

# Witness Protection in Nepal: Recommendations from International Best Practices



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International Commission of Jurists  
P.O. Box 91  
33 Rue des Bains  
CH-1211 Geneva 8  
Switzerland.  
E-mail: [info@icj.org](mailto:info@icj.org)  
[www.icj.org](http://www.icj.org)

International Commission of Jurists  
Asia Pacific Regional office  
10/1 Soi Aree 2, Phahonyothin Rd.  
Samsennai, Phayathai  
Bangkok 10400  
Thailand.

International Commission of Jurists  
Country Office  
4th Floor, Nepal Bar Association Building,  
Ramshapath, Kathmandu  
Nepal.

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**International Commission of Jurists**  
4th Floor, Nepal Bar Association Building,  
Ramshapath, Kathmandu, Nepal.

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This briefing paper and its annexes were drafted by Susan Appleyard, and revised by John Tyynela, Satish Kharel, Matthew Easton and Frederick Rawski. Expert advice and research assistance was provided by Prem Chandra Rai, Govinda Sharma, Leah Hoctor, Sheila Varadan and Ilaria Vena. Legal review was conducted by Ian Seiderman (ICJ Legal Advisor), and the International Criminal Law Service ([www.iclsfoundation.org](http://www.iclsfoundation.org)).

# Table of Contents

## GLOSSARY

<b>Witness Protection in Nepal: A Briefing Paper .....</b>	<b>1</b>
<b>1. Introduction .....</b>	<b>1</b>
<b>2. The Need for Witness Protection in Nepal .....</b>	<b>3</b>
<b>3. Efforts to Protect Witnesses and Victims in Nepal.....</b>	<b>9</b>
<b>4. Basic Principles for Establishing a Witness Protection Program....</b>	<b>12</b>
<b>5. Recommendations for a Witness Protection and Assistance         Program .....</b>	<b>14</b>
<b>Annex I: Witness Protection in International Instruments .....</b>	<b>22</b>
<b>1. International Human Rights Standards and Jurisprudence .....</b>	<b>22</b>
<b>2. International Courts, Regional Bodies and UN Special         Procedures .....</b>	<b>34</b>
<b>Annex II: Best Practices for the Development of a Witness Protection Framework .....</b>	<b>40</b>
<b>1. Eligibility for Protection and Assistance .....</b>	<b>40</b>
<b>2. Structure and Operation of a Witness Protection Mechanism .....</b>	<b>55</b>
<b>3. Initiation and Termination of Protection and Assistance .....</b>	<b>64</b>
<b>4. The Scope and Nature of Protection and Assistance .....</b>	<b>74</b>
<b>Annex III: Annotated Reference List .....</b>	<b>89</b>





## Glossary

CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal on Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MOU	Memorandum of Understanding
NHRC	National Human Rights Commission
OHCHR	Office of the UN High Commissioner for Human Rights
OTP	Office of the Prosecutor of the ICC
RNA	Royal Nepalese Army, now renamed Nepalese Army (NA)
SCSL	Special Court for Sierra Leone
TCA	Torture Compensation Act
UNDCP	United Nations Drug Control Programme
UNODC	United Nations Office on Drugs and Crime
VWSS	Victims and Witnesses Support Section of the ICTR
WVS	Witnesses and Victims Section of the SCSL



# Witness Protection in Nepal: A Briefing Paper

## 1. Introduction

Witness protection and assistance measures are critical to the pursuit of reparations, truth and justice for past and ongoing serious crimes and human rights abuses. Measures to ensure the physical security and psychological wellbeing of victims and witnesses are especially important in situations of systemic impunity, such as following a crisis, unstable political transition or armed conflict. Such a situation has prevailed in Nepal since the end of the Maoist insurgency in 2006.

Witness protection and witness assistance are part of the state obligation to uphold human rights, including the obligation to provide a remedy when a rights violation occurs.<sup>1</sup> Impunity results when victims are not afforded access to effective remedies, when laws fail to criminalise serious human rights violations (*de jure* impunity), or when the laws that do criminalise human rights violations are not adequately enforced (*de facto* impunity). When impunity prevails, witnesses often come to fear the state apparatus, as officials are unwilling or unable to provide protection, or perpetrators and their associates control or exert significant influence over state mechanisms or authorities, directly or indirectly, rendering the justice and law enforcement systems ineffectual. In extreme cases, victims and witnesses are unable to participate in legal proceedings, resulting in an outright denial of their right to a procedural or substantive remedy for the rights violation. The right to an effective remedy, therefore, must include enough protection and support for victims and witnesses to ensure that they can safely seek redress for, or provide testimony about, human rights abuses.

