FOURTH REGIONAL SEMINAR ON GOOD GOVERNANCE FOR SOUTHEAST ASIAN COUNTRIES

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

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INDEX

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

FOREWORD

It is my great pleasure and privilege to present this report of the Fourth Regional Seminar on Good Governance for Southeast Asian Countries, which was held in Manila from 7 – 9 December 2010. This was the second time to hold a Good Governance Seminar in Manila and it was a pleasure to visit the capital city of the Philippines once again, and to experience the wonderful hospitality and friendliness of our Philippine hosts, friends and colleagues.

The main theme of the Seminar was "Securing Protection and Cooperation of Witnesses and Whistle-blowers" and it was attended by 22 criminal justice practitioners from Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand and Vietnam. The Seminar was co-organized by UNAFEI and the Department of Justice of the Republic of the Philippines.

Witnesses and whistle-blowers play a significant role in the criminal justice process, and how to protect them and secure their cooperation is a shared concern among law enforcement authorities all over the world. This shared concern is reflected in various articles of the United Nations Convention against Transnational Organized Crime and its Protocols, and the United Nations Convention against Corruption. To actually implement the measures provided by those conventions and achieve success, it is indispensable to develop each country's criminal justice practitioners' knowledge and expertise of how to effectively protect witnesses and whistle-blowers and obtain their cooperation. The purpose of this Seminar was to become familiar with the current situation of this global issue: how to secure protection and cooperation of witnesses and whistle-blowers, and to broaden knowledge thereof.

Owing to the very well prepared and informative presentations and contributions given by the participants and Visiting Experts, and the lively discussions of the issues raised therein, the three-day Seminar concluded with all attendees' improved knowledge of this important issue and its particular situation in Southeast Asian countries. Information on beneficial practices employed by international colleagues and useful international methods of addressing the protection of witnesses and whistle-blowers were shared and exchanged.

On the basis of the foregoing, the participants could agree upon and adopt a series of practice-oriented recommendations as the final document of this Seminar. As Director of UNAFEI, I genuinely hope that these recommendations will contribute significantly to enhancing cooperation among Southeast Asian countries to fight against organized and economic crime, including corruption.

It is my pleasure to publish the recommendations, and this Report of the Seminar, as part of UNAFEI's mission, entrusted to it by the United Nations, to widely disseminate meaningful information on criminal policy.

Finally, I would like to express my sincere and deep appreciation, on behalf of UNAFEI, to the co-organizer, the Department of Justice of the Republic of the Philippines, for its enormous contribution in convening the Fourth Regional Seminar. Without its members' expertise, professionalism and tireless efforts, this meeting could not have been such a success.

Tatsuya Sakuma
Director, UNAFEI

November 2011

INTRODUCTION

Opening Remarks by
The Honourable Francisco F. Baraan III
Undersecretary, Department of Justice,
Republic of the Philippines

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Introductory Remarks by
Mr. Haruhiko Ukawa
Deputy Director, UNAFEI

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Presentation by
Mr. Severino H. Gaña
Senior Deputy State Prosecutor,
Department of Justice,
Republic of the Philippines

OPENING REMARKS

The Honourable Francisco F. Baraan III
Undersecretary, Department of Justice
Republic of the Philippines

His Excellency, the Ambassador of Japan, Mr. Makoto Katsura; Director of UNAFEI, Mr. Masaki Sasaki; our visiting experts; the participants of this seminar from the Southeast Asian countries of Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Thailand and Vietnam.

My dear participants of this three-day seminar: On behalf of the Department of Justice, the sponsor of this seminar, I welcome all the participants, especially our foreign guests, to our country – the Philippines. I also extend a welcome from the Secretary of Justice, Secretary Leila M. De Lima, who is now in Washington D.C., attending an international conference on corruption that requires the attendance of many secretaries of justice from all over the world.

Why do some crimes go unpunished? Why do criminals just go on their merry way? The big names and the big fish, the high and the mighty, they are all almost visual. It is because they have all the means to bribe, the means to hide, the means to protect themselves; but more than that, they have the means and the motive to harass and intimidate witnesses and even kill witnesses and whistle-blowers. And in the Philippines, kill they will. A living example would be the Maguindanao massacre. Many witnesses were silenced and the killers realized that they have cultured a prevalent impunity. This is not only the case in the Philippines but in most Southeast Asian countries. So, this seminar comes at a very opportune time when the President, during his State of the Nation Address, mentioned the strengthening of the Witness Protection Program as well as the primary programmes of the new administration under his presidency. Indeed, the administration of justice will fail unless we come up with a strong, effective programme to protect and to secure witnesses and whistle-blowers. In the Philippines, for example, we have many laws intended to protect whistle-blowers. In fact, we have the Witness Protection and Security Benefit Program which was passed as early as 1991. And then we have some pending bills in the Senate: one of them, the bill of Senator Miriam Defensor-Santiago, establishes a whistle-blower bill of rights, and we have the same provisions in the impeachment proceedings in the House of Representatives. We have likewise the same provision in our Anti-Trafficking in Persons Act of 2003. Also, in our National Drug Law Enforcement and Prevention Coordinating Center, we also have this provision to protect and secure whistle-blowers and witnesses. In a very recent resolution passed by the Supreme Court, the rule of the Writ of Amparo, includes provisions for the protection and security of whistle-blowers – it is one of the important features of the Writ of Amparo. And even our many offices and agencies in the government, like the Bureau of Corrections, the Office of the Ombudsman and the Department of Social Welfare and Development, in cases of administrative proceedings, all have almost similar provisions to protect and secure whistle-blowers. And as it happens, the Philippines has good initiatives and good laws, but bad implementation - almost always. So, this is a challenge to all the participants in this seminar: that we come up with solutions to protect and secure whistle-blowers and to send the message to criminals that silencing a witness or a whistle-blower is no longer an option. Thank you very much and good day!

INTRODUCTORY REMARKS

Haruhiko Ukawa
Deputy Director, UNAFEI

It is my pleasure to open the discussions at the Fourth Regional Seminar on Good Governance for Southeast Asian Countries. This year's seminar topic, "Securing Protection and Cooperation of Witnesses and Whistle-Blowers", has two components to its subject matter: measures to secure protection, and measures to secure cooperation. The topic also mentions two groups of people as covered by these measures: witnesses and whistle-blowers.

As an introduction to the seminar, I will first provide a quick overview of the topic, and then proceed to explain the relevant laws and practices in Japan.

I. SECURING PROTECTION OF WITNESSES

Criminal justice systems rely upon witnesses to provide information and testimony necessary to detect, investigate, and prosecute criminal activity, and to convict those who are responsible for it. The ability of witnesses to fully cooperate and testify without fear is, therefore, a prerequisite for the systems to function properly and achieve their intended goals.

This is particularly true in the investigation and prosecution of organized crime and terrorist groups, for witness intimidation and retaliation are prevalent elements of their modus operandi. The same can be said about large-scale corruption. Corrupt leaders of government, bribe-taking officials, and successful businesspersons involved in the scheme, all of them powerful figures, will take advantage of whatever means are at their disposal to discourage witnesses from coming forward and cooperating with the authorities.

Against such a backdrop, Article 24 of the United Nations Convention against Transnational Organized Crime (UNTOC) and Article 32 of the United Nations Convention against Corruption (UNCAC) mandate States Parties to take appropriate measures to provide effective protection to witnesses. The relevant provisions are almost identical, and Article 32, paragraph 1 of the UNCAC reads as follows:

> Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

Witness protection in the broad sense includes the following:

(1) witness assistance and support;[1]
(2) police protection;
(3) procedural protection[2] and;
(4) witness protection programmes.[3]

We invited Ms Karen Kramer, a Senior Expert at the United Nations Office on Drugs and Crime, to speak to you about witness protection generally. She will provide you with an excellent overview including

1 "Witness assistance and support" refers to measures designed to reduce the psychological burden of witnesses and to avoid secondary victimization.
2 "Procedural protection" refers to procedural measures designed to allow witnesses to testify free of intimidation and fear.
3 "Witness protection programme" refers to a formally established programme that provides for the relocation and change of identity of the witness.

the background, objectives, and key features of witness protection programmes.

II. SECURING COOPERATION FROM WITNESSES

One important fact of life, known to all investigators and prosecutors, is that evidence that most persuasively and effectively establishes criminality often comes from tainted sources.

As criminals know much more about criminal activities and conspiracies than law-abiding citizens do, accomplice testimony plays a vital role in investigation and prosecution of organized crime and corruption. When the target of investigation and prosecution is the leader or his or her close associate within the group, testimony from accomplices and insiders is not just useful: it may be *the only means available to connect the most culpable* to criminal activity that can be proven in a court of law.

In order to encourage and facilitate the cooperation of such people, a number of countries allow authorities to offer leniency or immunity in exchange for cooperation, information, and truthful testimony. There is a growing recognition of the effectiveness and usefulness of such practices, which is reflected in Article 26, paragraph 1-3 of UNTOC and Article 37, paragraph 1-3 of UNCAC. They are similarly phrased, and the latter reads in relevant part as follows:

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence … to supply information useful to competent authorities for investigative and evidentiary purposes…;

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence …;

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence….

In some countries, notably the United States, plea bargaining and cooperation plea agreements between prosecutors and witnesses/defendants are widely utilized. You will hear from Mr. Courtney, a United States Department of Justice attaché to the U.S. Embassy in Manila, how cooperation plea agreements operate in the United States.

In other countries, including Japan, such practices are still controversial. You will hear from Ms. Zimmermann, a Legal Desk Officer working for the German Federal Ministry of Justice, about the policy discussions that took place in Germany on the subject, and how they were incorporated into a recent law change regarding Germany's so-called crown witness system.

One thing to bear in mind: while witnesses cooperating under promises of leniency are one of the main categories of participants in witness protection programmes, a fundamental difference between the two measures should not be overlooked. Leniency is offered in exchange for the witness's cooperation, but protection is not: it simply removes obstacles to full cooperation, and it should not be seen as a reward.

III. WHISTLE-BLOWER PROTECTION

"Whistle-blower" is not a precisely defined legal term. The UNCAC does not use the term. Instead, it refers to "any person who reports in good faith and on reasonable grounds to the competent authorities any

facts concerning offences established in accordance with the Convention (Article 33)."

Whistle-blowers do not necessarily become witnesses, but they play an important role of alerting the authorities to wrongful acts that would have otherwise remained unnoticed. For that reason, the UNCAC requires States Parties to "consider" incorporating appropriate measures to protect reporting persons from unjustified treatment.

IV. JAPANESE LAWS AND PRACTICES

A. Witness Protection in General

Regular police and other criminal justice authorities, notably the public prosecutors office, provide witness protection in Japan. There is no specialized agency responsible for the matter. Police protection is provided on a case-by-case basis and may be enhanced in accordance with the risk involved.

B. Witness Assistance and Support

Various forms of witness assistance and support – measures designed to reduce psychological burdens and avoid secondary victimization of witnesses – are provided especially for victim-witnesses, by both the police and public prosecutors offices.

The first step in the provision of assistance is to inform the witness of the details of the criminal procedure and to explain what to expect during the investigation and upcoming trials. In order to facilitate the understanding of the process, the public prosecutors office has prepared a 54-page easy-to-read colour booklet entitled For Victims of Crime.[4] Other assistance given by the prosecutors office includes accompanying witnesses to courthouses and introducing other organizations that can provide services, such as psychological and financial support, not within the competency of the prosecutors offices

C. Procedural Protection

The Japanese Code of Criminal Procedure and court rules provide for a wide variety of procedural measures designed to ensure that witnesses testify free of intimidation and fear:

(1) Limiting disclosure of a witness's personal information;
(2) Presence of accompanying persons for psychological support;
(3) Shielding of witnesses;
(4) Testimony via videoconferencing;
(5) Removal of defendant from courtroom;
(6) Removal of spectators from courtroom;
(7) Use of pretrial statements.

As these measures affect the defendant's right to fair and public trial and the right to confront witnesses, a careful balancing between competing interests – witness protection and the defendant's procedural rights – is essential. In Japanese law, such a balancing is reflected in the measures available and the conditions under which they may be applied.

1. Limiting Disclosure of a Witness's Personal Information

During preparation for trial and as part of pretrial discovery, prosecutors are required to notify the defence counsel of the names and addresses of their witnesses. Likewise, the prosecutor's evidence, which may contain personal information of witnesses, will be disclosed. While such information cannot be suppressed entirely, the Code allows for the possibility to delay or set appropriate conditions on the disclosure in order to protect the witnesses.

4 The contents of the booklet (English version) can be accessed at the following link: http://www.moj.go.jp/ENGLISH/CRAB/crab-02.html

2. Presence of Accompanying Persons for Psychological Support

The court, after hearing the opinions of the prosecutor and of the defendant or his/her counsel, may allow any witness to be accompanied by an appropriate person during the testimony if the witness is likely to feel extreme anxiety or tension. Accompanying persons are usually a family member, a psychological counsellor, or a police officer who has been providing assistance from an early stage in the investigation. The role of the accompanying person is to quietly sit by and provide mental support, and they are prohibited from disturbing the examination of witnesses or taking action that may unduly influence the testimony.

3. Shielding of Witnesses

The court, after hearing the opinions of the prosecutor and of the defendant or his or her counsel, may order that the witness be shielded from the defendant and/or from the spectators. Shielding can avoid stressful face-to-face confrontation with the defendant and help protect the witness's identity. In practice, shielding is done by setting up a screen.

There are two types of shielding: shielding from the defendant and from the spectators. As the former affects the defendant's right of confrontation, it is only available when the defence counsel is present in court. The screen will be set up in such a way that the counsel can still see the witness and observe his or her demeanour.

4. Testimony via Videoconferencing

Article 24, paragraph 2(b) of the UNTOC and Article 32, paragraph 2(b) of the UNCAC mention rules of evidence that allow testimony to be given through video link or other communication technology. The courts in Japan, after hearing the opinions of the prosecutor and of the defendant or his or her counsel, may place the witness in a different room and have him or her testify via simultaneous two-way video and audio transmissions. This option is available for (1) victim-witnesses of certain sex crimes and (2) witnesses who may feel pressure and have their peace of mind seriously harmed, if examined under ordinary procedure.

Accompanying persons, shielding, and videoconference technology may be used together.

5. Removal of the Defendant from the Courtroom

When the presence of the defendant creates pressure and makes the witness unable to testify fully, upon hearing the opinion the prosecutor and the defence counsel, the court may temporarily remove the defendant from the courtroom. In order to protect the rights of the defendant, this procedure is available only when the defence counsel is present, and after the testimony, the court is required to call the defendant back, inform him or her of the content of the testimony, and grant an opportunity to place further questions to the witness.

6. Removal of Spectators

When the presence of a particular person makes the witness unable to testify fully, the court may exclude that person from the courtroom. As this does not directly affect the defendant's procedural rights, the requirements and conditions are less strict than those that apply to removal of defendants.

7. Use of Pretrial Statements

Under the Japanese Code of Criminal Procedure, hearsay (pretrial statements of witnesses are hearsay) is generally inadmissible. However the Code recognizes several exceptions, and statements taken by a public prosecutor and signed by the witness are admissible if one of the following conditions are met:

(1) the witness is unavailable to testify at trial; or
(2) the witness takes the stand, gives different testimony, and the prior statement before a prosecutor is considered more trustworthy.

While these hearsay exceptions do not directly protect the witnesses, they indirectly do so by discouraging criminals from attempting to kill, harm, or otherwise threaten witnesses, in the hope of making them unavailable or influencing their testimony.[5]

5 Note that witness tampering usually justifies a finding that the pretrial statement is more trustworthy than the trial testimony.

8. Some Statistics

The following table shows the number of witnesses for whom procedural protection measures have been applied (source: Supreme Court of Japan). There has been a steady growth in their usage since their introduction in 2000. They are not just potential measures on the statute books but are a real and utilized part of Japan's current criminal practice.M

	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Accompanying Persons	10	38	68	51	87	68	77	70	86	555
Shielding	104	847	912	1,062	1,074	1,103	1,233	1,222	1,007	8,564
Testimony via Video-link	–	67	122	136	217	210	234	224	202	1,412

D. Witness Protection Programmes

Currently, there is no formally established covert programme that provides for relocation and change of identity of witnesses.

E. Measures to Secure Cooperation from Witnesses

Persons who testify truthfully against their accomplices usually have already made truthful admissions of their wrongdoing and have accepted responsibility for it. Naturally, these admissions will be reflected in the prosecutor's charging decision and sentencing recommendations as well as the sentencing decision by the court.

Beyond that, however, Japan is a "Land without Plea-bargaining." There is no immunity statute or crown witness system, either. Despite some powerful arguments in favour of introducing such measures, they have been controversial and have not materialized so far.

F. Whistle-blower Protection

The Whistleblower Protection Act was enacted in 2004. The Act protects persons reporting certain prescribed wrongdoing (called "Reportable Facts") from unjustified dismissal and disadvantageous treatment such as demotion and salary cuts.

Reportable Facts include criminal conduct and statutory violations relating to protection of life, body, or property, consumer interest, environmental preservation, and ensuring fair competition. The scope of the act is not limited to wrongdoing within government but extends to whistle-blowing within the private sector.

Although the Act is not without its critics – for example, it is often pointed out that violation of tax laws and election laws are not included in Reportable Facts – it is expected to promote compliance with law generally, and to contribute to the prevention and detection of various forms of wrongdoing.

V. CONCLUSION

While the need to protect witnesses is universal, how best to achieve it differs from country to country. It has to be determined in accordance with each country's legal tradition, society and culture, available resources, levels and types of criminality, and frequency of violence against witnesses. For that purpose, learning from other countries' experiences and looking into emerging international standards and good practices should be particularly useful. This Seminar is intended as an opportunity to share experiences and exchange ideas, and I hope it will contribute to developing a common understanding on this important subject of witness protection.

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

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I. SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

A witness is a crucial support in the dispensation of justice in any civilized society. Nowadays we hear a lot of squabbles about unceremonious dismissals or acquittals in sensational criminal cases. One of the reasons for this acquittal is the lack of or recantation/desistance of witnesses.

A witness happens to be the eyes and ears of the Court. The information provided by victims and witnesses aids in the identification and arrest of the suspect. The role of witnesses and the evidence they provide in criminal proceedings is crucial in prosecuting and securing the conviction of offenders.

Conversely, a person witnessing a crime usually experienced trauma. During the course of investigation the witness may suffer harassment and threats from the accused. He or his relatives and loved ones are open to the risk of being threatened, abducted, maimed or even bribed. For all these reasons, a person is reluctant in becoming a witness.

The Philippines has taken appropriate measures to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings. Republic Act No. 6981 or "The Witness Protection Security and Benefit Act" was enacted on 24 April 1991, to encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a court or quasi-judicial body, or before an investigating authority, by protecting him from reprisals and from economic dislocation.

II. RATIONALE FOR THE ENACTMENT OF THE LAW

Witnesses for fear of reprisal and economic dislocation usually refuse to appear and testify in the investigation/prosecution of criminal complaints/cases. Because of such refusal, criminal complaints/cases have been dismissed for insufficiency and/or lack of evidence. For a more effective administration of criminal justice, there was a necessity to pass a law protecting witnesses and granting them certain rights and benefits to ensure their appearance in investigative bodies/courts.

III. SALIENT FEATURES OF R.A. 6981 THE WITNESS PROTECTION SECURITY AND BENEFIT ACT

A. Section 2. Implementation of Program

The Department of Justice (DOJ), through the Secretary, formulates and implements the Witness Protection, Security and Benefit Program. The Department may call upon any department, bureau, office or any other executive agency to assist in the implementation of the Program and the latter offices shall be under legal duty and obligation to render such assistance.

B. Section 3. Admission into the Program

Any person who has witnessed or has knowledge or information on the commission of a crime and has testified or is testifying or about to testify before any judicial or quasi-judicial body, or before any investigating authority, may be admitted into the Program:

Provided, That:

a) the offense in which his testimony will be used is a grave felony as defined under the Revised Penal Code, or its equivalent under special laws;

b) his testimony can be substantially corroborated in its material points;

c) he or any member of his family within the second civil degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively, because or on account of his testimony; and

d) he is not a law enforcement officer, even if he would be testifying against the other law enforcement officers. In such a case, only the immediate members of his family may avail themselves of the protection provided for under this Act.

If the Department, after examination of said applicant and other relevant facts, is convinced that the requirements of this Act and its implementing rules and regulations have been complied with, it shall admit said applicant to the Program, require said witness to execute a sworn statement detailing his knowledge or information on the commission of the crime, and thereafter issue the proper certification. For purposes of this Act, any such person admitted to the Program shall be known as the Witness.

C. Section 4. Witness in Legislative Investigations

In case of legislative investigations in aid of legislation, a witness, with his express consent, may be admitted into the Program upon the recommendation of the legislative committee where his testimony is needed when in its judgment there is pressing necessity therefor: Provided, That such recommendation is approved by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

D. Section 5. Memorandum of Agreement with the Person to be Protected

Before a person is provided protection under this Act, he shall first execute a memorandum of agreement which shall set forth his responsibilities including:

a) to testify before and provide information to all appropriate law enforcement officials concerning all appropriate proceedings in connection with or arising from the activities involved in the offense charged;

b) to avoid the commission of the crime;

c) to take all necessary precautions to avoid detection by others of the facts concerning the protection provided him under this Act;

d) to comply with legal obligations and civil judgments against him;

e) to cooperate with respect to all reasonable requests of officers and employees of the Government who are providing protection under this Act; and

f) to regularly inform the appropriate program official of his current activities and address.

E. Section 6. Breach of the Memorandum of Agreement

Substantial breach of the memorandum of agreement shall be a ground for the termination of the protection provided under this Act: Provided, however, That before terminating such protection, the Secretary of Justice shall send notice to the person involved of the termination of the protection provided under this Act, stating therein the reason for such termination.

F. Section 7. Confidentiality of Proceedings

All proceedings involving application for admission into the Program and the action taken thereon shall be confidential in nature. No information or documents given or submitted in support thereof shall be released except upon written order of the Department or the proper court.

Any person who violates the confidentiality of said proceedings shall upon conviction be punished with imprisonment of not less than one (1) year but not more than six (6) years and deprivation of the right to hold a public office or employment for a period of five (5) years.

G. Section 8. Rights and Benefits

The witness shall have the following rights and benefits:

(a) To have a secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or tolerable level. When the circumstances warrant, the Witness shall be entitled to relocation and/or change of personal identity at the expense of the Program. This right may be extended to any member of the family of the Witness within the second civil degree of consanguinity or affinity.

(b) The Department shall, whenever practicable, assist the Witness in obtaining a means of livelihood. The Witness relocated pursuant to this Act shall be entitled to a financial assistance from the Program for his support and that of his family in such amount and for such duration as the Department shall determine.

(c) In no case shall the Witness be removed from or demoted in work because or on account of his absences due to his attendance before any judicial or quasi-judicial body or investigating authority, including legislative investigations in aid of legislation, in going thereto and in coming therefrom: Provided, That his employer is notified through a certification issued by the Department, within a period of thirty (30) days from the date when the Witness last reported for work: Provided, further, That in the case of prolonged transfer or permanent relocation, the employer shall have the option to remove the Witness from employment after securing clearance from the Department upon the recommendation of the Department of Labor and Employment.

Any Witness who failed to report for work because of witness duty shall be paid his equivalent salaries or wages corresponding to the number of days of absence occasioned by the Program. For purposes of this Act, any fraction of a day shall constitute a full day salary or wage. This provision shall be applicable to both government and private employees.

(d) To be provided with reasonable travelling expenses and subsistence allowance by the Program in such amount as the Department may determine for his attendance in the court, body or authority where his testimony is required, as well as conferences and interviews with prosecutors or investigating officers.

(e) To be provided with free medical treatment, hospitalization and medicines for any injury or illness incurred or suffered by him because of witness duty in any private or public hospital,

clinic, or at any such institution at the expense of the Program.

(f) If a Witness is killed, because of his participation in the Program, his heirs shall be entitled to a burial benefit of not less than Ten thousand pesos (P10,000.00) from the Program exclusive of any other similar benefits he may be entitled to under other existing laws.

(g) In case of death or permanent incapacity, his minor or dependent children shall be entitled to free education, from primary to college level in any state, or private school, college or university as may be determined by the Department, as long as they shall have qualified thereto.

H. Section 9. Speedy Hearing or Trial

In any case where a Witness admitted into the Program shall testify, the judicial or quasi-judicial body, or investigating authority shall assure a speedy hearing or trial and shall endeavor to finish said proceeding within three (3) months from the filing of the case.

I. Section 10. State Witness

Any person who has participated in the commission of a crime and desires to be a witness for the State, can apply and, if qualified as determined in this Act and by the Department, shall be admitted into the Program whenever the following circumstances are present:

(a) the offense in which his testimony will be used is a grave felony as defined under the Revised Penal Code or its equivalent under special laws;

(b) there is absolute necessity for his testimony;

(c) there is no other direct evidence available for the proper prosecution of the offense committed:

(d) his testimony can be substantially corroborated on its material points;

(e) he does not appear to be most guilty; and

(f) he has not at any time been convicted of any crime involving moral turpitude.

An accused discharged from an information or criminal complaint by the court in order that he may be a State Witness pursuant to Section 9 and 10 of Rule 119 of the Revised Rules of Court may upon his petition be admitted to the Program if he complies with the other requirements of this Act. Nothing in this Act shall prevent the discharge of an accused, so that he can be used as a State Witness under Rule 119 of the Revised Rules of Court.

J. Section 11. Sworn Statement

Before any person is admitted into the Program he shall execute a sworn statement describing in detail the manner in which the offense was committed and his participation therein. If after said examination of said person, his sworn statement and other relevant facts, the Department is satisfied that the requirements, it may admit such person into the Program and issue the corresponding certification.

If his application for admission is denied, said sworn statement and any other testimony given in support of said application shall not be admissible in evidence, except for impeachment purposes.

K. Section 12. Effect of Admission of a State Witness into the Program

The certification of admission into the Program by the Department shall be given full faith and credit by the provincial or city prosecutor who is required not to include the Witness in the criminal complaint or information and if included therein, to petition the court for his discharge in order that he can utilized as a

State Witness. The Court shall order the discharge and exclusion of the said accused from the information.

Admission into the Program shall entitle such State Witness to immunity from criminal prosecution for the offense or offenses in which his testimony will be given or used and all the rights and benefits provided under Section 8 hereof.

L. Section 13. Failure or Refusal of the Witness to Testify

Any Witness registered in the Program who fails or refuses to testify or to continue to testify without just cause when lawfully obliged to do so, shall be prosecuted for contempt. If he testifies falsely or evasively, he shall be liable to prosecution for perjury. If a State Witness fails or refuses to testify, or testifies falsely or evasively, or violates any condition accompanying such immunity without just cause, as determined in a hearing by the proper court, his immunity shall be removed and he shall be subject to contempt or criminal prosecution. Moreover, the enjoyment of all rights and benefits under this Act shall be deemed terminated.

The Witness may, however, purge himself of the contumacious acts by testifying at any appropriate stage of the proceedings.

M. Section 14. Compelled Testimony

Any Witness admitted into the Program cannot refuse to testify or give evidence or produce books, documents, records or writings necessary for the prosecution of the offense or offenses for which he has been admitted into the Program on the ground of the constitutional right against self-incrimination but he shall enjoy immunity from criminal prosecution and cannot be subjected to any penalty or forfeiture for any transaction, matter or thing concerning his compelled testimony or books, documents, records and writings produced.

In case of refusal of said Witness to testify or give evidence or produce books, documents, records, or writings, on the ground of the right against self-incrimination, and the state prosecutor or investigator believes that such evidence is absolutely necessary for a successful prosecution of the offense or offenses charged or under investigation, he, with the prior approval of the department, shall file a petition with the appropriate court for the issuance of an order requiring said Witness to testify, give evidence or produce the books, documents, records, and writings described, and the court shall issue the proper order.

The court, upon motion of the state prosecutor or investigator, shall order the arrest and detention of the Witness in any jail contiguous to the place of trial or investigation until such time that the Witness is willing to give such testimony or produce such documentary evidence.

