specifically designated housing units where witnesses can recover and where access is allowed only to support groups (such as non-governmental organizations, social workers and medical staff). Some countries have even constructed top-security facilities for the short-term protection of witnesses until they testify or are permanently relocated. Such designated units for the protection of witnesses under threat may be of limited usefulness since they are in locations known to the community and easily disclosed. For protection purposes, a safe house may not always be a static point (in other words, in a designated location) but any location not generally known as the usual residence of the individual under protection, where the police can monitor and control all access and communication. It can be as simple as an apartment or hotel room.

Police investigators should be trained to assess – when interviewing at the pretrial phase – whether witnesses are subject to intimidation or threats and they should make recommendations to the designated authority on proposed action. As under witness protection programmes, those actions would require a high degree of confidentiality and the witness's consent. The obligations of the parties could be outlined in a memorandum of understanding and any breach by the witness could be made grounds for the termination of protection.

Court proceedings potentially expose the witness and the programme to risk. Not only is the witness likely to be vulnerable to intimidation and threats while physically present in the courtroom to give testimony, but sensitive information regarding the programme is liable to be exposed and tested by the parties (such as the identity and whereabouts of the witness or the security measures implemented). It is critical that any such risks be identified and addressed at the earliest opportunity through timely and appropriate consultation and liaison with the prosecution. Additional procedural protection measures may then be requested from the court for the duration of the testimony, such as the use of pseudonyms in witness statements or suppression of the identity of the witness if permissible under applicable law and if that does not so undermine the weight of the witness's testimony as to be counterproductive.

Schemes such as those described above could be complementary to witness protection programmes and could be used to provide initial support to persons who may later be admitted to a protection programme. It may also be advisable to have the two pro-



grammes administered by different authorities in order to avoid confusion and because the funding, personnel (including that of non-governmental organizations), standard operating procedures (including security and weapons training) and risks at issue between the two are very different.

The Australian Federal Police is considering the development of a witness management plan in addition to the National Witness Protection Program. The plan would apply to cases where the level of threat or intimidation and the options to provide sufficient protection do not warrant relocating or changing the identity of the witness. Its aim would be to support those witnesses who do not qualify for formal witness protection. Unlike the National Witness Protection Program, which is based on legislation (Witness Protection Act 1994), the witness management plan has developed as a policy and would be applied by the regular police.

In Chile, there are distinct sets of protection measures for felony and non-felony cases. The first category includes measures such as shielding the identity of witnesses, protective incarceration, relocation and change of identity. The second category includes softer remedies, such as police patrols, changing of telephone numbers and other common measures. The police, at the request of the prosecutor or the court, apply both sets of measures.

## **2. Procedural protection**

In a number of countries, the court may decide to apply specific measures during the hearing of testimony to ensure that witnesses testify free of intimidation and fear for their lives. These measures can also be applied in sensitive cases (trafficking in persons, sex crimes, child witnesses and family crimes, among others) to prevent the revictimization of victim-witnesses by limiting their exposure to the public and the media during the trial. They include:

- (a) Use of a witness's pretrial statement instead of in-court testimony;
- (b) Presence of an accompanying person for psychological support;
- (c) Testimony via closed-circuit television or videoconferencing;
- (d) Voice and face distortion;
- (e) Removal of the defendant or the public from the courtroom;
- (f) Anonymous testimony.

Gang members gatecrashed a party and in the ensuing fight a partygoer was killed. An innocent onlooker who observed the murder gave a statement to the police, which was corroborated by other evidence. The witness received threats of reprisals by the gang if he testified in court. The level of threat did not warrant placing the witness in a protection programme. Instead, the witness protection authority decided that keeping the witness anonymous was possible and would provide sufficient protection and, accordingly, it filed a request with the court. The request was granted based on the fact that the witness would be exposed to danger if his identity became known. Voice distortion and a screen were used during the trial to conceal the identity of the witness.

There are usually no statutory restrictions as to the types of crime or witness for which such measures can be allowed. Their application may be requested by the prosecutor and decided by the court after it has heard the opinion of the defence. The court's decision is usually open to appeal.

The elements typically taken into account by courts when ordering the application of procedural measures are:

- (a) Nature of the crime (organized crime, sexual crime, family crime etc.);
- (b) Type of victim (child, victim of sexual assault, co-defendant etc.);
- (c) Relationship with the defendant (relative, defendant's subordinate in a criminal organization etc.);
- (d) Degree of fear and stress of the witness;
- (e) Importance of the testimony.

Procedural measures can be grouped into three general categories depending on their purpose:

- (a) Measures to reduce fear through avoidance of face-to-face confrontation with the defendant, including the following measures:
  - (i) Use of pretrial statements (either written or recorded audio or audio-visual statements) as an alternative to in-court testimony;
  - (ii) Removal of the defendant from the courtroom;
  - (iii) Testimony via closed-circuit television or audio-visual links, such as video-conferencing;
- (b) Measures to make it difficult or impossible for the defendant or organized criminal group to trace the identity of the witness, including the following measures:
  - (i) Shielded testimony through the use of a screen, curtain or two-way mirror;
  - (ii) Anonymous testimony;

- (c) Measures to limit the witness's exposure to the public and psychological stress:
  - (i) Change of the trial venue or hearing date;
  - (ii) Removal of the public from the courtroom (in camera session);
  - (iii) Presence of an accompanying person as support for the witness.

Those measures may be used alone or in combination to produce a greater effect (for example, videoconferencing with shielding or anonymity with face distortion).

In the Republic of Korea, protective measures used during the investigation stage include:

- (a) Appointing assistants and trustees to accompany the witness and offer support;
- (b) Expunging the personal information of the witness;
- (c) Using video links or two-way mirrors.

The protective measures used during testimony include in camera sessions, witness anonymity and testimony by video link.

In the application of procedural measures, due consideration should be given to balancing the witness's legitimate expectation of physical safety against the defendant's basic right to a fair trial.

In jury trials, any restriction of a defendant's right to confront his or her accuser potentially introduces a bias in the trial. Any implying of the defendant's dangerousness may unfairly prejudice the jury, thereby undermining the presumption of innocence and giving disproportionate value to the protected witness's testimony. Trial courts must instruct jurors that the use of protective measures should not bias their decision on guilt or innocence. In addition, trial court judges should give general instructions as to the weighing of witness testimony to prevent the jury from overvaluing evidence given by a protected witness. Despite such cautionary instructions, when procedural measures are applied to reduce the witness's fear of a face-to-face confrontation with the defendant, they impose an additional burden on the accused to prove his or her innocence, or at least the absence of threat.<sup>11</sup>

### **(a) Pretrial statements**

In some countries, written or recorded audio or audio-visual statements given by a witness before an investigator, prosecutor, investigative judge or judge during the pretrial phase may be admissible as evidence in court in exceptional cases, for example, if the witness dies before the trial date.

<sup>11</sup>Nora V. Demleitner, "Witness protection in criminal cases: anonymity, disguise or other options?", *American Journal of Comparative Law*, vol. 46, 1998, pp. 660–661.

Allowing pretrial statements as evidence in court when the witness is available to testify could be used as a protective measure insofar as it does not expose the witness to potential intimidation by the defendant. Conversely, doing so could affect the defendant's right to a fair trial, preventing him or her from directly challenging the witness's testimony and raising additional points other than those recorded during the taking of the statement. As a result, pretrial statements could be allowed on the condition that the defence (counsel/defendant) has the chance to examine and challenge the credibility of the statement and the granting of its admissibility. Those standards are easier to maintain when the statement is taken with the exclusive purpose of being used in court in the place of live witness testimony. In such cases, at the request of the prosecutor, the pretrial hearing of a witness can be conducted as an alternative to in-court witness testimony.

Under the Criminal Procedure Code of Japan, pretrial statements may be used instead of witness testimony only with the consent of the defence. If consent is withheld, the witness has to testify in court. However, the court may, under certain conditions and despite objections from the defence, decide to use the pretrial statement of the witness, for instance, if it deems that the witness is in a pronounced state of fear or anxiety that makes his or her testimony different from the pretrial statement made before a prosecutor.

### **(b) Accompanying persons**

The court may allow a witness to be accompanied by another person during testimony if the witness is likely to feel considerable anxiety or tension (see figure I). The presence of accompanying persons is particularly common with vulnerable witnesses, especially victims of sexual crimes or child witnesses.

As with all support functions, the accompanying person must be someone who has only basic information about the witness's evidence and is not a party to the case. Typically, an accompanying person is a parent, teacher, police officer or therapist.

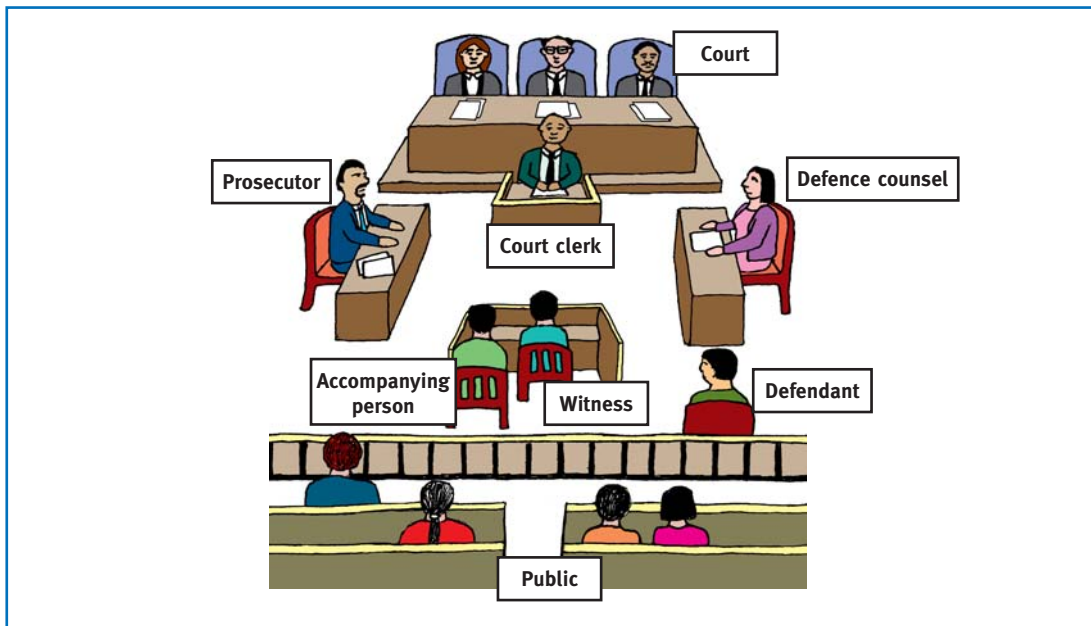
Accompanying persons may not:

- (a) Disturb, hinder or unduly influence the cross-examination and testimony;
- (b) Object to particular questions;
- (c) Offer advice to the witness.

Accompanying persons may:

- (a) Be in close physical proximity to or in contact with the witness during testimony;
- (b) Inform the court of the witness's condition;
- (c) Recommend a recess, for example, if the witness is too distressed to continue.

**Figure I** Sample courtroom arrangement when an accompanying person is present



Source: Ministry of Justice of Japan.

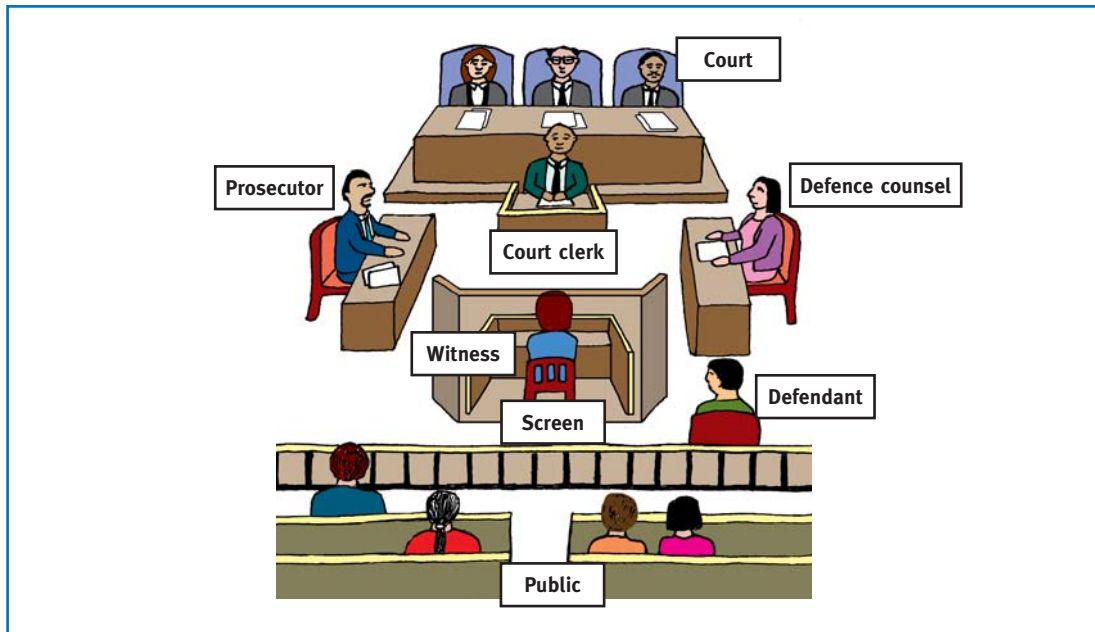
The presence of accompanying persons can sometimes be challenged by the defence on the grounds that they strengthen the impression of the defendant as a dangerous individual because of the fear caused to the witness. In such cases, the court may order accompanying persons – especially if they are uniformed police officers – to sit with the public but in close proximity to the witness.

### (c) Shielding of the witness

The use of screens, curtains or two-way mirrors may be ordered by the court to shield witnesses and their identity from the defendant and from the public and the media as a means to reduce potential intimidation. Screens should not prevent the judge, magistrates, jury and at least one legal representative of each party to the case (prosecution and defence) from seeing the witness and the witness from seeing them. Their use affects the right to face-to-face confrontation, with no opportunity for the defendant to see the expression or attitude of the witness and to challenge the latter's credibility on the basis of such appearance (see figure II). The right to cross-examination is not affected.

In Japan, screening is done in such a way that the defence counsel can still see the witness, so the right to face-to-face examination is not greatly affected. The exclusion of the defendant from the courtroom is done only in exceptional circumstances. Even then, the defendant has to be informed of the content of the witness's testimony and be given the opportunity to challenge it.

**Figure II** Sample courtroom arrangement when a screen is used



Source: Ministry of Justice of Japan.

#### **(d) Removal of the defendant from the courtroom and in camera sessions**

In exceptional cases, the court may order the removal of the defendant from the courtroom as a precautionary measure to prevent intimidation of the witness during the taking of testimony or as a punitive measure in response to intimidation attempts by the defendant, such as verbal threats or threatening gestures made towards the witness. That measure has serious implications for the defendant's right to confrontation. To compensate, after the completion of testimony, the defendant may be allowed back in the courtroom to read the transcript of the testimony and dictate questions to the witness. The defendant would then be removed again from the courtroom to allow the witness to respond.<sup>12</sup>

When the threat against the witness does not come from the defendant but from people who are not parties to the criminal proceedings but are related to the case, the court may exclude the public from the courtroom. That measure does not apply to the parties to the case.

#### **(e) Use of modern communications technology**

In article 18, paragraph 18, of the Organized Crime Convention, States parties are called upon to introduce domestic legislation allowing testimony by videoconference or through other technological means, such as devices and software for image and voice distortion, to prevent the revealing of a witness's identity to the defendant and the public.

<sup>12</sup>Stjepan Gluščić and others, *Protecting Witnesses of Serious Crime: Training Manual for Law Enforcement and Judiciary* (Strasbourg, Council of Europe Publishing, 2006) p. 331.