This briefing paper is meant to contribute to the debate on how best to establish witness protection and witness assistance mechanisms as part of

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1 For theoretical background and a summary of current international law and standards relating to the right to a remedy, see: International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide* (2005).

efforts to address human rights violations and abuses in Nepal, in particular those that occurred during the conflict. For this reason, its recommendations are largely directed at establishing independent and effective witness and victim protection and assistance mechanisms that would be associated with proposed transitional justice institutions: a truth and reconciliation commission and a commission to investigate conflict-related enforced disappearances. However, the principles, recommendations and annexes are relevant for the establishment of witness protection mechanisms addressing the full range of criminal and non-criminal protection needs.

At the time of publication of this paper, draft legislation which if passed will establish the framework for transitional justice institutions, and a draft criminal procedure code have both been presented before Parliament. The National Law Commission has released a draft witness protection bill focusing on criminal justice-related protection needs. The National Human Rights Commission is also in the process of developing its own witness and victim protection capacity. The International Commission of Jurists (ICJ) hopes that the information contained within the body of this report and its annexes will serve to inform each of these initiatives, and help to ensure that they are consistent with international human rights law and standards.

Witness protection and witness assistance are inter-related but distinct mechanisms. Witness assistance focuses on financial, medical, material, psychological and social support to victims and witnesses throughout the legal process through governmental, voluntary and community-based means. Witness protection focuses on measures to protect the safety of victims, witnesses and other closely associated persons from physical violence, threats of violence, intimidation, retaliation or other threatening or harassing conduct. This may involve a number of interventions, including restrictions placed on an accused prior to testifying (restraining orders or suspension from duty), measures offered to testifying witnesses during proceedings (video-link testimony, *in camera* hearings) and outside measures offered to victims, witnesses and closely-related persons (change of identity, continuous police protection).

This briefing paper addresses both witness protection and assistance, but places an emphasis on protection measures. Both are critically important

for ensuring justice, truth and effective legal remedies. It summarises the current state of witness protection and assistance in Nepal, highlights underlying principles, and offers some preliminary recommendations. Annex I provides an overview of relevant international standards, focusing on treaty law and international principles related to the protection of witnesses and victims. Annex II summarises international best practices and lessons learned. Annex III contains an annotated reference list of key resources.

## **2. The Need for Witness Protection in Nepal**

The lack of an effective protection mechanism addressing human rights violations and abuses has reinforced fundamental weaknesses in the justice system. It has become difficult to identify witnesses or obtain evidence during an investigation, and, once a case is underway, witnesses and victims often withdraw their complaints due to threats or bribery. As a result, there have been few investigations or prosecutions of alleged perpetrators who are members of the military or security forces or who hold positions of power. Continuing impunity for these violations and abuses further emboldens perpetrators, and has the potential to lead to further witness harassment and intimidation.

Even before the outbreak of armed conflict in 1996, efforts to prosecute corruption or to bring human rights abuses to light through commissions of inquiry were severely undermined by the reluctance of witnesses to provide testimony for fear of intimidation, harassment and violence. In recent years, despite monitoring by civil society and international organisations, reports of threats and violence against victims and witnesses remain common, particularly in criminal cases involving conflict-related human rights abuses, such as torture and ill treatment, including conflict-related sexual violence, and extra-judicial killings and enforced disappearances.

*Torture.* Victims of torture often face threats, harassment and intimidation when seeking redress. In its concluding observations on Nepal in 2005, the Committee against Torture expressed concern about “alleged reprisals against and intimidation of persons reporting acts of torture, in the forms

of re-arrests and threats, and the lack of witness protection legislation and mechanisms.”<sup>2</sup>

The Torture Compensation Act (TCA) of 1996 creates a mechanism through which persons subjected to torture in detention can seek compensation, but it does not provide for protection measures. As a result, the TCA has been limited in its effectiveness with few victims filing claims under the Act. In the cases that have been filed, witness testimony has been rare due to fear of retaliation. It is also common for victims to withdraw claims after being subjected to harassment or intimidation by the police. Advocacy Forum, a human rights organisation that often represents victims in TCA cases, has reported that victims or their families have frequently experienced threats and intimidation, specifically when they attempt to file First Information Reports (FIR) with the police.<sup>3</sup> Examples include:

- Teksu Rai, a restaurant owner who refused to pay bribes to a local police inspector, was detained and beaten by police with an iron rod. He filed a TCA claim, but withdrew it due to threats and intimidation.<sup>4</sup>
- Kamal Pun, who was allegedly tortured by police in Myagdi district, filed a TCA claim after police refused to register an FIR, and has since been subject to threats.<sup>5</sup>
- Amar Nepali, a student allegedly tortured by the police in Dhampur, Banke District, filed a TCA claim but was forced to withdraw it due to constant pressure and threats from the police.<sup>6</sup>
- Jitman Basnet received death threats in 2007 after publishing a book about the torture he suffered at the Army’s Maharajgunj

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2 Committee against Torture, *Concluding observations on Nepal*, UN Doc. CAT/C/NPL/CO/2\_2005, (2005), para. 28.

3 Advocacy Forum, *Hope and Frustration: Assessing the impact of Nepal’s Torture Compensation Act, 1996* (1998).

4 *Ibid.*, p. 30; see also: Asian Human Rights Commission, “Update (Nepal): Torture victim harassed and threatened with fabricated charges,” (18 August 2006), available at <http://www.ahrchk.net/ua/mainfile.php/2006/1918/>

5 Kim Soo A, UPI Asia Online, “No Justice for Nepali Torture Victims” (27 August 2008).

6 Confidential interview (July 2011).

Barracks in 2004. He approached the police seeking protection, but no action was taken. He has subsequently had to leave the country.<sup>7</sup>

*Violence Against Women.* Women who have experienced violence during the conflict fear the repercussions if they attempt to seek redress for, or sometimes even discuss, their experiences. Interim protection efforts by the government have failed to address abuses primarily perpetrated against women, such as rape and other forms of sexual violence.<sup>8</sup> The lack of protection exacerbates impunity and encourages further violence. Examples include:

- In February 2005, three members of a ‘village defence force’ in Kapilvastu district allegedly raped an 11-year-old girl. The police did not investigate the matter. Instead, the police pressured the victim’s family to enter into mediation with the perpetrators. The doctor who treated the victim and provided medical evidence to police was also subjected to violence. The doctor’s brother was killed in an apparent revenge attack after he was apparently mistaken for the doctor.<sup>9</sup>
- In a recent post-conflict case, two women in Banke District alleged to have been raped by police recanted their statements under oath in court after coming under intense pressure from the police.<sup>10</sup>

*Unlawful Killings and Enforced Disappearances.* Examples abound of threats and intimidation of witnesses to these serious conflict-related human rights violations, as well as to lawyers, human rights defenders and journalists. Examples include:

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7 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Legato, *Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc. A/HRC/7/14/Add.1 (25 February 2008).

8 The difficulties faced by women victims and witnesses have been documented in a recent report by the Advocacy Forum and the International Center for Transitional Justice. Advocacy Forum, *Across the Lines: The Impact of Nepal’s Conflict on Women* (2010), available at <http://ictj.org/publication/across-lines-impact-nepals-conflict-women>

9 Amnesty International, *Nepal: Fractured country, Shattered Lives* (2005), p. 7.

10 Confidential interview (July 2011).

- Maina Sunwar, a 15-year-old schoolgirl from Kavre was tortured by Nepal Army personnel and subsequently died in Army custody in February 2004. She was arrested and tortured after her mother spoke out about the rape and murder of Maina's cousin five days earlier.<sup>11</sup>
- Police repeatedly harassed and threatened Jay Kishor Lav and Rajeev Kumar Karna, father and brother of Sanjeev Kumar Karna, after they sought information about Sanjeev, arrested by police in Janakpur in October 2003.<sup>12</sup>
- While documenting experiences of detainees at Maharajgunj barracks, the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) found that "[r]eleased individuals received direct threats from Royal Nepal Army (RNA) personnel upon their release. Former detainees have been told that they would be killed if they revealed any information about their detention to anyone, particularly human rights organisations".<sup>13</sup>
- In March 2010, Nepal Army personnel shot and killed two women and a 12-year-old girl while they were collecting tree bark in Bardiya National Park. Park officials and Army personnel subsequently threatened family members of one of the victims, pressuring them to sign an agreement not to file a criminal case.<sup>14</sup>

*Calls for Change.* Numerous international and national non-governmental organisations have called for effective protection mechanisms. These organisations include the Women's Rehabilitation Centre (WOREC),<sup>15</sup> the

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11 Advocacy Forum, *Separating fact from fiction: The enforced disappearance, torture and killing of Maina Sunuwar* (2010), p. 12.