N. Section 15. Perjury or Contempt

No Witness shall be exempt from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion pursuant to this Act. The penalty next higher in degree shall be imposed in case of conviction for perjury. The procedure prescribed under Rule 71 of the Rules of Court shall be followed in contempt proceedings but the penalty to be imposed shall not be less than one (1) month but not more than one (1) year imprisonment.

O. Section 16. Credibility of Witness

In all criminal cases, the fact of the entitlement of the Witness to the protection and benefits provided for in this Act shall not be admissible in evidence to diminish or affect his credibility.

P. Section 17. Penalty for Harassment of Witness

Any person who harasses a Witness and thereby hinders, delays, prevents or dissuades a Witness from:

(a) attending or testifying before any judicial or quasi-judicial body or investigating authority;

(b) reporting to a law enforcement officer or judge the commission or possible commission of an offense, or a violation of conditions or probation, parole, or release pending judicial proceedings;

(c) seeking the arrest of another person in connection with the offense;

(d) causing a criminal prosecution, or a proceeding for the revocation of a parole or probation; or

(e) performing and enjoying the rights and benefits under this Act or attempts to do so, shall be fined not more than Three thousand pesos (P 3,000.00) or suffer imprisonment of not less than six (6) months but not more than one (1) year, or both, and he shall also suffer the penalty of perpetual disqualification from holding public office in case of a public officer.

IV. ISSUES AND CHALLENGES

A. Admission to Witness Protection Program

Under the law a person who is "testifying or about to testify before any judicial or quasi-judicial body" can be admitted in the program. Provisional coverage for a period of ninety (90) days, subject to re-evaluation, is allowed for witnesses under serious threats so that they can be given certain benefits even if all the required documents for application have not yet been completed. Although application for admission requires strict compliance with statutory requirements, stringent vetting procedures and threat evaluation, the program has liberalized admission requirements especially when threat level on bona fide witnesses in media and political killings is high.

B. Lack of Intelligence and Security Force

Presently, the Program has no existing intelligence and security force. It has to rely to other law enforcement agencies to augment the temporary services of the Intelligence Security and Operations Group (ISOG). Under the set-up, Mission Order of ISOG personnel are issued either by the National Bureau of Investigation (NBI) or the Philippine National Police (PNP).

In the past there were plans for the establishment of an organic security force to strengthen the Program's organizational structure. From the inception of the Program the protection and security of its witnesses have mainly been provided by its Intelligence Security and Operations Group (ISOG) composed of contractual employees most of whom came from the police and military service. Augmentation, as may be necessary, is provided by the National Bureau of Investigation (NBI) and Philippine National Police (PNP) with whom the Program has an existing Memorandum of Agreement.

The plan however has been shelved mainly because due to the prevailing economic crisis, drastic change (formation of new bureaucracy, creation of plantilla positions) will weigh heavily on its weak logistical support which may be better prioritized for the witnesses's basic needs.

Moreover, creation of plantilla positions may seem counter to the Program's highly confidential nature which requires utmost trust and confidence in its employees.

C. Weak Support System

Witnesses often decline to testify for the prosecution not only because of fear of physical harm but more often because of economic dislocation. Through the years the inventory of witnesses and their dependents have dramatically risen together with the high number of cases of national interest, political and Extra-Judicial Killing cases. However, the program has to work on a shoe string budget to fund judiciously and effectively allocate its meager resources to witnesses-clients and to support its administrative and operational requirements.

Although the program provides psycho-social counseling to witnesses as maybe necessary, there is no support system for recreation and self development for witnesses for them to become productive, alongside the protecting and security aspect of the program.

Much as the Program hopes to enhance witness benefits this cannot be done unless the budgetary requirements be made available to them.

D. Uneven Application of the Law

Under RA 6981 any person who has witnessed or has knowledge or information on the commission of the crime and has testified, is testifying or about to testify may be admitted provided that he is not a law enforcement officer even if he would be testifying against other law enforcement officers.

Under the law, policemen and military are not qualified to be admitted under the program; however, in cases in which these law enforcers are testifying against their superiors, who have power and authority over their promotions, assignments and other aspects, it is simply impossible for them to come forward and testify without protection.

In such a case, only the immediate members of his family may avail themselves of the protection provided under the WPP law. However, the WPP has issued Certificates of Admission to police officers with a proviso that only immediate members of his family may avail of the protection provided under the RA 6981.

E. Role of Other Law Enforcers

The law enforcer's role in protecting witnesses: In practice, while the law enforcers encourage witnesses to come forward, they do not take prompt or effective actions to protect them. Under the police force's rules, it is the responsibility of the police to give protection to any person that is being threatened, even if the person is not a witness. If protection is necessary, the police may request/recommend that the DOJ admits the person to the program once a case has been filed. Because of the lack of protection for witnesses at the early stage of the process, such as during police investigations, most cases do not progress beyond the initial stages of investigation.

V. CONCLUSION

Crimes have evolved with the progression of technology. Criminals have become more sophisticated and intelligent. If they cannot find ways to go around the laws and legal procedures, they threatened, harassed or even bribed the witnesses of justice. This extensively challenges the government in terms of law enforcement and crime prevention.

I believe that no amount of law enforcement could prevent or thwart criminal activities. We need vigilance, cooperation and support of the people in the dispensation of criminal justice system. As we impose laws and moral obligations, let us equally provide our citizens with security and protection to counteract the peril of being hunted or harassed by anti social elements. We are obliged to act on account of numerous experiences faced by the courts of witnesses turning hostile due to threats, coercion and monetary considerations at the instance of those in power, their henchmen and hirelings and other innumerable corrupt practices ingeniously adopted to smother and stifle truth. As a result truth and justice become ultimate casualties. [1]Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and

1 WITNESS PROTECTION-Bird's Eye View, A. Hariprasad.

injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution.

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

*Karen Kramer**

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 PERSPECTIVE[1]

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 size 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. Vitim 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. The 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 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 service 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 situation. 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 over stressed. 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 it's 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 he 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]

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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 due consideration should be given to balancing the witness's legitimate expectation of physical safety against the defendant' rights to a fair trial.[21]

C. Who is a "Witness"

It is worth emphasizing that the term "witness" refers to persons who gives (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 they don'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, whistle blower and witness so whistle blower 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 replace, 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 natural 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 witnesses[37]

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 programems 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 education[56]

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 progamme 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 county 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.

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS
An Overview of the Law as it stands in Germany

*Anne Katharina Zimmermann**

I. INTRODUCTION

A. The Significance of Witness Protection in General

German criminal procedure law obliges the criminal prosecution authorities to prosecute all suspects provided there are "sufficient factual indications" of a criminal offence which may be prosecuted (section 152 subs. 2 of the Code of Criminal Procedure [*StPO*][1]). This so-called principle of mandatory prosecution entails an obligation to prosecute each suspect and, if the prerequisites for this apply, an obligation to prefer charges. The principle of mandatory prosecution however encounters restrictions when it comes to serious and the most serious criminal offences, in particular from the field of organised crime, where the conspirative structures are difficult to penetrate with the existing investigation methods.

It is frequently not possible to penetrate the largely sealed off networks of groups of offenders who associate in gangs using investigation measures from the outside and to obtain the information particularly required to solve serious criminal offences. The criminal prosecution authorities hence particularly depend on information from individuals from the criminal world who can provide the necessary information on structures and on those running the operation from behind the scenes. One way of making the latter willing to testify is by "rewarding", in one form or another, information which incriminates others and leads to their conviction.

Another means of obtaining witnesses who are willing to testify, in particular in fields of crime in which factual information cannot be obtained or is difficult to obtain because of the particular level of professionalism of the offenders, is to structure witness protection so well that such witnesses lose their fear of the offenders and remain willing to testify during the entire proceedings.

B. Definition of "Organised Crime"

Because of the diverse manifestations of organised crime, it is rather difficult to find a conclusive definition. The German Federal Parliament established the following definition[2] in 1992 when adopting the "Act on Suppression of Illegal Drug Trafficking and other Manifestations of Organised Crime" (*Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität – OrgKG*)[3]:

"Organised crime is understood to mean planned commission by several parties of criminal offences (which are of considerable significance individually or as a whole), determined by the pursuit of profit and/or power, working together for a prolonged or indefinite period of time, dividing tasks, using commercial or business-like structures or use of violence or other means suitable for intimidation, or attempting to exert an influence on politics, the media, public administration, judicial authorities or the economy."

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1 German Code of Criminal Procedure (*Strafprozessordnung*), Federal Law Gazette 1987 part I, p.1319.

2 Federal Parliament printed paper 12/989; this is at the same time the practical definition which is binding on the public prosecution offices, cf. Guidelines for Criminal and Administrative Fines Proceedings (*RiStBV*) Annex E No. 2.

3 Federal Law Gazette, 1992 Part I, p.1302.

The term "organised crime" however goes further in the view of the European Union and the United Nations; accordingly, at least six of the following eleven characteristics must apply[4]:

- involvement of more than two people,
- for a prolonged or indefinite period of time,
- suspected of involvement in serious crimes,
- determined by the pursuit of profit and/or power,
- separate roles for each member,
- use of some form of discipline or control within the group,
- active internationally,
- use of violence or other means suitable for intimidation,
- use of commercial or business-like structures,
- engagement in money laundering, and
- influence on politics, the media, public administration, judicial authorities or the economy.

The scale of organised crime is made clear if one takes a look at its global annual turnover: Approximate estimates put this figure at Euro 500 to 1,000 billion. For comparison: South Korea's GDP was approx. Euro 640 billion in 2009; India's was Euro 950 billion and Germany's was approx. Euro 2,500 billion. This is therefore a phenomenon of considerable dimensions, not only in terms of criminal law, but also in economic terms.

II. THE CURRENT SITUATION, ISSUES AND CHALLENGES IN GERMANY REGARDING WITNESS/WHISTLE-BLOWER PROTECTION AND EFFORTS TO IMPROVE THE SITUATION

Witnesses in Germany are on principle obliged to appear before the public prosecution office and in court in response to a summons, to testify truthfully and to swear an oath on their testimony if requested to do so (unless the right to refuse testimony or to refuse to provide information applies in accordance with sections 52 et seqq. StPO). These are civil duties which are not established by the Code of Criminal Procedure, but are imposed as a condition, and are now explicitly provided in section 48 subs. 1 StPO. The State has the possibility to enforce this obligation through coercive procedural measures (section 51 StPO). On the basis of this obligation which has been imposed by the law, a particular obligation is incumbent on the State to protect the witness' legal interests, above all of life, limb and certain assets, if these are placed at risk as a result of the testimony.

It is important to make clear that there is a difference between witness protection (in its classical sense) and witness support and assistance measures, although there might be measures which serve both purposes. In Germany there exist a wide range of services to (victims-) witnesses regarding their assistance, e.g. information rights, psychological assistance or assistance in obtaining compensation (section 406h StPO). In the following the focus will be on witness protection measures only.

A. The Legal Basis of Witness Protection

The legislature has continually refined witness protection in the past two decades. The "Act on Suppression of Illegal Drug Trafficking and other Manifestations of Organised Crime"[5] already entailed major improvements in this field. For instance, the possibility was created for the first time to limit statements on place of residence and identity and personal particulars when examining witnesses, depending on the degree of endangerment, or to do without them altogether (section 68 StPO).

4 Art. 2 of the United Nations Convention Against Transnational Organized Crime; Annual European Union Organised Crime Situation Report (6204/1/97 ENFOPOL 35 REV 2) GD H II.
5 cf. footnote 4.

With the Act on the Federal Criminal Police Office (*Bundeskriminalamtgesetz*)[6], the legislature introduced in 1997 a special empowerment provision of the Federal Criminal Police Office for witness protection at national level.

The Witness Protection Act (*Zeugenschutzgesetz*)[7], which came into force on 1 December 1998, provided with sections 58a, 168e, 247a and 255a StPO a statutory basis for the deployment of video technology in examinations, as well as its subsequent use in the main hearing.

With the Act to Harmonise Witness Protection (*Zeugenschutzharmonisierungsgesetz – ZSHG*)[8], which came into force on 31 December 2001, the legislature finally created a clear statutory basis for measures of witness protection.

The culmination of legislative developments in witness protection for the time being is formed by the Second Victims' Rights Reform Act (*2. Opferrechtsreformgesetz – 2. ORRG*)[9], which came into force on 1 October 2009, which in particular enhanced the rights of (victim) witnesses.

1. The Witness-Protection Provisions of the Code of Criminal Procedure

Significance attaches in witness protection in criminal procedure first and foremost to the possibility not to have to state certain personal and address data, and moreover to the deployment of video technology.

(i) The Protection of Address Data

Growing significance attaches to the protection of witnesses' privacy in criminal proceedings, given that many witness are afraid of giving their personal particulars when being examined. A witness is fundamentally obliged to state his/her first and family name, birth name, age, position or trade and place of residence when being examined (section 68 subs. 1 StPO). The purpose of the provision is to avoid mistaken identity; it is however also to create a reliable basis for evaluating credibility and to make it possible for those concerned to obtain information. The obligation is then incumbent on the State to protect witnesses from their data becoming known beyond the degree that is necessary in criminal proceedings. It must however always strike a balance between the necessary protection of witnesses' rights of personality and the purposes of the criminal proceedings, in particular taking account of the right of the accused to a fair trial[10], of the degree of endangerment of the witnesses and where appropriate of the nature of the data which are to be protected.

This is ensured in Germany in many instances by a graduated system of possibilities for confidentiality being provided for, depending on the degree of endangerment, which applies both to witness examination and the bill of indictment, and to the documentation in the files. The Second Victims' Rights Reform Act has retained this graduated system, has further improved the coordination of the individual protection mechanisms, and has also appropriately expanded them with regard to witnesses' rights.

(a) Statement of the Witness' Residential Address on Examination

Even before the Second Victims' Rights Reform Act came into force, there were exceptions to the principle that certain information is to be provided (section 68 StPO). For instance, witnesses could be permitted on examination in accordance with section 68 subs. 2 sentence 1 StPO to state their business address or place of work or another address at which documents can be served, instead of their place of residence, if there is reason to fear that the witness or another person might be endangered by the witness stating his/her place of residence. Such an endangerment may be feared for instance if an attack on the witness or a third party has previously taken place or has been threatened, or if the endangerment emerges

6 Act on the Federal Criminal Police Office and on Cooperation between the Federation and the *Länder* in Criminal Police Matters (*Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten*), Federal Law Gazette 1997 part I, p.1650.

7 Act on the Protection of Witnesses on Examination in Criminal Proceedings and to Improve Victim Protection (*Gesetz zum Schutze von Zeugen bei Vernehmungen im Strafverfahren und zur Verbesserung des Opferschutzes*), Federal Law Gazette 1998 part I, p.820

8 Act to Harmonise the Protection of Endangered Witnesses (*Gesetz zur Harmonisierung des Schutzes gefährdeter Zeugen*), Federal Law Gazette 2001 part I, p.3510.

9 Federal Law Gazette 2009 part I, p.2280.

10 Codified in Article 6 the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in the version of 17 May 2002 (Federal Law Gazette II 1054).

because of criminalistic indications, criminological experience or experience of life[11].

This reduced statement of personal particulars in accordance with section 68 subs. 2 StPO was also reflected in the investigation files, given that the provision applies not only to examination by a judge, but via section 161a subs. 1 sentence 2 StPO also to examination by a public prosecutor.

In accordance with section 68 subs. 3 sentence 1 StPO, it was also possible for witnesses to be permitted not to state personal particulars on examination if there was reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the life, limb or liberty of the witness or of another person. Documents establishing the witness' identity are kept at the public prosecution office and are only included in the files when the danger has ceased (section 68 subs. 3 sentence 3 and subs. 4 StPO).

Since implementation of the Second Victims' Rights Reform Act there is now a comprehensive list in section 163 StPO to clarify that the provision contained in section 68 StPO is already to be adhered to by the police in the investigation proceedings.

Also with the aim in mind of witness protection, the right of the witness not to have to state their place of residence in certain cases was additionally expanded to the required degree (section 68 subs. 2 and 3 StPO). This possibility now also exist if there is justified reason to fear that an unfair influence will be exerted on the witness. Moreover, if there is a corresponding endangerment, the witness' information regarding his/her identity or place of residence may not be revealed in the file to the person potentially posing a risk, including after conclusion of their examination (section 68 subs. 5 StPO). The measures described which were carried out in the protection of address data however relate not only to investigation proceedings, but also to court proceedings.

(b) Statement of the Witness' Residential Address in the Bill of Indictment

In the event of an endangerment (in accordance with section 68 subs. 1 sentence 1 and subs. 2 sentence 1 StPO), it was sufficient to state in the bill of indictment the witness' address at which documents can be served (section 200 subs. 1 sentence 3 StPO). Corresponding to the measures that have been described, in order to better consider all witnesses' rights of personality (not only those of endangered witnesses), it has now been clarified by the Second Victims' Rights Reform Act that the bill of indictment does not have to contain a witness' complete address (section 200 subs. 1 sentence 3 StPO) and in special cases even only his/her name (section 200 subs. 1 sentence 4 StPO).

Because it was previous practice in Germany to state (non-endangered) witnesses' full address in the bill of indictment when they were named, this often led to the undesirable situation that the accused was hence automatically aware of the addresses of all witnesses in each set of proceedings since the bill of indictment is to be communicated to the indicted accused in accordance with section 201 StPO. It is however not necessary in the vast majority of cases for the indicted accused to know the witnesses' residential address. Where this might nonetheless be necessary in individual cases in the interest of checking credibility, he/she can be informed of the address where appropriate through inspecting the files.

Finally, when naming witnesses, their identity, place of residence or whereabouts in accordance with section 68 subs. 3 StPO is not to be disclosed, only this fact is to be indicated in the bill of indictment (section 200 subs. 1 sentence 5 StPO).

(ii) Protection by means of the Provisions on Video Examination

Not only the abovementioned data protection provisions, but also provisions on the deployment of video technology, may contribute towards effective witness protection in criminal proceedings. Firstly, the possibility exists to examine witnesses separately, with simultaneous audio-visual transmission for other parties to the proceedings (sections 168e and 247a StPO), whilst it is permissible to record witness

11. Meyer-Goßner, *StPO*, 53rd edition, 2010, section 68, margin number 12.

examinations on an audio-visual medium – video recording – for the purpose of their subsequent use in the main hearing (sections 58a and 255a StPO). The provisions are not limited to specific fields of crime or certain groups of witnesses.

(a) Simultaneous Audio-Visual Transmission

Section 168e StPO provides for the investigation proceedings that if there is an imminent risk of serious detriment to the well-being of the witness, he/she may be examined by the judge such that the judge carries out the examination separately from the other persons entitled to be present (in particular the accused and his/her defence counsel). The examination is transmitted to them simultaneously by means of an audio-visual transmission. Additionally, this video examination by the judge may be recorded and used later in the main hearing, so that the witness is spared a confrontation with the indicted accused (section 168e sentence 4 StPO).

There is however always a requirement of a concrete risk to the well-being of the witness, the cause of which must particularly lie in an examination in the presence of the persons entitled to be present.

For the main hearing, section 247a StPO provides for video examination of the witness such that the presiding judge and the other parties to the proceedings do not leave the courtroom, and the witness is in another place outside the courtroom, the examination being transmitted to the courtroom using a direct audio-visual link. The examination may take place in a separate room in the court building or in another place at home or abroad where the preconditions for audio-visual transmission are guaranteed. This is possible, firstly – as in section 168e StPO – if there is an imminent risk of serious detriment to the well-being of the witness. It may however also be carried out if the personal appearance of the witness in the main hearing is opposed by a particular obstacle.

The testimony may also be recorded in the case of a video examination in the main hearing. In fact, it should be recorded if there is a danger that the witness cannot be examined during a future main hearing (for instance in an appeal proceeding) and if the recording is required in order to establish the truth. Whether this is the case is to be decided by the court at its duty-bound discretion, albeit it follows from the manifestation as a directory provision that, should the statutory prerequisites apply, it is to be ordered as a rule.

(b) Video Recording

The recording of a witness examination on audio-visual media in the investigation proceedings is regulated by law in the shape of section 58a StPO. This recording may be played in the main hearing subject to certain preconditions (cf. section 255a StPO in conjunction with sections 251 et seqq. StPO) – in particular with the consent of the indicted accused and of his/her defence counsel, or if the witness cannot be examined in the foreseeable future. A recording should be made if the examined witness is less than 18 years of age[12] or if there is a fear that the witness cannot be examined during the main hearing and if the recording is required in order to establish the truth, section 58a subs. 1 No. 2 StPO; section 247a StPO.

(c) Possible Detriment to the Rights of the Accused

The implementation of video examination in the main hearing in accordance with section 247 StPO is at the duty-bound discretion of the court. When exercising its discretion, the court must consider that the examination of the witness in person in the courtroom (section 250 sentence 1 StPO) was regarded by the legislature as being the standard case, and hence video examination, as an exception to this principle, is contingent on preconditions subject to a narrow interpretation. Only if these prerequisites are met is there latitude for a discretionary decision. A proper balance is to be struck here between the justified interest of the

12 This age limit was increased from 16 to 18 by the Second Victims' Rights Reform Act, so that there is now greater latitude to spare the witness an encounter with the accused by means of playing the recording. This new age limit also corresponds to the age limit of many international agreements on the protection of children and juveniles.

witness (witness protection) on the one hand and the rights of the indicted accused, which also have constitutional status, to a fair trial on the other hand. In particular, the inalienable rights of the indicted accused, in addition to the presumption of innocence, also include his/her right to a legal hearing and his/her right to ask questions. Furthermore, he/she also has a right to accelerated proceedings and at the same time comprehensive clarification of the criminal offence. The indicted accused must have an effective possibility to question a witness and to question his/her credibility and reliability. All this is at least made more difficult by video examination, if not actually prevented.

The principle of examination in person (section 250 StPO) is largely granted by simultaneous transmission (section 247 sentence 3 StPO), since only the physical presence of the witness in the courtroom is done without[13]. Having said that, the duty to investigate ex officio emerging from section 244 subs. 2 StPO[14] is affected if direct communication between the parties to the proceedings, in particular between the court and the witness, is not possible, but is filtered through a technical medium. This may cause a major detriment to the formation of judicial conviction. Also, spontaneous questions on the part of both the court and of the indicted accused are made more difficult. Finally, the motivation to testify truthfully may be reduced if there is no direct confrontation with the court and the parties to the proceedings.

(iii) The Undertaking of Confidentiality

In order to make it possible to verify the statement of a witness by consulting other evidence, the court must on principle know the identity of the witness. Statements regarding the identity may therefore not be refused as a rule. A witness may however exceptionally be assured by the criminal prosecution authorities (public prosecution office or police) that his/her identity will be kept secret if there is a particular endangerment to the witness. This can be considered namely with serious crime, in particular organised crime. The statement of the witness is then presented in the main hearing by the police officer who examined the witness. This approach is however very seldom taken in practice, especially since it is not binding for the court proceedings and does not eliminate the court's duty to ascertain the truth. Detailed guidelines for this procedure are provided in Annex D to the Guidelines for Criminal and Administrative Fines Proceedings[15].

2. Witness Protection in accordance with the Act to Harmonise Witness Protection[16]

It is particularly important in proceedings related to criminal offences of organised crime to win over witnesses who are willing to testify and to maintain their willingness to testify over the entire proceedings. Criminal prosecution authorities and courts frequently and particularly rely here on witnesses who come from among the offenders and can provide valuable information particularly because of their high degree of familiarisation with the planning of the offence and its commission. The willingness of a witness to testify is contingent on guaranteeing comprehensive protection. This is not only a matter of protecting the witness him/herself, but also his/her relatives and other persons close to him/her.

With the adoption of the Act to Harmonise Witness Protection in 2001, the legislature created a statutory basis for specific witness protection measures, and hence for greater legal security in this field. The legislature opted not to limit the area of application to the fields of crime "organised crime" and "terrorism"[17]. Having said that, section 2 subs. 2 sentence 2 of the Act to Harmonise Witness Protection contains a special proportionality clause according to which witness protection measures in accordance with the Act to Harmonise Witness Protection are ultimately only considered in cases of serious crime.

(i) Scope and Competence in Application of the Act to Harmonise Witness Protection

Section 1 subs. 1 of the Act to Harmonise Witness Protection lists the prerequisites under which

13 cf. on this Fischer in JZ (*JuristenZeitung*) 1998, p.820.
14 Meyer-Goßner, *StPO*, 53rd edition, 2010, section 244, margin number 12.
15 Guidelines for Criminal and Administrative Fines Proceedings, Annex D I. (Use of informants and deployment of cooperating witnesses in criminal prosecution).
16 cf. footnote 9.
17 The Draft of the Federal Council still provided for such a restriction. (Federal Council printed paper [*BR-Dr.*] 458/98).

witness protection may be provided in criminal proceedings. The witness to be protected must be in danger specifically because of his/her willingness to testify. An endangerment which is only abstract is not sufficient. The analysis of endangerment, which is carried out by the competent witness protection units, must reveal factual indications that damage is likely to occur to the legal interests of the witness.

Admission to witness protection is contingent on it being impossible to research the facts, or to identify the accused, or on this being made much more difficult, without the statement of the person who is to be protected. Less incisive measures therefore take priority.

The witness must have consented to the protection measures; he/she may therefore not be included in a witness protection programme against his/her will.

A person must be suited for the implementation of witness protection measures. The person to be protected may for instance be unsuited if he/she makes false statements, fails to meet agreements or is unable to do so, is not willing to maintain confidentiality or commits criminal offences.

In accordance with section 1 subs. 2 of the Act to Harmonise Witness Protection, the Act also applies to relatives of the witness or accused or to other persons close to him/her, given that dangers may also threaten this group of individuals. Even if a witness or accused person were to be willing to testify, suppressing their own endangerment, this is frequently questioned when the endangerment threatens persons close to him/her.

In accordance with section 1 subs. 4 sentence 1 of the Act to Harmonise Witness Protection, witness protection measures may be terminated if one of the preconditions mentioned above did not apply (from the outset) or has subsequently ceased to apply. The termination of criminal proceedings by itself does not however entail rescission of the witness protection measures if the endangerment continues to exist (section 1 subs. 4 sentence 1 of the Act to Harmonise Witness Protection)[18].

(ii) The Witness Protection Unit, Section 2 of the Act to Harmonise Witness Protection

Special witness protection units have been set up both at the Federal Criminal Police Office and in all Federal *Länder*. These special units are as a rule separated from the investigative units, which is considered necessary for reasons of police tactics.

Inclusion in a witness protection programme is as a rule suggested by the individual criminal prosecution authority/public prosecution office dealing with the investigation proceedings; only then does the special witness protection unit start work, which then takes a formal decision on inclusion in the witness protection programme.

In accordance with section 2 subs. 2 of the Act to Harmonise Witness Protection, there is no fundamental legal right to the commencement of protection measures by the witness protection unit. Rather, the decision on the commencement, nature, scope and termination of such measures is in any case contingent on an examination of proportionality in which in particular the gravity of the offence, the degree of the endangerment, the rights of the accused against whom the testimony is to be given, and the impact of witness protection, are to be taken into account.

Accordingly, all witness protection measures taken, such as the issuance of cover documents, financial benefits or the termination of witness protection must be comprehensible at any time, thus obliging the witness protection units to provide seamless documentation. This information, which is subject to confidentiality, is kept in files in the witness protection units and does not constitute a part of the investigation file. The files are however to be made available to the public prosecution office for criminal proceedings on request. Officials of the public prosecution office and witness protection units are also obliged to provide information on witness protection in criminal proceedings in accordance with general principles. In

18 If measures in accordance with the Act to Harmonise Witness Protection can no longer be considered because the preconditions do not apply (or no longer apply), but the endangerment continues to apply to major legal interests of the individual in question, the competent police authorities must ensure their protection by taking measures under police law. In this case, the legal basis changes under which protection is granted, and possibly also the methods and the police officers in persona, but protection continues to be guaranteed.

accordance with section 54 StPO, they however require consent to testimony, which is to be granted, but may however also be restricted where appropriate, taking account of the purposes of witness protection.

The judicial control of the proceedings exercised by the public prosecution office remains unaffected (section 2 subs. 4 of the Act to Harmonise Witness Protection). Until the final conclusion of a set of criminal proceedings, all important decisions are to be taken subject to agreement between the public prosecution office and the witness protection unit. Also, once the proceedings have been concluded, the public prosecution office is to be provided with information because it may have information, for instance from follow-up proceedings, which is significant to the decision on the termination of witness protection.