In January 2003, four people were arrested in the former Yugoslav Republic of Macedonia and charged with trafficking in humans. A 23-year-old woman from Moldova was among the victims and also a key witness. After the arrest of the defendants, she was repatriated to Moldova. When the trial opened, the Southeast European Cooperative Initiative (SECI) Regional Center for Combating Transborder Crime in Southeast Europe facilitated the transportation of the victim to the former Yugoslav Republic of Macedonia to testify. The court however dismissed the case. On appeal by the prosecutor, the court ordered the case to be tried. Disappointed by developments and fearing for her safety, the witness refused to travel and appear in court again. The criminal procedure codes in both countries allowed testimony via videoconference. On 28 April 2005, the witness testified in the trial held in the former Yugoslav Republic of Macedonia through a videoconferencing link from a court in Moldova. It was the first time such testimony had taken place between two countries in that region.

- (a) *Image and voice distortion techniques* can be used to keep the witness's identity secret in situations where the defendant and the witness know each other. When the witness is present in the courtroom, the techniques may involve the use of simple means, such as a theatrical disguise to hide or alter the witness's facial characteristics (wigs, make-up, large sunglasses). Image distortion can also be combined with evidence via closed-circuit television, altering or blurring by electronic means the witness's face to prevent recognition. If the witness could be recognized merely by the sound of his or her voice, special electronic equipment can be used to distort the witness's voice while testifying behind a screen or via videoconference. Where the audio recording of court proceedings is mandatory, the voice-distorted testimony should be maintained in the official records. However, if the defendant knows the witness, the validity of such measures is limited as the defendant would be able to identify the witness from the substance of the testimony and describe to others the person against whom to retaliate;
- (b) *Videoconferencing* refers to the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions. It allows the options of the witness testifying from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location through an audio-visual link. Videoconferencing offers the benefit of enabling the witness to be absent from the place where the proceedings are being held but at the same time to see and hear – and be seen and heard by – the judge, magistrates or jury and the other parties. The testimony is broadcast to the courtroom where the prosecutor, defendant and public are present. As a protective measure, it reduces the threat to the witness's security and the danger of intimidation by the defendant in the courtroom. Where total anonymity is required, videoconferencing may be used in



conjunction with screens or image distortion. Questions by the prosecutor or the defence counsel are relayed by microphone to the witness, who usually answers through voice distortion.<sup>13</sup>

A number of countries have designated special courtrooms in the regular court system for the holding of trials of cases involving organized crime and have equipped them with the latest communications technology. In the Republic of Korea, a special, new courthouse is being built specifically to accommodate the taking of remotely given evidence via video link. Although the use of modern communications technology, especially videoconferencing, depends upon the financial resources available, it is not prohibitively expensive.

There are countries where the use of electronic means to hide the witness's facial or other characteristics is not allowed because they are considered to limit the right of face-to-face confrontation and to prevent the jury or magistrates from gaining an impression of the witness's relevant physical attributes, for example in cases where it is claimed that the defendant used force to restrain the witness.<sup>14</sup>

#### **(f) Anonymous witnesses**

Keeping some or all of a witness's identity details hidden from the defence and the public can be an effective means of protection in the rare cases where the substance of the testimony itself does not identify the witness to the defence and the testimony is corroborated by other evidence. The measure is usually granted by the court at the request of the witness, and the ruling can usually be appealed and is revocable.

Countries where anonymous testimony is allowed:

- (a) Keep records of the witness's identity separately from the transcript of the trial and in a secure location;
- (b) Sanction or prosecute in accordance with the law any attempt to reveal an anonymous witness's identity.

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<sup>13</sup>In article 18, paragraph 18, of the Organized Crime Convention States parties are called upon to make use of videoconferencing as a means of facilitating the taking of testimony from witnesses residing in a different State party's jurisdiction. An interpretative note included in the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.06.V.5, p. 199) reflects a proposal submitted by the Italian delegation during the negotiations and recommends its use as a guideline for implementing the above provision. According to that proposal, the judicial authority of the requested State would be responsible for identifying the witness and, on the hearing's conclusion, for drawing up minutes indicating the date and place and any oath taken. The hearing would be conducted without any physical or mental pressure on the witness. Other safeguards provided are the right of the requested State to interrupt the videoconference if it infringes on fundamental principles of its domestic law and the right of the witness to have an interpreter or not to testify, if that is provided for by the national law of either the requesting or the requested State. Moreover, the law of the latter shall apply in case of perjury. Finally, the costs of the videoconference would be borne by the requesting State.

<sup>14</sup>Council of Europe, European Committee on Crime Problems, Committee of Experts on Criminal Law and Criminological Aspects of Organised Crime, *Report on Witness Protection (Best Practice Survey)*, Best Practice Survey No. 1, document PC-CO (1999) 8 REV (Strasbourg, Council of Europe Publishing, 1999).



The jurisprudence of the European Court of Human Rights on implementation of article 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, No. 2889) has created a set of conditions for the use of anonymous witnesses that are incorporated in the respective legislation and court practices of the 46 States parties to the Convention and that limit the weight or probative value that may be placed on such evidence (see European Court of Human Rights, *Kostovski v. The Netherlands*, Judgement of 20 November 1989, Application No. 11451/85, Series A, No. 166; *Windisch v. Austria*, Judgement of 27 September 1990, Application No. 12489/86, Series A, No. 186; *Lüdi v. Switzerland*, Judgement of 15 June 1992, Application No. 12433/86, Series A, No. 238; and *Doorson v. The Netherlands*, Judgement of 26 March 1996, Application No. 20524/92, Reports 1996-II).

### **(i) Partial or limited anonymity**

Where partial or limited anonymity is granted, the witness may be cross-examined in court by the defence but is not obliged to state his or her true name or other personal details, such as address, occupation or place of work. That measure is particularly useful when hearing the testimony of undercover agents and members of surveillance teams who would be in danger if their real identities became known to the public. Such a witness usually testifies in court under the assumed name that he or she was known by during the operation but states his or her true function (police officer, investigator etc.).

### **(ii) Total or complete anonymity**

When total or complete anonymity is granted by the court, all information relating to the identity of the witness remains secret. The witness appears in court but testifies behind a shield, disguised or through voice distortion. In practice, that measure is useful only in cases where witnesses were innocent bystanders of the crime, and therefore such cases rarely involve prosecutions of gang leaders, who typically order others to carry out their violent schemes. If the defendant knows the witness, then maintaining complete anonymity would be unrealistic, as the defendant can readily identify the witness through his or her testimony or the context of the information provided.

In Germany, when total anonymity is granted, a law enforcement officer gives the evidence in court in place of the witness, stating what the witness saw. With the exception of information relating to the identification details of the witness, there are no limitations to the right of the defence to challenge the testimony as relayed by the law enforcement officer. Additionally, the defence has the right to submit in writing questions to be put to the anonymous witness by the reporting officer, who will subsequently report the answers to the court. The Federal Court of Justice has ruled that, because of its largely hearsay character, such testimony has limited value unless otherwise corroborated by other material evidence (Council of Europe. *Terrorism: Protection of Witnesses and Collaborators of Justice* (Strasbourg, Council of Europe Publishing, 2006)).

Total anonymity is an exceptional measure and may have serious implications for the defendant's right to a fair and open trial, face-to-face confrontation and right to cross-examine a witness. It places limitations on the right to challenge the genuineness, accuracy and sincerity of the testimony. The defence in such cases may not be able to verify:

- (a) Any relationship with the defendant that may be the cause of a prejudiced attitude;
- (b) The origin of the knowledge;
- (c) Any personal history that may affect the witness's credibility (mental condition, criminal record, habitual lying etc.).

An example of the serious legal issues raised by the use of anonymous witnesses is the criticism that the International Tribunal for the Former Yugoslavia received for allowing for the first time a totally anonymous witness to testify in the Tadic case (*Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T). Tadic was arrested in Germany on 12 February 1994, and charged in connection with crimes committed in 1992 in the Omarska prison camp in Bosnia and Herzegovina. Pursuant to a request by the International Tribunal for the Former Yugoslavia, Germany transferred custody of Tadic to the Tribunal in April 1995. The Tribunal indicted Tadic on 132 counts of crimes against humanity and war crimes. During the trial, the prosecutor filed a motion requesting protective measures for seven witnesses, including total anonymity for some of them (testimony via one-way closed-circuit television, voice and image distortion, non-disclosure of identifying data, sealing and removal from court records of such data, testimony during in camera sessions of the chambers). The trial chamber's decision by majority vote (2 to 1) to grant the prosecution's motion was severely criticized as limiting the right of the defendant to a fair trial (see <http://www.un.org/icty/cases-e/index-e.htm>, which also contains the separate opinion of Judge Stephen on the prosecutor's motion requesting protective measures for victims and witnesses). No trial chamber of the International Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda has allowed an anonymous witness since then. On 26 January 2000, Dusko Tadic was convicted and sentenced to 20 years of imprisonment.

In view of the impact that the use of anonymous testimony has on the rights of the defendant, its application should be established statutorily with strictly defined conditions that balance the need for protection with the defendant's right to a fair trial.<sup>15</sup> In countries where total anonymity is used:

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<sup>15</sup>Of relevance here is the jurisprudence of the European Court of Human Rights, according to which the maintenance of the anonymity of the witness does not entail infringement of article 6 (Right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms if the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities (e.g. questioning the anonymous witness in the presence of counsel by an investigating judge who was aware of the witness's identity, even if the defence was not) (see *Doorson v. The Netherlands*, Judgement of 26 March 1996, Application No. 20524/92, Reports 1996-II, paras. 72–73).

- (a) A conviction needs to be corroborated by other material evidence and cannot be based solely or to a decisive extent on the anonymous testimony;
- (b) The defendant should be allowed to put questions directly to the witness during testimony or through the defence counsel, in written form or otherwise;
- (c) The reasons for maintaining the secrecy of the witness's identity should be revisited at different stages of the criminal proceedings and after their completion;
- (d) The decision-making authority (investigative judge, court, other) should verify that there is a witness and should clarify circumstances that may affect the witness's reliability (mental illness, bias against the witness etc.).

The handling by court staff of anonymous witnesses' data is of particular importance. Court proceedings, evidence and information related to the case are typically handled by a number of people. Court staff responsible for the safekeeping of such information and for entering such information into the record must be carefully selected.

In New Zealand, the identification data of anonymous witnesses are produced by the protection unit on police letterhead and given directly to the judge, who reads them and stores the document in the court's safe. That information is then kept secure but it can be retrieved if it becomes necessary to trace the witness or if new evidence is uncovered leading to an appeal or review of the case.

### **3. Self-protection**

There are occasions where, because of the lack of an established witness protection programme, refusal of the witness to enter witness protection where such programmes exist or lack of eligibility criteria, witnesses may be offered support to look after their own protection.

In cases of low threat, a lump-sum payment may be offered to witnesses to assist them in their own resettlement. That will likely be within their own country and offers a viable alternative to admission to a protection programme. Such is often the case in large or heavily populated countries where people can easily resettle without raising undue interest in their new environment. The respective police or witness protection unit may facilitate and assist with the move but does not assume any responsibility, and there is no formal agreement or memorandum of understanding between the parties. The problem is that such an arrangement may result in an entire lack of control over the choice of the new location and no means to manage the risk that the witness may pose to the new community.

Law enforcement authorities in some countries focus on instilling in witnesses what may be termed a feeling of security. They work with witnesses in analysing risky situations and develop self-protection measures to enable witnesses to take more effective control of their personal lives and to behave in a way that supports other measures implemented by the protection unit.



## V. Setting up a witness protection programme

### A. Need versus want

A State's decision to set up a witness protection programme should be reached on the basis of a thorough analysis of factors relating to the level and types of criminality within its society, frequency of violence against participants in criminal proceedings, demonstrated ability and will to prosecute high-profile crimes and availability of resources. For example, the existence of powerful criminal syndicates willing to go to any length to protect their criminal operations and their rich lifestyles (paid for using the proceeds of those criminal operations) may leave little doubt about the need for a witness protection programme to aid prosecutors.

*Zahaira Habibulla H. Sheikh and Another v. State of Gujarat and Others* (2004) 4 SCALE 375 (the Best Bakery case) was a case involving the killing of 14 persons in a communal riot in Gujarat, India. Thirty-seven of the prosecution witnesses, including several eyewitnesses (some of them relatives of the deceased), turned hostile at the trial, which resulted in the acquittal by the court of all 21 accused persons. When reversing the acquittal and ordering a retrial outside Gujarat, the Supreme Court of India made several observations on the question of witness protection, stating that legislative measures to emphasize prohibition against tampering with witnesses, victims or informants had become the inevitable need of the day and that witness protection programmes were imperative in the context of the alarming rate of "somersaults" by witnesses. In fact, the Supreme Court has since sought responses from various countries on the question of witness protection, and the Law Commission of India has submitted an extensive report on the subject and a draft bill to the Parliament for adoption (India, Law Commission of India, *Consultation Paper on Witness Identity Protection and Witness Protection Programmes* (New Delhi, August 2004)).

### B. Legislation versus policy basis

Using protection measures affects the rights of the defendant and potentially influences the right to a fair and unbiased hearing. It also leads to serious disruption of the life of the witness and any persons accompanying the witness in the programme. It may even have implications for third parties. Because of those serious implications, protection programmes should be well grounded in either legislation or policy.

In the majority of cases, witness protection is based on statute in the form of the criminal procedure code, police law, special legislation or even the constitution.

Section 80A of the Constitution of Chile provides that protective measures for witnesses and victims are among the main functions of the Office of the Public Prosecutor. The protective function is thus a duty of the Office of the Public Prosecutor by constitutional mandate, which gives it a place of note in the hierarchy of the national legislation.

Legislation should be sufficiently flexible to allow the application of measures to meet the needs of any particular case, its significance within the community and the interests of the parties. If the statute contains an exhaustive list of offences for which protection can be provided, it may be appropriate to have an omnibus clause, enabling the relevant authority to exercise discretion in determining witnesses associated with crimes that ought to come under the protection scheme.

Legislation should specify at a minimum:

- (a) Protection measures that may be adopted;
- (b) Conditions for their application and criteria for admission of witnesses;
- (c) Procedure to be followed;
- (d) Authority responsible for the programme's implementation;
- (e) Reason for the programme's termination;
- (f) Rights and obligations of the parties;
- (g) Confidentiality of the programme's operations.

The existence of legislation is the most common scenario but may not always be required. There are examples of countries with established programmes where witness protection is not based on a law, such as New Zealand. In those countries, witness protection was developed as a regular police function deriving directly from the responsibility of the police to protect the life and safety of people. Policy, coupled with the agreements signed with witnesses admitted to the programme, provide a sufficient and adequate framework for the programme's operations.

The difference between the groups of countries that base witness protection on legislation and those that base it on policy does not always follow the traditional civil law–common law divide. In Austria, the Netherlands and Norway, which are civil law countries, witness protection has not been legislated. At most there are mandating provisions in the law governing the police force. The absence of a detailed legal framework, however, does not prevent the application of a full range of protection measures (change of identity, resettlement and financial support, among others).

In the United Kingdom (a common law country), the Serious Organised Crime and Police Act of 2005 placed on a statutory footing the arrangements for the protection of witnesses. That was deemed necessary after a steady rise in witness protection cases in recent years (55 per cent from 2001 to 2003)<sup>16</sup> had highlighted the need to help providers secure assistance from Government agencies in setting up protection arrangements and to offer additional safeguards through the introduction of offences for disclosing information relating to those arrangements. Even though the Act does not create a national programme in the United Kingdom, it:

- (a) Creates uniform criteria for admission and eligibility;
- (b) Penalizes the disclosure of information about protection arrangements or about the identity or location of a protected witness;
- (c) Establishes the duty of public authorities to render assistance to protection units;
- (d) Allows the transfer of responsibility for witnesses between police forces (relocation).

