

WITNESS PROTECTION AS A KEY TOOL IN ADDRESSING SERIOUS AND ORGANIZED CRIME

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I. INTRODUCTION

Many countries are affected by criminal activities that have a profound impact on human security and development, such as corruption, drug trafficking, serious and organized crime, human rights violations and terrorism. Yet, the ability the criminal justice systems of countries to investigate and prosecute such forms of serious crimes are often very limited. One of the challenges for many for countries is in obtaining the cooperation of victims and witnesses in order to obtain important information and evidence about such criminal matters.

This paper will discuss: 1) the globalization of organized crime as background on why organized crime is a problem for all states; 2) why witness protection measures are important for the effective functioning of criminal justice systems; 3) what is meant by the concepts of victim and witness assistance, support and security; 4) some of the factors that have given rise to witness protection programmes; 5) the objectives and key features and elements of most witness protection programmes; 6) the use of witness protection; and 7) provide some recommendations. This paper looks at witness protection primarily from the point of view of serious and organized crime but mentions also its use in the human rights context as well as in the work of the International Courts and Tribunals.

The paper draws substantially from the UNODC *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* manual published in 2008, as well as upon information obtained from many colleagues working in the field of witness protection around the world whose expertise, support and advice have been instrumental to the work of UNODC in supporting states in this area.

II. ORGANIZED CRIME - AN INTERNATIONAL PERSPECTIVE¹

Globalization has facilitated the diversification of organized criminal groups and has permitted a dramatic (although little understood) growth in the global prevalence of organized crime. In 2004, the United Nations High-level Panel on Threats, Challenges and Change, identified transnational organized crime as one of “six clusters of threats with which the world must be concerned now and in the decades ahead”.² In February 2010, the UN Security Council noted that “in a globalized society, organized crime groups and networks, better equipped with new information and communication technologies, are becoming more diversified and connected in their illicit operations,” which in some cases may aggravate threats to international security.”³ Moreover, it noted with concern “the serious threats posed in some cases by drug trafficking and transnational organized crime to international security in different regions of the world.”⁴

Although organized crime (and corruption) affect both developed and developing regions there is

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1 See also, *The Globalization of Crime, A Transnational Organized Crime Threat Assessment*, UNODC 2010.

2 Statement at UN Security council, SC/9867, February 2010.

3 *A more secure world: Our shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, United Nations, 2004, p.2

4 Ibid.

more of a risk for developing states. In developing regions where State institutions and mechanisms are in transition, organized criminal groups have proven very successful in mobilizing themselves to meet the goods and services demands of unregulated markets. They are able to use bribery and other forms of corruption to co-opt public officials in order to achieve their criminal objectives. Overtime, these groups become more powerful and are thus better able to threaten the growth of parallel legitimate structures.

As globalization increasingly guides a new international order, the dilemma becomes more obvious: How can a multilateral system created to deal with tensions between States fight criminal groups that are non-State, yet transnational and powerful enough to threaten sovereign States?³ The answer is two pronged. States must continue to strengthen their own capacity, but given the global nature of the threat, national efforts must form part of a coordinated multilateral response.

At the national level, organized crime (and corruption cases) can be some of the most difficult and complex to investigate and prosecute. Disrupting or dismantling criminal groups requires getting information about actors, activities and financial dealings that can difficult to obtain because of the secrecy of their operations and because corrupted officials are often paid to alert and protect them from such investigations. The tools that are routinely used by successfully law enforcement investigations to bring down criminal groups have been:

- 1) The use of criminal intelligence in order to understand the threats that presently and are likely to affect a particular jurisdiction and region and to assist law enforcement authorities in prioritizing and allocating its resources;
- 2) Informants and whistle blowers, to provide information about where to look and what to look for;
- 3) special investigation techniques, such as electronic surveillance and undercover operations, in order to penetrate these groups and gain evidence;
- 4) the ability to persuade persons working for criminal organizations to provide information and, more importantly, testimony about the identities and the activities of criminal organizations in exchange for some leniency;
- 5) The ability to provide security to witnesses, including relocation and a new identity.

These elements, along with comprehensive and effective anti-money laundering schemes and the ability to seize and confiscate the proceeds of crime and the ability to effectively cooperate with other countries for mutual legal assistance and extradition, are the main elements of any successful anti- organized crime programme and are also key elements in the investigation and prosecution of corruption cases. Corruption too thrives in secrecy where both the giver and the taker are beneficiaries.

III. ASSISTANCE, SUPPORT AND SECURITY FOR VICTIMS AND WITNESSES AS ELEMENTS IN UPHOLDING THE RULE OF LAW

A. Victim and Witness Assistance and Support

The process of investigating and prosecuting offenses, grave or not, depends largely on the information and testimony of witnesses. In this regard, witnesses are the cornerstones of successful national criminal justice systems. Prosecutors depend upon witnesses who are reliable- whose testimony can be accepted as truthful, accurate and complete. The recall of witnesses and their ability to relate relevant information may be affected by many factors, including age (such as for both child and elderly witnesses), intellectual or physical impairment, language, by their relation with the offender or involvement in the case or offence or due to trauma they have suffered as a victim. In addition, the needs and rights, where appropriate, of victims should always be addressed to ensure that they are treated with care and respect and are not further victimized. Therefore it is good practice for criminal justice systems to provide assistance and support measures to victims and other witnesses in order to facilitate their ability to participate in the criminal justice system and to give the kind testimony that is required for the maintenance of the rule of law.⁵

Assistance and support measures should be employed before, during and after a trial to help witnesses in coping with the psychological and practical issues they may have in testifying. They may also be used in coordination with procedural protections and other security measures. Security provided by the police is aimed at providing physical security before, during and after trial. Procedural protections are those that may be used both to support a witness' ability to testify as well as to enhance a safety before and during the trial. Witness protection programmes are considered a last resort providing more special protection measures, including those of international relocation and identity change.⁶

A growing number of criminal justice systems provide a range of services to victims as well as to vulnerable witnesses which may include: information about the rights of victims, information about the roles of actors in the criminal justice system, assistance in obtaining medical, social, and psychological services that may be provided by the state or by non-governmental organizations and service providers, assistance in obtaining compensation (victims), and providing a support person while testifying. Some jurisdictions provide services only to victims and others provide services to victims and witnesses. Services may also be provided to help minimize obstacles to participation in a criminal hearing or trial. (such as transportation and child care).