(iii) Confidentiality, Obligation in accordance with Section 3 and Section 10 of the Act to Harmonise Witness Protection

The solution of the tension between properly safeguarding the necessary confidentiality of witness protection measures, on the one hand, and the right to a fair trial on the other, is served by sections 3 and 10 of the Act to Harmonise Witness Protection. Here, the safeguarding of effective witness protection is contingent inter alia on the confidentiality of the witness protection measures. Office-holders are already obliged to observe confidentiality in accordance with provisions of service law; unauthorised disclosure of information is subject to criminal punishment in accordance with section 353b subs. 1 No. 1 of the Criminal Code (*Strafgesetzbuch – StGB*)[19] – up to five years' imprisonment or a fine. In the main, the provision of section 3 of the Act to Harmonise Witness Protection hence serves to safeguard confidentiality by other persons (firstly, the persons to be protected themselves, and secondly those private individuals who can be claimed against for measures in accordance with the Act to Harmonise Witness Protection), who in accordance with the Obligations Act (*Verpflichtungsgesetz*)[20] can be "formally obliged to carry out their obligations in a conscientious manner". In this respect, these individuals are equated to office-holders, so that they are threatened in the event of violating this obligation with criminal prosecution in accordance with section 353b subs. 1 No. 2 StGB. The person to be protected will need to be placed under an obligation as a rule since the willingness to be placed under an obligation (with the consequences of criminal prosecution in the event of a violation), is a major criterion for the suitability of a person who is to be protected.

Section 10 of the Act to Harmonise Witness Protection, by contrast, regulates obligations to provide information in formal judicial proceedings, that is before courts and committees of enquiry. It must be ensured in these proceedings too that the personal particulars under which a person who is to be protected lives, as well as his/her current whereabouts, are not disclosed and hence their endangerment increased. Section 10 subs. 3 of the Act to Harmonise Witness Protection clarifies for criminal proceedings that the provisions contained in sections 68 and 110b subs. 3 StPO remain, that is that the accused and the defence do not have to accept any further restrictions. For all other court proceedings, a person enjoying protection, in derogation from the provisions of the respective rules of procedure, is entitled to make a statement on the person only regarding a former identity, and may refuse to give information which allows conclusions to be drawn as to the current personal particulars and place of residence and whereabouts.

(iv) Utilisation of Personal Data, Section 4 of the Act to Harmonise Witness Protection

Section 4 subs. 1 of the Act to Harmonise Witness Protection determines as one of the central provisions of the Act that the witness protection units may refuse to provide any information to public and non-public agencies apart from the public prosecution offices regarding personal data of the person who is to be protected, where this is necessary for his/her protection.

Section 4 subs. 2 of the Act to Harmonise Witness Protection contains a blanket clause granting public

19 Criminal Code in the version of the promulgation of 13 November 1998 (Federal Law Gazette. I p.3322), most recently amended by Article 3 of the Act of 2 October 2009 (Federal Law Gazette. I p.3214).

20 section 2 subs. 2 No. 2 of the Act on the formal Obligation of Persons who are not Tenured Civil Servants (*Gesetz über die förmliche Verpflichtung nicht beamteter Personen*) of 2 March 1974 (Federal Law Gazette Part I, 469, 547).

agencies the power, on request by the witness protection units, to block data or not to forward them. The requested authorities must comply with the request of the witness protection units unless there are prevailing third-party interests which are eligible for protection or such interests of the general public. The general clause applies to public files and registers, such as the registration, identity card, passport, driving licence and vehicle registers.

The further blanket clause contained in section 4 subs. 3 of the Act to Harmonise Witness Protection obliges agencies outside the public domain to comply with the request of the witness protection units to block the transmission of data. This provision is necessary because considerable amounts of data processing are also carried out in the private domain, for instance in banks, insurance companies and utilities. Furthermore, public and non-public agencies must ensure for the area of their internal data processing that witness protection is not impaired (section 4 subs. 4 of the Act to Harmonise Witness Protection). The reference to sections 161 and 161a StPO contained in section 4 subs. 5 of the Act to Harmonise Witness Protection makes it clear that these restrictions do not apply in relations to the public prosecution office exercising judicial control of the proceedings. The recognition and prevention of spying attempts by third parties is served by the provision that public and non-public agencies must notify each request to release blocked data to the witness protection unit (section 4 subs. 6 of the Act to Harmonise Witness Protection).

(v) Temporary Cover, Section 5 of the Act to Harmonise Witness Protection

Section 5 of the Act to Harmonise Witness Protection regulates the structure of temporary covers. Persons who are to be protected must be equipped with documents by means of which a fictitious life can be traced, which is for instance necessary to take up work or to register children for school or to change schools. As a blanket clause, section 5 subs. 1 of the Act to Harmonise Witness Protection clarifies that public agencies are empowered to produce and alter cover documents at the request of the witness protection units and to process the altered data. This refers for instance to identity cards, driving licences, wage tax cards or certificates.

The blanket clause contained in section 5 subs. 2 of the Act to Harmonise Witness Protection obliges non-public agencies to comply with the request of the witness protection units to issue cover documents. This is significant because identity cards, as well as documentation of entitlements and performance, are also drawn up in the non-public sphere to document life events.

In accordance with section 5 subs. 3 of the Act to Harmonise Witness Protection, persons to be protected may take part in legal transactions under their cover, for instance by renting apartments or holding bank accounts.

(vi) Benefits from the Witness Protection Unit, Section 8 of the Act to Harmonise Witness Protection

With the provision on benefits from the witness protection units paid to the persons to be protected, section 8 of the Act to Harmonise Witness Protection touches on one of the most controversial topics in the field of witness protection, given that it relates to the tension between effective provision of protection for endangered individuals on the one hand and the right of each accused person to put up defence and to a fair trial on the other.

Section 8 subs. 1 of the Act to Harmonise Witness Protection makes it possible to provide temporary economic support by the witness protection units unless in individual cases the persons to be protected can use their own resources. On principle, these persons must continue to support themselves. They must have recourse to their own savings where necessary.

The fundamental prohibition of economic advantage is one of the fundamental requirements of the Act to Harmonise Witness Protection. Potential witnesses are not to be able to hope to enjoy material advantages through inclusion in witness protection, such as a larger home or higher monthly payments. This provision details the legal concept from section 136a StPO, in accordance with which inter alia the promise of

advantages not provided for by the law is prohibited, including for witness protection.

A strict standard is to be applied to the nature and scope of possible benefits which is orientated in line with the weighing up criteria of section 2 of the Act to Harmonise Witness Protection. Hence, the accusation is prevented which would otherwise be possible that the testimony of the person who is to be protected was, so to speak, bought with material advantages.

Section 8 sentence 2 of the Act to Harmonise Witness Protection makes it clear that benefits from the witness protection units which a person to be protected has deceptively and unfairly obtained, such as by knowingly making untrue statements about the preconditions for witness protection, can be demanded back. These prerequisites will not normally apply if the content of a statement is simply corrected.

3. Impairment of the Defence through Measures in accordance with the Act to Harmonise Witness Protection?

The provisions of the Act to Harmonise Witness Protection offer good possibilities to achieve effective protection of an endangered witness. Disadvantages may however be caused to the accused and the indicted accused with regard to an effective defence as a result of measures provided for in the Act to Harmonise Witness Protection. Since inclusion in a witness protection programme as a rule is proposed by the respective criminal prosecution authority dealing with the investigation proceedings (section 2 subs. 2 sentence 1 of the Act to Harmonise Witness Protection, see above), case constellations are conceivable in which the protection of the witness is not primarily focussed on, but procedural tactical considerations of the criminal prosecution authorities also at least play a role[21]. Instead of strengthening the ascertainment of the truth, witnesses who are willing to testify may also be influenced in particular by the prospect of being included in a witness protection programme and nicen up their testimony so as to make themselves more important for the criminal prosecution authorities than they actually are. This may encourage false testimony. It is also possible for the witness to be protected to portray the endangerment potential more dramatically than it is in reality, given that inclusion in a witness protection programme is associated with measures which might be understood to constitute not inconsiderable advantages[22].

There is no empirical proof of these fears, and these would probably also be difficult to establish, but because of the comprehensible motivation of the witness they cannot however be fully ruled out. It is however first and foremost a matter for those who deal with inclusion in the witness protection programme to recognise such tendencies and nip them in the bud. The judge in the main hearing must however also be aware that he/she might need to pay particular attention to the motivation of the witness, and concomitantly to the value of his/her testimony.

B. Witness Protection as an Obligation incumbent on Employers: Federal Constitutional Court's "Whistleblower" Ruling

The "whistleblower"-problematic does not refer to witness protection in its classical sense as "whistleblowers" do not necessarily become witnesses in a criminal proceeding. In general they alert to the competent authorities important information on wrongful acts in private companies or even in the public sector. This is more an aspect of civil-/labour-law. In the "Whistleblower" ruling of the German Federal Constitutional Court it has been pointed out that in addition to the state's obligation to protect witnesses, (civil and public-law) employers also have an obligation in individual cases to protect a witness who has provided information on irregularities within the company to the criminal prosecution authorities, in criminal proceedings against civil law sanctions or other disadvantages with which they may be threatened during or after the conclusion of criminal proceedings. This is not witness protection in the classical sense; nonetheless, this area is highly significant since it repeatedly occurs in current political discussions in Germany.

21 More on this: Ulrich Eisenberg, *Zeugenschutzprogramme und Wahrheitsermittlung im Strafprozess*, in Festschrift für Gerhard Fezer, p. 197 et seqq.

22 Such as creation of a cover (section 5 subs. 1-3 of the Act to Harmonise Witness Protection) and material benefits (section 8 sentence 1 of the Act to Harmonise Witness Protection).

The Federal Constitutional Court found in its "Whistleblower" ruling of 2 July 2001[23] that testimony of an employee in the investigation proceedings against his/her employer did not necessarily entitle it to terminate employment. Particularly the obligation to testify was said to be a general civic duty. It was said not to be compatible with this duty in a state based on the rule of law for those who complied with it to suffer disadvantages under civil law. The Court found that this was the only way to satisfy the constitutional duty of the State to guarantee a functioning administration of justice in the public interest.

The case-law of the labour courts which has been handed down since the "whistleblower" ruling has not been able to prevent non-uniform and partly contradictory handling of this prohibition of discrimination pronounced by the Federal Constitutional Court. The legislature has hence been planning for quite some time to include a "whistleblower section" in the Civil Code (*Bürgerliches Gesetzbuch*) to eliminate the legal and factual uncertainties in this field[24]. However, so far without any results.

III. EFFECTIVE MEASURES TO ENCOURAGE COOPERATION OF WITNESSES OF ORGANISED CRIME IN GERMANY WITH A FOCUS ON THE "CROWN WITNESS" SYSTEM

Before the crown witness system in Germany is explained in more detail, it is important to know that these regulations do only apply to persons who themselves have committed a criminal offence and who are subject to mitigation principles due to the fact that they are willing to cooperate with the judicial authorities.

A. The Crown Witness Arrangements in Germany prior to the Entry into Force of the Act Amending the Criminal Code[25]

The figure of the crown witness was fundamentally alien to German criminal procedure law for a long time. A crown witness arrangement was included in criminal law, including those criminal provisions which are not contained in the Criminal Code, for the first time in 1981 with section 31 of the Narcotics Act (*Betäubungsmittelgesetz*)[26]. This provides that the court may mitigate the sentence, or can refrain from imposing punishment, if the offender

- has made a major contribution by voluntarily revealing his/her knowledge to discovering the offence over and above his/her contribution to it, or
- voluntarily reveals his/her knowledge to a unit in such good time that considerable criminal offences in accordance with the Narcotics Act with regard to which he/she has become aware of the planning can still be prevented.

Further "crown witness arrangements" for specific criminal offences are provided for by the applicable law in the field of organised crime (sections 129 subs. 6 and 261 subs. 9 StGB), as well as in the field of terrorism (section 129a subs. 7 StGB).

Controversial discussions have been going on in Germany for decades and are continuing on the introduction of a crown witness arrangement covering all crimes[27]. This is partly because crown witness arrangements are in a certain state of tension with the principle of mandatory prosecution and the guilt principle: A criminal offender may buy him/herself free of criminal prosecution by means of denunciation. The punishment distances itself from its function of being a fair compensation for guilt[28]. Art. 3 of the Basic

23 Order of the Federal Constitutional Court of 2 July 2001, ref. 1 BvR 2049/00.
24 German Federal Parliament, Committee on Food, Agriculture and Consumer Protection: Proposal for the statutory establishment of informant protection for employees in the Civil Code of 30 April 2008. (Committee printed paper 16(10)849 – This proposal did not find political favour.)
25 Act Amending the Criminal Code – Assessment of Punishment with Assistance in Solving and Preventing Crimes (*Gesetz zur Änderung des StGB – Strafzumessung bei Aufklärungs- und Präventionshilfe*), Federal Law Gazette. Part I 2009, 2288.
26 Act on Trafficking in Narcotics (*Gesetz über den Verkehr mit Betäubungsmitteln*), of 28 July 1981 (Federal Law Gazette. I, 681).

Law (*Grundgesetz*) (the principle of equality) is also affected given that those who are entangled in a criminal environment can obtain advantages more easily than a person committing a single crime, who cannot denounce anyone. What is more, the criminal prosecution authorities place themselves under suspicion of negotiating with crime.

German legal policy has also repeatedly tackled the question in recent years of the degree to which the structure of crown witness arrangements should be improved or expanded in the law, particularly in view of the fact that the threat not only of organised crime, but in recent years especially also of terrorist attacks, appeared to grow[29].

The discussions in this respect touched on the same questions again and again: Should crown witness arrangements be regulated for specific crimes in the individual elements of the offences themselves (as in the abovementioned sections 129 and 129a StGB), or should a multi-crime provision be introduced? Should the advantages granted only be considered if the testimony of the crown witness relates to offences in which he/she was personally involved, or should they also apply if he/she can provide information regarding offences which are unrelated to the offence of which he/she is being accused? And, finally, also the question of whether one should adopt a US system of "corroboration", according to which no conviction may be handed down solely on the basis of the testimony of a crown witness.

B. The So-called "Big Crown Witness Arrangement" adopted as Law

With the "Act Amending the Criminal Code - Assessment of Punishment with Assistance in Solving and Preventing Crimes", which came into force on 1 September 2009[30], a multi-crime "big" crown witness arrangement was opted for, whilst retaining the provisions contained in sections 31 of the Narcotics Act and sections 129 and 129a StGB. A provision was included in the Criminal Code[31] with which all offenders of particularly serious criminal offences are to be covered if they make a major contribution by voluntarily disclosing their knowledge towards solving or preventing criminal offences, including those in which they were not personally involved ("multi-crime" application). It was particularly pointed out as a reason for the necessity of such a broad crown witness arrangement that "there are considerable evidentiary problems when it comes to crimes from the area of organised crime and terrorism" and that it was hence necessary to provide adequate and suitable tools to offer an incentive to offenders who might be willing to cooperate in solving crimes and to assist in their prevention[32].

As to the crimes for which assistance in solving and preventing crimes is to be provided, the new provision is linked to the lists of criminal offences contained in section 100a StPO. These are in particular criminal offences which as a rule are committed in connection with organised crime.

The legal consequences of assistance in solving crimes within the meaning of section 46b StGB are placed at the discretion of the courts: In accordance with section 49 subs. 1 StGB they can mitigate sentence – including life imprisonment – or refrain from imposing sentence if the offence is only threatened with time-limited imprisonment and the offender has not incurred a prison sentence of more than three years. The discretion of the court in this term is guided by section 46b subsection 2 of the Criminal Code which states that the court shall have particular regard to the nature and scope of the disclosed facts and their relevance to the discovery or prevention of the offence, the time of disclosure, the degree of support given to the prosecuting authorities by the offender and the gravity of the offence to which his disclosure relates, as well as the relationship of the circumstances mentioned before to the gravity of the offence committed by and the

27 The so-called Crown Witness Act, promulgated on 16 June 1989 (Federal Law Gazette. I 1989, 1059), on which – having been expanded to include the prosecution of (other) organised crime – a sunset clause was ultimately imposed up to 31 December 1999, and which was then no longer extended, was of little significance in practice.
28 Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*) 45, 259.
29 On the development of the legislative procedure cf. König in *Neue Juristische Wochenschrift (NJW)* 2009, 2481.
30 cf. footnote 26.
31 Section 46b of the Criminal Code "Assistance in solving or preventing serious criminal offences".
32 Federal Parliament printed paper 16/6268, p. 1 et seq.

degree of guilt of the offender.

In order to avoid any misuse of the concessions made possible under section 46b of the Criminal Code, a time limit is stipulated for the submission of information as a witness for the prosecution.

Mitigation of punishment or dispensing with punishment are excluded if the perpetrator discloses the information at his disposal after the decision has been issued to open the main proceedings against him (section 207 of the Code of Criminal Procedure). This cut off point for considering submissions by the perpetrator is designed to enable the courts to examine the statements of witnesses for the prosecution as to their veracity before judgment is handed down. Should the perpetrator provide information relevant to the investigation during interlocutory proceedings (section 199 et seqq. of the Code of Criminal Procedure), the court may have these examined before the decision is taken to open the main proceedings, and send the files to the public prosecution office for further investigation if necessary.

However, even if the perpetrator contributes to discovery or prevention only during the course of the main proceedings (thus excluding the possibility of applying section 46b of the Criminal Code), there is the possibility of honouring this during sentencing in accordance with section 46 subsection 2 of the Criminal Code.

It is not yet possible to say with certainty whether the new Act fulfils its purpose; there are no authoritative figures on this. The Coalition Agreement of the current government however provides in turn to structure the crown witness arrangement in such a way that the possibility to mitigate punishment may only be opened up if the offender's disclosure is linked to with his/her own criminal offence[33].

IV. WITNESS PROTECTION AT EU LEVEL

Witness protection is not only of national interest; this topic is also becoming more and more the subject of debate in the cross-border domain. Considerations to regulate witness protection EU-wide have been in existence for several years. It was suggested back in 1997 in Recommendation 16 of the "Action Programme on the Prevention and Fight against Organised Crime"[34] to examine the needs of protection of witnesses and persons who collaborate in the action of justice. The Council Declaration of 25 March 2004[35] on combating terrorism and the Hague Action Plan[36] also refer to a proposal on the protection of witnesses and collaborators.

The European Commission in particular has also been calling for a long time for the introduction of obligatory minimum standards for witness protection at European level; to this end, it presented already in 1996 a "Resolution on individuals who cooperate with the judicial process in the fight against organised crime"[37]. Furthermore, a Commission Working Document on 13 November 2007 on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice was presented[38]. This document provides an overview of the state of legislation and the general procedure to be followed at national, European and international levels; it furthermore contains an analysis of the problems, goals and possible political options.

But not only the European Commission, also the Council of Europe has made big efforts when it comes to witness protection. Especially the "Recommendation concerning intimidation of witnesses and the right of the defence"[39] and the "Recommendation on the protection on witnesses and collaborators of

33 "Growth, Education, Unity": The coalition agreement between the CDU, CSU and FDP for the 17th legislative period, Nos. 4945 et seqq. (http://www.cdu.de/doc/pdfc/091215-koalitionsvertrag-2009-2013-englisch.pdf).
34 Official Journal of the European Union C 251 of 15 August 1997.
35 In English at: http://www.ena.lu/declaration_combating_terrorism_extract_concerning_establishment_position_coordinator_brussels_march_2004-020007089.html
36 Official Journal of the European Union C 65/120 of 17 March 2006 - COM(2005) 184 final.
37 Official Journal C 010, 11/01/1997, p. 0001-0002.
38 Commission of the European Communities, Brussels, 13 November 2007 - COM(2007) 693 final.

justice"[40] provide for specific guidance in the field of witness protection.

Therefore, it has been shown in recent years that, on the one hand, there has been progress in the field of EU-wide cooperation; for instance both the Council Framework Decision on combating terrorism[41] and the Council Framework Decision on the standing of victims in criminal proceedings[42] offer possibilities to alleviate punishment in exchange for information and protection rights of (victim) witnesses. Most EU Member States also have a witness protection regulation either in a separate statute or in their Code of Criminal Procedure[43]. These as a rule contain definitions of terms (protected witness, anonymous witness, person collaborating with the judiciary), procedural (special precautions in the proceedings, alternative procedures for testimony), as well as non-procedural measures (physical protection, change of place of residence, cover identity).

However, there are also differences: Some countries consider witness protection to be primarily a matter for the police, whilst others allot a primary role to the judiciary and the ministries. The countries also differ widely in the manner of the measures with which witnesses' collaboration is to be made easier. In some cases different legal traditions and contexts also have a role to play. These differences show that, all in all, a framework for binding minimum standards is not in place.

One can however gather from practitioners that the necessary protection can be provided in most cases by means of bilateral agreements which – where necessary – are concluded on an ad hoc basis, as well as through an increased informal exchange of experience and information, as well as cooperation. Those practitioners often give the opinion that there is no need for an EU-wide regulation on minimum standards in this field and that such a regulation would not have any added value.

V. STATISTICAL INFORMATION

A. On Witness Protection Cases

It is difficult to obtain reliable figures on witness protection measures and programmes in that the responsible authorities are unwilling to reveal certain information because of the priority of the protection and confidentiality of witness protection measures. This is to prevent amongst other things interested groups obtaining a picture of the specific means and methods with which witness protection is provided by collating information in a mosaic-like manner.

The Federal Criminal Police Office has released the following figures from 2006 for publication:

• Numbers of cases:	witness protection cases 2006	330
	carried over from 2005	266
	new cases	64
	completed cases	55
• Fields of crime:	organised crime	262
	national security crimes	10
	other serious crime	58
• Protected witnesses:	witnesses (total)	330
	male	229
	female	101
	nationality German	154
	nationality not German	176
	others involved	328

39 Council Recommendation No. R (97) 13 as of 10 September 1997.
40 Council Recommendation No. R (2005) 9 as of 20 April 2005.
41 Official Journal of the European Union L 164 of 22 June 2002, 3 Article 6.
42 Official Journal of the European Union L 82 of 22 March 2001, 1 Article 8.
43 A separate Witness Protection Act exists in 18 EU Member States; 9 EU Member States do not have such a law (these include Denmark, Finland, France, Greece, Luxembourg, the Netherlands, Austria, Spain and Cyprus).

For the above reasons, virtually no information is also available when it comes to the question of the cost and staffing needs in the context of witness protection. According to unverifiable estimates, an average of six to eight witness protection officers per witness protection unit in Germany appears to be sufficient. Special response units, mobile response units, or also investigation groups, are also deployed in some cases, each of which is independent of the witness protection unit in terms of staffing.

Taking a look at the budget plans of the individual Federal *Länder* is also no more informative since the funds officially entered for the purposes of witness protection frequently do not reflect the actual circumstances (for instance because financial resources used for witness protection are "hidden" in other items of the budget plan in order not to permit conclusions to be drawn here either).

B. On the Impact of the Crown Witness Arrangements in Germany

One can observe that the crown witness arrangement on terrorism, which was not extended beyond 1999, was applied with particular success in the cases of former RAF (*Rote Armee Fraktion*) terrorists and in the exposure and prosecution of the PKK [Kurdistan Workers' Party]. There are also several sets of proceedings in which the arrangement which was brought into the field of organised crime made it possible to solve cases.

In terrorist crime committed by foreigners, and when it comes to trials of members of the PKK in particular, crown witness statements have made it possible to indict senior PKK cadres and made a major contribution towards their conviction, in some instances sentencing them to long prison terms. The lion's share of these indictments could presumably never have been laid without the contribution towards detection made by "crown witnesses". The successes in investigation at that time made it possible not only to expose the structures of the PKK; they are also likely to have made a major contribution towards the PKK's decision to cease violent terrorist activities in Germany. In terms of German terrorism, the crown witness arrangement was applied to former RAF members who had gone into hiding in the GDR and who were taken into custody after unification. Their testimony made a major contribution towards solving crimes from the seventies. It remains to be seen whether the "big crown witness arrangement", which has now been adopted as law[44], will lead to comparable successes in investigation.

In the criminal law on narcotics, the "crown witness arrangement", which has been in existence since 1982 (section 31 of the Narcotics Act), has been well received by practitioners. It was already applied in more than 2,300 cases in the few years subsequent to its entry into force, namely from 1985 to 1987[45]. According to practitioners, the regulation led to considerable successes in investigation, particularly in the fight against organised narcotics-related crime.

VI. CONCLUSION

The constitutional system of the German Basic Law obliges the state agencies to also consider the interests of witnesses in criminal proceedings. The legislature is in this regard faced by a challenge to achieve optimum protection of witnesses without in doing so impairing the justified interests of the accused in a defence. Measures to protect witnesses must be compatible in general terms with the purposes of criminal proceedings, given that the state bodies are primarily obliged to solve crimes and to find the guilt or innocence of an accused person in a fair trial based on the rule of law. Under this premise, an attempt should be made to ensure that the measures have as concrete an impact as possible: Witnesses of criminal offences primarily need the best possible protection in practice.

In the field of witness protection within criminal procedure, the legislature once more took a major

44 cf. footnote 26.
45 Körner, *Kommentar zum Betäubungsmittelgesetz, Arzneimittelgesetz*; 6th ed. 2007: section 31 marginal no. 8.

step towards improving this protection in 2009 with the Second Victims' Rights Reform Act.

It is possible to state for the period prior to this that the legislative activities to improve witness protection in Germany took a major step forward with the adoption of the Act to Harmonise Witness Protection. The discussion on stepping up the fight against organised crime, which started in the mid-eighties, brought about improvements in witness protection in a total of three steps: First of all, with the Act on Suppression of Illegal Drug Trafficking and other Manifestations of Organised Crime from 1992, witness protection in criminal procedure was considerably improved by enabling endangered witnesses when examined to refrain from stating their personal details or place of residence, or to limit the information provided. The Witness Protection Act from 1998 led especially to a statutory provision of the deployment of video technology in the Code of Criminal Procedure. Finally, the Act to Harmonise Witness Protection placed witness protection by the police, which has a long tradition, on a statutory footing, and hence closed a loophole in the law to combat particularly serious manifestations of crime. It can be regarded as a slight blemish that it has not been possible to integrate the provisions of the Act to Harmonise the Protection of Endangered Witnesses in the Code of Criminal Procedure. However, this reflects the fact that witness protection lies in the grey area between risk aversion and criminal prosecution, and that at least when it comes to police witness protection the two aspects cannot be separated from one another.

Through its "whistleblower" ruling in 2001, the Federal Constitutional Court made it clear that statements of an employee in the investigation proceedings against his/her employer do not necessarily entitle it to terminate employment if the witness was merely carrying out his/her general civic duty.

When it comes to the harmonisation of witness protection at EU level, it can be found that on the one hand there are many efforts to establish joint minimum standards, but that because of the highly-differing witness protection systems which the EU Member States have implemented nationally, there is no common consensus on how this has to take place.

INSIDERS AS COOPERATING WITNESSES: OVERCOMING FEAR AND OFFERING HOPE

Robert E. Courtney III[*]

I. THE PROBLEM: CRIMINAL CONSPIRACIES AND A CODE OF SILENCE

Most nations and international organizations today recognize that criminal conspiracies pose greater threats to society than the actions of individuals. We have only to scan the headlines of any major newspaper in any country to see examples of criminal organizations and their impact on our nations. From violent organizations like Italian Mafias and drug cartels, to private armies of entrenched political groups in developing countries, to smaller, but insidious conspiracies that corrupt public officials, organized criminal activity has become a fact of modern life. Almost 50 years ago the United States Supreme Court summarized the danger of criminal conspiracies as follows:

> "*[C]ollective criminal agreement--partnership in crime--presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often… makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise has embarked.*"[1]

The impact of these criminal organizations has resulted in increasing international cooperation and the adoption of international agreements such as the UN Convention Against Transnational Crime (UNTOC)[2] and the UN Convention Against Corruption (UNCAC).[3] Such Conventions recognize that if left unchallenged by law enforcement, criminal organizations pose significant dangers to the foundations of our very institutions of government.