### C. Programme location

Once it has been decided that there is a need for a witness protection programme, policy-makers need to determine where to place the programme within the broader structure of the government or the judiciary. Linked to this decision is the funding source and exercise of oversight over the activities of the programme.

One of the decisions to be made is whether the programme should be located within or outside the police force. 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, as is the case in Australia, Austria, Canada, the Hong Kong Special Administrative Region of China, New Zealand, Norway, Slovakia and the United Kingdom, programmes are located within the police force. Responsibility for management of the programmes (decisions on admission, funding, recruitment and other matters) is vested in the chief executive of the police force (the police commissioner) and is associated with the position (*ex officio*). Cohabitation of witness protection agencies with the police may lead to an uneasy relationship. Police officers are inquisitive by nature and the security of the information may be compromised. In cases where the programme is located within the police force, the isolation

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<sup>16</sup>United Kingdom of Great Britain and Northern Ireland, Home Office, "Serious Organised Crime and Police Act 2005: guidance notes", 2005, p. 3.

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.

A balance is required between the need to operate in extreme confidentiality and the need to maintain an adequate level of cooperation with the police, for example in conducting threat assessments or moving witnesses at times of greatest risk from their place of domicile to new locations.

In Colombia, the Netherlands, the Philippines, South Africa and the United States, programmes are separated organizationally from the police force and placed under the equivalent of the Ministry of Justice, the Ministry of the Interior or the State Prosecutor's Office. Here it is the chief executive of the respective institution (Secretary or Minister of Justice, Attorney General, State Prosecutor) who holds decision-making power over admission to the programme and oversight of activities.

Finally, in a third group of countries (which includes Italy), the programme is implemented by a multidisciplinary body consisting of high-level representatives of the law enforcement, prosecutorial, judicial and Government authorities. That body takes decisions on such matters as admission to the programme and termination of witness protection. It also exercises oversight over implementation of the programme and makes budgetary submissions to the Government.

Whether the programme should be located within the police or not seems to lose importance in the light of the fact that all three groups include countries with successful and long-standing witness protection programmes. More so than the location of the programme, the following issues seem to be key to the success of witness protection programmes:

- (a) Separation from the investigation;
- (b) Confidentiality of procedure and operations;
- (c) Organizational autonomy from the regular police.

#### **D. Organizational structure**

From a structural point of view, witness protection programmes may exist at the national or regional level or both. Where national and regional programmes coexist within the same country, the responsibilities of the respective protection agencies need to be clearly delineated but, ideally, their decision-making process should be centralized at the national level to ensure consistency of admittance criteria and applied measures.



In parallel with the National Witness Protection Program (NWPP) run by the Australian Federal Police, there are seven programmes at the state or territory level. NWPP deals only with cases of organized or other serious crimes in which there is a very real threat against the witness's life. The subnational programmes have a broader scope and cover lower-level cases, including domestic violence. The Australian Federal Police accepts referrals from state jurisdictions and crime commissions; liaises regularly through the Australasian Heads of Witness Protection Forum; and maintains a good working relationship with each state jurisdiction. However, information about witnesses or methodology is not shared, and cases are kept confidential and private. State agencies and the Australian Federal Police can relocate witnesses to another part of the state or to another state. Protocols are currently being developed to enable any witness protection authority to seek the transnational relocation of protected witnesses.

The United Kingdom has no national police force. Instead, there are 43 regional police forces in England and Wales, 8 in Scotland and 1 in Northern Ireland. As far as witness protection is concerned, the Scottish Crime and Drug Enforcement Agency provides witness protection for all eight police forces in Scotland. In England, Northern Ireland and Wales, witness protection is implemented at the local level and dedicated programmes have been established in, among others, the London Metropolitan area, Greater Manchester area, Northumbria, West Yorkshire, Hampshire and Merseyside. The forces that do not have their own witness protection programmes outsource that function to neighbouring forces. At the national level, the Serious Organised Crime Agency established under the Serious Organised Crime and Police Act of 2005 has a witness protection unit. The Witness Protection Bureau established within the Home Office of the United Kingdom has no operational capacity but provides support and central services to witness protection units, such as access to social housing, benefits and medical care for protected witnesses. The Bureau is also the single point of contact for international relocations and operations.

## E. Personnel

Staffing is a crucial element for the success of any protection programme. Witness protection officers need to possess a particular set of qualities and skills. They are required to be vigilant protectors, interrogators and undercover agents, as well as innovative thinkers, social workers, negotiators and even counsellors. One of the first tasks when establishing a programme is to decide where to find people with such qualifications.

In New Zealand, the witness protection unit has its origins in the country's VIP Protection Team, which was well trained and centralized. The team members had the cover of their duties of protecting public figures so were reasonably able to work in a semi-covert capacity and had a plausible reason for prolonged absences from their stations.

To ensure the confidentiality and security of information, protection agencies need to establish strict recruitment criteria and vetting procedures. The following are common elements of the recruitment and training of programme personnel:

- (a) *Qualifications.* Protection is a complex task requiring experience in a variety of fields, ranging from close personal protection and handling of weapons to law and psychology. A minimum of five years of service and adequate security clearance according to applicable laws and regulations are among the basic conditions;
- (b) *Integrity.* Officers and administrative staff employed by witness protection units should be of high moral standards and have among their personality traits both integrity and the ability to maintain confidentiality. Those qualities create the necessary conditions for witness protection programmes to operate with the utmost confidentiality;
- (c) *Psychological profile.* Witness protection is an arduous task. Personnel need to reconcile themselves with the fact that in most cases they will have to protect former criminals. Irrespective of how good they may be as police officers, some of them could find it impossible to switch roles, going from pursuers of criminals to becoming their protectors. In addition, as witnesses are isolated from their social surrounding and lose their normal support network, protection officers become almost surrogate families to them. Despite professional distancing, that relation could have a severe psychological impact on handlers. Recruitment needs to be based on a psychological assessment of candidates, and counselling should be available to personnel for the duration of their service;
- (d) *Full-time force.* Employment within the unit may be either full-time or part-time. The core staff of the unit should be a full-time force in order to reduce the risk of compromise and ensure high-level protection services through constant training. Part-time personnel could be available and used on a call-up basis for physical protection against lower threats at the regional or local level;
- (e) *Volunteer force.* Because of the nature of protection services and the effect they may have on a handler's life (long absences from home, increased danger, need to maintain secrecy, among others), employment with the unit is in most cases voluntary. Officers need to apply and go through a vetting procedure that includes interviews and physical and psychological tests. Ideally, a mix of genders, ages and personalities should be aimed for in an endeavour to reflect society at large and acquire the combination of personal qualities and skill sets required (young go-getters, cautious types etc.);

In South Africa, the strategy of the Witness Protection Unit to improve the management of witnesses is based on the development of a diverse staff working on a full-time basis. According to the National Prosecuting Authority 2004–2005 Annual Report on the Witness Protection Program Unit, 41 per cent of the staff are male and 59 per cent are female. As for diversity, 41 per cent are black, 29 per cent are white and 12 per cent are Indian.

- (f) *Tenure.* Most agencies have a policy of rotating staff every 3–5 years. The reasons are career development, prevention of corruption and the demanding nature of the job. Often, those factors have to be balanced against the need to retain qualified staff for longer periods of time in service with the unit;
- (g) *Salaries and benefits.* Service with the witness protection programme implies having long working hours and being on call almost continuously to respond to emergency situations. The benefits offered to officers, however, vary. Some programmes pay only police salaries linked to rank and years of service, while others offer special benefits, such as overtime or additional compensation;
- (h) *Training.* Ongoing skills maintenance and development is the key to the effectiveness of a witness protection programme. Protection officers perform a number of functions that require aptitudes that are different and perhaps broader than normal police functions. As a result, training must be multidisciplinary in nature and cover diverse fields. Coordinated and standardized training in national witness protection programmes could increase the confidence of the authorities in the capacity of other countries to protect witnesses and lead to the strengthening of international cooperation on witness relocation;
- (i) *Outsourcing.* Protection programmes provide specialized services to their clients. If no specific arrangements are in place, events such as an accident or illness may compromise the programme, as hospitals require the patient’s medical history and personal details. Even though insourcing has the advantage of providing services to both witnesses and officers of the protection unit alike, it is costly. Some programmes choose to outsource particular support services, especially medical care. In-house doctors can be used for the initial check-up or treatment, with specialized or prolonged medical assistance being offered by physicians and hospitals from an approved roster. Psychological support, however, is in most cases provided by internal psychologists. For outsourced services, especially from the private sector (private hospitals, physicians etc.), strict selection and confidentiality criteria need to be applied. The following examples show how different witness protection programmes outsource certain services:

- (i) In Australia, NWPP has recruited its own psychologist, who can be called upon at any time. If a witness needs ongoing psychological or medical assistance, an arrangement is in place with a national health-care provider whereby the person can seek assistance. Records are controlled centrally by the health-care provider in order to protect the identity of the witness;

(ii) The programme in New Zealand uses police-approved physicians in the initial stages and a psychologist from a police-approved list for ongoing trauma counselling in case of witness relocation. As for medical care, a police physician is used for initial check-ups, and then a new national health index number is used. If the witness has a medical history that needs to be included in the new records, it is sanitized and added to them;

(iii) In South Africa, psychologists have been recruited in the head office and each of the nine branch offices of the Witness Protection Unit to offer support to both witnesses and programme officials;

(iv) ICC uses private health insurance, with health-care providers being given no factual information but only a code. In-house psychological assessments are also available. The aim is to get people out in 4–5 months, during which time a social worker looks after individuals through an “induction” programme with no access to their actual identity details.

## F. Funding

The cost associated with setting up and operating witness protection programmes can be a reason why countries hesitate to establish them. Expenses differ from country to country, depending on living costs, population size, crime rates and other factors, and must be weighed against the return: dismantling of organized criminal networks, shorter investigations, more efficient prosecutions, integrity of the criminal justice system. Even in absolute figures, witness protection is usually a small percentage of the total police budget in countries where such programmes exist. Basic costing includes:

- (a) One-time expenses to set up the programme (equipment for the unit, premises);
- (b) Relocation costs;
- (c) Staff salaries and overtime;
- (d) Travel;
- (e) Allowances for witnesses;
- (f) Psychological assessments and counselling.

The majority of the expenses are accounted for by staff salaries, overtime and travel. Relocation expenses can be considerable but vary depending on the benefits that witnesses are entitled to in each particular programme. In New Zealand, for example, witnesses as a rule go onto social security and the programme only occasionally tops up their entitlements.

Adequate and regular funding should be appropriated by government budgets to ensure the programme’s sustainability and the availability of resources for the duration of protection. Budget forecasting should make allowances on a number of variable and interrelated factors, such as:

- (a) Existence of alternative police arrangements for emergency and temporary security provisions;
- (b) Success of procedural protection measures in reducing the number of witnesses that need to enter protection programmes;
- (c) Strictness of criteria for admission to witness protection programmes;
- (d) Sociocultural environment, which determines the number of family members who need to accompany the witness in the programme;
- (e) Average number and duration of stay of witnesses and family members in the programme;
- (f) Efficiency of the criminal justice system;
- (g) Witness's living standards based on average standards in relocation communities or, if imprisoned, any special added prison costs;
- (h) Reach of organized criminal networks in the country;
- (i) Inflation, which has a direct impact on operational costs.

The complexity of the operations involved in each case depends largely on whether witnesses need to be relocated alone or together with persons close to them. The concept of sustainability must be recognized. Funds need to be adequate to sustain the new identity and location of witnesses into the future. As protection is a lifelong commitment, expenses are cumulative and increase the overall budget each year. Even after the end of the initial resource-intensive period of relocation under the programme, some ongoing support is often provided in the form of occasional threat assessments and an emergency response mechanism to counter any unexpected resurgence of the threat.

In some cases, government budgets make fixed yearly allocations to protection programmes. An unexpected increase in the number of witnesses entering a programme can be addressed by special funds earmarked for use in urgent cases.

Governments could also enact statutory provisions allowing the programme to be funded through the use of proceeds from property seized or confiscated for having been acquired through activity involving drug trafficking or organized crime. Such provisions could also allow the use of proceeds from illegally acquired assets that witnesses entering the programme are obliged to hand over to the protection unit. However, funding witness protection solely through sources that could vary substantially from year to year depending on the success of seizure operations could compromise the effectiveness of protection services.

At the regional level, the establishment of joint funds to help finance witness protection programmes and promote cross-border cooperation could be considered.

For security reasons, programmes do not publish details regarding budget allocations, operational costs and benefits. Only general information is available. The budgetary procedures and the financial cost of witness protection are different in the various parts of the world:

<i>Country</i>	<i>Procedures and cost</i>
Australia	The Australian Federal Police submits budget bids to the Government each year. Some of the funds are tied and can only be used for defined activities. The budget is divided among broad functions. For witness protection, staff salary costs per financial year are about 4.5 per cent of the “Protection” staffing budget and operating costs are about 9 per cent of the “Protection” operating budget. The programme has about 20–30 active cases per year. In accordance with the Australian Federal Police report for the period 2005–2006 on witness protection to the Parliament, the programme’s annual cost was 1 million Australian dollars (approximately 775,000 United States dollars). <sup>a</sup>
Canada	In the period 2005–2006, the Witness Protection Program of the Royal Canadian Mounted Police dealt with 53 new cases involving 66 persons. The total cost of the Program for the same period was 1,933,000 Canadian dollars (approximately US\$ 1,823,000), not including wages, expenses and administrative costs. <sup>b</sup>
Italy	In 2004, the budget was close to 65 million euros (approximately US\$ 84 million) for 4,000 witnesses and family members.
Philippines	The yearly budget of the programme is 30 million Philippine pesos (approximately US\$ 614,000). Extra money may be available from emergency funds. Funds are channelled from the Budget Department to the Justice Department. From there, the portion for the witness protection authority is drawn. The programme has under its protective custody some 500 witnesses nationwide. The duration of custody is usually two years but may extend to 6–8 years for cases going to the high court.
South Africa	The programme is registered as a subprogramme in the Department of Justice and Constitutional Development and was allocated a fixed annual budget of 55 million rand (approximately US\$ 7.5 million) for the period 2006–2007 by the National Treasury. About 80 per cent of the programme’s budget goes to operational expenses. On average, there are 250 witnesses and 300 related persons in the programme. In the period 2001–2002, witnesses were under the programme for about five years. In 2006, the cycle was reduced to 2.5 years through the fast-tracking of witness protection cases in the criminal justice system. <sup>c</sup>

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<sup>a</sup>Australia, Australian Federal Police, *Witness Protection: Annual Report 2005–06* (Canberra, Team Leader Publications, 2006), p. 9.

<sup>b</sup>Canada, Public Safety Canada, “Witness Protection Program Act: annual report 2005–6”, available at [www.publicsafety.gc.ca/abt/dpr/le/wppa2005-6-en.asp](http://www.publicsafety.gc.ca/abt/dpr/le/wppa2005-6-en.asp).

<sup>c</sup>South Africa, National Prosecuting Authority, *Witness Protection Programme Unit: Annual Report 2004–2005* (Pretoria, 2006).

<i>Country</i>	<i>Procedures and cost</i>
Thailand	<p>Around 100 persons are reportedly admitted to the programme every year. That figure includes people protected in safe houses and by the police. The yearly budget for the programme is close to US\$ 500,000, divided into three areas:</p> <ul style="list-style-type: none"> <li>(a) General protection measures, such as police protection, safe houses and removal of the witness's personal data from the court records;</li> <li>(b) Special measures to be applied in serious crimes, including change of name and place of residence, financial support and physical security;</li> <li>(c) Compensation for the families of witnesses who are killed.</li> </ul>
United States	<p>Between 1970, when it was created, and 2005, the WITSEC Program handled more than 7,500 witnesses and 9,600 family members or associates. In the fiscal year 2003, the United States marshals devoted US\$ 59.7 million to the Program.<sup>d</sup></p>
United Kingdom	<p>Overall budget details are not available for the United Kingdom. However, in the period 2006–2007, the budget for the witness protection programme of the Merseyside police force, which covers the Liverpool area (population: 1.5 million), was 550,000 British pounds (approximately US\$ 1,080,000).</p>

The budget for the witness protection programme of the International Criminal Court accounts for less than 2 per cent of the entire budget of the Court.