Again, it is important to emphasize that the purpose of witness assistance as distinguished from witness protection, is to achieve efficient prosecution and avoid secondary victimization. While such services are generally provided first by the state, non-governmental organizations with experience in dealing with vulnerable categories of the population can prove valuable partners in this process.⁷

B. Witness Security

It is often the case that witnesses neither want to cooperate with law enforcement or judicial authorities because of perceived or actual intimidation or threat against their person or family member.

“In most of cases (in those not related to organized and other very serious crimes), witnesses do not face life-threatening situations. Instead, they suffer verbal threats, intimidation, harassment, assault, property damage or simply fear of reprisal as a result of their cooperation with the [authorities].”⁸ Further, the risk of harm in the majority of instances lasts only to the conclusion of the trial or hearing - conclusion meaning after the convictions, sentencing or appeal process is over). This is because in most cases, the goal of any threat or intimidation is to *prevent* the witness from testifying. Where witnesses are at risk, the importance of getting cases to trial or to conclusion quickly can not be overstressed. Moreover, it is important that police and prosecutors identify at the first stages of contact vulnerable witnesses who need special consideration during their contact with the criminal justice process.

The protection of witnesses is based on three building blocks complimenting and supporting each other with the most complete system being a mixture of all three disciplines. Witness protection thus refers to a range of methods and measures that can be applied at all stages of the criminal proceedings to ensure the safety and security of witnesses in order to ensure their cooperation and testimony. The measures taken should be proportional to the threat and of limited duration.

It should be noted that protection of any form should never provide a motivation to testify but merely remove or counter the witness' view that he or she is in danger if he/she cooperates. Moreover, no person should ever be forced to accept protection measures. Consent should always be given by a witness. As a practical matter, unless you have a willing witness, witness security will in any case be a waste of resources.

Witness security measures fall into three categories, i) police protection/target hardening and good

5 See also the UN Guidelines on Justice for Child Victims and Witnesses of Crime.

6 UNODC Good Practices, p.27.

7 Ibid, p.28.

8 UNODC Good Practices, p.29.

operational practices, ii) judicial and procedural measures, and iii) covert witness protection programmes.

1. Police Protection/Target Hardening

The police have the primary responsibility for ensuring safety and security of citizens. In this regard, good investigative practices and basic police protection provide the basis of all other protection measures. Good investigative practices include keeping investigations confidential, minimizing contacts with uniformed police and prosecutors, ensuring that all information about a suspect's criminal background, especially related to violence, ties with criminal groups and any acts of intimidation or threats made to witnesses is made known to prosecutors and judges (especially at bail hearings). At all stages, police and investigators should be sensitive to whether the witness has been or is likely to be intimidated, threatened or in danger due to their cooperation.

In cases where a witness feels insecure but there is no ascertainable risk of threat, these feelings of insecurity can be addressed by briefing them on personal security, which may include information on how to increase the security of their homes (fortifying locks and windows), ensuring that they have mobile phones and emergency contact numbers or an advocate or police officer that they can phone, etc.

In addition to the above, where there is some level of risk to a witness, the police can provide security measures. Some usual police protective measures are close (body guard) protection, regular patrolling around the witness's residence and place of work, escort to and from the court, installation of security devices at the witness's home and perhaps the place of work, monitoring mail and phone calls, and temporary change of residence etc.⁹

2. Procedural Protections

These refer to measures taken at the request of the prosecutor, the witness or *sua sponte* by the court to ensure that the witness can testify free of intimidation and fear. There are usually no statutory restrictions as to the types of crimes or witnesses for which such measures can be allowed.¹⁰ These measures can be applied in sensitive cases (such as with trafficking in persons, sex crimes, or family crimes) and where there are vulnerable victim-witnesses in order to prevent re-victimization by limiting their exposure to the public or the media or to the accused, during the trial. Procedural measures may include:

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

One of the more complex of these procedural measures is the anonymous testimony. Anonymity refers to the keeping of some or all of the witness's identity detail hidden from the defence and the public in the rare cases where the substance of the testimony itself does not identify the witness to the defence and where it can be corroborated by other evidence. Of jurisdictions where this is permitted, some allow it only up to a certain period before the trial.

In this way it is felt that the witness can be protected for the short period his or her identity is revealed to the defence. In some jurisdictions, the witness may be examined in court by the defence but is not obliged to state his or her true name or provide other personal details. This measure can be useful for the testimony of undercover agents who would be in danger or where ongoing investigations would be compromised if their true identity were known.

⁹ See also additional information, UNODC Good Practices, p.30.

¹⁰ Good Practices for the Protection of Witnesses, p.3.

Where total anonymity is permitted, the witness testifies behind a shield or is disguised and information relating to identity is not revealed. In practice, this measure is useful for cases where witnesses who were innocent bystanders and whose identity is not already known to the defence. In most cases, the defendant can readily identify the witness through his or her testimony.