12 Confidential interview.

13 United Nations Office of the High Commissioner for Human Rights, *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004* (2006), p. 49.

14 United Nations Office of the High Commissioner for Human Rights, *Investigating Allegations of Extra-Judicial Killings in the Terai* (July 2010), pp. 25-26.

15 Women's Rehabilitation Centre, Statement to the Human Rights Council: Specific recommendations to address women's human rights in Nepal (26 January 2011).



Forum for Women, Law and Development,<sup>16</sup> Advocacy Forum and the International Centre for Transitional Justice,<sup>17</sup> Human Rights Watch and Advocacy Forum,<sup>18</sup> and the Asian Human Rights Commission.<sup>19</sup>

The Informal Sector Service Centre (INSEC)'s report on witness protection options for Nepal, based on regional discussions and focus groups, is the most detailed to date, and provides a set of recommendations for the structure and operations of a witness protection program. The report concludes:

[P]ersons involved in serious human rights violations are enjoying immunity from punishment due to lack of appropriate protection for the witnesses and the victims. Since the victims and witnesses of such cases have to face threats and abuses, they do not wish to cooperate during the investigation or trial of the cases.<sup>20</sup>

Victims themselves have also called for change. Families of the disappeared have voiced concerns about the lack of protection mechanisms in draft legislation that would establish transitional justice institutions.<sup>21</sup>

In addition, several United Nations human rights authorities have urged the Government of Nepal to establish a mechanism to protect witnesses. In 2005, the Committee against Torture recommended that the government “[c]onsider adopting legislative and administrative measures for witness protection, ensuring that all persons who report acts of torture or ill-treatment are adequately protected”.<sup>22</sup> In December 2010, OHCHR-Nepal

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16 *Mira Dhungana v. Nepal Government et al.*, writ no. 0043/2065 (4 November 2009).

17 *supra* note 8, Advocacy Forum, *Across the Lines*, p. 102.

18 Advocacy Forum and Human Rights Watch, *Still Waiting for Justice* (October 2009).

19 Asian Legal Resource Centre, *Effective Witness Protection Lacking in Indonesia and Nepal* (August 2010).

20 INSEC, *Witness Protection: A Study Report* (June 2011), p. 35.

21 Ram Kumar Bhandari, “Stolen Lives: The Disappearance Commission should ensure justice, not obstruct it”, *Nepali Times* (2 September 2010).

22 Committee against Torture, *Concluding Observations on Nepal*, UN Doc. CAT/C/NPL/CO/2\_2005, (2005) para. 28.

called on the government to establish an effective mechanism to ensure protection for all victims of and witnesses to rights violations and abuses, noting that proposed transitional justice legislation did not contain adequate witness and victim protection provisions.<sup>23</sup>

OHCHR-Nepal's 2008 report on disappearances and abductions in Bardiya District during the conflict also recommended that the government:

[Guarantee] protection and security against ill-treatment, intimidation or reprisal, for witnesses, relatives of the disappeared, human rights defenders and others investigating or carrying out advocacy regarding disappearances and other human rights violations... [and set] up a witness protection scheme for those cooperating with official investigations.<sup>24</sup>

Interlocutors have expressed to ICJ their concerns that transitional justice mechanisms will have little chance of success without witness protection measures. Many alleged perpetrators of serious violations or their individual, institutional, or ideological allies, remain in positions of power, including members of the Government and Constituent Assembly. There is fear that a truth commission or disappearance commission will fail to effectively combat impunity. Indeed, the last commission formed to investigate disappearances between 1950 and 1990, established after the 1990 People's Movement, did not hear from a single witness.

A related concern is that, without the creation of conditions free of fear for victims' participation in the process, there will be little chance of significant legislative and institutional reform necessary to guarantee non-repetition. This fundamental dimension of the right to reparation depends for its practical implementation on measures to protect witnesses and other participants from threats.

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23 OHCHR Nepal press release, "OHCHR urges the prompt establishment of a witness and victim protection mechanism in Nepal," (18 December 2010).