## **G. Principles of operation**

### **1. Confidentiality**

Organizational autonomy is a fundamental principle for the successful implementation of a witness protection programme. The protection unit should be separate from investigation agencies and the prosecuting authority and it should enjoy operational “isolation” from police services. Only in exceptional circumstances – and at the initiative of the unit – should information be shared with other police units. That may happen, for example, in a case where the police are requested to provide logistical support in operations of the unit or to contribute to the assessment of the seriousness of the threat against a witness's life.

<sup>d</sup>United States of America, Department of Justice, Office of the Inspector General, Audit Division, *United States Marshals Service: Administration of the Witness Protection Security Program: Executive Summary* (March 2005), p. 1.



All proceedings involving the admission of witnesses to the programme and actions taken should be kept strictly confidential. No document given or submitted in support thereof should be released except upon order of the protection authority or, in exceptional circumstances, of the competent court. Administrative procedures within the programme often make it difficult to meet acceptable standards of oversight of expenditure while at the same time protecting confidentiality so as not to compromise any of its operations. The unit should have a stand-alone database for its operations in order to provide the highest levels of security and confidentiality. An important aspect of such a system is the ability to track and identify any unauthorized attempt to extract information from the system.

Regardless of the quality of the data protection system put in place, the greatest risk of compromise comes from the human element within the process. It is imperative that all staff, both handlers and administrators, be vetted to ensure the highest possible level of security. Only by setting the highest professional standards can those responsible for the programme meet its demanding requirements.

To ensure confidentiality, the disclosing of sensitive information relating to the standard operating procedures, programme staff or the whereabouts or new identity of witnesses is often criminalized.

Under section 17, paragraph 1, of the Witness Protection Ordinance of the Hong Kong Special Administrative Region of China, disclosing without lawful authority or reasonable excuse the identity or location of a person who is or has been a participant or who has been considered for inclusion in the witness protection programme is a serious offence. The maximum penalty is 10 years' imprisonment. In a recent court case of the Independent Commission against Corruption (ICAC), a solicitor, a barrister, a businessman and the latter's girlfriend were charged with conspiracy to pervert the course of public justice and attempting to disclose the identity of an ICAC-protected witness. It was a well-organized plot aiming to threaten or dissuade the protected witness from cooperating with ICAC during the course of the investigation. On 12 June 2006, the solicitor, the businessman and the girlfriend were found guilty of conspiracy to pervert the course of public justice. The businessman's girlfriend was further convicted of attempted perjury. The barrister was found guilty on two counts of attempting to disclose the identity of the protected witness (<http://legalref.judiciary.gov.hk>).

## **2. Partnerships**

Even though confidentiality and operational autonomy are the guiding principles, successful witness protection programmes are based on building partnerships with government agencies and the private sector to provide witnesses with the wide range of services required (new identification documents, housing, financial support, medical care, education for children etc.).



Protection programmes need to establish a close working relationship with agencies dealing with:

- (a) Personal identification (passport agency, driver's licence);
- (b) Public housing;
- (c) Social security;
- (d) Prisons (in the case of incarcerated witnesses);
- (e) Rehabilitation of formerly convicted offenders;
- (f) Education;
- (g) Health, dental and psychological care;
- (h) Banks and other financial institutions.

Coordination requires the establishment of secure channels of communication between the witness protection unit and all those agencies. The identification of contacts after strict vetting, in each of the bodies and organizations outlined above to act as liaison officers with the unit greatly assists with the smooth running of the programme and enhances the level of security. In the initial stages of programme implementation, it is essential that senior staff in the unit meet with appointed liaison officers in other government departments and private institutions to draw up protocols under which they will cooperate in the running of the programme. The protocols should detail provisions on security of information and secrecy and restrict access to documentation on identity changes to persons with security clearance and a legitimate need to know. It is at that point that training needs for support and ancillary staff should be identified.

### **3. *Neutrality***

If potential witnesses meet the criteria previously noted, then admission to a protection programme should be available to them irrespective of whether they testify in a case involving organized crime or other crime or whether they are victim-witnesses, innocent bystanders to crimes or justice collaborators. In practice though, members of the latter group are the most common participants in witness protection programmes. Their cooperation is often linked to the expectation of leniency in sentencing (to avoid a long term of imprisonment), the need for protection from enemies already trying to kill them or even the desire to retaliate against former associates by testifying against them. It is not surprising therefore that admission to a programme may sometimes be portrayed as an easy "way out" for criminals or as a way for them to avoid prosecution by implicating others.

Witness protection programmes, especially when they are part of the police, go to great lengths to ensure that admittance to the programme is not seen as a reward for cooperation and that there is a clear separation between protection services and investigative agencies. In Australia and the United Kingdom, the memorandum of understanding

signed with participants includes a provision on the dissociation of protection from investigation. In New Zealand, interviews of witnesses considered for the programme are recorded on videotape as evidence that such aspects have been discussed.

Given that financial support during participation in the programme may be construed as compensation for cooperation, most countries support participants financially only for a limited period of time (1–2 years), offering them at the same time assistance to find new jobs. After that period has elapsed, witnesses are usually entered into the broader social security system.

The instability associated with conflict and post-conflict situations may give rise to the need to extend protection services to defence witnesses.

In 2005, Saddam Hussein, the former President of Iraq, and seven of his aides were tried by the Iraqi High Tribunal. They were charged with crimes against humanity following the killing of 148 people in the wake of a failed assassination attempt against Saddam Hussein in the town of Dujail in 1982. The rules of the High Tribunal provided for the creation of a victims and witnesses unit, but that was not established until well into the trial. The defence complained about the assassination of a defence witness and regular intimidation attempts, raising serious concerns about the fairness of the proceedings. The only means of providing effective protection was to initially base some witnesses outside Iraq and fly them to Baghdad only for testimony. Others were allowed to testify behind a curtain and their names were not revealed to the public. Furthermore, between the opening of the trial in October 2005 and July 2006, three defence attorneys were assassinated and a fourth one was forced to leave the country after he was wounded in an ambush. Replacement attorneys reached an arrangement with the Government whereby they would be allowed to carry personal firearms and the Government would pay the salaries for three armed guards for each defence lawyer. In practice, the majority of attorneys chose to resettle with their families, at their own expense, outside the country and travelled to Baghdad only for scheduled court hearings. (“Judging Dujail: the first trial before the Iraqi High Tribunal”, *Human Rights Watch*, vol. 18, No. 8 (E) (November 2006), available at [www.hrw.org/doc/?t=pubs](http://www.hrw.org/doc/?t=pubs)).

To safeguard their neutrality, witness protection programmes endeavour:

- (a) To admit people according to a set of predetermined criteria among which the level of threat is a key determinant;
- (b) To maintain separation from investigation agencies;
- (c) To make objective decisions independently from the prosecution after obtaining and evaluating the prosecution’s input about the importance of the case and the evidence offered by the witness;

- (d) During the assessment process, to make the witness clearly aware that admission is not a reward for cooperation and to provide an accurate picture of the nature and implications of the programme;
- (e) To provide for the witnesses' welfare ensuring that benefits would be no greater than their legal earnings before admission to the programme.

#### 4. Transparency and accountability

Transparency is a basic principle of good governance and witness protection programmes should similarly be held accountable for money dispensed. To perform that task and verify the need and procedures followed, auditors must have access to all information related to expenditure. However, simple things like a hotel receipt or aeroplane ticket may reveal the witness's true identity or location. To maintain confidentiality, witness protection programmes are usually subject to special procedures for auditing and reporting.

The following are some examples of how auditing is performed in different jurisdictions:

Australia	<p>NWPP is audited twice a year by:</p> <ul style="list-style-type: none"> <li>(a) <i>A team delegated by the Police Commissioner.</i> Records are maintained in such a way that details of the operations (locales, names and so on) are not revealed. For example, hotel receipts are provided in sealed envelopes and not reviewed by the auditor. The audit team also reviews procedures and methodology;</li> <li>(b) <i>The Australian National Audit Office, as a Government requirement.</i> The Office is not given access to the records and engages an official from the Australian Federal Police team to audit on its behalf.</li> </ul> <p>The Australian Federal Police is required to submit an annual report to the Parliament on NWPP performance and operations. The reports are prepared in such a way as to provide as much detail as possible without prejudicing the effectiveness of the programme.</p>
China Hong Kong Special Administrative Region	<p>At the Hong Kong Police Witness Protection Unit, receipts are cross-referenced to secret file numbers, while the audit is internally vetted to maintain confidentiality.</p> <p>At the Independent Commission against Corruption (ICAC), expenditure of the witness protection programme is not open to outside checks. The Director of Investigation of the Private Sector is authorized to perform audits.</p>
New Zealand	<p>Two special police auditors are authorized to check accounts. Auditors need security clearance. Receipts are sanitized and operational names are given with no reference to the clients' original or new names.</p>

Philippines	A special disbursing officer is appointed.
South Africa	<p>The witness protection programme is audited annually by the Office of the Auditor-General, whose staff must have top-secret clearance. The Auditor-General reports on the effectiveness and efficiency of the administration, operations and financial management of the witness protection unit.</p> <p>The director of the witness protection unit submits an annual report including financial statements and challenges to the parliamentary committee on justice matters.</p>
Thailand	The Office of National Audit reviews spending.
United States	The WITSEC Program has been the subject of a number of congressional hearings and the administration of the programme by United States marshals was audited at least twice between 1993 and 2005 by the Office of the Inspector General of the Department of Justice.

## VI. Entering witness protection

### A. Application

The initiative to include an individual in a protection programme could originate from a number of sources, including:

- (a) *The witness.* In South Africa, witnesses may apply for protection to the investigating officer, prosecutor or other public functionary concerned, police chief, prison director (if the witness is incarcerated) or any officer of the witness protection unit. The receiving authority is obligated to forward the request to the relevant branch office of the witness protection unit with a recommendation on whether to admit the witness to the programme or not. The director of the programme makes the final decision on admission;
- (b) *The police.* In countries such as the United Kingdom, where witness protection has developed informally as a police function, applications can be made by investigators directly to the protection authority, which then determines whether to admit the witness to the programme;
- (c) *The prosecutor.* In Italy, the request for protection must be made by either the public prosecutor or the anti-Mafia prosecutor in charge of prosecuting the offences in support of which the protected witness will testify. In cases where more than one office is conducting related enquiries, the proposal can be made by any of the offices by mutual agreement. In organized crime cases, the proposal should be transmitted to the national anti-Mafia prosecutor. For terrorist offences, the proposal should be made in agreement with the relevant public prosecutor;
- (d) *The police or prosecutor or judge.* In Slovakia, the law distinguishes between the investigation phase and the trial. During the investigation, a written proposal for including a person in the witness protection programme and implementing urgent measures may be elaborated and submitted to the unit by the criminal investigator or the prosecutor. Once the trial begins, the presiding judge may also take the initiative.

In some countries, an additional procedural stage is introduced between the applicant and the witness protection authority responsible for admissions to the programme, apparently to streamline the procedure and ensure that the application criteria are applied uniformly. For example, in the Netherlands, an application for protection may be submitted to the national public prosecutor by the prosecutor who is investigating the

case. The latter then forwards the request to the decision-making authority, together with a recommendation on whether or not the request should be accepted. That process ensures that sponsorship from non-prosecution sources includes a knowledgeable analysis of the potential value to the prosecutor of the admissible evidence elicited from the proposed programme candidate.

## **B. Decision-making authority**

The power to admit witnesses to or remove them from a witness protection programme is usually vested in an authority outside the witness protection unit. That authority, also known as the witness protection authority, is mandated to oversee the implementation of the programme, decide on budget allocations and provide policy guidance.

The witness protection authority may be:

- (a) *A single official*, such as the Minister or Secretary of Justice, the Attorney General, the public prosecutor or the police commissioner;
- (b) *A multidisciplinary body* consisting of representatives from the relevant ministries, the prosecutor's office, the courts or the police force. Decisions can be based on either a unanimous or majority vote.

However, there are variations to the general rules mentioned above:

- (a) In Austria and South Africa, only the head of the witness protection unit can make decisions regarding admission to or removal from the witness protection programme;
- (b) In Germany, at the federal and state levels, the decision to admit witnesses to or remove them from the programme is made jointly by the witness protection unit and the public prosecutor.

Careful consideration should be given to how the witness protection authority exercises its discretionary powers and which measures it can apply. In most cases, decisions are not subject to any kind of external review because, for security and confidentiality reasons, no other authority has access to the information available to the witness protection authority. However, in some instances, the decisions made by the witness protection authority are subject to internal or judicial review.

In Slovakia, Witness Protection Act No. 256/1989 allows the witness protection authority to reconsider its own decisions regarding admission to or rejection from the witness protection programme. The process is seen as a compromise between a total absence of legal remedies and a formal appeal and may be initiated at the request of the criminal investigator, prosecutor or judge.

## C. Criteria for admission

Before admitting a witness to a protection programme, an assessment needs to be conducted to provide the witness protection authority with all the information it requires to make a valid and informed decision. Some of the most important elements of that assessment are:

- (a) *The level of threat to the person's life;*
- (b) *The witness's personality and psychological fitness.* Witnesses must be able to adjust to and follow a stressful programme that isolates them from the places and persons they know;
- (c) *The danger that the witness, typically a former collaborator of the defendant, may pose to the public if relocated under a new identity;*
- (d) *The critical value of the witness's trial testimony for the prosecution and the impossibility of gaining such knowledge elsewhere;*
- (e) *The importance of the case in dismantling criminal organizations.*

Such an assessment may also consider other aspects, such as the witness's family situation (marital status, number of children or other protected family members, criminal record of spouse).

The assessment process is an unsettling period for the applicant. If necessary, interim protection may be offered until a final decision is reached.

### 1. The threat

Witnesses must be under serious threat to be admitted to a witness protection programme. It is less important what type of witness they are (whether victim, justice collaborator etc.) or what type of crime they have observed. In general, the threat must be against the witness's life; it does not extend to his or her well-being or property.

In the Hong Kong Special Administrative Region of China, the Witness Protection Ordinance of 2000 providing for the creation of the witness protection programme stipulates that the approving authority should provide witnesses with protection and other assistance when, due to their status as witnesses, their personal safety or well-being is at risk. That provision differs from provisions of witness protection legislation in other countries in that it allows a witness to be included in the programme on the basis of the existence of a serious threat against his or her well-being, not only against his or her life.

A threat assessment can be defined 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. In the majority of programmes, the

threat assessment is performed by the witness protection unit alone or in cooperation with the regular police. In some programmes, such as those of Austria and the United States, the assessment is performed by regular police officers or an investigative agency in order to maintain separation from the protection unit, especially when the unit lacks relevant information. In the case of international relocation, the witness protection units of the countries involved would, as a rule, have to cooperate in evaluating the threat.

A distinction between “threat” and “risk” should be made. A threat assessment looks at whether the life of the witness is in serious danger, and should address issues such as:

- (a) The origin of the threat (group or person);
- (b) The patterns of violence;
- (c) The level of organization and culture of the threatening group (for example, street gang, Mafia-type group, terrorist cell);
- (d) The group’s capacity, knowledge and available means to carry out threats.

A risk assessment examines the chances of the threat materializing and assesses how it can be mitigated. The assessment is conducted according to set standards and using a matrix. Action is taken to reduce the probability of the threat being carried out, for example by using unmarked cars to transport witnesses, resettling witnesses temporarily or providing them with new identities. The assessment is conducted by the witness protection unit and is a key factor in providing tailor-made protection to suit the needs of the witnesses.