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. The defence is allowed 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.¹¹

Another procedural measure that presents some legal issues in the use of shields to reduce potential intimidation. Their use is not practicable in many jurisdictions to right of the accused to face-to-face confrontation with the witness. Where used, screens should not prevent the judge, jury and at least one legal representative of each party from seeing the witness and from the witness seeing them.¹² The problem with their use for many jurisdictions is that they prevent the accused from seeing the witness's demeanour and to challenge his or her credibility on this basis. In Japan, for example, screening is done in such a way that the defence counsel can still see the witness so that the right to face-to-face examination is not greatly affected.¹³

A measure that is being more readily used is that of testimony by video-conference.

Videoconferencing refers to the real-time transmission of video (visual) and audio (sound) transmission between two locations. It allows the virtual presence of a person in the territory over which the state or entity has jurisdiction.¹⁴ This technology allows for witnesses to testify from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location. In the courtroom setting, it means that a judge, the defendant, the defence counsel and the prosecutor can ask questions of the witness and see and hear the witness's answers and demeanour in *real time transmission*.¹⁵ Videoconferencing equipment can permit the concurrent transmission of computer images, such as documents [and photos] so that video can be displayed on one screen and the computer data on another. In other words, a remote witness can be seen on a big screen while the document being discussed by the witness can be visible simultaneously also to the judge/jury on screen monitors.

Although the taking of remote testimony via videoconferencing is more often used in the context of mutual legal assistance between states, it is also increasingly used to take the testimony of protected witnesses. In this regard it can be used either to avoid direct contact between the witness and the defendant and hence has value for some vulnerable witnesses. It can be also used when the physical security of a witness at a particular court or jurisdiction cannot be adequately addressed.¹⁶

Video conferencing technology has advanced to allow for transmission with no interruption or delay and with excellent visual displays. It is deemed reliable and once up and running, relatively easy and cost effective to use. Moreover, the transmissions can be encrypted so as to prevent the identification of both locations of the videoconference.¹⁷

11 Council of Europe, *Terrorism: Protection of Witnesses and Collaborators of Justice* (Strasbourg, Council of Europe Publishing, 2006). Also mentioned in the *UNODC Good Practices*, p.39.

12 UNODC, *Good Practices for the Protection of Witnesses*, p.35.

13 Ibid.

14 Mutual Legal Assistance in Criminal Matters Act, Canada, Article 22.1(1), R.S., 1985c.30 (4th Supp.).

15 Fredric Lederer, *The legality and practicality of remote witness testimony*, p.20.

16 www.unodc.org/unodc/en/treaties/stoc-cop-session5-conferencepapers, CTOC/COP/2010/CRP.2, p.2.

17 See, www.unodc.org/unodc/en/treaties/stoc-cop-session5-conferencepapers, CTOC/COP/2010/CRP.8, Expert group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, Report of the Secretariat, p.2. and also, CTOC/COP/2010/CRP.2, The technical and legal obstacles to the use of videoconferencing, Note by the Secretariat.

At the international level, the use and acceptance of video-conferencing is rising at the international criminal courts and tribunals which use it to take the testimony of victims, vulnerable witnesses or for witnesses who are unable to travel to the court's location for physical or psychological reasons, as well as for protection purposes.

In summary, procedural measures can be grouped into three general categories depending on their purpose:

(1) *“Measures to reduce fear through avoidance of face-to-face confrontation with the defendant,”*¹⁸
such as the use of pre-trial statements in lieu of in-court testimony (where permitted); removal of the defendant from the courtroom (while still watching the trial via a video link); and testimony via closed-circuit television or audio visual links, such as video-conferencing.

(2) *“Measures to make it difficult or impossible for the defendant or organized criminal group to trace the identity of the witness,”*¹⁹
by the use of anonymous testimony or a screen, curtain or two-way mirror to shield the witness while giving testimony.

(3) *“Measures to limit the witnesses' exposure to the public and psychological stress.”*²⁰
such as by a change of the trial venue, removal of the public from the courtroom (hold the session “*in Camera*”) and by having the presence of an accompanying person to provide support for the witness.”

These measures may be used alone or in combination for greater protection. It is important to keep in mind that however procedural measures are used, due consideration should be given to balancing the witness's legitimate expectation of physical safety against the defendant's rights to a fair trial.²¹

C. Who is a “Witness”

It is worth emphasizing that the term “witness” refers to persons who give (testimonial) evidence, so they include experts and victims. The witness protection laws of some countries also include judges, prosecutors and police, and even journalists, as persons who are entitled to witness protection. While such persons may indeed suffer threats and be in risk of harm, putting them doesn't need witness protection programmes but rather the protection of the police along with other measures such as temporary reassignment.

Sometimes the issue comes up as to whether informants can be provided protective measures and the legislation of some countries includes informants as persons eligible for protective measures. But it should be clarified that in most jurisdictions an informant is a person who provides information to authorities which is used for the purposes of further investigation and their identity is not disclosed. Therefore, they do not become witnesses. There is frequently confusion about the differences between being an informant, whistleblower and witness so whistleblower protection so it is worth looking at these issues more closely.

D. Who is a Whistle-blower?

A whistleblower can be a person who merely provides information or he/she can be a witness in a criminal matter. In order to better understand the difference between a whistleblower and an informant, one needs to understand what is meant by whistle-blowing.