Standing in opposition to modern criminal conspiracies are the law enforcement systems of our individual countries. As we all know, because of our strong commitment to due process and the rule of law, we require formal evidence be presented in court before someone can be convicted of a crime. It is the experience of the United States that without witness testimony from "insiders" to entrenched criminal organizations, there is little likelihood of convicting the leadership. But the difficulties in obtaining the witnesses needed to convict the leaders of criminal conspiracies can be daunting.

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1 Callanan v. U.S., 364 U.S. 587, 593-594 (1961).

2 In the Foreword to the UNTOC, UN Secretary General Kofi-Annan described the threats to civil society by criminal conspiracies in these words: "Arrayed against these constructive forces, however, in ever greater numbers and with ever stronger weapons, are the forces of what I call "uncivil society". They are terrorists, criminals, drug dealers, traffickers in people and others who undo the good works of civil society. They take advantage of the open borders, free markets and technological advances that bring so many benefits to the world's people. They thrive in countries with weak institutions, and they show no scruple about resorting to intimidation or violence. Their ruthlessness is the very antithesis of all we regard as civil. They are powerful, representing entrenched interests and the clout of a global enterprise worth billions of dollars, but they are not invincible."

3 The preamble to UNCAC describes some of the dangers posed by official corruption as the reason for member states joining UNCAC in these words: "*concerned* ...about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering, *Concerned further* about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States, *Convinced* that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential...[member states have acceded to UNCAC]."

The leaders of organizations insulate themselves from criminal prosecution by passing orders through underlings; the criminal bosses often never personally "get their hands dirty" in the commission of criminal acts by their syndicate; and the leaders often use violence and intimidation to prevent witnesses from testifying. The resulting fears of the consequences that will follow if they cooperate with law enforcement stand in the way of obtaining the critical testimony of "insiders." Therefore, effective responses to the threats of criminal organizations require special, coordinated tools that allow law enforcement officers to obtain the testimony needed to break the conspiracies and convict the leaders.

II. THE FEARS: VIOLENCE AND SOCIETY'S PUNISHMENT

The fear that deters insiders from giving testimony is twofold. First, they fear violence and retaliation from their fellow conspirators for becoming government witnesses. Second, they fear the punishment society will inflict if they admit their participation in the criminal conspiracy they are asked to unmask. Criminal organizations play on and reinforce these fears to deter cooperation with law enforcement by their members.

Examples of fearsome violence against those who become government witnesses are legion. One drawn from our experience involves the murder of a government witness' brother early on the morning he was scheduled to testify against members of the La Cosa Nostra (LCN). Another involves the arson murder of five female, family members of a witness against a violent drug organization; murders arranged by the drug organization's leader from jail.[4] Each country represented at this conference can share its own experiences with such violence, including violence in corruption cases.

Fear of prosecution, the second fear deterring would-be cooperators, has been "institutionalized" by the United States' Italian Mafia, known as La Cosa Nostra (LCN). As a prerequisite to full "membership" in the organization, the LCN requires a prospective member to participate in a murder. In addition to demonstrating that the member has the "qualities" desired by this vicious organization, it was believed that participation in the murder also made future cooperation impossible. Since the penalties for murder were so great and the societal repulsion to murder was so strong, the LCN believed that those who participated in murders would never become cooperating witnesses.[5] The LCN has been proven wrong.

III. COUNTERS TO FEAR: WITNESS PROTECTION AND COOPERATION PLEA AGREEMENTS

Over the past 40 years the United States has developed two powerful mechanisms for overcoming the fears that deter insiders from becoming witnesses. These two tools, when properly utilized, allow police and prosecutors to acquire the formal witness cooperation from insiders needed to convict leaders of criminal conspiracies and demolish criminal organizations. These two tools are 1) the Federal Witness Protection Program and 2) Cooperation Plea Agreements.

A. Federal Witness Protection Program

The Federal Witness Protection Program ("the Protection Program") was created in 1970 by an act of the U.S. Congress entitled "the Organized Crime Control Act of 1970." The Protection Program was originally created to help obtain witness testimony in Italian Mafia cases. To this end, the law created a system to provide for the health, safety and welfare of witnesses and their families both during and after the

4 The drug boss is currently facing federal charges in Philadelphia, Pennsylvania relating to these cruel murders.

5 The LCN has a special "ceremony" where a man who is considered "qualified" to be a full or "made" member of the organization swears an oath of allegiance, i.e., the oath of Omertà, the Mafia code of silence. Though the ceremony varies from family to family, it usually involves the pricking of the trigger finger of the inductee, then dripping blood onto a picture of a Saint, which is then set afire in his hand and kept burning until the inductee has sworn the oath of loyalty to his new "family." The oath is along the lines of "[a]s this card burns, may my soul burn in Hell if I betray the oath of Omertà," or "As burns this saint, so will burn my soul. I enter alive and I will have to get out dead."

conclusion of the trial proceedings. In the years since it was created, the Protection Program has been expanded to other types of significant criminal conspiracy cases, not just those involving Italian Mafia cases, and has been modified to address issues not originally foreseen, such as providing protection for incarcerated cooperating witnesses.

By statute the United States Witness Protection Program is prosecutor-driven. The statute gives the United States' Attorney General the authority to provide for witness relocation and protection. See Title 18, United States Code, Section 3521, a copy of which is attached hereto as Annex 1. Thus prosecutors decide who should be admitted into the Protection Program. Neither judges nor defense attorneys have a role in this decision. Over the last 40 years procedures and criteria have been established under the authority of the Attorney General to ensure that the Protection Program only admits people who are witnesses in important cases and who are not likely to constitute a future danger to society.[6]

In the implementation of the Protection Program a special unit in the Criminal Division of the Department of Justice in Washington, known as the Office of Enforcement Operations ("OEO"), oversees and administers the operation of all phases of the Protection Program, including the decision of who should be accepted into the Protection Program. In addition to the prosecutors in OEO, two other agencies have substantial roles in implementing the protection features of the Protection Program. These are the United States Marshals' Service (Marshals' Service) and the Federal Bureau of Prisons ("BOP"). The Marshals' Service handles protection for non-incarcerated witnesses and their family members; BOP handles protection for witnesses who are serving jail sentences by establishing "jails within jails" that only house cooperating witnesses.

Of course, no one can be forced to go into the Protection Program. It is purely a voluntary decision on the part of a witness to request and accept protection under the umbrella of the Protection Program. Indeed, a person can decide to leave the Protection Program at any time. However, because it is expensive and complex to protect people, at the outset there is written agreement that is signed by the witness and the Marshals' Service that details what each has agreed to do. Thus, when it has been determined that a witness is a suitable candidate for the Protection Program, the witness and his/her adult family members who are to be protected will be asked to sign a Memorandum of Understanding. The Marshals' Service agrees to satisfy each commitment set forth in the MOU as long as the witness remains in good standing in the Protection Program. On the other hand, the Marshals' Service will not be required to provide amenities or services not included in the document. Typically the Marshals' Service agrees to relocate the witness and family to another part of the United States, to provide a new identity, and to help the family start a new life, which includes basic job location assistance for the relocated witness and, as well as the payment of living expenses for a period. At the same time, the witness and family members must satisfy their obligations under the MOU, including cooperation in searching for new employment in the relocation area and not taking any action that may compromise their new identities and location.

The witness' obligations can be difficult to honor, including, specifically the agreement not to take any action that might divulge the new identity and residential location. This means the witness cannot return to the "danger area,"[7] or stay in contact with friends and relatives, except through means authorized by the Marshals' Service. If the witness breaches his security, OEO will expel him from the Protection Program and no longer authorize the Marshals' Service to provide services. (This does not mean that the witness' new identity will be revoked; nor does it mean that in the event of an actual danger that the witness will not be provided protection. However, OEO may refuse to approve continued payment of subsistence or provision of other types of support.)

The restrictions on the witnesses are often as stressful as the testimony given in court.[8] Some witnesses find the Protection Program so restrictive they are unable to adjust. Some even decide to return to

6 It should be emphasized that the Protection Program is only available to witnesses and their families. It is not designed to provide protection to non-witnesses who may feel threatened by criminal elements.

7 The "danger area" is the broadly considered to be the areas where the witness is likely to be known or recognized, and therefore potentially targeted for violent retribution. Thus, for example, the "danger area" for a witness from New York City could include a large area of the East Coast of the United States since that is the geographic area in which he is most likely to be recognized.

8 It is not uncommon for a wife of a prospective witness to break down in tears when told that she will not be able to attend her mother's funeral in the "danger area" when/if her mother should die.

their old home city. There are a number of instances where witnesses who withdrew from the Protection Program and returned to the "danger area" were murdered. For example, against the advice of the Marshals' Service a man from Philadelphia, Pennsylvania who had been a cooperating witness against the LCN found the Protection Program too restrictive and decided to leave the Protection Program and return to his old hometown. He was murdered within a matter months of returning.

The humorous (and grossly inaccurate) portrayal of the Protection Program in the comedic movie *My Blue Heaven* does catch one element many familiar with the Protection Program have experienced. The principal character in the movie describes his attitude toward the changes required by participation in the Protection Program as follows:

> *I get to never see my parents again or my loved ones. I get to live in a place ... it's okay, don't get me wrong ... the air is clean, the people are nice ... but for a guy like me, raised on the sidewalks of the city that never sleeps, it's a living hell.*[9]

Perhaps as a result of its strict rules, it is unquestionable that the Protection Program has been a tremendous success. No relocated witness who followed the Marshals' Service rules has been harmed, and there have been thousands of successful prosecutions throughout the United States as a result of courtroom testimony from protected witnesses. Most noteworthy, the entrenched leadership of the LCN organizations, which justified the original creation of the Protection Program, has been convicted in cities throughout the United States based upon the testimony of "insiders" who were protected by the Protection Program.

B. Cooperation Guilty Plea Agreements

The other "tool" that works hand-in-glove with the Witness Protection Program is the "Cooperation Plea Agreement." It is a fact that most "insiders" in serious criminal conspiracies have personally committed criminal acts. The Cooperation Plea Agreement is a mechanism which allows criminal "insiders" to plead guilty and to receive reduced jail sentences if they provide "substantial assistance" to the prosecution by cooperating and testifying.

It is the policy of the United States, incorporated in statutory law, to encourage such cooperation by allowing judges to impose jail sentences that are less than the sentences they would have received if the defendant had not cooperated. This policy recognizes that persons who have committed serious crimes should not be allowed to avoid all penal sanctions by agreeing to testify. At the same time, the policy gives the "insider" hope that at the end of the process, the insider will still have the opportunity to start a new life. It is the collective judgment of the United States that the cost of allowing reduced sentences for cooperation against leaders of the criminal organization is justified by the need to defeat the criminal organizations that pose such serious threat to civil society.

Prosecutors desiring the testimony of "insiders" always need to weigh the importance and public value of the insider testimony in a specific case against the risk that a serious criminal will not receive appropriate punishment. The Cooperation Plea Agreement is the balancing mechanism that allows both testimony and appropriate penal sanctions. Over the past thirty years the United States has developed considerable experience in the use of Cooperation Plea Agreements. It is now common to require criminal-witnesses to plead guilty to representative criminal violations and face the likelihood of jail sentences.

Unlike the Witness Protection Program that is controlled by the prosecutor, the Cooperation Plea Agreement requires the active involvement of the defense attorney and the judge, as well as the prosecutor. First, the prosecutor discusses the case with his/her supervisors and obtains approval from the leadership of the prosecution office to consider a Cooperation Plea Agreement with the specific defendant in the specific case. Next, the prosecutor and defense attorney discuss the proposed plea agreement and its likely meaning in the specific case. If the agreement is acceptable to the defense attorney and the client, the plea agreement must be set forth in writing and signed by the prosecutor, the defense attorney and the defendant. Next, the

9 From dialogue of "Todd Wilkerson", a fictional participant in the Witness Protection Program, as portrayed by Steve Martin in MY BLUE HEAVEN (Warner Brothers Pictures 1990).

agreement is presented to the judge who can accept or refuse the agreement. Moreover, all parties understand and agree that the decision as to what sentence will be imposed is *solely* the decision of the judge. Cooperation Plea Agreements used by the US Department of Justice expressly state that the agreement does not bind the judge with respect to what sentence ought to be imposed. Thus, it is the judge, informed by his/her training and by having a full understanding of the case, who decides what sentence to impose.

If the judge decides to accept the agreement, the judge will require the defendant-cooperator to plead guilty in open court to the charges covered by the plea agreement. In most cases the defendant-cooperator will testify for the prosecution after the judge has accepted the plea agreement and after the defendant-cooperator has pled guilty. Thus, sentencing is deferred until the defendant-cooperator has completed cooperating with the prosecutor so that the judge may consider the significance of the cooperation. The expected cooperation can often involve several trials and different crimes, depending on the knowledge of the defendant-cooperator. In most violent criminal conspiracy or drug cases, the defendant-cooperator will be held in jail without bail and will be incarcerated in the Bureau of Prisons Protected Witness jail while cooperating and awaiting sentence.[10]

When the time comes to sentence the cooperating defendant, the judge is required by law to consider and evaluate these five factors:

(1) the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
(5) the timeliness of the defendant's assistance.

Section 5K1.1 of the United States Sentencing Guidelines.[11] Applying these factors, the judge decides what the appropriate sentence should be for the cooperating witness in the specific case.

The positive effects of a cooperation plea bargaining system is that law enforcement has something to offer to overcome the fear of the potential witness that he will receive the same jail sentence as if he did not cooperate. Together with the Protection Program, the Cooperation Plea Agreement offers hope to the cooperating insider that he/she may have a new life free from the influences of the criminal syndicate they are exposing.

IV. WITNESS PROTECTION PROGRAM AND COOPERATION PLEA AGREEMENTS IN PRACTICE

One example of the effectiveness of these two tools, taken from our experience in prosecuting the LCN in Philadelphia, Pennsylvania illustrates this. In the period between 1991 and 1993 a war broke out between two competing factions of the LCN. During this period there were a series of murders and attempted murders, including a brazen motor vehicle ambush on a major expressway at the height of rush-hour. These competing acts of violence were ordered by the LCN "boss" and by his rival. Neither of the men actually pulled a trigger or was near the scenes of the violent crimes. Indeed, the LCN structure, depicted in Appendix III, is designed to insulate the leadership from the commission of crimes ordered by those leaders. As a result of investigation, prosecutors learned the identity of three men who were "shooters" in three LCN murders and built prosecutable cases against them. After much thought, prosecutors approached their defense attorneys and entered into separate cooperation plea agreements with the each of the three conspirators AND sponsored

10 The time spent in jail will count toward whatever jail sentence is ultimately imposed.
11 In the United States sentencing in Federal Court is guided by Sentencing Guidelines. The provision of these guidelines applicable in sentencing cooperators is Section 5K1.1. A copy of this provision is attached in Annex 2.

them for the Witness Protection Program. Each man was required to plead guilty to his participation in the murders. Based upon their testimony, together with other evidence developed in a 2 year investigation, prosecutors charged the entire leadership of the Philadelphia LCN, including the boss and 22 others, with the crime of Racketeering and multiple acts of murder and extortion. After a 3 month trial, interrupted at one point by the murder of a brother of one of the insider-witnesses, all were convicted.[12] At sentencing the boss and his "underboss" were sentenced to life in jail without the possibility of parole. The three cooperating witnesses were sentenced respectively to 10, 12 ½ and 15 years in jail for their role as "shooters" in murders ordered by the "boss." Without the Cooperation Plea Agreements they would have been sentenced to life in jail. Each served his sentence in a Bureau of Prisons Witness Protection facility in different federal jails, and thereafter was protected by the Protection Program.

V. CONCLUSION

In order to defeat modern criminal organizations, modern law enforcement needs to adapt to the challenges posed by sophisticated criminal syndicates. This means civil society must realize that tools appropriate for dealing with individual criminal acts are not adequate when dealing with the modern, sophisticated criminal organizations. Accordingly, our nations must provide law enforcement with the tools necessary to obtain testimony from members of these criminal conspiracies. This testimony will protect society from criminal organizations and at the same time provide due process in the legal proceedings against the leaders of these conspiracies. In the United States the Witness Protection Program and Cooperation Plea Agreement have been effective tools in eliminating and minimizing entrenched criminal organizations, and offer a baseline experience that other countries may reference when considering how to deal with modern criminal organizations.

12 The prosecution had offered to have the Witness Protection Program cover the brother and his family. However, the brother refused. At the time he was murdered he was living in his family home in Philadelphia.

APPENDIX I

Title 18, United States Code, Section 3521, Witness Relocation and Protection

(a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

(b)(1) In connection with the protection under this chapter of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General shall take such action as the Attorney General determines to be necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person, including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists. The Attorney General may, by regulation--

(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

(B) provide housing for the person;

(C) provide for the transportation of household furniture and other personal property to a new residence of the person;

(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(E) assist the person in obtaining employment;

(F) provide other services necessary to assist the person in becoming self-sustaining;

(G) disclose or refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the Protection Program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the Protection Program, and the benefit it would afford to the public or to the person seeking the disclosure, except that the Attorney General shall, upon the request of State or local law enforcement officials or pursuant to a court order, without undue delay, disclose to such officials the identity, location, criminal records, and fingerprints relating to the person relocated or protected when the Attorney General knows or the request indicates that the person is under investigation for or has been arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence;

(H) protect the confidentiality of the identity and location of persons subject to registration requirements as convicted offenders under Federal or State law, including prescribing alternative procedures to those otherwise provided by Federal or State law for registration and tracking of such persons; and

(I) exempt procurement for services, materials, and supplies, and the renovation and construction of safe sites within existing buildings from other provisions of law as may be required to maintain the security of protective witnesses and the integrity of the Witness Security Protection Program.

The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph (G).

(2) Deductions shall be made from any payment made to a person pursuant to paragraph (1)(D) to satisfy obligations of that person for family support payments pursuant to a State court order.

(3) Any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General under paragraph (1)(G) shall be fined $5,000 or imprisoned five years, or both.

(c) Before providing protection to any person under this chapter, the Attorney General shall, to the extent practicable, obtain information relating to the suitability of the person for inclusion in the Protection Program, including the criminal history, if any, and a psychological evaluation of, the person. The Attorney General shall also make a written assessment in each case of the seriousness of the investigation or case in which the person's information or testimony has been or will be provided and the possible risk of danger to other persons and property in the community where the person is to be relocated and shall determine whether the need for that person's testimony outweighs the risk of danger to the public. In assessing whether a person should be provided protection under this chapter, the Attorney General shall consider the person's criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for protecting the person, the relative importance of the person's testimony, results of psychological examinations, whether providing such protection will substantially infringe upon the relationship between a child who would be relocated in connection with such protection and that child's parent who would not be so relocated, and such other factors as the Attorney General considers appropriate. The Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.

(d)(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including--

(A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings;

(B) the agreement of the person not to commit any crime;

(C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter;

(D) the agreement of the person to comply with legal obligations and civil judgments against that person;

(E) the agreement of the person to cooperate with all reasonable requests of officers and employees of

the Government who are providing protection under this chapter;

(F) the agreement of the person to designate another person to act as agent for the service of process;

(G) the agreement of the person to make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation;

(H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title; and

(I) the agreement of the person to regularly inform the appropriate Protection Program official of the activities and current address of such person.

Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person under this chapter, and the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include a procedure for filing and resolution of grievances of persons provided protection under this chapter regarding the administration of the Protection Program. This procedure shall include the opportunity for resolution of a grievance by a person who was not involved in the case.

(2) The Attorney General shall enter into a separate memorandum of understanding pursuant to this subsection with each person protected under this chapter who is eighteen years of age or older. The memorandum of understanding shall be signed by the Attorney General and the person protected.

(3) The Attorney General may delegate the responsibility initially to authorize protection under this chapter only to the Deputy Attorney General, to the Associate Attorney General, to any Assistant Attorney General in charge of the Criminal Division or National Security Division of the Department of Justice, to the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice (insofar as the delegation relates to a criminal civil rights case), and to one other officer or employee of the Department of Justice.

(e) If the Attorney General determines that harm to a person for whom protection may be provided under section 3521 of this title is imminent or that failure to provide immediate protection would otherwise seriously jeopardize an ongoing investigation, the Attorney General may provide temporary protection to such person under this chapter before making the written assessment and determination required by subsection (c) of this section or entering into the memorandum of understanding required by subsection (d) of this section. In such a case the Attorney General shall make such assessment and determination and enter into such memorandum of understanding without undue delay after the protection is initiated.

(f) The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter, including information with respect to the nature and circumstances concerning child custody and visitation. Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.

APPENDIX II

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

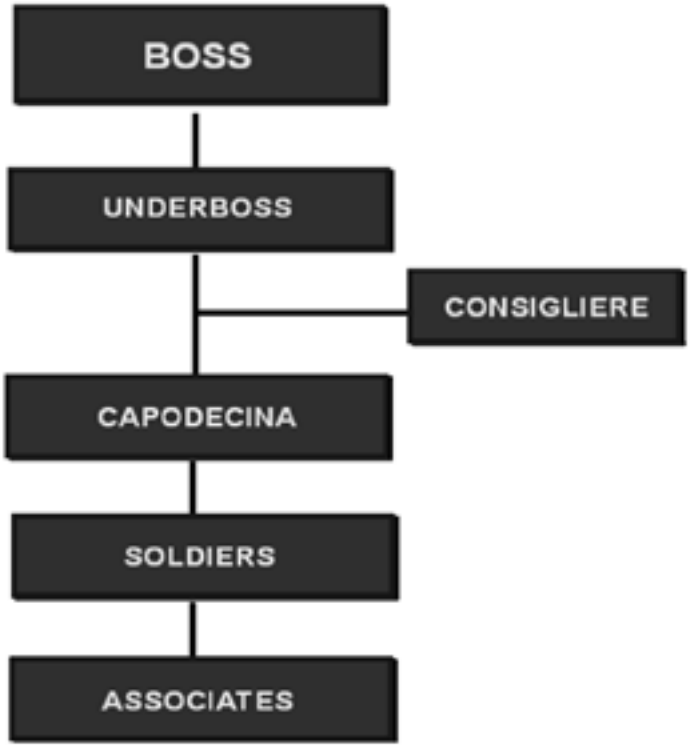
(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
(5) the timeliness of the defendant's assistance.

Commentary of the Sentencing Commission includes the following:

A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation

APPENDIX III

Structure of La Cosa Nostra [Mafia] Organization



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Please note that the following papers have not been edited for publication.
The opinions expressed therein are those of the authors and do not necessarily reflect the position of the departments they represent.

UPDATE ON THE IMPLEMENTATION OF THE WITNESS PROTECTION SECURITY AND BENEFIT PROGRAM (WPSBP)

*Rommel Baligod**

I. OVERVIEW OF PROGRAM'S OPERATIONS

At a time when government is under fire because of its perceived inability to stop unexplained killings as borne by the recommendations of the Melo Commission, the UN Special Rapporteur Philipp Alston, EU Needs Assessment Mission and the National Consultative Summit on Extra Judicial Killings and Enforced Disappearances organized by the Supreme Court, the need to improve protection of witnesses, victims, judges and prosecutors has been consistently articulated.

Although there has been a marked increase in the number of applications for coverage under the WPSB Program, due mainly to the increasing awareness of the importance of protecting witnesses in the prosecution of heinous crimes, the Program has remained under resourced. From the stand point of the prosecutors and law enforcers witness protection and care has become a vital tool in the effective prosecution of criminal cases. With the proactive stance taken by the Justice Department under Secretary Leila M. de Lima in the implementation of the Program's mandate even the courts have relied on the Program for security and other allied assistance to judges and court personnel particularly in high risk cases.

From only six admissions in its inception in 1991, the Program has expanded its operations through the years. For the period covering 1 January 2010 to 30 November 2010 a record of 162 applications were filed with the Program. Out of this number 113 applicant witnesses were admitted and added to the witnesses already being maintained by the Program. As of 30 November 2010, the Program had under its coverage a total of 463 witnesses nationwide. However, for the period 1 July-30 November 2010 alone, commencing from the assumption to office of the new administration under the 15th President of the Republic of the Philippines, His Excellency, Benigno C. Aquino, 109 applications were filed out of which 63 applicant witnesses were admitted.

As a general rule, dependents of covered witnesses extend up to the second civil degree. At an average family size of four, this translates to additional 2,000 warm bodies to feed, secure, transport, send to school and care for. We have obtained 61 convictions in 75 important cases with 42 convicted accused and utilizing 36 covered witnesses; thereby posting a conviction rate of 81.33% for the period under review.

The increase in the number of witnesses and the successful prosecution of cases are mainly attributed to the late Senior State Prosecutor Leo Dacera, the former Program Diretor of the WPP, who passed away last month. During his administration, awareness of the importance of protecting witnesses in the prosecution of heinous crimes has dramatically increased.

Pursuant to the directive of Secretary De Lima to strengthen the Witness Protection Program the following measures have been recommended for implementation:

A. Proactive Implementation

Program's implementers in the regions have been directed to adopt a proactive stance in seeking out witnesses in cases involving political killings, media murders and human rights violations. Although application for admission for witness protection coverage necessarily requires strict compliance with statutory requirements, stringent vetting procedures and the identification and evaluation of threats, program personnel have been directed to liberalize admission requirements particularly when threat level on bona fide witnesses

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in media and political killings is high.

B. Enhancement of Witness Benefits

Witnesses often decline proposal to testify for the prosecution not only because of fear of physical harm but more often because of economic dislocation. To allay witnesses' uncertainty because of a drastic change in their way of life upon admission into the Program economic benefits and social services should be enhanced.

Psychological counseling which are presently undertaken in coordination with the Department of Health and Department of Social Welfare and Development shall be extended ample logistical support.

Direct financial assistance shall likewise be increased to ameliorate witness clients' economic condition.

Increase in employees' benefits.

C. Witness-Client Skills Training & Education

To prepare witnesses in re-joining mainstream society after their discharge from the Program as protected witnesses and to lessen their dependence on the Program consistent with security requirements a wide-ranging vocational orientation-training program shall be undertaken in cooperation with TESDA and/or TLRC to prepare them for suitable employment here and abroad .

D. Institutionalization of Coordination with Judiciary & Other Pillars of Criminal Justice System

Speedy disposition of cases is a key feature in the maintenance of a reliable and credible witness protection program. Prolonged pendency of cases particularly before the high courts results to apathy and indifference of witnesses on the success of the case. Loss of opportunity, isolation and boredom associated with extended confinement in relocation sites and safe houses away from native community and relatives dampen witnesses' resolve to testify. A team of prosecutors shall be organized to monitor and coordinate, and if circumstances so warrant, take over cases involving covered witnesses.

E. Upgrade in Training and Equipment of Protective and Administrative Personnel

Acquisition of firearms suitable for close quarter battle, body armor and communication equipment for use of protective personnel are essential requirements for enhancement of the Program's protective capability.

Upgraded training of administrative personnel should likewise be undertaken to keep them posted on trends in record keeping and confidentiality.

Purchase of utility vehicles to augment the Program's aging fleet to transport witnesses from regional relocation sites to trial venues across the country is an operational necessity for the security and well being of witnesses.

F. Construction of a Secure WPP Building

At present the Program's administrative operations are carried out in three separate locations within the DOJ compound for lack of space. This exposes program documents, personnel and witnesses to risk because accused, their relatives, representatives, lawyers, their agents and the general public all converge in DOJ to follow up their various concerns. Operation is hampered and confidentiality and security is unavoidably compromised under this set-up as regulations and procedures designed to protect and secure covered witnesses cannot be fully implemented as it would interfere with activities of other DOJ agencies also holding office in the compound.

It must be noted that two media organizations (Jucra and Juror) doing the justice beat have free access

to all parts of the DOJ compound. For a credible witness protection organization to function there is a need for the construction of a secure building devoted to witness protection purposes only to ensure the effective discharge of the Program's mandate.

II. PROGRAM SPECIAL CONCERNS

A. Media Murders, Extra Judicial Killings, Ampatuan Maguindanao Massacre & Rebellion Cases

Because of the rise in media murder cases and extrajudicial killings the Philippines was labelled by the international media organizations as the most murderous country for journalists.