In the case of emergency measures taken before the start of a formal protection programme or during the course of the programme, threat assessments are often undertaken for particular operations, such as transportation to court and family reunions, and provide the basis for allocating resources and identifying appropriate protection arrangements.

Throughout the programme and even after its termination, it may be necessary to carry out periodic threat evaluations in order to decide whether to continue, upgrade, discontinue or reinstate protection measures.

## ***2. Suitability of a witness***

Profiling a witness assists the protection authority in making an informed decision about the measures to be taken, the methods to be implemented and the contingency plans to be introduced should the programme be compromised. The assessment is a management tool that provides authorities with information on the kind of protection and support services that witnesses require and how they are to be managed.

It is often stated that ideal witnesses do not exist, just witnesses who need to be managed differently. Reportedly, the most demanding group is composed of teenage members of street gangs, especially females, who are attracted to the gang subculture, have a “live fast and die young” attitude, do not follow rules and possess no life skills.



Brenda Paz was born in Honduras and grew up in Los Angeles, United States. At the age of 12 she dropped out of school and became a member of the Mara Salvatrucha street gang, better known as MS-13, which is one of the most violent street gangs in the United States. For the next five years, she moved with MS-13 members from state to state. Then, in 2002, she was arrested for stealing a car. In exchange for leniency, Brenda gave prosecutors first-hand information about MS-13 armed robberies, stabbings and shootings stretching from California to Texas to North Carolina. She gave valuable information on the gang's history, structure and operations. That knowledge made her the key witness in a federal murder trial in which the defendant was her boyfriend and an MS-13 leader in northern Virginia. To keep her safe from retribution from the gang, Brenda was admitted to the WITSEC Program. She was relocated to another state and furnished with a new name and social security number. She was warned to be inconspicuous and to avoid any contact with gang members, but the strictures and isolation became too much for Brenda. She made contact with her former gang and its members convinced her to come back, assuring her that she was forgiven. She left the WITSEC Program and rejoined the gang. Within days she was dead. Her body was found in a river with a rope around her neck, 16 stab wounds to the chest and arms and three deep cuts across the neck. (Daren Briscoe, "The new face of witness protection: a changing demographic strains a storied program", *Newsweek*, 2 May 2007; Sam Dealey, "America's most vicious gang: MS-13 is spreading senseless violence to cities and suburbs across the country", *Reader's Digest*, January 2006; and Douglas A. Kash, "Hiding in plain sight: a peek into the Witness Protection Program", *FBI Law Enforcement Bulletin*, vol. 73, No. 5 (May 2004), pp. 25–32).

In deciding whether to admit someone to a witness protection programme, the competent authority must balance the threat to the life of the witness against:

- (a) *The character of the witness and his or her ability to maintain secrecy.* Almost invariably, the failure of an operation is due to the intentional or unintentional disclosure of information by the protected person. If the disclosure is significant, the witness's identity and place of residence needs to be changed a second time, putting the programme under severe strain. It is generally accepted that certain categories of witness cannot qualify for any protection programme because they are careless or irresponsible;
- (b) *The likelihood of relapse into criminal activity and the associated risk to persons in the witness's new and unsuspecting social environment.* Most protected witnesses are career criminals. Some try to hide behind their new identities to perpetrate new crimes. Witness protection programmes go to great lengths to ensure that relocated witnesses do not go on to victimize others with impunity;
- (c) *The witness's willingness to abide by the strict limitations imposed by the programme on his or her personal life.* Entering a witness protection programme

requires severe personal sacrifices. Participants are removed from their family and social environment and must break with friends and life as they know it. Evidence has shown that during the application period, when witnesses are still in serious danger and the threat is fresh, they are willing to follow any measure that guarantees their safety. As time passes, however, some gain a sense of confidence and refuse to resign themselves to imposed restrictions and, within a few years, most decide to leave the programme or are removed.

### **3. Value and relevance of the testimony**

The testimony given by the witness must be crucial to the prosecution. In that respect, it is vital that before an assessment takes place and before an individual is admitted to the programme, the witness provides as full and comprehensive a statement as possible. That is to ensure that the protection programme or the assessment process will not be called into question in a court of law as inducement for witness cooperation.

### **4. Voluntary participation**

Entering a protection programme requires the informed consent of the witness. Witness protection authorities should clearly and realistically explain to witnesses the measures to be taken and the limitations to their personal life that participants in the programme need to accept. Voluntary participation in the programme on the basis of complete and informed consent is ensured by the signing of a memorandum of understanding between the witness and the protection unit. Participation entails the obligation to actively support all protection measures undertaken and to abstain from compromising the security of the programme by, for example, discussing related matters with third persons or the media.

The protection of witnesses in South Africa used to be governed by section 185A of the 1977 Criminal Procedure Act (Act 51/1977). The section provided that witnesses could, for protection purposes, be held in custody involuntarily. That repressive and restrictive measure was used to coerce witnesses to give evidence and became a tool of the apartheid regime in political trials. In 2000, a new law on witness protection repealed section 185A by providing that witnesses must voluntarily agree to enter a witness protection programme and may not be held, not even as a protection measure, in a prison or police cell.

## **D. Memorandum of understanding**

Upon admission to the programme, witnesses are required to conclude with the witness protection unit a memorandum of understanding, which, in most cases, is understood to

be a document that defines the actions of the witness protection authority on the one hand and of the witness on the other, in detail and in advance. It is not considered an agreement or contract and cannot be challenged before a court of law. However, the memorandum of understanding is, in some countries, legally binding and its method of implementation, or the lack thereof, by the protection unit can be subject to judicial review (for example, in the Hong Kong Special Administrative Region of China and in South Africa). Whether a memorandum of understanding is to be considered a contract or not also depends on whether witness protection units are liable for damages or harm caused to protected witnesses because of weak or ineffective measures. In the United States, the statutory authority establishing the protection programme relieves all staff from any liability for acts taken or harm caused when those acts are taken in connection with the programme.

Regardless of whether the memorandum of understanding is legally binding or not, protection units still need to establish procedures for handling complaints by witnesses regarding the implementation of the memorandum of understanding, especially the type of measure applied and the abuse or misuse of power by the witness protection unit. Any kind of investigation into such complaints or allegations should be conducted outside the public domain in order to ensure both that the individual or systemic problem can be corrected and that sensitive information about the witness is not divulged.

A memorandum of understanding usually includes:

- (a) A declaration by the witness that his or her admission to the protection programme is entirely voluntary and that any assistance must not be construed as a reward for testifying;
- (b) The scope and character of the protection and assistance to be provided;
- (c) A list of measures that could be taken by the protection unit to ensure the physical security of the witness;
- (d) The obligations of the witness under the programme and possible sanctions for violations, including removal from the programme;
- (e) The conditions governing the programme's termination.

Both the witness and the persons accompanying the witness in the programme are required to conclude a memorandum of understanding with the protection unit. For security reasons, they are not usually provided with copies of the signed document, which is kept safe by the protection unit so that it cannot be found by someone searching for the witness.

In urgent cases, warranted by the level and immediacy of threat, witnesses may be placed provisionally under protection before a memorandum of understanding is signed and while their admission to the programme is still under consideration. The length of this period ranges from several days (10 days in Latvia) to much longer periods (three months in Slovakia, and as long as it takes for the witness protection authority to gather sufficient

information to reach a decision on the matter in Italy). Such temporary urgent measures can often be expensive and require coordination with special police units. They usually consist of:

- (a) Regular surveillance;
- (b) Close protection;
- (c) Temporary resettlement to a secure area in another part of the country;
- (d) Protective incarceration;
- (e) Transfer to a special unit within the same prison, if the witness is serving a prison sentence;
- (f) Financial support.

Provisional protection does not necessarily lead to inclusion in a witness protection programme. If the witness is not regarded as essential to the prosecution or if the level of threat is not significant enough to warrant relocation and a change of identity, witnesses will not be offered the possibility of participating in such a programme. Final acceptance to the programme is conditional upon signature of a memorandum of understanding.

## VII. Responsibilities of the parties

Admission to a witness protection programme results in a new start in life and creates a protector-protectee relationship between the protection authority and the witness based on a series of agreed actions that may vary from country to country, but that, at a minimum, include:

- (a) For the protection authority:
  - (i) Making arrangements to protect the lives of the witness;
  - (ii) Relocating participants and issuing new personal documentation;
  - (iii) Providing financial support for a finite period of time;
  - (iv) Providing initial assistance with job training and finding new employment;
  - (v) Providing counselling and other social services, including appropriate education (for example, in cases involving international relocation or children);
  - (vi) Extending protection and benefits to persons accompanying the witness in the programme;
- (b) For the witness:
  - (i) The obligation not to compromise, directly or indirectly, any protection or assistance provided;
  - (ii) Complying with the protection authority's instructions regarding the assistance provided;
  - (iii) The obligation not to commit any crimes;
  - (iv) Fully disclosing information on his or her past criminal history and on all financial and other legal obligations;
  - (v) The obligation to provide true testimony;
  - (vi) Complying with restrictions on disclosure of information related to the investigation of the crimes concerned.

There are examples of witness protection authorities assuming additional obligations. For example, in the Republic of Korea, authorities compensate the witness for any financial loss sustained as a result of participating in the programme.

## **A. The protection authority**

### **1. *Protecting the life of the witness***

Witness protection programmes focus on ensuring the physical security of witnesses. They revolve around keeping witnesses safe by giving them new names and keeping them in undisclosed and secure locations. As a general rule, persons in the programme who may know each other should not be kept close to each other. When necessary (for example, in cases that take place in a small geographical area or when the witness is publicly known), providing protection may mean repeatedly moving the witness and his or her close family members to different locations (such as hotels, state institutions, public housing units, houses or apartments) to ensure their safety.

The particular programme of each witness commences when the memorandum of understanding is signed. The threat level determines which protection measures will be applied. Inasmuch as a protection programme is only employed as a measure of last resort, it normally includes relocation and the provision of a new identity. Steps to resettle the witness should be taken as soon as possible. In fact, the question of resettlement should be discussed with the witness even before he or she is admitted to the programme.

The memorandum of understanding establishes and informs programme participants about the good security practices they must abide by for the duration of the protection programme. Those practices include having no contact, other than through the protection unit's secure procedures, with individuals from their original area and not travelling outside the area of relocation without the knowledge and approval of the unit. A participant in a witness protection programme usually goes through an initiation and induction course that includes familiarization with the details of his or her new identity and training in basic self-defence techniques or the use of firearms. For the duration of the programme, any contact with the witness, whether initiated by law enforcement, prosecutorial or judicial authorities, must be arranged through the protection unit. Contact with family members not included in the programme or with former friends is discouraged, although the unit may occasionally facilitate reunions or secure telephone or video communication. In that respect, witnesses can initiate but cannot receive telephone calls and can stay in written contact with certain members of their past through secure mail, forwarding channels.

When witnesses are called to testify, they occasionally must return to the area of primary danger. That is the time when they are most at risk and a special security plan needs to be developed with the cooperation of the police. Measures are taken to ensure the witness's safe transportation to and from the court and his or her safety during testimony.

Investigators and prosecutors may sometimes request to debrief or question a protected witness regarding his or her knowledge of facts other than those related to the primary case. They may also seek knowledge or clarification of the structure and methods of

operation of criminal networks known to the witness. In such cases, a meeting with investigators and prosecutors is organized at a neutral place outside the area to which the witness has been relocated. Special security measures are again taken by the protection unit.

If necessary, witnesses should be moved more than once. In exceptional circumstances, they may be relocated to another country.

## **2. Financial support**

Admission to a witness protection programme often puts a strain on the witness's financial situation. Participants are uprooted from their working and living environment and resettled in a new place where, for security reasons, they cannot practice their original professions and must be directed towards a new job. This is particularly true for witnesses exercising licensed professions in fields such as medicine, law and accounting, for whom opening a practice where they have been relocated may provide a lead to their whereabouts. At least initially, witnesses need financial support while in the programme to help them adapt to their new circumstances. Financial support may be temporary or last for the duration of the programme. Witnesses should also be provided with assistance in finding a new job. The ability of a participant to quickly become financially independent through the provision of education, professional training, skills development and work experience is an important factor in alleviating programme stress and helping witnesses to follow programme rules and remain in good standing. Depending on the circumstances, assistance in the form of a low-interest or interest-free loan to start a new business may also be provided.

Understandably, witness protection authorities are reluctant to release information about the amount of money that witnesses receive. The level of financial assistance is usually at the relevant authority's discretion and should, in principle, aim at ensuring an adequate income that is no greater than the witness's legal earnings before entering the programme. Each case should be considered on its own merits, based on the principles of reasonableness and necessity. The authority has a duty to the public to ensure that government funds are spent prudently. Taxation regimes governing benefits differ: in some countries, allowances are exempt from taxation while in others they are taxed.

The harshest criticism made of witness protection programmes is that subsistence payments to protected witnesses can be construed as a reward for assisting the investigation and giving evidence. To address that issue, programmes operate on the principle that the main aim of granting admission to a witness protection programme is to save a witness's life, not to substantially enhance his or her living standard. Furthermore, the financial benefits granted by a witness protection programme are not meant to maintain a criminal's standard of living if his or her lifestyle was financed by illegal activities. In Australia, legislation requires that all benefits given to the witness, including financial assistance, must be revealed to the defence. In New Zealand, the benefits granted by the witness protection authority rarely exceed a witness's social security benefits.

In countries with developed economies, subsistence payments are often unattractive. In some circumstances, inclusion in the national welfare system works as an incentive for witnesses to become financially independent as soon as possible. But in developing economies, social security benefits (a regular salary, medical care, education etc.) may be attractive.

### **3. Persons close to the witness**

Witnesses cannot be separated from their family members forever. In the early years of witness protection, little attention was given to the maintenance of relations between witnesses and the persons close to them. As a result, participants would often walk out of the programme or compromise security by trying to contact relatives or partners.

Witness protection programmes have adapted to meet that need by extending protection to the witness's family members, cohabitants and other persons close to him or her. The number of persons that may accompany a witness in the programme depends, in part, on factors such as family traditions and social culture. Witnesses with strong social and family links pose a range of additional difficulties that must be considered during the assessment process. Ultimately, other measures may have to be taken to ensure protection. Alternatively, the decision may be taken to exclude that person as a witness. One key group that must be considered when relocating persons close to the witness is young children, who may compromise the programme by revealing confidential details to outsiders.

In 2005, in country A, where family ties tend to be strong, for every witness admitted to the protection programme, an average of more than three family members had to be included as well (3.2 family members per witness). In country B, slightly over one family member per witness (1.2) was admitted to the programme, and in country C the average was 1.1 family members per witness. In both countries B and C, social ties are weaker than in country A.

The memorandum of understanding signed by the witness and the witness protection authority usually sets out clearly that the protection programme prohibits all direct contact between the witness and relatives and friends who are not included in the programme. All communication with those persons must pass through the protection unit. The almost total break in family and social bonds often creates serious psychological problems for witnesses. One way of maintaining those links, for example between a protected child and a biological parent who did not enter the programme as a result of divorce, is to organize reunions in a place away from the area where the witness has resettled, or to arrange for shielded electronic communication. When the witness has relocated to a different country, reunions must, for security reasons, take place in a third country and require the cooperation of law enforcement authorities in that country. Creating direct communication networks among specialized witness protection units can prove useful in facilitating such operations.



Most witness protection units prefer telephone or video communication to family reunions. The latter option is labour- and money-intensive, as secure environments must be created and sustained for periods ranging from a few hours to several days.