There are many definitions of whistle-blowing but here it is preferred to view it as a means of promoting accountability. Whistle-blowing can perhaps be best understood by breaking it into some key elements:

18 Good Practices for the Protection of Witnesses, p.32.

19 Ibid, p.32.

20 Ibid, p.33.

21 Ibid, p.33.

- i) an act of disclosure;
- ii) by a person with privileged access to data or information;
- iii) of an organization;
- iv) either public or private;
- v) about corrupt, illegal, fraudulent or harmful activity;
- vi) under the control of that organization;
- vii) the disclosure is made to an internal entity or to external entities, such as regulatory bodies, ombudsmen, anti-corruption entities, law enforcement agencies or the media;
- viii) with the purpose of evaluating/assessing the risk, threat, conduct so that it can be removed, stopped or reduced.

Whenever a risk arises that the activities of an organization have gone wrong, it is usually the people working for the organization who first know about it. While employees are the people best placed to raise concerns and so enable the risk to be removed, stopped or replaced, they also often have the most to lose. Whistleblowers can too can be victimized - they can ostracized by peers and management, suffer harassment, be demoted or moved to less desirable locations, lose jobs, be charged with crimes or with violating employment agreements for divulging information, or in some cases they may face physical danger.

So, let us return to the question of what is the difference between an informant and a whistle-blower. The main difference is in motivation and also liability. Most informants are persons somehow involved in or connected to unethical or illegal activities. They disclose information for personal benefit, some for money but most as a means to reduce the liability for their own illegal conduct, either voluntarily or due to coercion.²² Thus we can say that their motivation is generally for private gain.

By contrast, a whistle blower makes the disclosure not for any private benefit but in order to benefit a larger community - whether it be the organization or for the public at large, or both.

“In most cases, whistleblowers receive no benefits for their disclosures outside of the ability to maintain the status quo.”²³ However, it is true that there are some anti-corruption laws that allow for rewards to be given to those that disclose wrongdoing, mainly for fraud and corruption. In Asia, a number of countries give rewards to those who have revealed corruption.²⁴ Some of these, like the law of South Korea, give the whistleblower up to a certain percentage of the money recovered.²⁵ So, although there can be a benefit, there is no guarantee for the whistleblower that his/her disclosure will result in a financial gain. This is certainly not the case with paid informants.

E. Witness Protection Programmes

The primary objective of any witness protection programme is to safeguard witnesses in cases of serious threat which cannot be addressed by other protection measures in cases of special importance where the evidence to be provided by the witnesses (including victims) cannot be obtained by other means. Witness protection programmes have been defined by the Council of Europe as:

A standard or tailor-made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice.²⁶

The UNODC *Good Practices for the Protection of Witnesses manual* further defines a witness protection programme as,

²² Whistleblowing, International Standards and Developments, David Banisar, May 2006, revised February 2009, page 4.

²³ Whistleblowing, International Standards and Developments, David Banisar, May 2006, revised February 2009, p.4.

²⁴ See Whistleblowing, International Standards and Development, pages 5, 37.

²⁵ Ibid, p.37.

²⁶ Council of Europe, Recommendation Rec (2005) 9, of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice.

A formally established covert program, subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.²⁷

1. Historical Development of Witness Protection Programmes

In order to fully understand the objectives of most witness protection programmes, it is helpful to understand their historical development. Witness protection programmes have developed out of need to more effectively deal with organized crime and even in earlier times, terrorism. As noted earlier, investigating the activities of organized crime groups and terrorist cells can be difficult for law enforcement authorities due to their secretive nature. Often the only way to gain information about the activities and actors is through one of their members who decide to cooperate with law enforcement authorities for crimes that they have committed, generally in the hope of obtaining some leniency from the court.²⁸ Such persons are referred to as “collaborators of justice”.

One thing that all such groups have in common – whether we are talking about the Italian Mafia, narcotics trafficking groups, terrorist cells, inner city gangs or “crews”, motorcycle and prison gangs – is the code of silence that they impose on their members. If the code of silence is broken, the penalty is usually death. When a justice collaborator decides to break the code of silence and collaborate with law enforcement authorities in testifying for the prosecution against the members of the criminal organization, the organization will call for his assassination. It is institutionally necessary for criminal organizations to keep their disaffected members in line by guaranteeing that there is no “safe haven” from their retaliation.²⁹

Therefore, witness protection programmes developed in order to provide a “safe haven” from such retaliation for collaborators of justice. It is for the same reason that the successful reputation of a witness protection program as a “safe haven” is its most important attribute.³⁰ If a witness protection program is penetrated and protected witnesses are killed, then others will not consider the programme as an alternative even if this means serving a long or even a life sentence in prison.³¹

2. Witness Protection involving Human Rights Cases

It is important to note that although witness protection programmes are most commonly referred to in connection with organized crime and to a lesser extent, terrorism and corruption cases, it can and is available for other serious cases, such as human rights violation.

Witness protection is also an issue for states that have suffered civil conflicts where government actors committed crimes against its citizens, as in Argentina and Brazil. The same principles and criteria that apply to the protection of witnesses for the prosecution or organized crime and other serious cases can be applied for the prosecution of human rights violations. The main difference is that witnesses of human rights violations are frequently victims of these crimes rather than criminal associates/collaborators of justice. For these people, the measures of relocation and identity change may not be acceptable because they may imply further victimization. Brazil for example, established a protection programme specialized to deal with human rights cases under the authority of a Presidential Commission on Human Rights. While most services are provided by the protection unit, support services and even relocation assistance are provided by a network of vetted non-governmental organizations (NGOs). This system has been in place for several years and

27 UNODC Witness Protection Good Practices manual, p.5.

28 A collaborator of justice “means any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organization of any kind, or in offences of organized crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organization, or about any offence connected with organized crime or other serious crimes.” Council of Europe, Recommendation Rec (2005)9, of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice.

29 Information provided by Mr. Victor Stone, Office of Enforcement Operations, U.S. Department of Justice.

30 The United States witness protection programme has been successful because no witness has ever been killed while following the program’s rules.