To dispel the impression that in our country many killers and masterminds of journalists who expose corruption in government get off the hook owing to the weakness of our criminal justice system, Secretary Leila De Lima directed the Program implementers to be involved in case buildup, identification of potential witnesses under threat, filing of charges, securing of warrants and relocation of witnesses in a number of cases.

On 23 November, 2009 the infamous Maguindanao massacre, which claimed 57 innocent lives, including a significant number of media practitioners, took place in Ampatuan, Maguindanao.

Suspects, including members of the powerful Ampatuan political clan, have been charged with 57 counts of murder while others have been detained for rebellion charges using Program resources. The prosecution is also directly supported by WPP including litigation costs of prosecutors, expert witness and other technical personnel. The cases are pending trial before the Quezon City Regional Trial Court. All in all close to 900 persons have been named in the indictment in said cases while many more remain as John Does.

The speedy convictions of the accused in the murders of Edgar Damalerio (Pagadian), Allan Dizon (Cebu) and Marlene Esperat (Sultan Kudarat), Armando Pace (Digos City), Judge Orlando Velasco (Dumaguete) have been secured through the testimony of witnesses under the Program.

Consequently, Program resources have to be applied above the customary level to these national interest cases, most especially in the recent Maguindanao massacre, in support of law enforcement, intelligence and investigation agencies' drive to help speedily resolve the case.

B. US Rewards For Justice Program

In the past the US government has paid substantial amounts to informants who proved crucial to the capture of extremist leaders in Mindanao. Recently 4 individuals who provided information for the neutralization of Khadaffy Janjalani and Jainal Antel Sali (Abu Solaiman) were admitted into the Program at the behest of the US State Department after payment to them of substantial amount of money. The rationale for the huge payments in cash to informants with extensive media coverage, is to encourage potential informants to come forward with information against remaining ASG and Jemaa Islamia personalities such as Isnilon Hapilon, Dulmatin Omar Patek and other religious extremist leaders still at large. This would enhance government's anti-terrorism campaign. Thereafter, the informants-witnesses and their families were turned over to the Witness Protection Program (WPP). This required refurbishing of existing DOJ facilities for use as secure temporary relocation sites, purchase of additional vehicles to supplement the Program's aging fleet, and payment of incentive pay to personnel directly involved in this operation for increased work load.

C. Support for Anti Terrorism Cases

Support for President Aquino's action program against anti-terrorism efforts continue to take up a large part of the Program's funds. Although the number and intensity of actual combat operations against the Abu Sayaff Group, Jemmaa Islamia and MILF may have declined the extremist groups appear to have taken a different tack by leaving their mountain lairs in Mindanao and shifting operations to the country's urban

centers. Thus, the spate of terror bombing attacks in Regions 9 and 12 in recent months have required extensive Program intervention in identifying and securing material witnesses and their relocation to safe locations.

Considering the mobility of suspected terrorists and their involvement in numerous cases pending across the country it has been essential to deploy and re-deploy material witnesses for them to testify in various courts in Metro Manila and Mindanao and relocate them elsewhere to ensure confidentiality and security. Emergency relocation of WCs and families to different harbouring sites in the country has increased cost of operation.

Again, through the cooperation and testimony of witnesses under the Program the prosecution succeeded in securing convictions in cases against ASG members and MILF Commander Tahir Alonto and other accused.

Thus, like in other Program special concerns, in anti-terrorism cases material and human resources above the customary level for regional cases have to be provided directly to witnesses in support of government's goal to decisively stomp out terrorism and criminality.

D. Trafficking In Persons Cases

The deportation of Filipinos from Malaysia and other Asean neighbors brought in its wake the filing in our courts of human trafficking cases mostly at the behest of international organizations. Considering that criminal cases against organized criminal syndicates have to be filed nationwide in the victims' port of departure/re-entry Program resources were devoted to secure, house and transport witnesses in support of said cases. Because of the successful prosecution of human trafficking cases Zamboanga City Prosecutor Ricardo Cabaron who is a Program implementer in Region 9 was recognized by the United States Government as the 2007 Sen. Benigno Aquino, Jr. Fellowship for Professional Development awardee and awarded a training course in the US.

E. Regionalization of Temporary Shelters and Safehouses

To highlight the significance of the Program's role in securing our witnesses, it is important to note that because of close family ties and extended family system ingrained in our culture the Program is oftentimes compelled to grant witnesses' requests to keep all family members in the safehouse for their security and peace of mind. This accounts for a high number of occupancy in temporary shelters. This is however more economical compared to the need to transport and secure the witnesses whenever they would want to visit their family outside of the safehouse.

To enhance operational efficiency, cut down on transport cost and reduce stress on witness clients and their families a number of regional temporary shelters with full security complement have been established in areas of witness preference where crime incidence on national interest cases appear to be on the rise. This is an area that we would have to closely look into to make the Program's operations in the countryside better felt. By doing so we would be able to make the government particularly the Department of Justice more relevant to the people's needs particularly the underprivileged and marginalized in our aim to strengthen the rule of law in our country.

III. CONCLUSION

I conclude my presentation by proposing the following amendments to the Witness Protection Act:

(a) Inclusion of provisions for evidentiary rules to permit witnesses to testify in a manner that ensures their safety such as video links, close circuit screens and other adequate means. Under the present set up, witnesses covered are treated and required to testify like ordinary witnesses. There are no rules as of yet on the manner of their testifying.

(b) Organic Protection Force for the Program should be established by law. The Program relies mostly on the other law enforcement agencies for protection and security of the witnesses. The downside of this is that we are left at the mercy of the other law enforcement agencies. In some regions, the Program practically has to plead to get security personnel from other agencies.

(c) The law should allow law enforcers to be covered under the Program. As earlier pointed out by Deputy Prosecutor General Gaña, law enforcers who are witnesses or have information regarding the commission of a crime cannot avail of the benefits under the program. This inhibition does not take into account the fact that in the prosecution of most crimes, law enforcers who responded to and investigated their commission, are indispensable witnesses. Needless to say that even law enforcers in this jurisdiction are also susceptible to corruption, threat and intimidation, causing them to avoid testifying or to testify falsely or evasively.

(d) Heavier penalty should be imposed for harassment of witnesses. Under existing law, the penalty for harassment is fine of not more than 3,000 pesos or imprisonment of not more than one year or both. The law is too lenient on this.

(e) Expanding the confidentiality provisions of the law to include all aspects of the coverage

(f) Increase penalty for recanting witnesses. Citation for contempt or perjury are the only penalty for recanting witnesses. The penalty should be increased including the reparation of all government expenses relative to his coverage

(g) Provisions on cross border relocation should be included in the law. There is no law at the moment requiring for the procedure and the manner of relocation of covered witnesses to other countries. No bilateral agreement with other countries on the matter.

(h) Change of identity implementation provisions must be had. The law or the rules of court do not have provisions on how to secure a change of witness identity.

(i) Fund augmentation for the Program. The present fund allocation of the Program is insufficient to feed, secure, care and protect the more than 2,000 witnesses and member of their respective families.

In parting, I quote the late Program Director Dacera,

"The witnesses must realize that they have only one country which they have the duty to serve, love and protect. In a more direct way, we must let them realize that every citizen has the duty to fight crime and respect the law, testify and convict criminals unmotivated by economic benefits alone for our nation to prosper and develop. It is only after we have achieved this that we may state that we have amply responded to today's challenge."

STRENGTHENING PROTECTION FOR WHISTLE-BLOWERS AND WITNESSES

*Lindley Santillan**

* Legal Officer, Committee on Justice, Senate of the Philippines.

Current Regime of Protection

Republic Act No. 6981

The Witness Protection, Security and Benefit Act

2

Key Features of Witness Protection Act

Persons Covered

Any person who has witnessed or has knowledge or information on the commission of a crime and has testified or is testifying or about to testify before any judicial or quasi-judicial body, or before any investigating authority (Section 3)

3

Witnesses in a Legislative Investigation

Section 4 of RA 6981 provides:

> In case of legislative investigations in aid of legislation, a witness, with his express consent, may be admitted into the Program upon the recommendation of the legislative committee where his testimony is needed when in its judgment there is pressing necessity therefor: Provided, That such recommendation is approved by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

4

Extent of Protection

A person admitted to the Witness Protection Program shall enjoy the rights and benefits described in Section 8 of the Law—which protection essentially refers to the safety and security of the person of the witness and his or her next of kin. It also provides for measures to provide economic security to the witness, (Subsections b and c of Section 8).

5

Implementing Agency

The Department of Justice, through the Secretary of Justice, shall be primarily responsible for the implementation of the Program.

The DOJ may call upon any department, bureau, office or any other executive agency to assist in the implementation of the Program and the latter offices shall be under legal duty and obligation to render such assistance.

6

Problem Areas

Challenges to Implementation

- Severe lack of funds and other logistics requirements;
- Lack of allied infrastructure to secure witnesses;
- Slow judicial processes;
- Effectivity of Program when State agents or other government officials are involved.

7

- Under the existing regime of protection provided by RA 6981, a genuine Conflict of Interest situation arises when state actors or government officials are the subject of disclosures or testimonies of witnesses.

- The very essence of checks and balances is eroded when the safety and well-being of witnesses against illegal acts of government officials, especially members of the executive branch, becomes the responsibility of the same branch of government, (i.e. the DOJ).

8

SAMPLE CASES

- Cases of witness to extra-judicial killings;

- Death of "Ampatuan Massacre" witness Suwaid Upham;

- So-called "whistleblowers" like Rodolfo "Jun" Lozada, Jr. (NBN-ZTE) and Wilfredo Mayor and Sandra Cam (Jueteng).

9

Pending Witness Protection Bills

- SBN 2368- Witness Protection, Security and Benefit Act (Sen. Francis G. Escudero)
- SBN 2173- Witness Protection and Benefit Program For Legislative Investigations (Sen. Francis N. Pangilinan)
- SBN 187- Witness Protection, Security and Benefit Act of 2010 (Sen. Antonio F. Trillanes)

10

Salient Features of Bills Seeking Amendment of RA 6981

- The creation of a separate and independent Witness Protection Program for persons who testify before either houses of Congress during investigations in aid of legislation, which shall be administered by the Senate and the House of Representatives respectively.
- The allowance of the perpetuation of testimony of a witness admitted to the Program in accordance with Rule 134 of the Rules of Court.

11

Pending Whistleblower's Protection Bills

- SBN 2112- Whistleblower Protection Act (Sen. Francis G. Escudero)
- SBN 1883 Whistleblower Protection Act (Sen. Miriam Defensor Santiago)
- SBN 1063 Whistleblowers Act of 2010 (Sen. Manny B. Villar)

12

Rationale for the Proposal for Whistleblower Protection Bills

- To address the gaps in affording protection to persons who come forward to expose corrupt government practices not otherwise provided under RA 6981;
- To provide protection for persons who come forward to expose corrupt practices by private persons and enterprises;
- To strengthen measures aimed at encouraging the disclosure of corrupt conduct and practices in the public service.

13

Salient Features of Whistleblower Protection Bills

- The pending measures seek to provide a definition of what a whistleblower is;
- The pending bills seek to define what "retaliatory action" is with reference to whistleblowers and their superiors;
- Seeks to provide measures to deal with retaliatory actions and reprisals whether within or outside the workplace;

14

- Provides measures to secure the confidentiality of the identity of the whistleblower as well as the subject of his or her disclosure
- Seeks to address other modes or manner of exacting retribution from whistleblowers, (e.g. disciplinary actions in the workplace against the whistleblower);
- Seeks to measures for the protection of whistleblowers in conjunction with existing anti-corruption laws, (e.g. RA 3019, RA 6713 and RA 7080 among others);
- Seeks to provide mechanisms for financial rewards for whistleblowers

15

- **Whistleblower** – shall refer to an informant or any person who has personal knowledge or access to data of any information or event involving acts constituting graft and corruption and chooses to voluntarily disclose the same.

16

- **Retaliatory Action** – shall refer to any negative or obstructive responses, reactions or reprisals to the disclosure made under this Act aimed at, pertaining to, or against a whistleblower or an informant or any of the members of his/her family and relatives up to the fourth civil degree of consanguinity or affinity. Said actions shall include criminal, civil or administrative proceedings commenced or pursued against said whistleblower or any members of his family or relatives up to the second degree of consanguinity or affinity as well as retaliatory action in the workplace.

17

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

*Ms. Philippe Nil**

I. INTRODUCTION

Witnesses and whistle-blowers' cooperation is a significant component in the conviction of offenders, especially in cases of corruption and organized crime, which damage the development of a country, its national economy, the rule of law, and the security and values of society. Witnesses and whistle-blowers give evidence and information in the investigation and trial of criminal offences and sometimes require protection due to the intimidation or threat of harm they may face in cooperating with the authorities to prosecute dangerous or powerful persons involved in corruption or organized crime. The government should pay more attention to this issue and provide effective laws and regulations and strengthen law enforcement, while fulfilling its fundamental legal obligations to its citizens. Especially, the government should establish effective mechanisms to protect both witnesses and whistle-blowers, including building the capacity of law enforcement personnel who implement these mechanisms.

II. EFFECTIVE LEGISLATION AND MEASURES

A. Effective Legislation

1. Legal and Judicial Reform

The Legal and Judicial Reform Strategy is a priority reform programme of the government of Cambodia. The strategic objectives of the Legal and Judicial Sector, in accordance with Constitutional values and the overall goals of supporting development and poverty reduction, are identified as:

- Improve the protection of personal rights and freedoms;
- Modernize the legislative framework;
- Provide better access to Legal and Judicial information;
- Enhance the quality of legal processes and related services;
- Strengthen judicial services, i.e. the judicial power and the prosecutorial services;
- Introduce alternative dispute resolution methods;
- Strengthen Legal and Judicial sector institutions to fulfill their mandates.

2. Fundamental Laws

In response to The Legal and Judicial Reform Strategy, Cambodia adopted fundamental laws to improve the legal system, such as the Law on Civil Procedure, the Law on the Civil Code, the Law on Criminal Procedure, and the Law on the Criminal Code. Other laws adopted were the Law on Anti-Corruption, the Law on Anti-Human Trafficking, and the Law on Terrorism.

Currently, some other necessary laws are being drafted and amended to national and international standards. The amending Law on Anti-drug Trafficking is currently under such amendment. Moreover, the Ministry of Justice will draft the Law on Protection of Witnesses as soon as possible.

3. Ratification of Conventions

Cambodia has already ratified or acceded to essential conventions: it ratified the the United Nations

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Convention against Transnational Organized Crime on 12 December 2005, and acceded to the United Nations against Corruption on 5 September 2007.

4. Effective Mechanisms to Protect Witnesses and Whistle-blowers

Cambodian law does not mention in detail securing the protection of witnesses and whistle-blowers. But the law does provide for police protection of witnesses and whistle-blowers as well as other ways of ensuring their safety. Furthermore, Article 24 of the United Nations Convention against Transnational Organized Crime (UNTOC) specifies that States Parties shall take appropriate measures to protect witnesses from potential retaliation or intimidation. As a result, measures for witness protection are identified as:

- Procedures for the physical protection of witnesses;
- Relocation and non-disclosure;
- Limiting the disclosure of information concerning their identity;
- Evidentiary rules to permit witnesses to testify in a manner that ensures their safety; such as via video link or other adequate means.

Articles 32 and 33 of the United Nations Convention against Corruption (UNCAC) also require States Parties to take appropriate measures to provide effective protection for witnesses. Article 33 requires States Parties to consider incorporating into their domestic legal systems appropriate measures to protect whistle-blowers from any unjustified treatment as they are frequently important in detecting offences in the public and private sectors.

B. Measures

There are several measures to protect witnesses to serious crime:

- Measures to protect witnesses should include whistle-blowers, victims, and individuals who have been involved in criminal activity but who cooperate with police, prosecution, or the court, as well as their families;
- Police carefully protect witnesses from intimidation;
- Procedural protection of witnesses needs to be implemented via the Law on Criminal Procedure or in specific legislation or specific provisions (to allow for trial detention of the alleged perpetrator; to prevent interference with the witnesses and others by alleged perpetrator; to order non-disclosure and testimony from witnesses);

The Law on Criminal Procedure and Law on the Criminal Code of Cambodia mention the procedure of witness protection, but not in great detail. Mention is restricted to the appearance of witnesses and investigation of evidence.

III. CRIMINALIZATION AND PUNISHMENT

A. Criminal Prosecution of Offenders who threaten Witnesses and Whistle-blowers

Those who commit corruption and organized crime use their wealth and power to undermine justice. Justice cannot be done if witnesses are threatened. Furthermore, serious crimes like corruption cannot be detected and punished if the investigators, prosecutors and the courts cannot prove guilt because evidence is suppressed. Therefore, under the Law on the Criminal Code of Cambodia, offenders who threaten witnesses are subject to criminal prosecution.

For example, in the Law on the Criminal Code of Cambodia Article 546 *Intimidations against a Witness:* "Any act of intimidation committed by a perpetrator alone or with consent of a third party to instigate a witness not to give any statement or to provide false oral or written testimony is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels.

It is punishable by an imprisonment from 5 (five) years to 10 (ten) years if the offence produces an

effect. (*Unofficial translation)*"

And Article 548 *Bribery given to a Witness:* "It is punishable by an imprisonment from five years to 10 (ten) years any person who gives directly or indirectly donation, present, promise or any interest to a witness in order:

1. not to testify as a witness;
2. to provide false testimony. *Unofficial translation*"

Article 23 of the United Nation Convention against Transnational Organized Crime (UNTOC) and Article 25 of the United Nation Convention against Corruption (UNCAC) require States Parties to address the problem of "obstruction of justice" by enacting legislation or other measures to criminalize enforcement, threats, or inducements to interfere with witnesses.

Unfortunately, Cambodian law does not mention criminal prosecution of offenders who threaten whistle-blowers.

B. Criminal Prosecution for Assisting Perpetrators, Co-Perpetrators, Instigators and Accomplices

The Criminal Code of Cambodia penalizes assistance to perpetrators, co-perpetrators, instigators and accomplices. Involvement in criminal activities causes many dangers to society and the economy, and is contrary to social values. Thus, the Law on the Criminal Code of Cambodia penalizes those who support criminals.

For example, Article 544: "It is punishable by an imprisonment from one year to three years and a fine from 2,000,000 (two million) Riels to 6,000,000 (six million) Riels for any act of providing to a perpetrator, co-instigators, instigator or accomplice of a felony with:

1. a lodging;
2. a hiding place;
3. means for living;
4. all means which facilitates the evasion or escape from an investigation *(Unofficial translation)*."

C. Criminal Prosecution of Witnesses and Whistle-blowers for False Testimony

Witnesses can be prosecuted for giving false testimony and for accepting a bribe to produce false testimony. As these actions obstruct justice, the Law on the Criminal Code of Cambodia provides for prosecution of such actions.

For example, Article 545 *Penalties for False Testimonies:* "False testimonies made after taking an oath before the court or a judicial police officer who acts under the framework of a rogation commission order is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000 (four million) Riels to 10,000,000 (ten million) Riels. *(Unofficial translation)*"

And Article 547 *Bribery taken by a Witness to Produce False Testimonies:* "It is punishable by an imprisonment from 5 (five) years to 10 (ten) years for the act of any witness who directly or indirectly solicits or accept donation, present, promise or any interest in order:

1. not to testify as a witness;
2. to provide false testimony. *(Unofficial translation)*"

IV. MITIGATION OF PUNISHMENTS AND/OR IMMUNITY GRANTS

A. Mitigation of Punishments of Witnesses

Witnesses to corruption and organized crime may include whistle-blowers, victims, and perpetrators who have become state witnesses. All should receive mitigation of punishment.

For example, the Law on the Criminal Code of Cambodia provides for mitigating circumstances in

Articles 93-95, which leave decisions to the courts' discretion. Article 93 *Definition of Mitigating Circumstances*: "When the nature of the offences or the personality of the perpetrator justifies, the court may provide the accused the benefit of mitigating circumstances. The mitigating circumstances may also be granted to the convicted person even he/she is declared as an individual who is in recidivism." Article 94 *Impact of Mitigating Circumstances*: "When the court grants the accused the mitigating circumstances, the minimum of the principal penalties imposed upon for a felony or a misdemeanor is reduced according to the following scale:

1. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 10 (ten) years, it is reduced to 2 (two) years;
2. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 5 (five) years and less than 10 (ten) years, it is reduced to 1 (one) year;
3. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 2 (two) years and less than 5 (five) years, it is reduced to 6 (six) months;
4. If the minimum of the penalty for imprisonment imposed upon is equal to or more than 6 (six) days, and less than 2 (two) years, it is reduced to 1 (one) day;
5. The minimum of the fine imposed upon is reduced to a half."

Article 95 *Penalty of Life Imprisonment and Mitigating Circumstances:* "When an offender is sentenced to life imprisonment, the judge who grants mitigating circumstances may pronounce the penalty of imprisonment of between 15 (fifteen) years and 30 (thirty) years. *(Unofficial translation)*."

B. Immunity Grants with Witness Protection Measures

Witnesses to corruption and organized crime may include whistle-blowers, victims and perpetrators who have become state witnesses. They and their families should get immunity from prosecution. Therefore, current legislation on witness protection needs to be amended to include clear provision for immunity grants.

V. INSTANCES OF SUCCESSFUL AND UNSUCCESSFUL IMPLEMENTATION

A. Implementation of Securing Protection of Witnesses and Whistle-blowers

As mentioned earlier, the Criminal Procedure Code and the Criminal Code of Cambodia briefly mention legal protection of witnesses and whistle-blowers. Other measures to secure protection of witnesses are also in place, but need to be elaborated.

Effective legislation and measures or mechanisms to protect witnesses and whistle-blowers are especially necessary to protect against revelation of witnesses' identity, ensure their permanent safety, and protect their families.

B. Implementation of Cooperation of Witnesses and Whistle-blowers

Cooperation of witnesses, whistle-blowers, victims, as well as former perpetrators is essential to ensure successful prosecutions and justice.

VI. RECOMMENDATIONS

Recommendations relate to securing protection and cooperation of witnesses and whistle-blowers:

- Establish effective legal measures or mechanisms to protect witnesses and whistle-blowers to improve the legal system and civil society of Cambodia;
- Expedient law enforcement as well as upholding of the fundamental legal obligations of the State;
- Build and strengthen the capacity of law enforcement personnel;
- Protect witnesses and whistle-blowers as well as their families (make them safe);

– Witnesses and whistle-blowers protection programmes to be co-ordinated by the police;
– Establish procedural protection measures;
– Policy strategies (training in standard investigation; development of police officers; and importance of the investigation of witness reports).

VII. CONCLUSION

To sum up, the protection and cooperation of witnesses and whistle-blowers is essential to ensure successful prosecution of corruption and organized crime. Cambodia already has legislation and other measures to protect witnesses and whistle-blowers and this is also a matter of government policy. In my opinion, existing Cambodian legislation and measures are insufficient in dealing with these matters. Effective legislation and measures to protect witnesses and whistle-blowers should be enacted as soon as possible, as well as strengthening law enforcement and building the capacity of law enforcement personnel who will implement these mechanisms.

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

Trimulyono Hendradi[*]

I. INTRODUCTION

The nature of corruption and organized crime nowadays, has transformed into extraordinary and sophisticated crime that intermingled with economic crime such as money laundering, fraud, or tax embezzlement. Unfortunately, corruption has impacted to national stability and security of societies.

Therefore, the importance of witness become crucial in the investigation and prosecution of the corruption cases, and they might provide great help for law enforcement officer such as police and prosecutor to reveal the case and put the perpetrator behind the bars. However, becoming a witness or reporting person is not an easy task since they may face threats, intimidation, physical abuse, even death, not only for themselves but also for their families, especially on crimes related with drug cartel or organized crimes.

Fighting against corruption is one of national objectives of Indonesian government; therefore the protection of witness especially in corruption cases becomes a great concern of the government. This paper will discuss the condition of witness and whistle-blower protection in Indonesia as well as the Indonesia legislations enacted, in order to support the protection of witness and whistle blower and also obstacles and challenges regarding the implementation of the law.

II. INDONESIAN LEGAL FRAMEWORK

A. Relevant Legislations

1. Law 13/2006 regarding the Protection of Witnesses and Victims

The Law is the foundation for protecting witnesses and victims. The law enacted in order to protect the rights of witnesses and victims in the crime proceeding and in line with the article 32 and 33 of United Nations Convention Against Corruption that stipulates the obligation for every state party to provide effective protection for witness, experts, victims and reporting person from potential retaliation or intimidation including his/her family or any person close to them. Indonesia has ratified this convention in 18 April 2006 by Law 7/2006.

Specifically Law 13/2006 defines any person who can obtain the protection and any assistance. Pursuance to article 1, the person defines as follows:

(i) Witness is any person who is eligible to give testimony in accordance with preliminary investigation, investigation, prosecution and in court examination regarding criminal cases that they, by their own, hear, see, and/or experiencing.

(ii) Victim is any person who suffers inflictions, physically and mentally, and/or economic loss caused by a crime;

(iii) Family is any person who is blood and/or marital related to the witness or victim.

Where in the explanation of article 10 para.1 defines Reporting person as any person who provides information to the law enforcer regarding criminal cases and crown witness is a witness who is also a suspect who provides assistance to reveal criminal cases that he/she involves.

Furthermore, the law stipulates that witness and victim have rights as follows:

(i) Having protection for the security of his/her own life, family, and belongings, also free from any threats regarding their testimony;

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(ii) Participating in selecting any kind of protection or security support;
(iii) Giving testimony without any pressure;
(iv) A translator;
(v) Free from any leading questions;
(vi) Any information regarding the case progress;
(vii) Any information regarding court decision;
(viii) Any information regarding the release of the convicted person;
(ix) Having new identities;
(x) Having new place to live;
(xi) Access to counselor;
(xii) Having allowance during their protection until the protection program is over.

However, not every case would be placed under the protection program of witness and victims. The protection program for witness is only given in some particular cases. The case that required protection will be decided by the Protection of Witness and Victim Agency. Some particular crimes that might need protection for their witness and victim are corruption, narcotics, terrorism, and any other crimes that put witness and victims in endangered situation (the explanation of article 5 sub 2).

2. Law 31/1999 regarding Eradication of Corruption

As mentioned earlier, corruption in Indonesia has become extraordinary crime; therefore the task of the law enforcement officer is getting harder. The prosecutor has big challenge to bring the corruption case every successful for prosecution. Witness and reporting person become very crucial as they can provide any data or testimony that may support the evidence of the case.

The necessity of securing witness and reporting person is stipulated by the Law 31/1999. Article 31 (1) stipulates that "in investigation and examination before the court hearing, witnesses and any other persons concerned with corruption cases shall be prohibited from mentioning the name or the address of the reporting person, or other matters which may reveal the identity of the reporting person". Where in the paragraph 2 states that "prior to the convening of a trial, the witness and other such persons shall be notified of the prohibition as referred to in paragraph (1)".

For the obstruction of justice, the law criminalizes the perpetrator as stated in article 21 that "any person intentionally preventing or obstructing, or directly or indirectly make failure the investigation, prosecution and examination or the suspect or defendant or witness in corruption case, is liable to minimum three years imprisonment and not exceeding of twelve years and/or fine of Rp. 150,000,000 (one hundred and fifty million Rupiahs) and not exceeding of Rp. 600,000,000 (six hundred million Rupiahs). (source: http://www.hamline.edu/apakabar/basisdata/2000/03/13/0022.html).

3. Law 35/2009 regarding Narcotics

The law 35/2009 was enacted by Indonesian government in order to face the illicit drugs crime that become more sophisticated, transnational and supported by very stable organization. Every year the victim of drugs abuse is increasing, therefore the law should be more applicable to the current condition and situation.

Regarding protecting witness, the law stipulates in article 100 that witnesses, reporting persons, investigators, prosecutors and judges in regards of the narcotic crime shall have the protection by the state from any threat that endangered their life, and/or their belongings, before, during and after the proceeding of crime".