## 4. *Liability*

There are different experiences regarding protection unit liability in cases of failed operations or weak protection measures. Despite the best of efforts, programme security is occasionally compromised by inadvertent disclosures or by accident, as, for example, when a witness bumps into a former colleague in his or her new workplace. Theoretically, it is possible for the next of kin of someone under protection to take legal action for harm caused (death, serious injury, incapacitation etc.) as a result of carelessly applied measures.

In some jurisdictions, such as Australia<sup>17</sup> and the Hong Kong Special Administrative Region of China,<sup>18</sup> legislation provides that the approving authority, officers and all other people involved in the witness protection programme are not liable to any action, suit or proceedings (including criminal proceedings) when the act or omission occurred in good faith in the exercise or purported exercise of powers conferred on them by the law. In the Philippines<sup>19</sup> and Thailand,<sup>20</sup> however, the law provides that in failed operations that have resulted in harm, incapacity or death, the witness's family is entitled to compensation.

## B. The witness

### 1. *Cooperation*

Upon entering the programme, the witness is required to cooperate fully with law enforcement and judicial authorities and to strictly observe all rules imposed by the protection authority. Cooperation can be in the form of positive obligations, such as compliance with instructions, full disclosure of personal history and true testimony, or abstention from certain actions, such as acknowledging participation in the programme, disclosing information on how the programme operates or making unauthorized contact with people from the witness's past. The memorandum of understanding usually provides that witnesses may be expelled from the programme if they fail to comply with any of the obligations contained in the memorandum of understanding. In practice, since participants know important details and may become a threat to the integrity of the programme even after it has terminated, expulsion is exercised judiciously as a last resort in response to serious security breaches or continuous refusal to cooperate.

<sup>17</sup>Australia, Witness Protection Act 1994 (Act No. 124 of 1994 as amended), sect. 21.

<sup>18</sup>Hong Kong Special Administrative Region of China, Witness Protection Ordinance (2000), chap. 564, sect. 16.

<sup>19</sup>Philippines, Witness Protection, Security and Benefit Act No. 6891 (1991), sect. 8 (g).

<sup>20</sup>Thailand, Witness Protection Act B.E. 2546 (2003), sects. 15 and 16.

## **2. Conduct**

The large majority of witnesses in a protection programme have criminal records and have been involved extensively in some form of criminal activity. Their value to law enforcement in combating criminal networks is usually proportional to how deeply they have been immersed in crime. Thus, it is not surprising that some witnesses return to committing crime. Witness protection programmes have also been criticized for providing a clean bill of health to offenders with extensive criminal records, who can use their new identities to escape debtor obligations, child custody and visitation arrangements or even to return to committing crime.

In the United States, the Witness Security Reform Act of 1984 led to the creation of the Victim Compensation Fund for making restitution to victims or their families for crimes that caused or threatened death or serious bodily injury and were committed by programme participants. In general, the Fund will, up to a statutory limit of US\$ 50,000 per case, cover expenses for medical and funeral costs and lost wages that are not reimbursable from any other source.

In response to such criticism, programmes have tried to be proactive in monitoring participants by, for example, conducting periodical checks of their environment and their activities. Furthermore, authorities threaten those who commit offences while under protection with removal from the programme without further notification. That is usually stated clearly in the memorandum of understanding to avoid giving false expectations of immunity from prosecution for future offences.

## **3. True testimony**

Witnesses who participate in a protection programme do so to testify free of intimidation in a court of law. Thus, witnesses should continue to be protected regardless of the quality of the evidence provided and of whether the testimony results in a conviction or not. However, if a witness changes his or her original testimony and turns hostile during trial, there should be no reason for him or her to continue to be in the programme since the threat against his or her life no longer exists. In such cases, the witness may be prosecuted for perjury.

## **4. Discharge of debts and other legal obligations**

Admission to a witness protection programme may seriously affect the rights of third parties who are left behind by the relocated witness and have little recourse for collecting their debts or securing the fulfilment of the witness's civil, administrative or other outstanding legal obligations (payment of alimony, visitation rights for the children of divorced parents etc.). To address that problem, witnesses are usually required, to the

fullest extent possible, to fulfil their legal obligations to third parties prior to entering the programme. That may mean selling their goods and effects with the assistance of the programme authorities. Recurring financial obligations, such as alimony or other monthly payments, can continue to be fulfilled following admission to the programme through an intermediary, usually the protection unit.

Special provisions are made to protect creditors and others holding civil judgements against the witness in case of refusal to comply or insufficient cooperation. Those provisions may include the right of the witness protection authority:

- (a) To reveal to creditors seeking to enforce judgements the details of any real or personal property owned by the witness (as in Australia);
- (b) To assist the witness in disposing of his or her property, or dispose of the property on the witness's behalf (as in Austria);
- (c) To take measures to ensure that the ability to reach the witness for the purpose of legal transactions is not obstructed by the witness protection measures (as in Germany);
- (d) To receive court summons and notifications on behalf of the witness (as in South Africa);
- (e) In extreme cases, to disclose to the plaintiff the name and location of the witness (as in the United States).

To maintain operational security, the Australian Federal Police may elect to provide witnesses with funds to enable them to settle their financial obligations. Those funds are paid back by the witness over time from the regular subsistence allowance received or from money obtained through employment.

### C. Termination of the programme

There is no set period during which a witness needs to remain financially dependent on a protection programme. The duration depends on a number of variables, including the witness's personality and the extent of the power exercised by the criminal syndicate. On average, witnesses are assisted financially for 1–2 years. Financial assistance may be terminated for any of the following reasons:

- (a) Security is compromised by the actions of the witness or his or her inability to honour obligations;
- (b) The witness violates the rules laid down in the memorandum of understanding;
- (c) The witness refuses to give evidence in court;
- (d) The seriousness of the threat against the witness's life has lessened.

Irrespective of the time that witnesses formally remain under protection, the commitment to their security, with its central elements of due diligence and risk management, is life-long. Experience has shown that even after the end of formal protection programmes, some form of care must still be provided (contact numbers, periodical threat assessment, police protection etc.). That is because the threat against a protected witness's life never fully disappears. Even after a conviction is secured, a person in custody may still be able to harm the witness. Witnesses may become vulnerable again and may need further assistance after the termination of the programme, as technology develops and makes the techniques and methodologies used obsolete.

### **1. Removal from the programme**

Severe violations of the conditions on which the witness entered the programme may lead to sanctions and ultimately to the early termination of the programme. Witnesses are warned at the outset about how they should behave, and all relevant facts are carefully considered. In the majority of cases, warnings have the desired effect, but if the advice is not taken, consideration may be given to terminating the programme. In cases of international relocation, the agency in the receiving country may consider not only ending protection but also returning the witness to the agency in the sending country. The decision to remove a witness from the programme does not usually have immediate effect, as authorities allow the witness time to prepare for life outside the witness protection programme. An appeal or revision process against such a decision may also be instituted.

In the United Kingdom, the witness protection policy of the Association of Chief Police Officers recommends that decisions to terminate the witness protection programme be communicated to the witness, in writing, with at least 21 days' advance notice. The witness then has the opportunity to prepare for life outside the programme or to appeal the decision. Notifications should indicate the method and procedure for appealing the decision.

The most serious violation that could lead to early termination of the programme is a relapse into criminal activity. Experience has shown that criminals turned justice collaborators find it difficult to change their lifestyle and to break the links with their criminal past. Whether witnesses remain in the protection programme or not, cases of recidivism are prosecuted and the criminal background of perpetrators is revealed to the prosecuting authority. Should witnesses remain in the programme, either because the crime was not serious or because they continue to be of great value to the prosecution, they should still be made accountable but in secure ways. For example, a witness can be prosecuted under the new name given to him or her by the protection unit and then relocated and renamed to ensure his or her safety. A new criminal record will then be created for his or her new personality that mirrors the convictions and criminal history acquired under both previous identities.

Salvatore “Sammy the Bull” Gravano was born in 1945 in New York City. Originally a soldier for the Brooklyn sector of the Gambino family, one of the five Mafia families that controlled organized crime in the United States at that time, Gravano rose quickly through the ranks. He became associated with John Gotti, who, in 1985, murdered Paul Castellano, the head of the Gambino family, to become the new Gambino boss. Gravano’s position in the family rose. In 1991, after he was arrested in a major operation of the Federal Bureau of Investigation, Gravano turned state’s evidence and testified against Gotti in exchange for a reduced sentence. Gotti received a sentence of life imprisonment. Gravano, who confessed to taking part in 19 murders, was convicted of a token racketeering charge and received a minimal sentence. Upon his release in 1995, Gravano entered a witness protection programme and was relocated with his family to Arizona. In February 2000, he was arrested and charged as the ringleader of an Arizona-based organization trafficking in “ecstasy”. Gravano pleaded guilty and is currently serving a 19-year sentence in Colorado at a maximum security prison.

## 2. *Voluntary exit*

One of the most difficult situations to manage is when witnesses decide, against the advice of the protection unit and because they find the isolating hardships associated with remaining in the programme no longer essential to keep them safe, to voluntarily withdraw from or abandon the programme. Even in such cases, the need to provide aftercare has been recognized and certain countries provide some form of protection in coordination with the local police (for example, regular patrolling of the witness’s residence, installation of alarms and exchange of contact numbers). However, it not possible to provide effective security to persons who are not willing to cooperate.

“ZV” was a member of a criminal gang. When arrested by the police, he turned state’s evidence and became a key witness for the prosecution in a major case involving organized crime. He was offered admission to a witness protection programme but declined, claiming that life in the programme was too restrictive. A few days after leaving witness protection, ZV was found dead along a highway, his upper body completely burned. Preliminary autopsy results indicated that he was first killed and then set on fire. According to the police, the victim was handcuffed and probably thrown out of a moving car.

In cases of voluntary withdrawal, witnesses may be asked to sign a termination paper or protocol to officially end protection. As former participants are just as capable of compromising the programme as ongoing participants are, they are asked not to keep any documentation or other proof (copies of the memorandum of understanding, other agreements or records of meetings with members of the protection unit etc.) of their involvement in the programme.



## VIII. Relocation and identity change

### A. A new identity

Identity change is an exceptional measure applied only when the threat against the witness's life cannot be averted through temporary relocation or other measures. It consists of the creation of a new personal profile for the witness, hiding his or her original identity by issuing personal documents under a new name, resettling him or her in a new area and creating a substitute life history. The witness's previous status (age, marital status, profession, religion etc.) is mirrored, to the fullest extent possible, in his or her new identity. The fundamental principle is that the witness protection programme should be neither of benefit nor detrimental to the witness. The extra effort to mirror the witness's original particulars is made to minimize the risk of exposure inherent in providing a new personal history and to facilitate ownership of the new identity by the witness. Furthermore, it provides a safeguard against recidivism. The witness's criminal record is transferred to the new name but in a manner that makes it impossible for third parties to trace the original conviction or identity of the witness.

The number of personal details altered varies in different countries. In some countries, such as the Netherlands, the United Kingdom and the United States, the authorities do not completely reinvent the witness's life but only change what is necessary. In other countries, such as Italy, New Zealand and Norway, additional items are changed. In all cases, however, there must be no connection between the old and new identities so that, no matter what resources are at the disposal of a criminal group, it is impossible for it to trace the witness. In that respect, a series of measures should be taken to resolve practical problems, such as leaving as a forwarding address a post office box number belonging to the witness protection unit for any correspondence related to the witness's old identity and address. The unit could also seek a court order prohibiting the publication of the witness's old photographs to further lessen the chance of identification.

Despite advances in biometric identification, ordinary physical characteristics are those most used to identify people. In some countries, the law allows plastic surgery to be used as a means of giving a witness a new identity by altering his or her facial features. Such provisions usually refer to the removal of distinguishing marks on the face or body such as tattoos, moles and birthmarks.

The witness protection unit can decide when to issue a new identity, but in most cases that is done after the trial has ended. Until the new identity emerges, there should be no interruption of the security and support services provided to the endangered witness.

## 1. Personal documentation

During the identity change process, all documentation relating to the old identity must be removed from the witness's possession. That is done not only for security reasons, in other words to prevent them from being found and used as a lead to the witness's real identity, but also to prevent protected witnesses from possessing and utilizing multiple identities. Witnesses are then provided with new documents to support the recently established profile. The documents should be originals bearing all the regular security features (photograph, signature, fingerprints, biometric data etc.) and should be issued in accordance with the law.

The type and number of documents provided to witnesses vary from country to country and may include:

- (a) Passport;
- (b) Identification card;
- (c) Medicare or health insurance card;
- (d) Tax number;
- (e) Citizenship certificate;
- (f) Driver's licence;
- (g) Birth certificate;
- (h) Trade and professional qualifications;
- (i) Educational qualifications.

In some countries, all personal documents need to be changed to the new name; in other countries, only those documents essential to the new identity have to be reproduced or altered. It has been noted that in both cases it might not be administratively feasible to provide all required documentation at the same time. Some documents take only days to produce while others may take months. Priority is given to documents essential to the security of the witness, while the remaining documents are supplied at a later stage. Records of the new identity and its holder should be securely stored by the witness protection unit.

### (a) Replicating personal history

For security reasons, it may not be advisable for witnesses to retain certain elements in their personal history, such as their work experience or educational background, that others could easily research. Witnesses often need to change careers, as practising their former professions could provide a clue to their new location. It is not uncommon for people in the programme who used to practise as licensed professionals (doctors, lawyers, engineers etc.) to have to be retrained or even to take on jobs as unskilled workers.



Person A was an internationally renowned financial expert. He agreed to cooperate with the police and testify in court for the prosecution in a major case involving organized crime in which he too was implicated. Because of his cooperation, his life came under threat and he was obliged to enter a witness protection programme and to adopt a new identity. Allowing him to keep his impressive qualifications in his specialized field would enable him to obtain a similar job in the financial sector, but it could also provide his pursuers with a lead to his whereabouts. As a result, he had to accept a relatively low-paid job, as well as financial support from the authorities, until he was able to re-establish himself professionally in an unrelated field where he was unknown.

When records were kept manually, it was relatively easy to enter new data in record books and to create new profiles for witnesses. Computerization has made the process more complicated, as new entries and changes to electronic databases may not always be possible or may leave traceable records.

Replicating a witness's personal history may prove particularly challenging when his or her country of origin has ceased to exist (the Soviet Union, Yugoslavia etc.), the country's legal system does not allow the altering of certain personal data (as in the Netherlands) or cooperation from some institutions, especially in the private sector, is not forthcoming.

In the Netherlands, a person who changes his or her name permanently cannot change his or her place or date of birth, because of associated civil and political rights, such as pension and voting rights. As a result, persons who enter the witness protection programme in the Netherlands are usually given temporary identities, which may include different places and dates of birth. When the witness protection programme ends, the temporary identity also expires.

## **(b) Sociocultural context**

If a protected witness is placed in a new community, the assumed identity must be able to stand up to scrutiny. Understanding the sociocultural context and the potential existence of strong family ties in a society are crucial for ensuring the success of the operation. In closed societies outsiders stand out, making integration difficult. Even in multicultural and multinational environments, informal ties exist among the various ethnic groups and people tend to gravitate towards their kin, making an information leak likely. Again, diligence is the key factor.

The challenge is greater in smaller countries, where tracing a person's movements is particularly easy. In such cases, creating a new identity for a protected witness may be

technically possible but impractical as an effective means of protection. In those situations, some witness protection units have shifted their emphasis from permanent relocation and identity change to physical protection and continuous moving of the protected witness. Participants are accommodated in secure areas under close protection for periods ranging from a few weeks to several months, after which time they are moved again. Obviously, such practices are resource-intensive and have severe implications for the witness's psychological status. Relocation overseas may be the only long-term option available.

### **(c) Inter-agency cooperation**

Changing a person's identity is a long process that requires coordination between the witness protection unit and the government agencies responsible for making changes to the public records and issuing personal documents. Government agencies must be obligated to render assistance whenever requested to do so by the witness protection unit and must have the capacity to provide covert documents whose details are known only to a limited number of authorized officials. The law should grant the officials immunity from criminal prosecution for forgery as they would be required to issue personal documents under fictitious data.