31 Information provided by Mr. Victor Stone, Office of Enforcement Operations, U.S. Department of Justice.

reportedly works well. Due to a history of human rights abuses and corruption by the government, this system was developed as a way to gain the trust of civil society. The other advantage of this system is that NGOs often have better resources than local government institutions as well as knowledge of local conditions and culture.

Another example comes from Argentina.

In “2006, when the first “state terrorism” trial in Argentina was coming to an end, Julio Lopez, a witness who had identified the main perpetrator in court, disappeared...(and had never been found). In the ensuing months, the country was hit by a wave of threats and in some cases, attacks on witnesses, lawyers, human rights defenders, prosecutors and judges involved in cases against member of the former military regime.”³²

As a result, the government began looking at the issue of witness protection in these cases. Although the issues involved are too many for further discussion here. The situation in Argentina points to not only failures of existing witness protection capabilities but likely also to other issues in the criminal justice system. One should keep in mind that witness protection is but one tool of a criminal justice system that relies upon the effective and appropriate responses in other areas.

3. The Rise of Witness Protection Programmes

The last few years has seen a rapid rise in the number of states that have established or are establishing witness protection programmes. Why is this happening? As mentioned earlier, the increased impact of organized criminal and terrorist groups is a factor. Perhaps an additional reason is the need for regional and international cooperation for the protection of witnesses. In a small country where everyone knows one another or where cultural or linguistic differences will easily identify an outsider, it is perhaps more imperative to have the ability to cooperate with other countries for the protection and relocation of witnesses. However, to do this requires the institutionalization of a programme that will have the knowledge and specialized expertise (protection officials, psycho-social workers, doctors, administrators for witness assets, etc.), services and other resources to manage all the elements required to relocate witnesses and family members, and to have the personal contacts that are so important in cooperating with the programmes of other countries.³³

4. Witness Protection at the International Courts and Tribunals

At the international level, it is apparent that witnesses are no less important for the success of the work of the International Criminal Court (ICC) and other special courts and tribunals.³⁴ The Rome Statute contains important provision for the protection of victims and witnesses. Article 68(1) provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Furthermore, ICC case law has interpreted the Rome Statute broadly as to who is entitled to protection.

The work of the ICC, and other international tribunals, in protecting victims and witnesses is complicated by several factors. Unlike national courts, they do not have their own police force that can protect their witnesses nor do they have territorial jurisdiction to keep or relocate them. Moreover, many of the

³² *The protection of witnesses of serious human rights violations: Cases in Argentina*, Federico Borello, 2010.

³³ Some evidence of the need for dedicated programmes with specialist expertise with the ability to provide the range of social, educational and support services normally provided by protection programmes comes from the experience of countries with multiple local police authorities providing witness protection services. Police forces may use different standards and criteria. For those relocating witnesses, including abroad, these issues along with coordination with different local authorities can become problematic. Further, it is probably not easy or resource practicable for all but the forces of the larger cities to have and to maintain the experience, expertise and/or familiarity with issues relating to domestic and international relocation. As a result, there is a move towards providing a centralized policy making and coordinating body for witness protection programmes that operate at local levels. This issue requires, however, some further examination.

³⁴ The Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Tribunal for Rwanda (ICTR) and the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL).

victims and witnesses of these courts and tribunals come from war, conflict or post-conflict zones where the rule of law is lacking. It is difficult to maintain their safety when it is precisely those institutions that are normally charged with protecting the public, such as the police and the military, who are the potential aggressors, or are incapable or indifferent. For such witnesses, relocation abroad may be the only viable option. However, this may mean not just severing all ties with family and friends left behind but also may require adjusting to life in an entirely different culture and environment.

Yet it is often difficult for the ICC to find countries that will take in its victims and witnesses due to legal and cultural difference, for example, the practice of polygamy can prove problematic for many countries. Finally, there is the cost factor of supporting witnesses who are not likely to ever have the means in a foreign environment to support themselves. Perhaps as a result of the above, only a handful of countries have entered into memorandums of understanding agreements for cooperation in the relocation of witnesses with the ICC. Another issue that has not been well defined is who is responsible for protecting witnesses when tribunal proceedings conclude. This has led the International Tribunal for Rwanda and the Special Court for Sierra Leone, for example, to provide training and support to national authorities. These are just some of the issues and challenges related to the protection of victims and witnesses by the ICC and other international courts.³⁵

IV. LEGAL BASIS FOR WITNESS PROTECTION

A. National Legislation

As noted previously, witness protection programmes have commonly developed because of need. Perhaps as a result, some countries progressively developed witness protection capabilities and programmes without a specific legislative basis, such as the Netherlands, Norway and New Zealand. In these countries, policy, coupled with the agreements signed with witnesses admitted to the programme, provide a sufficient and adequate framework for the programme's operations.³⁶ It is further interesting to note that countries without a specific legal basis include both common law as well as civil law countries that would normally require a legal basis.

However, it is recommended that covert protection programmes be grounded in policies and a legal framework due to their impact on the rights of the accused, the life of the protected persons and due to the financial resources needed to fund such programmes. In addition, other laws, such as criminal procedure codes and rules of court, will likely need to be reviewed and updated in order that they can provide for procedural protections (if not contrary to other laws).