4. Law 15/2003 regarding the Eradication of Terrorism Crime

The act of terrorism brings terror, fear, violence, and victims not only life but also belonging of society. The post traumatic of terrorist attack in Indonesia was one reason for the government to enacted Law 15/2003. In the law, the state shall provide the protection for witness, investigator, prosecutor and judge and their families from the possibilities of any endanger threat (article 33) and like the law of corruption, law 15/2003 also criminalize the obstruction of justice as stipulated in article 20 that every person who use the force or threat to intimidate investigator, prosecutor, lawyer and/or judge that may disturb the process of

crime is liable of minimum three years of imprisonment that not exceeding to fifteen years of imprisonment.

B. Institution related to Witness and Victim Protection

The protection of witness and victim in the criminal justice system of Indonesia are in the stage of investigation, prosecution and examining before the court. On every stage of prosecution, the law enforcement has duty to secure their witness and victims. However, since 2006 as the government enacted law 13/2006, the authority to securing witness and victims was also given to the new agency called Protection of Witness and Victim Agency (PWVA).

Therefore the institution relates with the witness and victim protection as follows:

1. Investigator

During the investigation, Indonesian Police as investigator for major crimes must comply Law 8/1981 regarding criminal procedure law, that stipulates the investigator shall hand over the complete case brief, the defendant and the evidence to the public prosecutor. And a complete case brief requires at least two witness as one witness is not sufficient to prove that an accused is guilty of the act he/she conducts. In case, one witness willing to give testimony however the other witness refuses to stand before trial in regards for his/her safety, this means that the police only have one witness. Therefore, the requirement for witness protection in the investigation stage is crucial. Though, the law does not stipulate specifically regarding the procedure to protect and secure the witness, Indonesian police has resources, safe house and human resources to secure the witness and victims in coordination with the PWVA.

Furthermore in article 113 of the Law 8/1981 regarding Criminal Procedure stipulates that under reasonable reason, a witness may not perform in the investigator's summons, and then the investigator will visit the witness to conduct the investigation. Law enforcement officer may use the article in order to protect the witness. Though the article does not clearly determines "the reasonable reasons", a witness may only absence under any reasons that admissible by the investigator for instance because of awareness of serious threat.

2. Prosecutor

Also, regarding criminal procedure law mentioned above, it is the obligation of prosecutor to bring the witness before the court for examining. Therefore, the prosecutor have burden to the witness presence. For corruption case, the prosecutor also has authority to investigate, and the obtain witness to support the investigation, however, unlike the police that have resources to protect witness and victim, prosecutors do not have resources to secure the witness and victim, for instance the safe house. Since prosecutors do not have the capacity, generally prosecutors maintain cooperation with the police and the PWVA in securing their witness before, during and after the court.

3. Judge

In examining the case, judges hear the testimony of witnesses. For the reason of the safety of the witness, judges in a trial can deliver a decree that the witness shall be put under witness protection program. Though it is not stated clearly, judges at trial have authority to do so.

In order to secure the witness, both Law of Criminal Procedure and Law 13/2006 regulate the absence of the witness before the court in giving his/her testimony. Article 162 of the criminal procedure law stipulates that testimony of the witness can be read before the court under several circumstances such as the witness is pass away, the location of the witness is far from the court, or may not present under reasonable reasons. Furthermore, the sworn testimony that is read before the court has the same value with the testimony of the under oath witness before the court.

Article 9 of Law 13/2006 protects witness who feels under serious threat, for giving testimony in writing or by electronic devices. The writing testimony should be given before competent authority and should be signed, while testimony by electronic devices should be made with the assistance of competent authority. However the use of communications technology before court is not common in Indonesia. The reason of this situation is because the use of technology must be supported by sophisticated technology. Lack of budget would constraint the use of technology before the court. This means that the witness must present

in the court, however to protect their safety, usually the court would be guarded by policemen on the base of the level of security. Another obstacle is some judges do not familiar in examining witness testimony without witness presence, especially in big cases, generally judge requires the witness to present before the court therefore they can question the witness in person to find the truth.

Furthermore, in article 176 of criminal procedure law states that if the defendant acts inappropriately judge has authority to remove the defendant from the court, after judge warns the defendant and he/she do not listen to judge. If the defendant continues to act improperly after warned by judge, then judge can remove the defendant and made the decision without the defendant presence instead. Judges also have authority to remove certain spectators if they think that spectators' presence will intimidate the witness in giving testimony. Not even spectator, media as well.

Lastly, Judges also have discretion to lighten the punishment of a person who coordinates with law enforcer in the successful of prosecution.

4. Protection of Witness and Victim Agency (PWVA)

As stipulated in article 11, Law 13/2006, PWVA, established as an independent agency and shall be responsible directly to the President. PWVA is a new agency that is put in the criminal justice system besides investigator, prosecutor and judge. The objectives of the establishment of PWVA is to provide security for witness and/or victim in order to give testimony in every stage of prosecution whether it is in investigation stage, prosecution or examining before court. The protection is given to the person who will give the testimony in court; in the progress of his/her testimony of after they give the testimony for a certain criminal cases.

In giving service to the community, PWVA takes the request from society who needs protection or assistance by email, letter, and telephone, in person or through law enforcement. PWVA will register the request and ask the person to complete the document. The requesting person must sign the letter of consent to follow the legislation and requirement under the witness and victim protection program. During the program the witness must not communicate in whatsoever way with any person unless under the PWVA permission. After the person submit his/her request, within 30 days PWVA will consider the request has been completed or not. If the person can comply the requirement, within 7 days PWVA will decide whether the request should be granted or denied.

Up to 2009, so far PWVA has registered 84 requests as follows:

NO	CASES	YEAR	
		2008	2009
1	Corruption	3	19
2	Homicide	1	10
3	Land dispute	1	9
4	Domestic violence	–	6
5	Torture and abuse	–	4
6	Fraud and counterfeiting	–	4
7	Sexual assault (rape)	2	3
8	Kidnapping	–	2
9	Election crime	–	2
10	Defamation	1	1
11	Shooting	–	3
12	Human rights abuse and environment	–	1
13	Unlawful detention	–	1
14	Bribery	–	1

15	Unlawful act	1	−
16	Embezzlement of migrant worker fund	−	1
17	Money politic	1	−
18	Malpractice	−	1
19	Embezzlement and Money Laundering	−	1
20	Negligence	−	1
21	Interception	−	1
22	The damage of pray house	−	1
23	Mal administration of public service and law enforcement	−	1
24	Selling of government asset	−	1
	Sum	10	74
	Total	84 cases	

Source: 2009 LPSK annual report

III. CURRENT SITUATION REGARDING WITNESS AND VICTIM PROTECTION

A. Citation of Related Cases

1. Incompetency of PWVA

On 14 March 2009, a Director of state owned company was murdered in his car after playing Golf. The victim was shot to death by two people. After investigation, the police found at least seven people involved in the murder, one of them was media business tycoon, high ranking policeman, and the other was the head of state commission. Police also found a key witness who was the wife of the victim. The police secured the woman in a safe house; however controversy rose after the police protection. Should the woman secured by PWVA as an independent agency? The police made an argument that it was their duty to secure the key witness, on the other hand critiques was pointed to PWVA for the incompetency to secure the key witness and victim.

2. Conviction of Whistle-blower

A high ranking policeman, report to the press about the enormous tax embezzlement scandal that connected to the employee of tax office in Jakarta. The suspect has arrested and allegedly taking bribery from many big companies. Unfortunately the whistle-blower was convicted and arrested for corruption cases related to one of the company he reported. The general asked for protection in the safe house; however the police did not release the general to PWVA and argued that even though he was a whistle-blower he also a suspect for corruption case, therefore he could not get the protection under the witness and protection program by PWVA.

The general asked for judicial review to the court of article 10 para.2, Law 13/2006 that stipulates a witness who also a suspect in the same case, may not be released from criminal charge if he/she is proofed guilty, however his/her testimony can be used as consideration by the judge for lightened the sentence. He argued that since he was a whistle-blower he could not be prosecuted on the same case. However the judges came to the decision that the general may not be mitigate from his status as a defendant, however, if he found guilty, the court will consider lightening the sentence.

B. Problems in Witness and Victim Protection Program

Both cases above show the problem regarding the implementation of the law of the protection witness and whistle-blower.

1. The Role of PWVA

Though, the existence of PWVA has been legalized in Law 13/2006 however the agency is rather new. The case above has shown that as a new agency, PWVA has a big assignment in protecting witness and victim, therefore, the existence of the PWVA must be supported by the other agencies such as Police, Prosecutor, Judge and Lawyer. The failure of PWVA to protect the key witness does not mean that the agency has incapability however there is a gap between the new law and agency with the older institution.

PWVA must be more aggressive in socializing its existence and build a good coordination and cooperation with the other institutions. In the first example of case, the woman chose to go to the police for protection rather than to PWVA, at the same time, the police did not report the condition of the women to PWVA, as an agency that is responsible in protecting witness. It is shown that the existence of the agency is quite unfamiliar either in the society or among the government institutions.

2. The Protection of Whistle-blowers

Indonesia does not have the regulation related to the protection of whistle-blower. There is still a controversy regarding the definition of whistle blower itself. Article 10 (2) Law 13/2006 only touches upon witness who take position as a suspect as well, on the same case. The article clearly states that the witness cannot be released from charge if he/she is proofed guilty, however his cooperation in revealing the case would be considered by judge to lighten his sentence. One of the legal experts in Indonesia, Harkristuti Harkrisnowo says the reason not to release the punishment is that there is a big concern of the condition as a whistle-blower might be used as an advantage by any person who conducts a crime to free from the punishment. For instance a person who conducts the bribery might use his position as a whistle-blower to report the case he involved to be released from his/her punishment.

Another Indonesian expert Yusril Ihza Mahendra says that the definition of whistle-blower in Indonesia has a different meaning. Whistle-blowers in Indonesia are not involved in the crime, where in common law countries, a whistle-blower is a person who involved in the crime reporting his/her conduct to the law enforcement.

Though the concept of whistle blower is not recognized in Indonesia, accordance with the progress to revise Law 13/2006, there is a big concern in the community to protect the whistle-blower in the future, because the general as mentioned in related cases above had succeeded in revealing the corruption case of billion Rupiah.

IV. CHALLENGES IN SECURING PROTECTION OF WITNESSES AND VICTIMS

In the future, in line with the transformation of serious crimes such as corruption and organized crime to become more sophisticated and difficult to reveal, the need to protect the witness will be more important. At the same time, the challenges will be bigger as well. The challenges in protection of the witness as follows:

1. Different Perspectives among Law Enforcement

The different perspectives among law enforcement will become a crucial issue. The difference will lead to conflict between law enforcement; therefore the good coordination among law enforcement is salient. So far, PWVA has signed some Memorandum of Understanding between another agencies and law enforcement officers such as Attorney General Office and Police. Recently PWVA has signed Letter of Commitment in Bali on December 1, 2010. In the future cooperation must be expanded to more agencies and institutions in order to show the existence of the PWVA and its authority among agencies but also to the community in the protection of witness and victim, therefore in the future a Standard Operational Procedure in protecting witness can be arranged between agencies.

2. Working across the Indonesian Territory

As a new agency, PWVA is demanded to broaden their area not only around the capital city because

serious crime such as corruption is conducted in every region, therefore the support from the government and law enforcement is needed. With the assistance from local government and law enforcement, PWVA may work together to get access to rural community. Besides the support from the government regarding fund is also needed, because it may be time consuming and money consuming in order to obtain data and to investigate witness who lives far from the head office of PWVA.

3. Competent Human Resources

Securing protection of witness is not an easy duty, the competent human resources is needed to comply the authority of PWVA. A well trained agent with good education background is the basic need of PWVA, a person who not only has highly competency but also a good approach skill to the witness and victim.

4. Technology Support

The support of technology is a needed in the courtroom, just in case a witness cannot testify directly before the court. However applicable regulation also needed in supporting the use of technology in court examine.

V. CONCLUSION

Preventing corruption and organized crime requires not only good investigation and prosecution of the crime, but also the protection of the witness and victims. However, securing protection of witness it is not an easy assignment, the coordination, cooperation and same perspective between law enforcement and related agencies is needed. The enactment of Protection Witness and Victims Law and the agency in Indonesia is a turning point in the development of protecting witness.

Even though, Indonesia has some incapability regarding legislation and resources; however the challenges would be eliminating in the future for instance by revising the law in the issue of whistle-blower and reporting person.

RESOURCES

RI Law Number 8 year 1981 regarding Criminal Procedure
RI Law Number 35 year 2009 regarding Narcotics
RI Law Number 15 year 2003 regarding Eradication of Terrorism Crime
RI Law number 31 year 1999 regarding Eradication of Corruption
RI Law number 13 year 2006 regarding Protection of Witnesses and Victims

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I am not a Whistle-Blower
http://www.mediaindonesia.com/read/2010/10/10/173514/16/1/-Yusril-Saya-bukan-Whistle-Blower
Indonesia does not have Regulation regarding Protection of Whistle-Blowers
http://www.mediaindonesia.com/read/2010/08/19/163244/16/1/Indonesia-tidak-Punya-UU-Perlindungan-Whistle-Blower

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS: A LAO PERSPECTIVE

*Vilayasinh Dainhansa**

I. INTRODUCTION

As we all aware, the criminal proceeding can take long time, in some case one month, one year or several years, depending on different circumstance or situation, to be closed. Sometime the prosecutors failed to prosecute criminals, but most of the cases carried out in my criminal department we have successes. The reason is that we have full cooperation of all participants participated in the criminal proceedings, especially the witnesses. It is not easy to collect evidences needed. The public prosecutors or organizations responsible for administration of justice do not know all offices and evidences related to any crime committed.

The administration of criminal justice is an important work of the public prosecutor and without the voluntary and full cooperation of the public, medias, witnesses and whistle blowers the administration of criminal justice would never successfully implemented; the offenders would never be prosecuted and convicted. Like the courts, the prosecutors need firm evidence, which would be also a testimony of the witnesses, to be able to perform the duty of prosecution of criminals and bring them to justice and to avoid punishing innocent people who never have commit a crime and to ensure that the human rights in the administration of justice are fully protected as the Constitution and the laws foreseen. Therefore, it is to conclude that the witnesses and or the whistle blowers are playing a significant role in the administration of justice. And the criminal justice administrators needs their contributions to the conviction of the criminals and they, they (the witnesses and whistle blowers) need a liable and full protection by the state.

The Lao government attaches the importance to the administration of justice and the national assembly has adopted several laws such the penal law, criminal proceeding law, the anti-corruption law and others laws being necessary and fundamental for the administration of criminal justice and has established the organizations responsible for the administration of criminal justice which stated by the police, continue by the public prosecutor and terminated by the court with the conviction or non-conviction of the criminals.

II. WITNESSES

A. Who Are the Witnesses?

Witnesses can be every person, who knows about or saw the incident constituting the offence or the circumstances of the case. According to this general explanation, it is to understand that the witnesses are including the victims of crimes.

According to Article 32 of the Criminal Procedure Law, it is regulated that a witness is an individual who knows about or saw the incident constituting the offence or the circumstances of the case. However, we do not recognize that the victims of crimes are witnesses of the crimes, but they will receive other legal protection. Person who are deaf, mute, or incompetent, children fewer than eighteen years of age, and relative of the litigants can be brought to give testimony, but they shall not be deemed to be witnesses. What they say, it is only for information for the investigators, public prosecutors and courts to trace the crime, or for more investigations.

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The witnesses have the rights to give testimony; to see the record of his testimony, during the investigation stage; to request to modify or add to his testimony; to complain against the acts and orders of an investigator, and interrogation, a public prosecutor or the people's court that he believes to be unlawful and to receive protections under the laws and regulations from any threat to life, health or Property because of giving testimony (Article 32 of the criminal Proceeding Law).

The witnesses do not have only rights, but they are obliged to perform some duties, such as to appear according to an order or summons of an investigator, an interrogator, a public prosecutor, or the people's courts and to be liable for his refusal to give testimony or for any false testimony.

B. What Protection do they Receive from the State?

According to the Article 32 of the Criminal Procedure Law, The witnesses receive the protection under the laws and regulations from any threat to life, health because of giving testimony. That is for instance a case if the accused or his relative or other persons try to kill or battery or injure the witnesses, they must be punished by the state according to the law (Article 88 and 90 of the criminal law).

Article 58 of the Criminal Procedure Law prescribes that the identification of the criminal by the witnesses shall be carried out under their secrecy and safety. When necessary, the investigator, or public prosecutor shall require witnesses to identify individuals or confirm objects or dead bodies and the identification (in a way that) ensures the anonymity and safety of such person. Do not make the accused or injure party to see the witnesses when he gives identify.

Article 62 of the criminal procedure law foreseen that the suspect will be detained and be not released because of the witnesses safety. That is a case if the suspect may flee, destroy evidence, commit a new offence, or hurt the injure parties or witnesses.

Likewise, it is also the regulation in the Article 66 of the Criminal Procedure Law. There is no pre-trial release of the accused If is convinced that the accused or defendant will flee, will destroy evidence, will commit further offences, will hurt witnesses. So public prosecutor may not pre-trial release the accused.

For their safety, in some cases witnesses may not disclose their name, address and others information if it is not safe. In the court's hearing, the court may be hearing the witnesses first or after for his safety. It does not allow the civil plaintiff, an accused or their relatives to see the witnesses.

Sometime the police, the public prosecutor or the people's court will ask the witnesses for appear to the hearing because of his safety.

Sometime the witnesses are refusing to come to the police station, public prosecutor's office or the people's court to give testimony. They just pretend not to known any things about the offence. They always say that when they come to the court or the police station or the public prosecutor or cooperate with them in bringing criminal to justice, they will lose their time, lose their money, and instead of having good things, they would be brought to a circumstance of risk and non-safety. There was a road accidence case in 2009: Mr. A was driving a car and then was hitting Mr. B's motorcycle and then went away. Mr. C incidentally and helped to take him to the hospital. Mr. A waked up, he said that Mr. C is an accused who was driving the car and hitting him and was arrested. Before the police could prove the evidence, Mr. C was detained for two months.

Most criminal cases are successfully carried out in Laos without the assistances of witnesses because there are enough physical evidences for prosecutor prosecute to criminal to the people's court have enough evidence and the accused have confessed to have committed a crime. There is no serious case and there is no case where the witness is murdered or injured.

C. The Accused

As I mentioned above, the accused is not the witness of the case according to the law of Lao PDR.

1. What is the Accused?

According to the Criminal Procedure Law article 28, the accused or defendant is an individual who has been brought to Proceeding by an order to open investigations issued by an investigators or Public Prosecutors.

The accused exercise the following rights to:

1) be informed of an offence against the charge made against him;
2) submit evidence;
3) submit requests;
4) ask to see the documents in the case file, to make a copy of required documents from the file or to make note of necessary information contained in the file, after investigation has been completed;
5) retain and meet with a lawyer or other protector to contest the case;
6) participate in court hearings;
7) require the recusal of a judge, public prosecutor, interrogator, investigators, expert or translator;
8) complain against acts and orders of investigators, interrogators, public prosecutors or the people's court that he believe to be unlawful;
9) Make a finally statement in court hearings as the last party;
10) Appeal against, or request the cancellation of an order of an investigator, an Interrogators, or public prosecutor, or an instruction, order or decision of the people' courts.

The accused performs following obligations to:

1) Appear according to an order or summons of an investigator, an interrogator, a public prosecutor, or the people's court;
2) Provide testimony or explanations relating to the charge;
3) Comply with the regulations and orders of people's court, in the court hearings.

Although the accused are not recognized as the witness after the law of law PDR, they will be receiving some beneficiary by the state if they provide substantial cooperation in an investigation or prosecution of a case.

Article 40 of the Penal Law regulated circumstances conducive to reduction of penal law responsibilities of the offenders. The court may reduction of penal responsibilities if an offender expresses remorse and surrenders to officials, and acknowledges and reveals offences committed by him and others. For example, instead of getting 20 years of life imprisonment for the murder, the offender would be sentenced for the murder for 10 years of life imprisonment for his or her substantial cooperation in giving information or revealing the case; or the court may stay of his penalty for those offenders sentenced to less than three years according to Article 47 of the Penal Law.

If there are no serious offences, investigators, public prosecutors, or the people's court may not use coercive measures such as detention (Article 61), arrest (Article 62), remand (Article 65), pre-trial house arrest (article 67), and suspension of position or duties(Article 68 of the Criminal Procedure Law).

III. WHISTLE-BLOWERS

A. Who are Whistle-blowers?

Whistle blowers are an individual or organization that know or see about of a person or government official the report to the organization that concern to solve.

The law of Lao PDR does not mention more about whistle blowers and it is not known in Lao PDR. However, the laws regulate the provisions that the peoples who are the opinion that their rights are violated or infringed; they can ask the concerned authorities to solve it. For the criminals case they can report it the concerned authorities such as the police and the prosecutor for prosecution.

This is a right to guarantee a legal access to justice (rights to submit petition) and it is foreseen in Article 41 of the Constitution of Lao PDR, Article 5 of Law on the Handling petition which is regulated followings:

> The state facilitates citizens and organization to exercise the right to petition, with the aim of protecting the interests of the state and collectives or (such citizen's or organization's) own rights and legitimate benefits in order to ensure transparency and effectiveness of the state administrative mechanism and government officials in the implementation of their duties (there by) eliminating and preventing negative occurrences in society.

Likewise, it is also the regulation of Article 18 of the Law on the Criminal Procedure.

To archive it, the State organizations have put the opinions boxes in front of their offices or in the public places to ensure that people, who would like to report the illegal activities of any persons or organizations, can exercise their rights without any fear or express their ideas if they think that the Government officials (police) do something unlawful

The office of the Supreme people's Prosecutor also has such a box, but it is on the fence near the police guard and was therefore, useless, because the people do not have courage to report illegal activities of the prosecutors because of fear of being recognized by the police. Therefore, it is planning to put it in the public place. It will be comfortable and safety for the citizen to express their ideas if they think that the government official (prosecutor) carry out unlawful activities. Moreover, the Office of the Supreme People's Prosecutor has the division to examine the claim and report of the people. If the report is reasonable, an investigation will be undertaken and prosecuted if there is a criminal offence.

Likewise, the People's Supreme Court has put the opinion box in place; however, until now there is no claims and report about any cases.

Importantly it is the hotline of the National assembly during its plenary sessions. There are many calls and their names are protected and not disclose to the public. There is a committee being responsible for the inspection of the report. Then the concerned minister or authorities have to explain or reply to the question or concerns.

B. State Protection of Whistle-blowers

According to the Article 7 of the Anti-corruption Law: Officials who conduct counter-corruption operation as well as those who participate in such as reports, information providers, injured persons, witnesses, and experts, shall be protected from revenge, or threat to their life, health, freedom, honor, reputation and property.

Any government office who infringes any of the above-mentioned prohibitions will be subject to re-education and disciplinary, and if the infringement constitutes an offence, shall be punished as provided in the laws and has cause.

According to the Article 25 of the Anti-corruption Law: Prohibitions on person who has position, power and duty to suppress, threaten, or obstruct any person who bring a claim, or provides feedback, including a person who provides negative information to concerned persons.

According to the Article 44 of the Anti-corruption Law: Individuals or organizations with outstanding performance in the implementation of this law, particularly those that provide cooperation and information on corruption, will receive the protection of security, rewards, and other policies-as appropriate.

The whistle blowers can be remaining anonymous and their name address and others personal information will not be disclosed. The whistle blowers do not have duty to be liable for any things because of

their report. It does not matter whether the report is true or false.

IV. CONCLUSION

Although the Lao government has tried to put necessary legislations in place, to establish state organizations responsible for the administration of justice, there are still many things to be done.

There are no special laws on the witnesses and whistle blowers and therefore, it is also difficult for the officials to implement the too general provision on the witnesses and whistle blowers protection in the real practices. Some cases are solely relying on confessions of the suspected or accused, this is against the Article 21 of the Criminal Procedure Law, which regulated that the confession of the accused shall not form the basis for the prosecution.

To ensure the full functioning of the administration of criminal justice and full cooperation of the witness and whistle blowers in the country, it is necessary to do the followings:

1) Creating law on the witnesses and the whistle blowers, which the provisions of their protection are included;
2) Training judges and legal and law enforcement about these laws adopted and on Securing Protection and cooperation of witnesses and whistle blowers.
3) Disseminating the important rights and duties of witnesses and whistle blowers by using televisions, radios, newspapers, magazine and others means.
4) continuing services of the hotline of the National Assembly; and
5) Increasing the numbers of the opinion boxes in the public places.

SECURING PROTECTION & COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

*Moktar Bin Md Noor**

I. INTRODUCTION

In our effort to ensure successful prosecution of organized crime and corruption, in Malaysia we have various laws and systems in place to protect witness and whistleblowers.
They are namely:

a) Abduction and Criminal
   Intimidation of Witnesses Act 1948 (Act 191)
b) Witness Protection Act 2009 (Act 696)
c) Whistleblower Protection Act 2010 (Act 711)
d) Pleas in mitigation [S. 176 (ii) (r) Criminal Procedure Code (Act 593)]
e) Plea bargaining [S.172C Criminal Procedure Code (Act 593)]

Witness protection is given upmost priority in our criminal justice system. This is evidently clear as it is being emphasized by the British colonial administration through the enactment of the Abduction and Criminal Intimidation of Witnesses Act 1947 (Ordinance no. 26 of 1947). We become a sovereign state after gaining independent from Great Britain on the 31st August 1957 and the law contiuned to serve our criminal justice system effectively. Then in 1977 it was revised by Act No.191 which became effective from 1 October 1977.

Then in 2009 a specially dedicated Witness Protection Act 2009 was enacted as Act No. 696 by our parliament. This follows by Whistleblower Protection Act 2010 (Act No.711) as it was published in the Gazette on 10 June 2010.

Besides the above mentioned three Acts, there are provisions in our Criminal Procedure Code (Act 593) which provide for pleas in mitigation and plea bargaining.

II. WITNESS PROTECTION

A. Legislation

Witness Protection Act 2009 (Act 696) is a piece of legislation specially enacted in order to give protection to a threatened witness, before, during and after a trial, by a specially formed Witness Protection Unit, an agency under Prime Minister's Department. The Act was passed by the Parliament of Malaysia and given Royal Assent on 18 April 2009. Then it was published in the Gazette on 30 April 2009. This Act will comes into operation on a date to be appointed by the Minister by notification in the Gazette.

B. Objectives

The objective of the Witness Protection Act 2009 is to established a programme for the protection and assistance of witnesses or participants and for other matters connected therewith. Its also cover high risk informer as a result of his assistance in a criminal investigation. Witness protection is usually required in trials against organized crime, where law enforcement sees a risk for witness to be intimidated by colleagues of defendants or accused person.

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C. Interpretation

In this Act, unless the context otherwise requires –

- "enforcement agency" includes a body or agency that is responsible for the enforcement of laws relating to the prevention, detection and investigation of any offence;
- "Register" means the Register of Participants;
- "Director General" means the Director General of Witness Protection;
- "Minister" means the Minister charged with the responsibility for Witness Protection Programme;
- "Registrar" means the registrar of Witness Protection;
- "participant" means a witness who has been included in the Programme;
- "public authority" means the public authority as defined in Clause (2) of Article 160 of the Federal Constitution;
- "Programme" means the Witness Protection Programme established under this Act;
- "criminal proceeding" includes any criminal trial or inquiry before a court or tribunal having criminal jurisdiction, an inquest or inquiry into death and a police investigation under the Criminal Procedure Code [Act 593], and any investigation by any other authority under any written law;
- "witness" means –
  a) a person who has given or who has agreed to give evidence on behalf of the Government in a criminal proceeding;
  b) a person who has given or who has agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence;
  c) a person who has provided any information, a statement or assistance to a public officer or an officer of a public authority in relation to an offence;
  d) a person who, for any other reason, may require protection or assistance under the Programme; or
  e) a person who, because of his relationship to or association with any of the persons referred to in paragraphs (a) to (d), may require protection or assistance under the programme.

D. Scope of Protections

The Director General shall take such actions, as he considers necessary and reasonable, to protect the safety and welfare of a participant.