### **(d) Court hearings**

On occasion, protected witnesses who have already been given new names need to appear in public under their original identity, for example, when they must testify in court or defend charges of criminal acts committed before entering the programme. To establish their relation to the case, they must appear under their old identity. If the relation between the defendant and the witness is well known, the court hearing could be closed to the public and the media so that justice may be administered in a secure environment. However, the use of the Internet to publicize a witness's identity is an emerging trend that should be taken into consideration.

In Canada, the Supreme Court of British Columbia issued an order prohibiting publication of any photographs or information identifying a protected witness in a terrorism-related trial. Such a witness was testifying at the trial of those accused of two separate bombings in 1985 that resulted in the deaths of 329 aeroplane passengers and 2 baggage handlers at an airport in Tokyo on the same day. The attack had been ordered by a militant Sikh group in retaliation for the Indian army's raid on the holiest shrine of the Sikh religion, the Golden Temple at Amritsar, in 1984. Despite the court's order, a website based in the United States and reportedly operated by a Sikh group published the witness's real name in what seemed to be a deliberate attempt to jeopardize the security of the witness ("U.S. website identifies key Air India witness", *CTV News*, 18 November 2003).

The witness protection unit should ensure the witness's safe transportation to and from the courthouse as well as his or her security during the trial. In legal systems that call for the trial of serious crimes by a jury, the defence may object to the presence in the courtroom of visibly armed officers from the witness protection unit, claiming that the jury may be negatively influenced by seeing the witness under guard. Officers may then need to sit among the public during the giving of testimony while remaining close to the witness.

### **(e) High-profile cases**

The impact that media coverage of a court case has on witness protection programmes needs to be given serious consideration. Criminal cases that are widely reported with pictures and stories of witnesses published in popular magazines and newspapers may render ineffective a witness's admission to the programme and even his or her relocation to another country. The same is true for witnesses who are public figures, such as politicians, artists or media personalities. Their regular exposure to the public makes them easily recognizable. Thus, other means of protection should be devised for that category of witness.

In the Hong Kong Special Administrative Region of China, a well-known talk show host was targeted in an attack. Because of his testimony, his life came under serious threat. His fame, however, meant that a change of identity was not a viable option. The only feasible way to protect him was to provide him with a bodyguard until the perpetrators had been convicted and the threat had diminished.

## **2. Reverting to the former identity**

Admission to a protection programme does not mean that a witness does away with his or her former identity and all related legal obligations forever. Instead, the old identity continues to exist in parallel with the new profile.

Protected witnesses can reassume their former identity once the programme has ended and once all identity documents provided under the programme are returned. However, that is optional; in most cases, the witness chooses to retain his or her new identity because, although the threat usually diminishes, it never completely disappears. Furthermore, as protection may last for years, the participants and persons accompanying them in the programme may establish themselves professionally, socially and personally under their new names. Any witness who reverts to a former identity must rebuild his or her life for a third time. The longer a witness must function under an assumed identity, the more difficult it becomes to return to the old identity and to reintegrate into society. For the same reasons, most protected witnesses (and those accompanying them) who have been relocated choose not to return to their place of origin after the end of the witness protection programme.

Restoring a witness's original identity can be one of the sanctions applied when a witness breaches the terms of the memorandum of understanding. However, witness protection units are cognizant of the danger that such people face when expelled from the programme, and they may allow them to keep their new identification documents and to continue living under their assumed names.

## B. International relocation

International relocation is situated at the top end of witness protection services owing not only to the significant costs, resources and impact it implies for the witness and his or her close family members, but also to the complicated nature of international relations. Nonetheless, for many small countries, the international relocation of threatened witnesses is sometimes the only means of guaranteeing effective protection.

Generally, it is sufficient to resettle a witness to another country. If the level of the threat is high though, the witness may need to enter the protection programme of the receiving country, where he or she will be provided with a new identity and personal documentation.

In principle, the choice of receiving country depends on the threat level and where the witness would fit in best. In practice, that choice largely depends on which country is willing to accept the witness. The witnesses themselves are rarely given a choice, even though they often try to make their cooperation and testimony conditional on relocation to a particular country or group of countries.

Pursuant to article 24, paragraph 3, of the Organized Crime Convention, States parties are authorized to enter into agreements or arrangements with other States for the international relocation of protected witnesses. In practice, cooperation is based on the following types of agreements:

- (a) *Regional or bilateral agreements on cooperation in witness protection or in combating specific crimes such as organized crime, drug trafficking and terrorism:* such agreements establish a formal mechanism for cooperation between States parties and usually require ratification by the national legislature;
- (b) *Special agreements or memorandums of understanding concluded directly between police forces, prosecutors' offices or other judicial and law enforcement authorities of the respective countries:* such agreements provide the basis for direct assistance and do not require ratification by the national legislature.

An agreement on cooperation in the protection of witnesses and victims signed by the Governments of Estonia, Latvia and Lithuania in March 2000 provides for a witness or victim of crime from any of these countries to be relocated to any of the other Baltic States for a limited period or, if the person's security can no longer be ensured by the sending State, permanently.

## 1. Conditions

International engagement procedures and measures are often included in national legislation or policies with the specific purpose of facilitating cross-border cooperation in witness relocation. The most common conditions include the following:

- (a) *Contacts between authorized agencies.* Confidentiality is of paramount importance. When preparing a formal relocation request, communication regarding the case should be limited to the authorized agencies of the countries involved. Requests are forwarded for approval to the minister-level official responsible for justice, law enforcement or immigration matters in the receiving country. Currently, the speedy transfer of witnesses directly between law enforcement agencies without further approval is uncommon;
- (b) *Disclosure.* Before the relocation application is even considered, the sending authority needs to divulge to the receiving authority all information relating to the witness, including criminal record, financial situation and civil liabilities. Withholding information may lead to the rejection of the relocation request. Even in highly sensitive cases, full disclosure is a prerequisite for making an informed decision. The sending authority is not obliged to (and often does not) provide details regarding the principal case that led to the witness's relocation. If a witness who has been given a new identity and who has been relocated overseas commits a crime, details of any criminal history under his or her original identity should be made available to the court by the witness protection unit;
- (c) *Reciprocity.* Some countries require a reciprocal arrangement with the sending country in order to accept the international relocation of protected witnesses. Whether reciprocity is a requirement or not, the sending authority should be able to provide the receiving authority with detailed reports on:
  - (i) The threat level;
  - (ii) The status and needs of the witness, in other words whether he or she is a career criminal or has been traumatized, his or her professional qualifications, psychological profile, capacity to adapt etc.;
  - (iii) The number of persons that need to be relocated with the witness;
  - (iv) The witness's financial capabilities;
- (d) *Compliance with immigration laws.* Although relocation to another country is intended in principle as a short-term measure, it normally continues indefinitely. Upon entering the country of destination, national legislation for the naturalization of foreign citizens applies, thus allowing relocated witnesses and those accompanying them to potentially apply for citizenship once all other criteria have been met;
- (e) *Criminal record.* The kind of criminal record deemed acceptable for protecting a witness varies from one country to another. To some extent, the acceptability of a criminal record depends on a particular society's values. For example, in some countries it would not be a major problem to accept a protected witness from

another country with a minor criminal record resulting from the use of “soft” drugs, such as cannabis. In countries with different drug policies, however, the reaction could be totally different. A waiver must be sought from countries whose immigration laws prevent the granting of sanctuary to persons with criminal records or require the prosecution of such persons by the authorities (the “dirty hands” concept). Without such waivers, the most common category of witness in need of international relocation, justice collaborators, would have to be excluded.

The European Police Office (Europol) has created an informal network of witness protection agencies from European Union member States and accession countries. The group meets on a regular basis to discuss the status of witness protection, to exchange information and good practices, to make recommendations for the harmonization of national legislation and to develop good practice policies for the witness protection agencies of member States. The network, which originally included the authorized representatives of 8 States not yet members of the European Union and 12 international organizations operating in the region, has gradually expanded to include representatives from other countries with extensive experience in witness protection, such as Australia, Canada, New Zealand, South Africa and the United States.

Similar efforts have been initiated in other regions. For example, the Australasian Heads of Witness Protection Forum has been established in Asia and the Pacific.

## 2. Obligations

Following the decision to relocate a foreign witness, the terms and conditions are open to negotiation between the respective agencies. A detailed agreement is subsequently signed providing for the mutual rights and obligations. The agreement usually covers the following matters:

- (a) *Responsibility*: The sending authority hands over responsibility for the safety of the witnesses to the receiving authority and is obliged to go through the receiving authority for any future contact with the witness;
- (b) *Financial cost*: The receiving country usually assumes all costs related to protection measures, but practices differ regarding the provision of financial support to witnesses. Some receiving countries assume all related obligations; others negotiate a cost-sharing agreement with the sending country; yet others require full reimbursement from the sending country;
- (c) *Integration*: The receiving country assists witnesses in finding employment and provides them with training programmes, language courses, health care and social benefits. Depending on the immigration laws of each country, witnesses are either automatically entitled to work or are issued temporary work permits that are then renewed on the basis of regular threat assessments made by the sending agencies. After a certain period of time, renewals can lead to permanent residence.

Protected witnesses are usually offered work opportunities and a standard of living in the receiving country that are comparable to their financial situation before entering the witness protection programme. Only legally obtained assets are taken into account in assessing that financial situation. Still, social and economic circumstances (for example, inflation, currency rates, unemployment, minimum wages and taxation rules) differ between countries, occasionally making it difficult to collect accurate information regarding living standards.

The calculation of pension rights is another challenging issue, as witnesses and relocated family members may have worked in several countries before reaching retirement age.

In an amendment to the Witness Protection Act (No. 256/1988) of Slovakia, the witness protection unit was empowered to confirm that a person with a changed identity is identical to the person prior to the change with respect to civil lawsuits and recognition of other entitlements arising from a person's admittance to the witness protection programme.

### **3. Other forms of international cooperation**

#### **(a) Third-country cooperation**

Recently, the need for a new form of international cooperation for the relocation of witnesses has emerged, one in which a range of support services are offered by the witness protection unit of a third country to its counterparts in the sending and receiving countries. The support may be as simple as facilitating the transit of witnesses through the territory or through the ports and airports of the third country to prevent a security compromise during passport, customs or immigration control. It may also involve more complicated operations, such as providing a safe haven for reunions between protected persons and family members who have not been relocated or providing assistance in giving court testimony by videoconference. Even though in both cases the identity of the third country could become known, those measures are considered safer than risking the identification of the country of relocation.

#### **(b) Imprisoned witnesses**

A large percentage of witnesses under protection serve prison terms. Their security is usually entrusted to special departments of the correctional system and is based on keeping them isolated from other prisoners. Only under special circumstances may they be housed in facilities with other prisoners who are also under protection.

Prolonged isolation creates what has been described as the “golden cage problem”, the development of serious psychological disorders. To alleviate that problem, some countries are introducing a system for the exchange of protected prisoners.



Two main obstacles, one practical and one legal, have been identified in such types of cross-border cooperation. First, very few countries have established the specialized type of facilities required for the protection of imprisoned witnesses and, second, receiving countries usually need a decision from a domestic or international court to imprison a person.

### **C. Implications of relocation and identity change for the witness**

For witnesses, relocation and identity change mean getting the opportunity for a new start; they also mean that witnesses must change their lives and be subjected to severe restrictions in their fundamental personal freedoms and individual rights in terms of movement, communication and work. Occasionally, witnesses may need to go through the process more than once to ensure effective protection. That can happen, for example, when a family member who has been relocated with the witness decides to leave the programme, forcing the remaining members to resettle and change identities again.

It is difficult enough for a witness to be relocated to a different part of the country and to sever all communication and links with his or her past, extended family members and friends, but moving abroad creates additional problems. Protected witnesses who have been relocated internationally must often overcome a language barrier, as well as cultural and social barriers, in order to fit in. In those cases, factors such as geography, local customs and even climate become important and are sometimes the reason why witnesses are unable to adapt to the new environment.

The most common elements for the successful integration of relocated witnesses in their new environment are:

- (a) Compatibility of ethnic and cultural background, not only to allow the witness to fit in physically, but also to help moderate any psychological stress resulting from a feeling of isolation;
- (b) Language;
- (c) Living standards;
- (d) Physical well-being;
- (e) Ability to become self-sufficient, in terms of gaining and maintaining employment within a reasonable period.

In the United Kingdom, protected witnesses and their accompanying family members are provided with “schooling” to facilitate their transition to a new life. The process lasts 3–4 months and success depends on the ability of protected persons, especially young children, to take in the changes. Thus, agencies are careful to avoid completely reinventing the witness’s life and focus on changing only what is necessary.



While in the programme, the witness must sever all ties with his or her past life. That includes getting rid of any property, including registered electronic appliances and software, that could potentially be traced to the owner through their serial numbers. Before entering a witness protection programme, it is therefore necessary for participants to declare all their possessions (property, money, equities etc.) to the witness protection unit, which then advises them on which items to dispose of. The unit should take market values into consideration when selling goods or property, so that witnesses do not suffer an unreasonable financial loss.

In Latvia, the legislation governing witness protection programmes originally required the police to ensure the security of not only the witness but his or her property as well. The law proved difficult to implement and was amended: property now has to be disposed of before the person enters the witness protection programme. If that is not possible, the Government must insure the property of the protected person.

It is important to note that if the protected witness is a former criminal, some of the assets may have been obtained illegally. Most countries insist that the witness should not be allowed to keep such property or money, irrespective of whether they are actually or constructively owned by the witness. Part of the forfeited property may subsequently be used to fund the witness protection programme or related programmes, such as a victims' compensation fund.



## IX. Future challenges

Since their initial establishment in the 1970s, witness protection programmes have undergone several changes, mostly as a result of experience gained, to make the systems more effective. The changes have included tightening the admission criteria, allowing persons close to the witness to participate and making the conditions for leniency stricter.

After more than 30 years of operations, witness protection programmes now face a new set of external challenges. Drastic changes are required in the light of emerging areas of concern: new forms of crime, the effects of globalization and advances in biometrics.

### A. New forms of crime

Organized crime and Mafia-type crimes have given rise to the need for special programmes to protect witnesses. Recent years have seen an increase in a new type of crime: gang crime. Street gangs, motorcycle gangs (such as Hells Angels) and racist skinhead groups were once primarily a concern in large urban areas. Today, gang problems have spread to previously unaffected communities and can now be found even in suburban and rural areas. Offences are more violent and frequent, injuries are more serious and the types of firearm used are more lethal. The significant increase in the number of potential witnesses in need of protection has put witness protection programmes under severe strain. In some countries, such as Australia, New Zealand and the United States, gang-related crimes have become the main focus of witness protection programmes. To address the problem, some countries, realizing that gangs tend to operate on a territorial basis, are looking into establishing short-term protection schemes that are separate from witness protection programmes and that provide for a series of temporary measures, including provisional resettlement.

### B. A global village

The technological advances of the past 20 years and, in particular, the rapid expansion of the Internet in all aspects of peoples' lives have placed increased demands on efforts to protect witnesses. Electronic devices of all sorts and sizes, including mobile telephones, laptops and even software, are registered to a user and can easily be traced. Witnesses entering a protection programme are usually required to declare ownership of such goods to the protection unit and to dispose of them in order to break that link to their past. As far as the Internet is concerned, it is universally recognized as offering tremendous possibili-

ties in the fields of education, information, communication and commerce. Unfortunately, it has also unleashed previously unknown dangers for law enforcement professionals. Besides its potential abuse for criminal purposes (cybercrime), the simple posting of personal information in a number of public databases creates a problem for witness protection authorities. The growing number of directories, addresses and customer profiles available online increases the risk that a programme will be compromised by the inadvertent posting of the details of a witness who has been relocated and given a new identity. The Internet is also an easy way of distributing compromising publications aimed at revealing the identity of a witness.