At minimum, legislation should specify:

- i) protection measures that may be used;
- ii) application and admission criteria and procedures;
- iii) the authority responsible for the programme's implementation;
- iv) criteria upon which a witness may be terminated from the programme;
- v) the rights and obligations of the parties;
- vi) that the programme's operations are confidential;
- vii) provide for penalties for the disclosure of information about protection arrangements or about the identity or location of protected witnesses³⁷

B. Bi-lateral and Multi-lateral Treaties and Regional Agreements

Witness protection authorities wanting to cooperate for the purpose of witness relocation will need

³⁵ For an analysis and information about the work related to protection of victims and witnesses of the ICC and the International Tribunals, see, *The Justice Sector Afterthought: Witness Protection in Africa*, Chris Mahony.

³⁶ UNODC *Good Practices*, p.44.

³⁷ *Ibid*, p.44-45.

some form of informal agreement directly between the authorities which may be modified on a case by case basis. Some protection authorities are able to operate simply one protection authority to another. However, probably more countries need some additional level of agreement which can be at the institutional level (between police agency and ministry). An agreement can be as simple as, the Ministries of X of State A and the Ministry of X of State B agree to cooperate for the protection of relocated protected witnesses.

States can ratify bi-lateral or multilateral treaties. One example of countries that went the treaty route is the Baltic States (Estonia, Latvia and Lithuania). However, due to the length of time that treaties can take to negotiate and ratify, this is the least practical solution. States can also join framework agreements done as part of regional organizations.

C. International Conventions

Finally, states can use International Conventions as a basis for cooperation. When Slovenia drafted its witness protection law, it did not include a provision that mentioned international cooperation for the relocation of witnesses. However, Slovenia was a Party to the UNTOC, so it used this Convention as a basis for cooperation with a country for this purpose until it was able to amend its witness protection legislation.

The UNTOC and the UNCAC both contain provisions relating to the need to protect witnesses and other persons from potential retaliation or intimidation with respect to the giving of testimony.³⁸ Under both Conventions protective measures could include physical protection, relocation, non-disclosure or limitations on the disclosure of information concerning identity or whereabouts and by allowing the use of testimony via communication technology such as, video links.³⁹ The Protocol against Trafficking in Persons contains provisions in Article 6 regarding assistance to and protection of victims of trafficking in persons, and the Protocol against the Smuggling of Migrants contains in Article 16 provisions concerning protection and assistance measures. There are many other Conventions, such as those relating to human rights, that touch up the need to protect victims and witnesses.

V. ELEMENTS OF A WITNESS PROTECTION PROGRAMME

Regardless of whether there is a legal framework on or not, what can be said about the majority of witness protection programmes is that they tend to operate on the basis of similar principles and rely on the same key elements, including the following:

- i) Participation must be voluntary;
- ii) Participation is for life, if required. However, the financial support provided will be for a limited duration;
- iii) Participation should not be seen as a reward for testimony;
- iv) Participation should not make the witness better off than he/she was before entering the programme;
- v) All existing legal obligations must be kept;
- vi) Due to the emotion hardship for witnesses and their families and due to the significant resources required of the state, relocation and change of identity are **tools of last resort**.

A. Location and Institutional Structure of the Programme

“Witness protection programmes can be institutionalized in different ways. For some countries, the police force is the programme’s natural environment, as out-of-court protection of witnesses is seen primarily as a police function. For others, separating protection from the investigation is of higher value in order to ensure objectivity and minimize the risk that admission to the programme unwittingly may become an incentive for witnesses to give false testimony that they believe the police or prosecution wants or needs.”⁴⁰

³⁸ UNTOC, Article 24, Para 1 and UNCAC, Article 32, Para. 1.

³⁹ UNTOC, Article 24, 2 (b) and UNCAC, Article 32 2(b).

Where a programme is located within the police force, “the isolation and autonomy (organizational, administrative and operational) of the covert unit responsible for the implementation of the programme from the rest of the police force is of great importance.”⁴¹

In a second category of countries, programmes are separated organizationally from the police and sit under the equivalent of the Ministry of Justice, the Ministry of the Interior or the State Prosecutor.⁴²

“In a third group of countries, programmes are implemented by a multidisciplinary body consisting of high-level representatives of the law enforcement, prosecutorial, judicial and government authorities and sometimes from civil society. That body takes decisions on such matters as admission to the programme and termination. It may also exercise some oversight over implementation of the programme and make budgetary submission to the Government.”⁴³

There are additional models, such as that of Brazil where witness protection falls under a commission for human rights and Kenya, which in 2010 created an independent witness protection agency which also has an oversight body.

Within these categories, witness protection programmes can further organize themselves to have one sub-unit dealing with victims and other dealing with collaborators of justice (former criminals).

Regardless of the location of the programme, the key issues to a programme’s success seem to be, “separation from the investigation, confidentiality of procedures and operations, and organizational autonomy from the regular police.”⁴⁴

B. Covert Nature

Witness protection programmes are covert units meaning all information about witnesses and the operational actions taken by the programme must be kept confidential and have their own databases for storing information. Since the greatest risk of compromise to a programme is the human element, all staff, including administrative personnel, must be vetted to ensure the highest possible level of security. Only by setting the highest professional standard can those responsible for the programme (and for the lives of the protected witnesses) meet its demanding requirements.⁴⁵

C. Transparency and Accountability

“Transparency is a basic principle of good governance and witness protection programmes should similarly be held accountable for money dispensed.” However, receipts for hotel stays or plane tickets may reveal the witness’s true identity or location. Therefore, in order to maintain confidentiality, “witness protection programmes are usually subject to special procedures for auditing and reporting.”⁴⁶

D. Neutrality

Admittance to a protection programme should never be viewed by the protected person (or the public) as a reward for their cooperation. To safeguard their neutrality, witness protection programmes endeavor to, admit witnesses according to a set of predetermined criteria among which the level of threat is a key determinant; maintain separation from investigation agencies (as noted above); and make objective decisions independently from the prosecution after obtaining and evaluating the prosecution’s views about the

40 UNODC *Good Practices*, p.45. Countries in this category include, Australia, Austria, Canada, Hong Kong Special Administrative Region of China, New Zealand, Norway, Slovakia, and the United Kingdom.