The action may include –

a) providing accommodation for the participant;
b) relocating the participant;
c) applying for any document necessary to allow the participant to establish a new identity;
d) providing transport for the transfer of the property of the participant;
e) providing payment equivalent to the remuneration that the participant was receiving before being included in the Programme including any increment to the remuneration which the participant would have been entitled to, if he was not included in the Programme;
f) where the participant is unemployed before being included in the Programme, providing payments to the participant for the purpose of meeting the reasonable living expenses of the partiicipant including, where appropriate, living expenses of the family of the participant and providing, whether directly or indirectly, other reasonable financial assistance;
g) providing payments to the participant for the purpose of meeting costs associated with relocation;
h) providing assistance to the participant in obtaining employment or access to education;
i) providing other assistance to the participant with a view to ensuring thar the participant becomes self-supporting; and
j) any other action that the Director General considers necessary.

E. Effectiveness

As Witness Protection Act 2009 (Act 696) is a new Act which creates a new government agency to implement it, it is now in the process of setting up it own office and making various appointment. The Act will comes into operation on a date to be appointed by the Minister by notification in the Gazette soon (December 2010). Therefore at the moment it is not possible to gauge the effect of the Act to the criminal

justice system in Malaysia. But it is no doubt that it will definitely give a positive impact in protecting and assisting witnesses and informers in Malaysia in future.

III. WHISTLE-BLOWER PROTECTION

A. Legislation

Another milestone in the effort to enhance the criminal justice system in Malaysia is the enactment of Whistleblower Act 2010 (Act 711). The Act was enacted by the Parliament of Malaysia and given Royal Assent on 2 June 2010. Then it was published in the Gazette on 10 June 2010. The Act will comes in force on a date to be appointed by the Minister by notification in the Gazette (on a later date).

B. Objectives

The objectives of the Whistleblower Protection Act 2010

a) To combat
   Corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector;
b) To protect persons making those disclosures from detrimental action;
c) To provide for matters disclosed to be investigated and dealt with; and
d) To provide for other matters connected therewith

C. Interpretation

In this Act, unless the context otherwise requires –

"Enforcement agency" means –

a) any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section division, department, agency or body, conferred with investigion and enforcement. Functions by any written law or having investigation and enforcement powers;
b) a body established by Federal Law or State Law which is conferred with investigation and enforcement function by that Federal Law or State Law or any other written law; or
c) unit, section, division, department, agency of a body established by a Federal Law or State Law having investigation and enforcement functions;

"Public Body" includes–

a) the Government of Malaysia.
b) the Government of State.
c) Any local authority and any other statutory authority.
d) Any department, service or undertaking of the Government of Malaysia, the Government of a State, or local authority; and
e) Any company or subsidiary company over which any public body as is referred to in paragraph (a),(b),(c) or (d) has controlling power or interest.

- "Private Body" means an office entity other than public body;
- "Improper Conduct" means any conduct which proved, constitutes a disciplinary offence or criminal offence;
- "Disciplinary Offence" means any action or omission which constitutes a breach of discipline in public body or private body as provide by law or in a code of conduct, acode of ethics or ocirculars or a contract of employment, as the case may be.
- "Authorized officer" means any officer of any enforcement.
- "Whistleblower protection" means protection conferred to a whistleblower under this Act
- "detrimental action" includes–
  a) act of causing injury, loss or damage.

b) Intimidation or harassment.
c) Interference with the lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person's employment, career, profession, trade or business or the taking of displinary action; and
d) A threat take any of the actions referred to in paragraphs (a) to (c)

D. Scope of Protections

A whistleblower shall, upon receipt of the disclosure of improper conduct by any enforcement agency, be conferred with whistleblower protection under this Act as follows:

a) protection of confidential information;
b) immunity from civil and criminal action; and
c) protection against detrimental action (the protection shall be extended to any person related to or associated with the whistleblower).

E. Effectiveness

Whistleblower Protection Act 2010 is a new law, it will comes into operation on a date to be appointed by the Minister by notification in the Gazette (in the future), therefore it effectiveness is yet to be measured but it is no doubt that it will bring a positive effect in combating corruption and other wrongdoing in Malaysia.

IV. IS "OBSTRUCTION OF JUSTICE" CRIMINALIZED?

A. Legislation

The answer is yes! "Obstruction of justice" is a criminal act in Malaysia.

Abduction and Criminal Intimidation of Witnesses Act 1947 (Act 191) is an Act enacted to handle this issue. It was first enacted in 1947 (ordinance no. 26 of 1947) and then it was revised in 1977 (Act 191 with effect from 1 October 1977).

B. Objectives

This Act is to provide enhanced punishments for the offences of abduction and criminal intimidation in certain circumstances.

C. Interpretation

In this act, unless the subject or context otherwise requires –

"criminal proceeding"

Includes any criminal trial or inquiry before a court or tribunal having criminal jurisdiction, and inquest an inquiry into a death, and a police investigation under the Criminal Procedure Code [Act 593]

For the purpose of this Act, the course of justice is impeded it any person from whom is required any evidence testimony, statement or information in or for thr purpose of any criminal proceeding, ceases to be avaible to give such evidence, testimony, statement or information, or with holds such evidence, testimony, statement or information, or gives or fabricates false evidence.

D. Effectiveness

It is important piece of legistion in Malaysia which keep "obstruction of justice" at check ever since it was enacted in 1947. Offenders are punished appropriately.

E. Punishment

It provide four types of offences/punishments for –

Section 3. Offence

Abduction with intent to commit

Punishment

Shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Section 4. Offence

Abduction impeding the course of justice

Punishment

Shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Section 5. Offence

Criminal intimidation to impede the course of justice

Punishment

Shall be punished with imprisonment which may extend to ten years and shall also be liable to fine.

Section 6. Offence

Abetments and attempts.

Punishment

Shall be punished with the punishment provided for that offence.

V. SYSTEM OF MITIGATION OF PUNISHMENT

A. Mitigation Factors

Section 176 (ii) (r) of the Criminal Procedure Code [Act 593] makes specific reference to mitigating factors. Among the accepted factors in mitigation of punishments after he is found quilty by the court and before passing sentence is the accused cooperation with the police (investigation stage) and the plea of guilty (prosecution stage).

The provision of mitigation may be regarded as a further safeguard to the accused.

B. Immunity Granted

There is a provision under Article 145 (3) of the Federal Constitution of Malaysia which stated that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proseedings before a Syariah court, a native court or a court – martial.

C. Is it Effectively Utilized?.

Yes! It is effectively utilized in Malaysia. Mitigation of punishment is for the court to consider while the question of immunity is up to the Public Prosecutor to decide. But both are important instrument in securing cooperation of key witnesses, including accomplice witnesses.

D. Plea Bargaining

It is the latest amendment to the Criminal Procedure Code (Act 593). Section 172C provides for plea bargaining which can be done at any time before the commendment of the trial.

Two areas where plea bargaining are allowed –

a) On the choice of the charge; or

b) On the quantum of punishment

Accused plea guilty after the process of plea bargaining is considered as cooperation rendered and therefore he is entitle for a leniency to the sentence.

VI. STATISTICS/CASES

A. Witness Protection Programmes

Not in operation yet, therefore no statistic or sample case available.

B. Whistle-blower Protection Law

Not in force yet, therefore no statistic or sample case available.

C. Obstruction of Justice

There were cases and accused person being convicted under the Abduction and Criminal Intimidation of Witnesses Act 1947, especially under section 5, that is "criminal intimidation to impede the course of justice", but the statistic is very low because the existing law has successfully act as a deterent to the likely offender.

D. Mitigation of Punishment or Immunity

There is no statistic available but it is widely practice in Malaysia in order to secure cooperation from key witnesses, as where as, it is allowed by the law.

VII. CONCLUSION

Malaysia is always keeping abreast with the international community by having an effective instrument of laws to protect and assist witnesses and whistleblowers in order to secure their cooperation. These important elements of Good Governance is enshrined in Malaysia since 1947 until today. It formed a vital part in our criminal justice system which managed to keep "obstruction of justice" at bay.

LEGISLATION RELATING TO PROTECTION AND COOPERATION OF WITNESSES IN THE UNION OF MYANMAR

San Lin[*]

I. INTRODUCTION

Since a criminal case is built upon the evidence provided by witnesses, each and every statement of witnesses is very important as it can change the course of the whole case. Witnesses play a crucial role in law enforcement efforts to bring the perpetrators to justice. Often, however, witnesses are intimidated, threatened, harmed and harassed to prevent them from speaking out. On the other hand, witnesses deviate from telling truth because of being influenced by corruption and bribery. So that the need of witnesses protection can be classified in two categories. The first one is to protect the physical and mental security of the witnesses from being threatened, intimidated, harassed and harmed before, during and after investigation, inquiry and trial. The second one is to prevent the witnesses from giving false statement and evidence to the responsible officials, police officers and the court during investigation, inquiry and trial. The role of witnesses is very important in a trial and in the criminal justice system of every country. Witnesses are required, and secure protection and cooperation of witnesses is essential to maintain the rule of law. Likewise, the whistleblowers who disclose improper conducts, malpractices and wrongdoings of lawbreakers are also required for the public interest. Legislation relating to establishment of witnesses and whistleblowers protection programme is required.

II. THE LEGISLATION RELATING TO PROTECTION AND COOPERATION OF WITNESSES IN GENERAL

Though the particular law relating to protection and cooperation of witnesses has not been enacted in Myanmar, there are some existing laws containing the provisions which have the nature and characteristics of protection and cooperation of witnesses.

A. Protection of Witnesses

To protect witnesses from being asked indecent, scandalous, vexatious, offensive questions, and questions intended to annoy or insult them, Sections 151 and 152 of the Evidence Act provide as follows:

Section 151. The Court may forbid any questions or inquires which it regards as indecent or scandalous, although such questions or inquires may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Section 152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

In preventing and suppressing trafficking in persons, to pay particular attention of women, children and youth, preventive measures for women, children and youth is widely provided in the Anti Trafficking in Persons Law enacted in 2005. Under that law, the Deputy Attorney General is the head of Working Group on Legal Framework and Prosecution Measures. One of the functions and duties of the Working Group is to lay down and carry out necessary arrangements for the effective protection of trafficked victims and witnesses in prosecuting cases under that law.

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In respect of safeguarding the rights of trafficked victims, preventive measures are provided in that law as follows:

Section 11. In order not to adversely affect the dignity of trafficked victims:

(a) if the trafficked victims are women, children and youth, the relevant Court shall, in conducting the trial of offences of trafficking in persons, do so not in open court, but in camera for the preservation of their dignity, physical and mental security.

(b) with respect to trafficking in persons, the publication of news at any stage of investigation, prosecution, adjudication shall be made only after obtaining the permission of the relevant Body for the Suppression of Trafficking in Persons.

(c) person not involved in this case shall not be allowed to pursue or make copies of documents contained in the proceedings.

Section 12. The Central Body shall, if the trafficked victims are women, children and youth, make necessary arrangements for the preservation of dignity, physical and mental security.

Section 14. The Central Body shall arrange and carry out for the security of life of trafficked victims and repatriation and resettlement as much as possible.

Under section 16 of that law, with respect to the trafficked victims who are women, children and youth, the Central Body and relevant Working Groups are responsible to give special protection of their dignity and identification and necessary security and assistance, and to give protection by keeping confidential the information relating to them.

Under section 19(e) of that law, the Central Body is responsible to lay down the security programmes and to make arrangements for other rights entitled while the trafficked victims are giving testimony or contesting a case.

Regarding hearing in camera, similar provision is provided in section 352 of the Code of Criminal Procedure as follows:

Section 352. The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

Under section 16 of the Brothel Suppression Act, 1949, if a person who is found having sexual intercourse or who is found in the circumstances visible for having sexual intercourse is produced as a witness he shall be tried in camera.

Under section 66(e) of the Child Law, any person who commits the offence relating to inserting and announcing information revealing the identity of a child who is accused of having committed an offence or who is participating as a witness in any case, in the radio, cinema, television, newspapers, magazines, journals or publications and displaying or making use of the photograph of the child without the prior consent of the relevant juvenile court shall, on conviction, be punished with imprisonment for a term which may extend to 2 years or with fine which may extend to kyats 10,000 or with both.

B. Protection and Cooperation of Informers

In uncovering criminals and suppression of offences, getting information is crucial. However, if the informer is to be identified in serious crimes, the person who knows the commission of an offence will not give information relating to the offence as he is afraid of facing the danger made by the offenders as retaliatory action.

To protect the safety of informers, section 125 of the Evidence Act provides that no Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information of any offence against the public revenue.

Similar provisions are inserted in some other laws to preserve the safety of informers and to get their cooperation in uncovering the commission of serious crimes.

Under section 8(j) of the Control of Money Laundering Law enacted in 2002, the Central Control

Board formed by the Government has the power to give necessary protection and giving reward to an informer in respect of money and property obtained by illegal means.

As gambling leads malpractices, corrupt practices and commission of other offences, suppression of gambling is crucial for community peace and law and order. To uncover and suppress gambling, cooperation of informers is essential. For this matter, section 20 of the Gambling Law empowers the Magistrate who tries the case to pass order to give at least five hundred kyats, the money gained from forfeiture, or confiscation, or the money gained from selling properties passed order to be confiscated under that law as reward to the informer.

To impose more effective penalties on offenders in respect of offences relating to narcotic drugs and psychotropic substances, and to cooperate with the States Parties to the United Nations Convention, international and regional organizations in respect of the prevention of the danger of narcotic drugs and psychotropic substances, the Narcotic Drugs and Psychotropic Substances Law was enacted in 1993.

Under Rule 65 of the Rules Relating to Narcotic Drugs and Psychotropic Substances, the Central Body may make such measures as may be necessary for giving reward to the following persons in respect of an offence which action has been taken under the Narcotic Drugs and Psychotropic Substances Law, with the approval of the Government:

(i) a person who gives an information relating to a commission of an offence contained in the said law;
(ii) undercover informer;
(iii) the persons who outstandingly make investigation, search and seizure to be able to seize the drugs, materials and offenders involving in the offence.

C. Prevention of Corruption

Corruption diverts witnesses from telling truth and ruins fair administration, justice and the rule of law. To prevent corruption, the penalties are provided in sections 161 and 162 of the Penal Code.

Under Section 161 of the Penal Code, any public servant who takes gratification other than legal remuneration in respect of an official act shall, on conviction, be punished with either description for a term which may extend to 3 years, or with fine, or with both.

Any person who takes gratification in order to influence public servant by corrupt or illegal means shall, on conviction, incur the similar punishment under Section 162 of the said Penal Code.

To provide more effective penalties for corruption, the Suppression of Corruption Act, 1948 was enacted.

If any public servant by corrupt or illegal means or by abuse of his office as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage, he is said to commit the offence of criminal misconduct in the discharge of his duty under section 4(1)(c), 4(2) of the said Act, and he shall be punished with imprisonment for a term which may extend to 7 years and all the gains found to have been derived by him, by the commission of that offence shall be liable to be forfeited to the State.

Regarding suppression of corruption, more severe punishments are provided in later laws.

Under section 46 of the Forest Law enacted in 1992, any forest staff who, by reason of his power accepts from any person cash or kind in a corrupt manner or in contravention of the law and participates and conspires in extracting, moving or unlawfully having in possession forest produce in a wrongful manner shall be punished with imprisonment which may extend from a minimum of 1 year to a maximum of 7 years.

Under section 25(a) of the Control of Money Laundering Law, any member of the Investigation Body who demands or accepts money or property either for himself or for any other person as a gratification in investigating money laundering offence shall, on conviction, be punished with imprisonment for a term which may extend from a minimum of 3 years to a maximum of 7 years and may also be liable to a fine.

Similar punishment is provided in section 30 of the Anti Trafficking in Persons Law for any public official who demands or accepts money and property as gratification either for himself or for another person in carrying out investigation, prosecution and adjudication in respect of any offence under that law.

More severe punishment is provided in section 18 of the Narcotic Drugs and Psychotropic Substances Law. Under section18 of the said law, any person who is authorized to search, arrest, seize exhibits and investigate in respect of any offence under that law, and guilty of asking and accepting any money and

property as gratification either for himself or for another person shall, on conviction, be punished with imprisonment for a term which may extend from a minimum of 5 years to a maximum of 10 years and may also be liable to a fine:

D. Tender of Pardon to Accomplice for Making Approver or State Witness

In serious crimes involving more than one offender where there is no reliable evidence or witness, making an accomplice approver or State witness is helpful to enable effective conviction of principal offenders. For this matter, section 337(1) of the Code of Criminal Procedure empowers the Magistrate not lower than the Magistrate of first class to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

Rule 66 of the Attorney General Rules made under the Attorney General Law, 2001 empowers Law Officers to tender conditional pardon to the accused for making him State witness in accordance with the provisions contained in section 337 of the Code of Criminal Procedure.

Section 19 of the Gambling Law empowers the Magistrate to make a person involving in the offence contained in that law prosecution witness and tender him a pardon in accordance with the procedures.

Section 14 of the Brothel Suppression Act,1949 empowers the Magistrate to examine a person who is not a principal offender among the persons prosecuted under that law as a witness relating to the offence. The person who is involved in the offence under that Act and he has made a full and true disclosure of the whole of the circumstances relating to the offence within his knowledge to the satisfaction of the Magistrate shall be entitled to receive an acknowledgement certificate from the Magistrate under section 15 of that Act. So receiving, he shall be exempted from being punished under that Act.

E. Immunity from Prosecution

To enable effective prevention and suppression of serious crimes including terrorism, financing of terrorism, transnational organized crimes and crimes related to money laundering and to enable rendering of assistance in criminal matters in accordance with international conventions, regional and multilateral agreements the Mutual Assistance in Criminal Matters Law was enacted in 2005. Under that law, immunity for witness from prosecution is provided as follows:

Section 31. The Central Authority shall, if the person who is to give testimony, statement or expert opinion in any foreign State has committed any offence previously in the Requested State, within 15 days or if it exceeds 15 days from the date of arrival at the said State and making report thereof, raise the issue to get prior agreement with the said State so as not to prosecute, detain, punish or restrict personal liberty in the said State with respect to the previous offence, during the period agreed upon by the two States.

Section 35. The relevant government department and organization shall not prosecute, detain, punish or restrict personal liberty of a person sent by a foreign State with respect to any offence committed by him previously in the Union of Myanmar within 15 days or if it exceeds 15 days from the date of arrival and making report thereof, during the period agreed upon between the two States while he is in the Union of Myanmar to give testimony, statement, expert opinion or in person, in accordance with this law.

Under section 13 (a) of the Anti Trafficking in Persons Law, the trafficked victims are exempted from being taken action for any offence under that law.

F. Prevention of Witness from Turning Hostile

In many cases, it is on the basis of the evidence given by witnesses that the State initiates the prosecution process. Because of inadequate protection given to witnesses, they are influenced to change their earlier statements. To prevent witnesses from turning hostile by telling lie, police officers making an investigation into an offence, as the statement made to the police officer is an inadmissible evidence, forward the crucial witnesses to the Magistrate for recording the statements of the witnesses before commencement of the trial. If the earlier statement to the Magistrate and the later statement made to the Magistrate during the trial contradict each other, action can be taken to the witness for giving false evidence.

Punishment for giving false evidence is provided in section 193 of the Penal Code as follows:

Section 193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine: and whoever intentionally gives or fabricates false evidence in any other case shall be punished with imprisonment of either description for a term which may extend to 3 years, and shall also be liable to fine.

G. Obstruction of Justice

The legislation addressing the use of physical force, threats or intimidation or promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence can be found in the Penal Code.

Under section 352 of the said Penal Code, whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person shall be punished with imprisonment of either description for a term which may extend to 3 months or with fine or with both.

Under section 506, whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which many extend to 2 years, or with fine, or with both; and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation or with imprisonment for a term which may extend to 7 years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to 7 years, or with fine, or with both.

Under section 507, whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution, to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to 2 years in addition to the punishment provided for the offence by the above mentioned section.

The penal provisions relating to the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official are provided in the Penal Code as follows:

Section 186. Whoever voluntarily obstructs any public servant in the discharge of his public functions shall be punished with imprisonment of either description for a term which may extend to 3 months, or with fine or with both.

Section 189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to 2 years, or with fine, or with both.

Section 228. Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any state of a judicial proceeding, shall be punished with simple imprisonment for a tem which may extend to 6 months, or with fine which may extend to one thousand kyats, or with both.

The punishment for assault or criminal force to deter public servant from discharge of his duty is an imprisonment for a term which may extend to 2 years or with fine, or with both under section 353 of the Penal Code.

III. CONCLUSION

Nowadays, many developed countries all over the world have developed their legislation by promulgating protection and cooperation of witnesses laws containing the provisions relating to various preventive measures and necessary arrangements for the witnesses who are under threat, intimidation and in danger. In Myanmar, since occurrence of offences harmful to the physical and mental security of witnesses retaliated by offenders is rare, so far, the particular law relating to protection of witnesses has not been still promulgated. But, when the situation requires, Myanmar may consider to promulgate the special law relating to protection of witnesses.

THAILAND'S WITNESS PROTECTION PROGRAMME

*Mr. Kerati Kankaew**

I. INTRODUCTION

Nowadays, we cannot deny that there are a large number of crimes. Undoubtedly, crimes are increasing in number. This is caused by many factors as the world has been developing dramatically. Technology and state-of-the- art invention play an important role in current crimes. Crimes have changed as the world has developed. The more development in technology, the more sophisticated crimes. This surely adds more difficulty for authorities to enforce the law. States cannot overlook this movement and in fact they have to develop the law to protect our societies from those sophisticated crimes. Today, we have criminal law as our weapon. To prove that a person has committed crimes, evidence must be clearly shown. Evidence can be witnesses, documents and hard evidence. There is a serious problem when a witness does not want to testify against a criminal due to fear for his own safety or even his or her family's safety.

The doctrine of "Witness Protection" comes from an idea to support criminal case proceedings. In the judicial system, no matter what proceeding system a state uses, a judge is always the one who is capable of ruling a judgment. Evidence is the most important source for a judge to rule a case lawfully. A state has the duty to ensure that criminals must be sentenced according to the state's law. To do so the state needs witnesses to testify in a criminal proceeding; however, the state also has a duty to ensure and provide protection to the witness. It is easy to understand that no one would want to do a thing for the state if, by doing so, it would cause harm to himself or his family. If a state cannot enforce the law by bringing criminals to justice, its citizens will not believe and trust in the state's governing power, resulting in a failure socially or even nationally.

II. WITNESS PROTECTION

A. Meaning of "Witness Protection"

"Witness" means a person who commits himself/herself to be present at, or give evidence to a competent official for investigation, a criminal interrogation, a court for criminal proceedings, and includes an expert but not a defendant who himself/herself is a witness.

"Security" means security in life, body, health, liberty, honor, property or any lawful rights of the witness before or at the time of or upon becoming a witness.

"Witness Protection" therefore means the method providing to a witness ensuring his or her safety and his or her family, including everything that he or she is entitled to have by law, in exchange for a witness's testimony.

B. Objective of Witness Protection

- For a competent officer to understand the law and perform his or her duty efficiently.
- For a competent officer to realize his or her authority and power imposed by law, in order for the officer to perform the highest level of protection in each case.
- To predict the number of witnesses in criminal cases in the future by planning and finding solutions against any potential obstacles beforehand.

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C. Method, Authority Power and Duty

The Law "the Witness Protection Act BE 2546" (2003) provides for two strategies.

1. General Provision Strategy

This is the more common strategy. According to the Section 6 of the Act, in a case where a witness loses his or her security, a competent official from criminal investigation, interrogation, prosecution or the Witness Protection Bureau, as the case may be, shall desire for the witness protection measures as deemed appropriate or as requested by the witness or other concerned party. Where necessary, the said person may request a police officer or other official for protection and this must be subject to the witness's consent.

Protection measures may include arrangements for a safe place for the witness; or change of name/ family name, domicile, identification, and information that would reveal the identity of the witness as appropriate, and the personal status of the witness and the nature of the Criminal case.

The protection of witnesses in general doesn't apply to the witness only but can also be used for those related to the witness. In a case where a witness's husband, wife, progenitor, descendant, or person with a close relationship to the witness is affected by the person becoming a witness and would lose security, he/she may request the competent official to design or arrange for measures as deemed appropriate, taking into account the consent of that person.

Protection measures may include arrangements for a safe place for the witness; or change of name/ family name, domicile, identification, and information that would reveal the identity of the witness as deemed appropriate, and the personal status of the witness and also the nature of the criminal case.

2. Special Protection Measures

A witness in the following [types of] cases may be eligible for the privilege of special protection measures:

- A case under the law on narcotic drugs, money laundering law, anti-corruption law, or customs law.
- A case related to national security under the Penal Code.
- A sexual offence under the Penal Code relating to the luring of a person for the sexual gratification of another.
- A criminal offence in the nature of organized crime under the Penal Code, including any crime committed by a criminal group with a well-established and complicated network.
- A case punishable with at least ten years of imprisonment.
- A case that the Witness Protection Bureau deems appropriate to arrange for protection.

Whenever there are explicit circumstances or suspicion that a witness has lost his/her security, the witness or other concerned party, a competent investigation official, competent interrogation official or competent criminal case prosecution official shall apply to the Minister of Justice or his appointed official to arrange for special protection measures, subject to the witness's consent.

D. Special Witness Protection Detail

The Witness Protection Bureau shall arrange for one or more of the following special protection measures:

- A new place of accommodation.
- Daily living expenses for the witness or his/her dependents not exceeding one year, with extensions as necessary for three months each time, not exceeding two years.
- Coordination with the relevant agencies in order to change the first name, family name and information that may contribute to knowledge of the personal identity of the witness, including arrangements for a return to original status.
- Action to help the witness have his/her own career, and training, education and other means of proper living for his/her life.
- Assistance or action on behalf of a witness for his/her lawful rights.
- Arrangements for a bodyguard service for a necessary period of time.

– Other actions to assist and support a witness with his/her security as appropriate.

E. Possible Benefits

The Witness Protection official can utilize the information and knowledge acquired from protecting the witness to further the case.

This would aid in the planning and determining the protection of the witness, making witness protection more efficient.

F. Principles for Witness Protection

The Witness Protection Bureau has rights and authority as follows:

– Determine the necessity to authorize the use of Witness Protection for the witness.
– Specify or comment regarding the protection measures to be used.
– Set rules and regulations for the witness to follow while under protection and if witness violates any rules that would result in the termination of the witness protection.
– Determine which department or official would be in charge of providing protection to the witness and also the location in which the witness would be protected.
– Determine the necessary weaponry, transportation, equipment and other utilities.
– Set a budget, and total funds to be used in providing protection to the witness.
– Set regulations and guidelines in requesting funds used in protection of the witness.
– Investigate and follow up on the witness protection and also on the expenses requested for the protection.
– Request the witness or any others related to give a statement or request further documentation/evidence to aid in the authorization of the protection of the witness.
– Delegate a sub-committee to pass judgment or carry out tasks set by the board.
– Assess and order the termination of a certain witness protection programme.
– Assess and order the modification of the protection methods or of the regulations set.
– Assess and order the authorization of continued witness protection or terminate the witness protection.
– Assess and order the authorization or termination of witness protection authorized prior to new regulations regarding witness protection in criminal cases.

G. Witness Protection Center

The Department of Special Investigations (DSI, a division of the Ministry of Justice) Regulations regarding the Witness Protection in Criminal Cases gives authority to the Office of Special Operations to be the Witness Protection Center and has rights and authority as follows:

– Administration and management of the Board of Witness Protection.
– Inspect the petition for witness protection filed.
– Assess and offer comments to the Board of Witness Protection.
– Input and file data of witness protection.
– Coordinate and follow up on the witness protection.
– Collect and follow up on data received to be presented to the Board of Witness Protection for further assessment.
– Inspect and give opinion regarding the expenses of a witness protection such that it is appropriate and most efficient.

The Witness Protection Center is also responsible for filing a petition regarding the reward budget and expenses. It is also responsible for acquiring the necessary equipment, transportation, tools and other up-to-date technology to be used in the witness protection and the training, development and improving of the strategy utilized in witness protection.