In the United States, a defendant on trial in Boston for marijuana charges based on information from an informant started a website in 2004 called “Who’s A Rat?”. The website ([www.whosarat.com](http://www.whosarat.com)) includes the names and photographs of undercover police officers and recipients of plea agreements who have cooperated with prosecutors. It also includes court documents detailing what the informers have agreed to do in exchange for lenient sentences. The website claims to have identified 4,300 informers and 400 undercover agents, mainly from documents available on the Internet. The website states that it is designed to assist attorneys and criminal defendants having limited resources and that it does not promote or condone violence or illegal activity against informants or law enforcement officers. However, federal prosecutors and law enforcement officials believe that it poses a grave danger to cooperating witnesses and defendants because broad dissemination of their identities may subject them to retribution from friends and associates of the defendant. (Adam Liptak, “Web sites expose informants, and Justice Dept. raises flag”, *New York Times*, 22 May 2007).

### C. Biometrics

Biometrics refers to the use of digital technology to record and recognize a person’s physical or behavioural traits. Although personal documentation containing biometrical data was introduced for law enforcement and counter-terrorism purposes, its use is problematic from a witness protection perspective. The increased use of biometrical identification documents, with features such as iris or facial scans, can limit the possibilities for persons with new identities to travel. For example, in some countries all foreign nationals entering or passing through the national territory are fingerprinted. As fingerprints are linked to a person’s identity, a witness who has visited one of those countries under his or her original identity may not be able to travel there again after receiving a new identity. As more and more countries introduce biometrics to verify the identity of individuals, the ability of protected witnesses to move around will become more restricted.

The problems posed by using biometrical data are not limited to the public sector. In fact, there is an increasing number of privately run databases containing biometrical information, such as those operated by financial institutions. Those institutions are increasingly

requiring biometrical measurements in order to verify the identity of customers, a practice that could pose enormous problems in cases of identity change. That has become all the more important since some insurance companies now refuse to make payouts unless DNA samples are provided as evidence of a person's identity. Discussions involving biometric working groups are currently under way and there is a great need for coordination on this issue among a wide range of associations and experts in the field.<sup>21</sup> While legislation puts forward methodologies, tangible cooperation is required. In the meantime, authorities are trying to trace all places where applicants for witness protection may have left their fingerprints or other forms of biometric data.

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<sup>21</sup>A recently released study commissioned by UNODC on fraud and the criminal misuse and falsification of identity emphasized the need for cooperation between criminal justice systems and the private sector in the investigation and prosecution of related crimes. Such cooperation is perceived as an important element in enhancing the effectiveness of law enforcement measures against, among other things, identity-related crime, but it can also be considered from the re-identification perspective under discussion here (see "Results of the second meeting of the Intergovernmental Expert Group to Prepare a Study on Fraud and the Criminal Misuse and Falsification of Identity" (E/CN.15/2007/8 and Add.1-3)).



## X. Conclusion

It is generally recognized that the State has an obligation to provide assistance and protection to persons who are likely to be harmed because of their collaboration with the criminal justice system. There are different means of protection. The kind chosen in each case depends to a large degree on the type of witness (victim, vulnerable witness, justice collaborator etc.), the type of crime (crime within the family, sex crime, organized crime etc.) and the level of threat or intimidation.

Witness protection programmes are considered to be a last-resort response in providing security to threatened witnesses. They were established to address the inability of regular police protection measures to provide a secure environment for witnesses willing to testify against powerful criminal defendants, such as members of the Mafia. Over the years, witness protection programmes have developed sophisticated practices allowing the change of identity of threatened witnesses and their relocation to a safe place as the only effective means of protection. The success of those operations has had a positive impact on securing crucial evidence and has made witness protection a key element in efforts to effectively fight organized crime.

### A. Main elements

Significant differences exist among the legal traditions, political environment, stage of development, society and culture, and levels and types of criminality in different countries. Those differences reflect the type and extent of protection that each country is able to provide. In most jurisdictions, witness protection is associated with simple police measures, such as the temporary placement of witnesses in safe houses or the provision of psychological support.

Before the early 1990s, only a handful of countries had established programmes to provide the extraordinary protection measures required for criminals who decided to cooperate with the prosecution by providing critical and otherwise unavailable evidence in cases of national significance. However, as the threat of organized crime has grown, more and more countries have sought to enhance their arsenal of protection measures and establish special units to assist threatened witnesses in resettling under a new identity.

The paths that have led to the development of witness protection programmes throughout the world differ. Despite those differences, once established, those programmes are

very similar irrespective of the geographical area, legal system, size or stage of social and economic development of the particular country. The similarities can be summarized as follows:

- (a) There is a combination of witness protection, plea-bargaining and accomplice testimony;
- (b) There is an almost exclusive focus on the small number of critical witnesses who offer to change sides and cooperate with the prosecution but demand protection to stay alive;
- (c) The use of relocation and re-identification – based on almost the same criteria (type of crime, threat, suitability, voluntary participation) – as a last resort in ensuring witness security.

## **B. Alternative measures**

The effects of witness protection programmes are maximized when there is a multi-pronged approach, starting with the application of temporary police measures, continuing with the use of evidentiary rules during court testimony and culminating, when all other measures are deemed to have proved insufficient, in identity change and relocation procedures.

## **C. Requirements**

Some of the most important elements for the establishment and operation of witness protection programmes are:

- (a) A clear legal or policy basis for designing a methodology and carrying out operations;
- (b) Adequate financing that is stable and continues for several years;
- (c) Strict personnel qualifications and vetting procedures;
- (d) Protection of the programme's integrity;
- (e) Close coordination with judicial and other Government authorities engaged in law enforcement and intelligence, prison administration, public housing, health and social security services, among others;
- (f) Accountability and transparency that conform with the programme's special security needs;
- (g) Obligation of government authorities to provide appropriate assistance, safeguarding the information disclosed to them;
- (h) Ability to offer assistance to national and international law enforcement agencies.



## D. Admission criteria

The severity of the threat to the witness and the seriousness of the crime in respect of which the witness testifies are among the main elements to be considered in the determination of admission to the programme. Other criteria depend mostly on the witness and include:

- (a) The importance of the testimony in a significant case;
- (b) The witness's willingness to cooperate;
- (c) The witness's suitability for being included in the programme in terms of psychological, mental and medical conditions.

## E. Costs

Even though witness protection programmes are expensive, the costs prove minor when compared with the programme's contribution to the effectiveness of prosecutions in cases involving serious crime. The costs are directly related to, among other things, the number of witnesses approved for inclusion and the financial benefits granted to the participants. It is interesting to note that in the initial phase, witness protection programmes are usually overambitious in that they seek to cover a wide range of witnesses and crimes. With the passage of time, however, the serious strain they come under as a result of the large number of participants and the increasing costs leads to the application of stricter conditions for admission to ensure the programme's efficiency and viability.

## F. Programme administration

Practical issues such as which body should be responsible for the programme (the police or some other authority), organizational structure (national or local) and decision-making authority (single official or collective body) are of secondary importance to the programme's success as long as the following principles are upheld:

- (a) Separation from the investigation;
- (b) Operational autonomy from the regular police;
- (c) Secrecy and security of information;
- (d) Shielding from political and other influences in the work of the programme.

## G. International relocation

The ability of countries to exchange protected witnesses in times of increased threat or to relocate them under a new identity in another country are important means of enhancing the capacity of national witness protection programmes. With few exceptions, however,

actual cross-border cooperation continues to be at a low level. To improve the situation, Member States should:

- (a) Develop agreed minimum standards warranting international relocation;
- (b) Simplify application and admission procedures;
- (c) Harmonize, where reasonable, national legislation and policies, including the terminology used therein;
- (d) Create networks of witness protection agencies to establish direct contact among relevant officials;
- (e) Coordinate recruitment, vetting and training standards for personnel;
- (f) Develop common criteria for the determination of living standards and benefits received by witnesses who are relocated to other countries.

# Annex I

## Consulted national authorities of Member States of the United Nations

### **Argentina**

Ministry of Justice and Human Rights  
Public Prosecutor of the Chamber of Appeals

### **Australia**

Australian Federal Police

### **Austria**

Department of Criminal Intelligence Service  
Witness Protection Department, Federal Ministry of the Interior

### **Bangladesh**

Joint Secretary (Police), Ministry of Home Affairs

### **Brazil**

Attorney General's Office  
Witness Protection Programme, Secretary-General's Office of the President of the Republic

### **Cambodia**

International Affairs Department, Ministry of Justice

### **Canada**

Royal Canadian Mounted Police

### **Chile**

National Victim and Witness Assistance Service, Public Prosecutor's Office

### **China**

Hong Kong Special Administrative Region  
Organized Crime Witness Protection Unit, Hong Kong Police  
Independent Commission against Corruption

### **Colombia**

International Cooperation Unit, Attorney General's Office  
Witness Protection Programme, Attorney General's Office

### **Costa Rica**

Intelligence Unit, Costa Rican Drug Institute

### **Ecuador**

Attorney General's Office

**Egypt**

Ministry of Justice

**El Salvador**

Protection Unit for Public Figures, Victims and Witnesses, Civil National Police

**Germany**

General Prosecutor's Office, Federal Court

Federal Ministry of Justice, Witness Protection Unit

**Guatemala**

Witness Protection Programme, Attorney General's Office

**India**

Joint Secretary (Judicial), Department of Justice, Ministry of Home Affairs

Supreme Court of India

**Italy**

Office of the Directorate for Criminal Affairs, Ministry of Justice

National Anti-Mafia Bureau

**Jamaica**

Office of the Director of Public Prosecutions

**Japan**

Ministry of Justice

**Jordan**

Anti-Narcotics Department, Public Security Directorate

**Kenya**

Attorney General's Office

**Latvia**

Victim and Witness Protection Unit

**Malaysia**

Attorney General's Office

Legal Affairs Division, Prime Minister's Department

Royal Malaysian Police

**Mexico**

Attorney General's Office

**Namibia**

Prosecutor General's Office

**Netherlands**

National Public Prosecutor's Office

**New Zealand**

National Bureau of Investigation Support, National Crime Service Centre, New Zealand Police

**Nigeria**

Prosecution and Legal Services, National Drug Law Enforcement Agency

National Agency for the Prohibition of Traffic in Persons and Other Related Matters

Attorney General's Office

**Norway**

National Witness Protection Unit, National Criminal Investigating Service

**Panama**

Attorney General's Office

**Paraguay**

Attorney General's Office

**Peru**

Attorney General's Office

National Anti-Corruption Police

**Philippines**

Witness Protection Programme, Department of Justice

**Portugal**

Magistrate for Public Affairs

**Republic of Korea**

Division for Criminal Legislation, Ministry of Justice

**Romania**

National Office for Witness Protection

**Senegal**

Ministry of Justice

**Sierra Leone**

Victims and Witnesses Unit

**Slovakia**

Department of Protective Services

**South Africa**

Witness Protection Unit, National Prosecuting Authority

**Spain**

Ministry of Justice

Spanish National Police

National Civil Guard

**Sri Lanka**

Attorney General's Office

Police Department

**Thailand**

Office of the Attorney General

Department of Rights and Liberties Protection, Ministry of Justice

Office of Justice Affairs, Ministry of Justice

**United Kingdom of Great Britain and Northern Ireland**

Central Witness Bureau, Home Office

London Metropolitan Police

Merseyside Police

National Crime Squad

Serious Organised Crime Agency

**United States of America**

Criminal Division, Office of Enforcement Operations, Department of Justice  
Criminal Division, Organized Crime and Racketeering Section, Department of Justice  
Witness Security Program, United States Marshall's Service, Department of Justice

**Consulted international and regional entities**

Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders

Caribbean Community

Central American Permanent Commission for the Eradication of the Production, Traffic, Consumption and Illicit Use of Drugs and Psychoactive Substances

Council of Europe

European Commission

European Police Office

Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea

International Criminal Court

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994

International Institute of Higher Studies in Criminal Sciences

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Regional Centre for Combating Transborder Crime, Southeast European Cooperative Initiative

Special Court for Sierra Leone

Stability Pact Secretariat against Organized Crime in Southeast Europe

United Nations Interregional Crime and Justice Research Institute

## Annex II

# National legislation

### **Australia**

Witness Protection Act (1994). Act No. 124. 18 October 1994.

### **Austria**

Federal law Gazette No. 105/1997. 19 August 1997.

### **Canada**

Witness Protection Programme Act. 1996, c.15.

### **Colombia**

Law No. 418/1997.

### **Germany**

Act to Harmonize the Protection of Witnesses at Risk (2001). BGBl. I.S. 3510. 11 December 2001.

### **Guatemala**

Law on the Protection of Trial Participants and Persons involved in the Administration of Criminal Justice. Decree No. 70–96.

### **Indonesia**

Law on Witnesses and Victims Protection (2002). June 2002.

### **Italy**

Law on the Protection of Witnesses and Persons Cooperating with Justice. Law No. 82. 15 March 1991.

### **Jamaica**

The Justice Protection Act (2001). Act No. 23. 21 November 2001.

### **Kenya**

Witness Protection Bill (2006). 15 May 2006.

### **Latvia**

Law on the Special Protection of Persons (2005). 19 May 2005.

### **Peru**

Law on Procedures Relating to the Granting of Privileges for Effective Collaboration and on the System of Protection for Collaborators, Injured Parties, Witnesses and Experts.

### **Slovakia**

Witness Protection Act (1998). Act No. 256/1998. 8 July 1998.

### **South Africa**

Witness Protection Act (1998). Act No. 112. 19 November 1998.

Witness Protection and Services Bill (1998). B9-98, 1998.

**United States of America**

Witness protection legislation:

18 U.S.C. 117

18 U.S.C. 224

18 U.S.C. 601

Victims of Trafficking and Violence Protection Act (2000). 22 U.S.C. 7101. 28 October 2000.



## Annex III

# International tribunals

### Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea<sup>a, b</sup>

#### *International Criminal Court*<sup>c, d, e</sup>

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994<sup>f, g</sup>

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991<sup>h, i</sup>

Special Court for Sierra Leone<sup>j, k</sup>

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<sup>a</sup>General Assembly resolution 57/228.

<sup>b</sup>See the Law on Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

<sup>c</sup>Rules of Procedure and Evidence (*Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.A).

<sup>d</sup>See the Rome Statute of the International Criminal Court (United Nations, Treaty Series, vol. 2187, No. 38544).

<sup>e</sup>See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (United Nations publication, Sales No. E.03.V.2) and corrigendum, part II.A, “Rules of Procedure of the Assembly of States Parties”.

<sup>f</sup>Security Council resolution 1994/955 as amended by Council resolution 2006/1717.

<sup>g</sup>See the Rules of Procedure and Evidence as amended on 10 November 2006.

<sup>h</sup>Security Council resolution 1993/827 as amended by Council resolution 2006/1660.

<sup>i</sup>See the Rules of Procedure and Evidence.

<sup>j</sup>Security Council resolution 2000/1315.

<sup>k</sup>See the Rules of Procedure and Evidence as amended on 24 November 2006.



## **Annex IV**

# **United Nations legal instruments and resolutions on standards and norms related to the protection of witnesses**

### **Legal instruments**

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/255, annex): entered into force on 3 July 2005

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex III): entered into force on 28 January 2004

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex II): entered into force on 25 December 2003

United Nations Convention against Corruption (Assembly resolution 58/4, annex): entered into force on 14 December 2005

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations, *Treaty Series*, vol. 1582, No. 27627): entered into force on 11 November 1990

United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex I): entered into force on 29 September 2003

### **Resolutions on standards and norms**

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex)

Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Council resolution 2005/20, annex)

Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Economic and Social Council resolution 1989/57)

Plan of action for the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Council resolution 1998/21, annex)



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