41 *Ibid*, p.46.

42 Columbia, the Netherlands, the Phillippines, South Africa and the United States.

43 Italy and Serbia both have this model. *Ibid*, p.46.

44 *Ibid*.

45 *Ibid*, p.53.

46 *Ibid*, p.57.

importance of the case and the evidence offered by the witness.⁴⁷

E. What are the Criteria for Admission to a Programme?

A request to be admitted to a protection programme can be made, depending upon the jurisdiction, by the witness, a law enforcement agency, a prosecutor or a judge. There should be standard procedures for the information required when making a request. Then the request would generally be forwarded to the decision-making authority with a recommendation on whether or not the request should be accepted. This 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.⁴⁸

Upon getting a referral request for protection, the witness protection programme will conduct an assessment that will look at the following elements:

- a) The level of threat to the person's life;
- b) The personality and psychological fitness of the person to adjust to and follow the stressful rules of the programme;
- c) The danger that the person may pose to the public if relocated under a new identity (typically applies to justice collaborators);
- d) The critical value of the witness's trial testimony for the prosecution and the impossibility of gaining such information from another source;
- e) The importance of the case;
- f) The family situation of the person, such as, number of family members that would need to be included, their ages, any medical issues or special needs, their criminal records, etc.⁴⁹

1. The Threat Assessment

The threat to a witness must be against their life or to family or close associates. Whether a threat exists will be determined by a threat assessment which may be performed by the witness protection unit alone or in cooperation with the police. The importance of the threat assessment can not be overstated as it is the key tool in determining whether a witness should be admitted to a programme or given alternative protective measures. This assessment is used to identify, assess and manage the risk and potential perpetrators of targeted violence against a witness and may be carried out periodically in order to determine whether to continue, change, or discontinue protective measures. A threat assessment should address issues such as, i) the origin of the threat (group or person); ii) the patterns of violence; iii) the type of organization and its culture (for example, street or motorcycle gang, Mafia-type group, or terrorist cell); iv) the group's capacity, knowledge and available means to carry out threats.⁵⁰

In contrast, "a risk assessment examines the chances of the threat materializing and assesses how it can be mitigated. These assessments are conducted according to set standards and using a matrix. Action is taken to reduce the probability of the threat being carried out. The risk assessment is conducted by the protection authority and is a key factor in providing tailor-made protection to suit the needs of the witness."⁵¹

2. Suitability of a Witness

In deciding whether to admit a person to a protection programme, the authority will have to balance the threat against the ability of the witness (and family members) to maintain secrecy otherwise they risk putting themselves and the programme's integrity in jeopardy. Another factor is whether there is a likelihood of relapse into criminal activity. Most protected witnesses are so-called career criminals who have never held legitimate employment and only know a life of crime. Finally, there is the person's willingness to abide by

47 Ibid, p.56.

48 Ibid, p.61.

49 Ibid, p.61.

50 Ibid, p.62.

51 Ibid, p.63.

the strict limitations imposed by protection programmes on their personal life. Experience shows that over time, many witnesses refuse to resign themselves to the restrictions imposed and either decides to leave the programme voluntarily or are removed.⁵²

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, the witness provide as full and comprehensive statement.... This is to ensure that the protection programme or the assessment process will not be called into question in a court as inducement for the witness’ cooperation.”⁵³

4. The Agreement between the Protected Person and the Witness Protection Authority

Upon admission to a programme, witnesses and other protected persons are required to conclude a memorandum of understanding (MOU), which defines the rights and obligations of both parties. The MOU usually includes:

- 1) “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;
- 2) the scope and character of the protection and assistance to be provided;
- 3) a list of measures that could be taken by the protection unit to ensure the physical security of the witness;
- 4) the obligations of the witness and possible sanctions for violations;
- 5) the conditions governing the programme’s termination.”⁵⁴

Some of the obligations of the witness include:

- 1) to provide truthful and complete testimony;
- 2) to comply with the protection authorities’ instructions and not to compromise any assistance provided;
- 3) not commit a criminal offenses;
- 4) to disclose all information about past criminal history as well as financial and legal obligations;
- 5) to fulfill their legal obligations to third parties prior to entering the programme, to the extent possible. Recurring financial obligations can continue to be fulfilled following admission to the programme through an intermediary, usually the protection authority.⁵⁵

Some of the obligations of the protection authority include:

- 1) Carrying out protection measures;
- 2) Arranging all matters related to a relocation;
- 3) Providing financial support for a limited duration;
- 4) Providing initial assistance with job training and finding employment;
- 5) Providing counseling and other social services, including appropriate education⁵⁶

F. Relocation and Identity

Witnesses can be relocated temporarily or permanently and they can be relocated domestically and abroad. International relocation is at the top end of witness protection services owing not only to the significant costs, resources and impact on the witness but also due to the complicated nature of international relations. As noted previously, for small countries, the relocation of witnesses abroad is sometime the only means of guaranteeing effective protection. If the level of threat warrants, a witness will need to enter the protection programme of the receiving country, where he or she will be provided with a new identity and

52 Ibid, p.63-64.

53 Ibid.

54 Ibid, p.65.

55 Ibid, p.67.

56 Ibid.

personal documentation.