Data of Witness Protection

Year	Number of Witnesses Under Protection	Completed	Remaining
2004	1	1	0
2005	15	4	11
2006	4	0	4
2007	2	1	1
2008	11	4	7
2009	11	4	7
2010	25	0	25
Total	69	14	55

Diagram showing procedures in obtaining protection

III. PROBLEMS, OBSTACLES AND POSSIBLE SOLUTIONS IN WITNESS PROTECTION

A. Problems and Obstacles in performing Witness Protection

Laws regarding witness protection in criminal cases were only recently established. This is because witnesses in criminal justice cases usually have a problem of coming to court to testify or give false testimony altering the truth due to the fear of their lives, possessions and that of close relations, by means of threats, abuse from those who have direct impact from the case such as powerful figures, or relatives of the defendant all of which effects the criminal justice process as justice is lost by not being able to bring the criminal to be punished by law. Furthermore people who are to become witnesses and also the officials responsible for providing protection of the witnesses' do not fully understand the boundaries, the rights, authority and means of witness protection as there is no clear procedures to follow. It requires officials with experiences in witness protection giving priority to the safety of the witness. The problem in offering witness protection can be further categorized in two sections as follows:

1. Problems and Obstacles received from the Witness under Protection

In order to receive protection the witness must perform and live within certain sets of rules and regulations set prior to the protection being given, resulting in a change and discomfort to their normal life causing witnesses to reach boredom if the court proceedings consumes large periods of time.

Witnesses under protection are given a sum of money as a reward and an allowance is given to those closely related to the witness, the witness is also given an allowance used in purchasing food, paying for the location of stay, and other vital expenses in their daily lives. This can sometimes cause some witnesses to take advantage of requesting funds that are used in an inappropriate manner.

2. Problems and Obstacles faced by Witness Protection Officials

There is lack of the man power to perform the protection voluntarily. This is because it is seen as something that doesn't require any skill, knowledge to perform, the commanding officials also do not show a lot of importance and care towards it. This job doesn't provide progress in a government official's career. Also the lack of female officials to perform the witness protection is a problem as DSI is currently faced with large numbers of female witnesses which is only proper if the protection was given by a female official.

There is also lack of the coordination between the investigating officials and the witness protection

officials, resulting in an inability for the protection officials to predict the dangers that the witness could face and the means to counter it. This also includes problems that could occur to the witness such as illness, family related problems, financial problems, mental health etc. as the protection official has to try to correct alone.[1]

No established training course or programmes are available to give knowledge to the witness protection officials. Currently officials rely on their own experiences in operating the protection causing a lack of standardized means of providing protection to witnesses.

Some operations require protection of the witness for a year, or many years before the witness is able to testify in court, leading to the officials becoming bored and unable to perform other tasks.

B. Possible Solutions

- Define clear set of protocols regarding the payment for the expenses required in the operation, to the officials and the witness according to the rights by law. This is to ensure that the official is able to perform their duties fully and able to control the budget for expenses for the witness with great efficiency.
- Provide support for the officials in witness protection that shows great potential and knowledge in this field as it is a job that requires a lot of patience, good wit/senses, skilled in the art of conversation to talk to the witness, and must be able to solve problems that had just occurred straight away. Provide a possible progression in career as an incentive for the officials to continue performing their job.
- Give the power for DSI officials to have a part in deciding and correcting problems of the witness in conjunction with the protection officials. This is so that the problems that occur can be dealt with correctly, not time consuming and suitable.
- Should provide a shift rotation of protection officials so that officials can also go on other operations and perform other duties as assigned by their commanding officers and wouldn't cause the officials to become bored in protecting the witness.
- Organize training for DSI officials regarding the rules and regulations in Witness Protection and also field training in the methods and possible ways to protect witness, skills in proper handling of firearms to ensure a single standard in giving protection to witnesses.

C. Protection of Persons who provide Useful Information relating to Government Officers' Corruption in Thailand

Corruption of officials in government agencies has long been a serious problem for Thailand; hence it is essential to find the appropriate mechanisms and measures to solve this problem. Monitoring is one of the important rights of people in order to participate in this matter by reporting activities which involve corruption. However, it relies on a person acknowledging and highlighting activities that are likely to be in conflict with the public interest or of persons at a higher level within an organization which can be detrimental to that person's career.

Whistleblowing is not only an act of revealing a serious problem in the internal administration of an organization, but also a tool that will bring evidence to legal proceedings of an accused. Nevertheless, whistleblowing comes with a high risk of retaliation for the whistleblower.

A significant factor encouraging whistleblowing is the measure protecting those disclosing information from any activities that may harm their lives, bodies and freedom and it will, definitely, help ensure people enthusiastically reveal information. Moreover, the offering of benefits in addition to protection will be an additional tool to persuade people to reveal information. Government must legislate and implement whistle

1 All Departments involved with witness protection, fall directly under the control of the Ministry of Justice. As witness protection policies are relatively new to Thailand, the levels and channels of cooperation between the various departments involved, with the aspects discussed in this paper are still to a degree being developed. Many of the relationships between different Bureaus and Departments are currently a little complicated and may go through more than one department, based upon personal contacts to achieve the desired result. More formal channels for inter department cooperation are currently being developed, which should enhance the effectiveness of these programs in due course.

blower protection law into practice which will, in time, create the environment to support whistleblowing. People expect a well-organized system and procedure for whistleblower protection law, and if such exists, people in possession of wrongdoing will feel safe to disclose information.

Unfortunately, currently the protection law is not adequate because a non-government agency must be founded to create principles and policies for the process of protection and to play an additional role as an authority to protect the whistleblower. It apparently seems that the prevention of corruption within an organization requires the establishment of legislation for whistleblower protection, which will not only benefit the country in the development of proficient skilled officers to solve problems related to corruption and unity, but also save the country's resources (funds and human resources) by founding of a new non-government agency to oversee whistleblower protection. Finally, it will be good for the country by helping to encourage confidence through the general populace in Government authority.

Thailand introduced legislation in 2008 to cover many aspects of corruption in Government agencies with sections 53-57 focusing on protection of the Whistleblower. These sections allow the Office of the National Anti-Corruption Commission to provide initial protection to a witness and grants authority for allocation of protection to an accused person, a witness or another involved party, as well as family members or others closely known to the whistleblower who may be at risk. Allocation of funding to a protected party is decided and allocated by a committee. In cases where the information is especially important or sensitive, the committee is empowered to take additional measures to ensure the reputation and credibility of the witness is also assured, in addition to physical safety. In the case of Government employees where the nature of the information disclosed may prejudice their continued employment in the same role or office, special measures are available to ensure their career will not be adversely affected by their revelations. The act also allows for the committee to allow a person who reveals information to be granted immunity from prosecution and to be entered into the witness protection programme. Penalties both financial and custodial exist for any person who reveals or discloses information about the identity or whereabouts of any protected person.

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

*Nguyen Nhu Nien**

I. INTRODUCTION

Ensuring the safety and cooperation of witnesses and other persons disclosing the offence, named whistleblowers, has always been considered as one of the most decisive factors for the success of the investigation, prosecution, and adjudication of criminal cases. Therefore, many countries in the world, including Vietnam, have issued many legal documents and practical measures to create favorable conditions for the participation of witnesses and whistleblowers. In respect of international laws, the protection for and the cooperation with the witnesses and whistle-blowers has been increasingly of importance. Some international legal documents, such as United Nations Convention on Transnational Organized Crimes or United Nations Convention against Corruption, have already had some binding provisions toward its member to effectively protect witnesses and persons disclosing crimes.

This presentation will briefly introduce policies and specific legal provisions of Vietnam to protect witnesses and whistleblowers. Also, the effectiveness of the implementation of these policies and legal provisions in the context of Vietnam shall be thoroughly discussed. Finally, some recommendations on practical measures to enhance the effectiveness of the protection for the witnesses and whistleblowers in the times coming shall be presented.

II. DOMESTIC AND INTERNATIONAL LAWS ON PROTECTION OF WITNESSES AND WHISTLE-BLOWERS

According to the defining provision of the Criminal Procedure Code 2003 of Vietnam (CPC 2003), the witnesses is the persons knowing some details, which are meaningful for the investigation and adjudication of a criminal case, and he/ she has been summoned by bodies conducting criminal proceedings to participate in the case to present his/her statements (Article 55 CPC2003). The witnesses' participation in the case, which is their legal responsibility, is under the decision to summon of the body conducting legal proceedings (Article 133 CPC 2003). So far, Vietnam has acceded, and being the state member of United Nations Convention on Transnational Organized Crimes or United Nations Convention against Corruption, it has full obligations and responsibilities to ensure the safety and cooperation of the witnesses and whistleblowers.

In conjunction with the process of expanding the guarantee of human rights in legal proceedings, the provisions on witnesses has been changed in the direction of humanizing the relationship between the state and witnesses, expanding rights of witnesses and legal undertakings for such rights. The demand on combating corruption and organized crimes effectively is the main momentum for such a process. The legal provisions on protecting witnesses is one of the main factors to enhance the truth and values in terms of proofing for the witnesses' statements because that can exclude the main reasons for the false statements, disclaim the initial statements of the witnesses – the fear for being revenged. At the same time, it might actively affect the enforcing authorities' activities in legal proceedings. In the context of combating organized crimes in Vietnam, this struggle can only gain success if legal bases on protecting the witnesses are established and fully implemented.

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The legal provisions relating to witnesses are legalized and provided in the first Criminal Procedure Code of Vietnam 1988. However, these provisions only concern on responsibilities of the witnesses without ensuring their legitimate rights and interests. If the witness does not come under summon, he/she can be legally subjected for the production, or even be prosecuted if he/ she refuses or hides from taking the testimonies. In order to address the demands from the struggle against crimes, some extra rights of the witnesses have been supplemented to the current CPC 2003 as compared to the CPC 1988. Accordingly, CPC 2003 provides some new rights of the witnesses such as the right to request the body which has summoned them to protect their life, health, honor, dignity, property and other legitimate rights, the right to make complaints on the decision or actions of bodies, or persons conducting legal proceedings, and the right to get the refund for transportation expenses and other costs as provided by legal provisions (Article 55 CPC 2003).

To adapt more effectively to the context of the struggle against drug offence, Article 14 in the Law on Preventing and Combating drug 2000 of Vietnam has provided that the persons who disclose crimes, the witnesses, the victim, and their family members are all protected. In fact, not only the people who disclose crimes, witnesses, the victims, but also their parents, husband/wife, children are also subject to the threat of being attacked by drug criminals. The reality shows the activeness and the necessity of these provisions, to create an effective and obvious change in the struggle against drug offence over the past years.

However, the reality of the activities in criminal proceedings in Vietnam shows that the ensuring for the safety and cooperation of the witnesses and whistleblowers still has some shortcomings: some social surveys in Vietnam show that the witnesses, the victim, and the relatives are still afraid of being face to face toward the accused, their friends and relatives in the adjudication process at trial. These face to face occasions might be out of control of the body conducting legal proceedings, such as outside the Court, in the corridor of the Court room when waiting for the trial commencing. Some kinds of forcing the witnesses not to cooperate with the body conducting legal proceedings via giving false statement or disclaiming previous statement have been found in some localities and become more popular and sophisticated. These factors are rooted in some grounds, both subjective and objective ones.

A. In Terms of Legal Provisions

In spite of playing a very important role, the obligations of witnesses and whistleblowers are heavier and many more than the legitimate rights and interests offered. The witnesses can be produced in case of absence without legitimate grounds or causing difficulties for the investigation and adjudication. In case of refusing to give statement without legitimate reasons, they might be subjected to criminal prosecution under Article 308 of the Penal Code 1999; in case of giving false statement, they might be subjected to criminal prosecution under Article 307 of the Penal Code 1999. The CPC 2003 has not created legal grounds to encourage the witness to actively implement their citizenship – to cooperate with the State in the struggle to prevent and combat crimes and clarify the truth of the case.

As compared to legislation on criminal procedure of many countries in the world, the CPC 2003 of Vietnam has no provisions on the relation based on the spirit of cooperation between witnesses and body conducting criminal proceedings. For example, the CPC 2003 provides many obligations and responsibilities, but not a single provision on bonus for the witnesses in case of good cooperation with body conducting legal proceedings. This legislation has no organic relationship between them and bodies conducting legal proceedings.

Consequently, the trials in Vietnam can still take place without the participation of the witnesses. In practice, there are some cases that the witness cannot attend the trial for some causes: when the trial takes place, the witness has died, or suffered from such serious sickness that he/ she cannot move, but these are very rare, just simply because the witness does not want to attend the trial because of several reasons. Although the law provides that the collegiate bench might decide to defer or continue the trial in case of absence of the witness (Article 192 CPC 2003), this provision does not give an explanation in which circumstance that the trial can be deferred or continued. This general provision has led to unsystematic behavior that the trial can still be taken place without the participation of the witness, even in some case there is a unique witness.

The CPC 2003 of Vietnam has just realized the right of the witness to request the authority to protect their life, health, honor, dignity, property and other legitimate rights and interests in criminal proceedings.

However, the CPC 2003 has not provided in details the specific methods, procedures applicable, and the corresponding guarantees, so that it turns to be general and has not taken into its full play in adjudication. For instance, Article 211 CPC 2003 provides that "in case of necessity to protect the witnesses and their relatives, the collegiate bench must decide on measures to protect them according to legal provisions". This is very formal and general, since it is not clear about which measures and legal provisions are. In other words, there have not been specific legal provisions and policies to protect witnesses and whistleblowers.

The researching provisions of CPC 2003 show that the status of the witness is much lower than that of the defendant or the accused. In spite of implementing legal obligations for public interests, the witnesses and their relatives might face disadvantages in the future; even being subjected to criminal prosecution based on their statements that they must not refuse. In some criminal cases, the witness has become the defendant.

This can be explained that a Vietnamese legal proceeding is a process. At first, since there is not enough information, the witness can be summoned, but when there is enough information about his/her connection to the offence, he/she can be subjected to the prosecution. As compared to many countries in the world, this is quite different. These foreign laws provide that the exemption can be applicable for the victim, civil plaintiff, civil defendant, the suspect, the defendant and the witness. Even, it is not allowed to take testimony from: the judges, priests, the defense counsel, the accused, Members of Parliament.

Apart from these issues, there has not been synchronization with other legislations (such as Labor Law, Law on Public servants, Law on anti corruption, Civil Code, Law on protecting and fostering for children, Law on denunciation) in ensuring the safety and cooperation with the witnesses and whistleblowers.

B. From the Body, Person conducting Criminal Proceedings

The criminal procedure law provides the task, power of body conducting criminal proceedings in collecting, analyzing evidence to construct grounds for convicting of a person. The person conducting legal proceedings can summon person knowing about the offence and listen to their presentation about the relating issues. However, it is not always that the role and status of witnesses in the inquisitorial model of Vietnam is properly appreciated because the laws provide that the truth on crime can be determined from different sources. In the CPC 2003, there are no provisions on responsibility of authorized persons in criminal proceedings in ensuring the witness' rights; thus, in practice, the violation of their rights still takes place sometimes.

C. From the Witnesses

The witnesses cannot often be aware of their role in the struggle on preventing and combating crimes. Many Vietnamese witnesses think it is a waste of time, income and only leads to troubles. In reality, it is very rare that the witnesses make complaints about the behavior of the investigator, prosecutor, or the judge, who have forgotten to explain their legitimate rights and interests, or just about inadequate and incorrect explanations. If any, these complaints also fall into the situation of being very long proccessed or of no response.

III. SOME RECOMMENDATIONS TO ENHANCE PROTECTION FOR WITNESSES AND WHISTLE-BLOWERS IN VIETNAM

– Amending, supplementing the CPC 2003 in the direction that:
+ Providing specific measures to ensure the witnesses' rights;
+ Synchronizing with other legislation (such as Labor Law, Law on Public servant, Law on anti corruption, Civil Code, Law on protecting and fostering for children, Law on denunciation);
+ Providing the bonus for the witnesses since many current provisions are formal only;
+ Providing the sanction on giving unsuitable statements in the direction on limiting criminal prosecution, and providing more on administrative sanctions;

+ Providing the mechanism to effectively protect the witnesses since the application of current measures to protect the witnesses has not been regulated consistently, thus leading to unsystematical application. At the same time, it is necessary to provide protections for witnesses' relatives.

+ Providing the classification of the witnesses and whistleblowers, so that they can benefit from their rights as legally provided (the juvenile, ethnic people or foreigners).

– Carrying out the propaganda within enforcing authorities and the public about the content of the protection for witnesses and other persons disclosing offence in criminal proceedings.

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DISCUSSIONS AND RECOMMENDATIONS

DISCUSSIONS AND RECOMMENDATIONS

The discussion sessions were chaired by Mr. Claro Arellano, Prosecutor General of the Republic of the Philippines.

Mr. Haruhiko Ukawa, Deputy Director of UNAFEI, sat as Co-Chair, and Mr. Trimulyono Hendradi, from Indonesia, sat as Vice-Chair.

Topic (i): Effective legislation and measures to protect witnesses.

Regarding effective legislation, the participants addressed the benefits of accession to the UNTOC and its Protocols and accession to the UNCAC. Ms. Kramer, the Visiting Expert from the UNODC, noted the importance of the conventions and protocols in furthering witness and whistle-blower protection in developing countries. The UNTOC, in Article 24 (1), requires States Parties to take appropriate measures to protect witnesses, and in Article 24 (2), provides for measures which may be included in such protective action. The UNCAC, meanwhile, in its Article 33, requires States Parties to consider taking appropriate measures to protect reporting persons. The participants later engaged in a comprehensive discussion of these issues under topics (iii) and (ii) respectively, below.

Regarding effective measures, Mr. Ukawa drew attention to the police protection procedures that can be employed in the ordinary course of police duties, without the need for special advanced measures for witness protection. There was a consensus that such regular police protection is important, especially for witnesses who are not subject to comprehensive witness protection programmes.

A roundtable discussion elicited the particular elements of witness protection provided in each country, such as testimony via video-conferencing and use of pre-trial statements as evidence. It transpired that many such procedures are not employed as a matter of course in the participating countries. The participants discussed procedural protection measures at the trial stage, particularly measures to reduce face-to-face confrontation with the defendant, which can be provided to any witness in the usual course of the criminal justice procedure.

Regarding the removal of the defendant during witness testimony, and video recording of testimony at the pre-trial stage, as available in Germany, the participants carefully considered the importance of balancing the protection of witnesses with the due process rights of the defendant.

Participants also considered at length the exclusion of the media from court hearings, as the presence of the media is necessary to ensure that justice is seen to be done, but over-exposure can make witnesses easily identifiable.

The participants next considered comprehensive witness protection programmes, where ordinary protection measures are not sufficient. Relocation, change of identity and financial assistance are provided by about half of the represented countries, while psychological support, medical care and protection of relatives are less widely available.

Mr. Ukawa drew attention to the opinion of Ms. Kramer that it was not the *location* (i.e. responsible agency) of the programme that was important, but rather its autonomy, independence and competence, and that these factors were vital to ensuring the neutrality of the programme.

Ms. Kramer noted that the confidentiality of such programmes is best served by their operational separation from normal police departments. Mr. Arellano emphasized the importance of confidentiality, which he said was the cornerstone of all witness protection programmes.

Following on from a detailed discussion of police involvement in witness protection programmes, it was nevertheless observed that witness protection is a tool for the prosecutor, and that the prosecutor is in the best position to determine the value of any evidence. Threat assessment is also important however, and countries must consider for themselves who is best placed to make that assessment.

The participants also noted that minor or child witnesses may require further special measures as per the United Nations Convention on the Rights of the Child.

Topic (ii): Mitigation of punishments and/or immunity grants for persons who provide substantial cooperation in an investigation or prosecution.

The UNCAC, in Article 37(2), requires States Parties to consider mitigating punishment in appropriate cases. Most of the represented countries do provide for mitigation of punishment, but few provide for immunity grants from prosecution.

Mr. Ukawa reminded the participants of the difference between mitigation or leniency and the provision of witness protection. While mitigation or leniency is given in exchange for truthful cooperation, witness protection is not: it simply removes obstacles to full cooperation by witnesses. If any witness protection programme is to have public support and legitimacy, it must not encourage lying or be seen to reward criminals. During court proceedings, the defence will raise questions about a protected witness's credibility and motivations – the prosecution must be able to ensure that this will withstand scrutiny.

Topic (iii): Criminalization and punishment of obstruction of justice.

As noted above, one of the UNTOC's most significant provisions is in Article 23, which requires States Parties to criminalize the obstruction of justice. Likewise, the UNCAC, in its Article 25, requires States Parties to criminalize the obstruction of justice.

The participants again discussed in a roundtable format whether or not their respective countries had criminalized the obstruction of justice, if so, how they had done it, and the punishment which exists for the crime. Half of the represented countries had criminalized the use of coercive means of obstructing justice, while fewer than half had criminalized the use of corrupt means.

Despite enacting such legislation to criminalize obstruction, the participant from Malaysia explained that the authorities there still encounter challenges in its enforcement.

Topic (iv): Effective legislation and measures to protect whistle-blowers.

The UNCAC provides a range of measures, preventive and enforcement, which are important for whistle-blower protection.

Ms. Zimmermann, the Visiting Expert from Germany, and Mr. Ukawa advised participants that it is important to remember that whistle-blower protection is a separate issue to witness protection. Whistle-blowers do not necessarily become witnesses in criminal proceedings, and the protection needed for whistle-blowers as such is more limited in scope. In Germany and Japan, whistle-blower protection falls under contract or labour law rather than criminal law.

A participant from the Philippines noted that this issue has a cultural dimension, as whistle-blowing is closely related to exposing corruption in government, and it is therefore important for countries which recognize that they must address corruption to protect whistle-blowers.

Similarly, to tackle corruption as effectively as possible, the participants agreed that whistle-blowing in both public and private sectors should be addressed.

Finally, it was noted that even if witness or whistle-blower protection is excellent, corrupt or intimidated judges can still fail the pursuit of justice and hence that good governance is essential. In this regard, Mr. Ukawa advised the participants of the publication of the Report of the First Regional Seminar on Good Governance for Southeast Asian Countries, held in Bangkok, Thailand, in December 2007, which addressed "Corruption Control in the Judiciary and Prosecutorial Authorities".

RECOMMENDATIONS

[UNTOC & UNCAC]

1. The United Nations Convention against Transnational Organized Crime (UNTOC) and its Protocols, and the United Nations Convention against Corruption (UNCAC) are the main international legal instruments in the fight against organized crime and corruption. They cover a wide range of measures, including witness protection, and establish a framework for further international cooperation. Accession to these conventions should be duly considered and is hereby encouraged. Appropriate measures to protect witnesses should be taken as required by the UNTOC and the UNCAC.
2. The use of force, threats or intimidation, and the promise, offering, or giving of undue advantage to induce false testimony or to interfere in the giving of testimony in relation to criminal offences seriously undermine witnesses' willingness and ability to produce accurate evidence and testimony. Such use of force, threats, and inducements should be duly criminalized in accordance with the UNTOC and the UNCAC, and such penal provisions should be properly enforced.

[General Recommendations]

3. Every actor in the criminal justice process has a role to play in witness protection. Adequate training for criminal justice personnel should be provided on protection measures and attendant ancillary procedures.
4. Various measures and ideas that do not require enabling legislation or changes in the existing law, such as providing separate waiting rooms and prompt disposition of pending trials, can substantially reduce the risks to and burdens of witnesses. Such measures and ideas, within available resources, should be considered to the extent practicable.
5. Special attention should be paid to the needs of vulnerable witnesses, particularly children.

[Police Protection]

6. Police measures to ensure the physical security of witnesses should be in place and duly applied. Depending on the level of the threats involved, enhanced security measures, such as temporary relocation and closer protection, should be applied when necessary.

[Procedural Protection]

7. Court procedures that allow witnesses to testify without fear and in a manner that ensures their safety should be available in accordance with each country's domestic law. In the application of such measures, due consideration should be given to balancing the need to protect the witnesses and to ensure the defendant's due process rights. Such measures may include the following:
   - Removal of defendants;
   - Removal of particular spectators and/or media;
   - Use of pre-trial statements of the witness;
   - Limiting disclosure of personal and identifying information of the witness;
   - Shielding the witness from the defendant and/or from spectators;
   - Disguising the face and/or distorting the voice of the witness;
   - Allowing accompanying persons during testimony;
   - Allowing testimony via videoconferencing or other communication technology.

[Witness Protection Programmes]

8. Where there is a serious threat to the witness's security as a result of his or her cooperation with the criminal justice authorities that cannot be addressed by other protection measures, a formally established covert programme that provides for, among other things, the relocation and change of identity of the witness may be established. Because of the significant state resources required to operate the programme, and the dramatic changes to the life and privacy of the witness, relocation and change of identity should be considered a measure of last resort. Admission to the programme should be voluntary, and the consent of the witness should be required.

9. In order to safeguard their neutrality, it is advisable that, regardless of their location in the government, witness protection programmes should be specialized and be separated from the investigation and prosecution functions. However, close coordination with various criminal justice authorities including the police, prosecution, judiciary and prison administration, and other governmental authorities, such as housing, health, and security, is also called for.
10. Witness protection programmes should operate on the basis of strict confidentiality.
11. Adequate funding should be allocated by state budgets to ensure the effective functioning and sustainability of witness protection programmes.
12. Particular care should be taken to ensure that the protection and the support provided by the programme are not seen as a reward for the witness's cooperation and testimony.

[Mitigation of Punishment]

13. Mitigation of punishment and grants of immunity from prosecution encourage accomplices and "insiders" to supply useful information and testimony. Providing for the possibility, in appropriate cases, of mitigating punishment or granting immunity to persons who provide substantial cooperation in the investigation and prosecution of criminal offences should be duly considered.

[Whistle-blower Protection]

14. Public and private sector employees who, in good faith and on reasonable grounds, report facts concerning possible criminal offences to competent authorities play an important role in bringing to light and providing an opportunity to tackle unlawful conduct. Due consideration should be given to adopting appropriate measures to protect such persons from unjustified treatment.

[Sharing of Experience and Enhancement of Understanding]

15. Notice should be taken of assistance and information provided by the UNODC, notably its publication entitled "Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime".
16. International fora, such as UNAFEI's Regional Seminars on Good Governance, allow for the development of international dialogue and the exchange of experiences and good practices, and participation is therefore encouraged. It is important that participants share and disseminate the content of such programmes with their colleagues at home.

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SEMINAR SCHEDULE

7 December	**Opening Ceremony** **Opening Address** by Mr. Masaki Sasaki, Director, UNAFEI **Address** by the Honourable Mr. Fransisco F. Baraan III, Undersecretary, Department of Justice, Republic of the Philippines **Special Address** by His Excellency Mr. Makoto Katsura, Ambassador of Japan
	Introduction **Introductory Remarks** by Mr. Haruhiko Ukawa, Deputy Director of UNAFEI **Introductory Remarks** by Mr. Severino H. Gaña, Jr., Senior Deputy State Prosecutor, National Prosecution Service, Department of Justice, Republic of the Philippines **Individual Presentation** by Mr. Rommel Baligod, Regional Prosecutor, Region II, Office of the Witness Protection Program, Department of Justice of the Republic of the Philippines
	VE Presentation, UNODC
	Individual Presentation, Cambodia Individual Presentation, Indonesia Individual Presentation, Lao PDR Individual Presentation, Malaysia Individual Presentation, Myanmar
8 December	Individual Presentation, Thailand Individual Presentation, Vietnam Individual Presentation, Senate of the Philippines
	VE Presentation, Federal Ministry of Justice, Germany Adviser's Presentation, Embassy of the United States in Manila
	Discussion
9 December	**Adoption of the Recommendations**
	Closing Ceremony **Address** by Mr. Masaki Sasaki, Director, UNAFEI **Closing Address** by the Honourable Mr. Fransisco F. Baraan III, Undersecretary, Department of Justice, Republic of the Philippines.

APPENDIX

PHOTOGRAPHS

- ***Commemorative Photograph***
- ***Address by Undersecretary Baraan***
- ***Introductory Remarks by Deputy Director Ukawa***
- ***Introductory Remarks by Senior Deputy State Prosecutor Gaña***
- ***Presentation by Visiting Expert***
- ***Discussion Session***
  (Co-chaired by Prosecutor General Arellano and Mr. Ukawa)

Commemorative Photograph

Address by Undersecretary Baraan

Introductory Remarks by Deputy Director Ukawa

Introductory Remarks by Senior Deputy State Prosecutor Gaña

Presentation by Visiting Expert

Discussion Session (Co-chaired by Prosecutor General Arellano and Mr. Ukawa)