Terms and conditions between the sending and receiving country are negotiated and set forth in an agreement. Generally, the sending authority hands over responsibility for the safety of the protected persons and is obliged to go through the receiving authority for any further contact with the witness. The receiving country usually assumes all costs related to the protection measures. However, others negotiate a cost-sharing agreement with the sending country and yet others require full reimbursement.⁵⁷

With respect to the integration of the protected person(s), the receiving country may assist them in finding employment and provide them with training, language courses, health care and other social benefits. The immigration laws of the receiving country will determine whether protected persons are allowed to work and may be able to issue them temporary work permits. Financial payments should take into account the standard of living of the witness prior to entering the programme. However, only legally obtained assets are taken into account in this assessment

Identity change is not done the same way in all programmes. In some cases, the identity change is a permanent change in others, a new identity is provided. If the witness leaves or is terminated from the programme, he/she can go back to their former identity.

G. Implication of Relocation and Identity Change for the Witness

The measures of relocation, especially international relocation, and identity change are last resort measures due to their hardship on witnesses. The process involves severing all ties with the past life, including all property that might identify or be traced back to the witness. If the protected person acquired the property illegally, most programmes do not allow them to keep the property or assets.

Relocation and identity change can be especially difficult for accompanying persons, especially children. Also electronics and internet use provides serious challenges for protected persons and for the programmes. Witnesses can easily be traced by electronic devices, cell phone and the internet. It is not possible for any programme to monitor every witness' use.

H. Financing

The costs associated with setting up a witness protection programme are among the main reasons countries hesitate to begin. There is no doubt that the costs for such programmes are expensive and this is the main reason why such programmes must be aimed at only the most important cases and within these, only for those witnesses who meet other criteria previously discussed.

The costs needs to be weighed against the possible benefits, such as disruption or dismantling of criminal groups by being able to get to their leaders, shorter investigations and more efficient high level prosecutions.

In the beginning, witness protection programmes tend to be too ambitious and seek to cover too many witnesses. Over time, strained resources and greater experience will allow for stricter criteria to be applied to limit the number of participants. Even so, it is not easy to predict how many cases in the future will require the services of a protection programme. For these reasons, it is important that when preparing a budget, the concept of sustainability must be factored in. Funds need to be adequate to sustain relocation of witnesses for some years. As protection is a long-term commitment, expenses are cumulative. Even after the end of the initial resource-intensive period of relocation, some aftercare is often provided through periodic threat assessment and emergency responses to counter any unexpected resurgence of the threat.

Countries where a family unit means an extended family face higher costs per witness. In some cases, even where the number of cases decreases, costs can remain stable or even increase. This can occur because

⁵⁷ Ibid, p.84.

attention is focused on more important case where strong criminal groups are involved, making the application of protection measures more vigorous and hence, more expensive.

Basic costs include:

- a) Premises, equipment and training
- b) Staff salaries and overtime;
- c) Travel costs
- d) Psychological assessment and counseling for witnesses (and for staff) if a person who can do these is not hired on a full-time basis;
- e) Financial allowances/payments to witnesses
- f) Other costs of support, such as vocational, education, language training.

Expenses differ from state to state, and are dependant upon some of the following variables:

- a) Existence of and use of alternative police arrangement for emergency and temporary security provisions;
- b) Admission criteria;
- c) Socio-cultural environment which will impact how many family member will generally need to accompany a witness;
- d) The duration of stay in a programme;
- e) Cost of living, including in relocation areas;
- f) Fast and significant changes in the inflation rate;
- g) Overreaching ability of organized criminal groups (for how long? Inside the entire country as well as in other jurisdictions?)
- h) The efficiency of a criminal justice system, which means how long a person has to be protected before the trial can greatly increase the need for protection and its costs.

In order to fund a programme, it is important to have a regular source of funding and to have some emergency funds in reserve. Funding might also come from the proceeds from the assets that witnesses entering the program are obliged to hand over if acquired by illegal means. However, it is inadvisable to fund programmes solely through sources that could vary year to year such as through proceeds of asset forfeitures.

VI. RECOMMENDATIONS FOR STATES

The experience of others provides some recommendations for those states wanting to provide protection measures and even establish dedicated witness protection programmes. First, counties can begin to gain experience by using police and procedural protection measures. These measures when applied appropriately by trained personnel can provide adequate protection for the vast majority of witnesses in need, keeping in mind that protection measures are just one of other important tools that must be collectively and effectively applied. If the legislative framework is not up to date or does not allow for needed measures, establish an interagency task force that can educate itself on what is wrong and what could be improved. Such as task force should ideally embrace officials of relevant law enforcement and judicial authorities, including prison authorities, other governmental agencies, persons responsible for legislative drafting and policy making, authorities, and NGOs, academics institutions or civil society institutions in order that they will understand and support any required changes.

For those moving to the establishment of covert protection programmes, it is suggested that they take serious the need to prioritize the kind of cases the protection programme will be used for as well as to properly and effectively use threat assessments. All actors involved in this process should be clear about what a witness protection programme is intended to provide and why. The term, “a tool of last resort” can not be understated.

One of the common mistakes of countries is to want to and try to protect too many witnesses at the

beginning. Instead, programmes should begin by taking just a few witnesses in a year in order to gain experience and confidence. It has to be remembered that the integrity of any programme - keeping witnesses safe and keeping operations confidential- is crucial to its long-term viability.

With respect to funding, it is difficult in the beginning to predict costs as there is a cumulative effect for each witness; moreover extended families will quickly drain resources. A safe rule to go by is to expect the unexpected by ensuring there is some reserve funding in case of emergencies. At the same time, protection programmes need to progressively build cooperation with other counties. This too takes time because cooperation in this area requires the trust and confidence of potential partners for the relocation of witnesses.

Finally, due to its nature, the community of witness protection authorities is a close group and most are willing to provide expertise and other support to developing programmes.