24 OHCHR Nepal, *Conflict Related Disappearances in Bardiya District* (December 2008), p. 91.

### 3. Efforts to Protect Witnesses and Victims in Nepal

In the absence of a comprehensive witness protection scheme, government and non-government agencies have made efforts to provide protection, but in a piecemeal manner and on a case-by-case basis. There have also been a number of legislative efforts to address the lack of an effective mechanism, though these remain inadequate and largely unimplemented.

In the non-governmental sector, organisations such as WOREC, Maiti Nepal and SAATHI have provided accommodation, subsistence support, and rehabilitation services for female victims. In some districts, the Women's Development Branches of District Development Committees have started centres for victims of crime, though they do not provide basic witness protection. A Supreme Court procedural directive has also allowed for concealing the identity of female and child victims and witnesses.<sup>25</sup> The provision has been used in the Supreme Court, appellate courts and district courts, including in rape and forced prostitution cases. For its part, the National Human Rights Commission has concealed the identity of witnesses on an *ad hoc* basis, and identified the setting up of a witness protection programme as a strategic objective in its 2008-2010 Strategic Plan.<sup>26</sup>

In November 2009 the Supreme Court of Nepal ordered the government to formulate legislation for the protection and assistance of victims and witnesses. It further ordered that until legislation is adopted, the Ministry of Home Affairs and Police Headquarters should develop and implement a plan to establish a witness protection and support section in Police Headquarters and in each district.<sup>27</sup> There has been little progress in implementing the Court's ruling, though the Ministry of Home Affairs has formed a task force in response to the ruling, and a draft law was recently made public by the National Law Commission.

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25 Supreme Court of Nepal, *The Procedural Directives on Maintaining Secrecy of the Parties in the Cases of Special Nature, 2064*, Preamble & Article 4. Available at: [www.supremecourt.gov.np/download/Gopaniyata\\_Nirdesika.pdf](http://www.supremecourt.gov.np/download/Gopaniyata_Nirdesika.pdf)

26 An expert engaged by the European Commission's Conflict Mitigation Programme produced a report making recommendations for setting up a Witness and Victim Protection Programme as part of the NHRC, including a set of indicators, a funding framework and a model Memorandum of Understanding. Cintia Lavandera, *Witness and Victim Protection Programme*, Report to the European Commission to Nepal, Europe Aid/122531/C/SER/NP (September 2008).

27 *Mira Dhungana v. Nepal Government et al.*, writ no. 0043/2065 (4 November 2009).

*Enacted and draft legislation.* Though they lack explicit provisions for a witness protection scheme, the draft criminal code, draft criminal procedure code and some provisions of existing and proposed legislation offer some peripheral protection through witness confidentiality and witness support provisions. Existing laws include:

**The Evidence Act, 1974** allows a court to reject any “question that could unnecessarily insult or annoy the witness”.<sup>28</sup> The ambiguous language of the Act is problematic, and unduly broad in a way that could infringe upon the due process rights of the accused. The Act, however, does require that witnesses be examined in the presence of all parties to the case.<sup>29</sup>

**The Government Cases Regulation, 1999** provides for allowances for witnesses including the cost of travel while giving testimony.<sup>30</sup> However, such payments are rare, due in part to the fact that an official allocation from the government budget to cover these costs has not been made.

**Human Trafficking and Transportation (Control) Act, 2007**, in Section 26, provides for protective measures when a “person provides reasonable grounds and requests the nearest police office for security against any type of retaliation for reporting to the police ... or providing a statement to a court or remaining as a witness”. Sections 20 through 27 provide for informant confidentiality, a prohibition on dissemination of information about the victim, security during travel related to court proceedings, police protection, accommodation at a rehabilitation center, and *in camera* proceedings. While these provisions are welcome, the absence of an implementing body has rendered them ineffective.

There are several draft laws and codes under consideration that could provide significant improvements in witness protection and assistance.

**The Draft Penal and Criminal Procedure Code:** Efforts to modernise Nepal’s criminal laws and procedures through the introduction of a criminal procedure and penal code, include elements of witness assistance

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28 *Evidence Act, 1974*, Section 51.

29 *Ibid.*, Section 49

30 *Government Cases Regulation, 1999*, Rule 15(3).

and protection.<sup>31</sup> The draft procedure code provides for the collection of witness testimony, including the use of written testimony, when a witness is living outside the jurisdiction of the court or unable to attend. It also allows video-testimony to be tendered in lieu of an appearance in court. However, it is not clear how these provisions will be reconciled with section 18 of the Evidence Act, which makes it mandatory for a witness who has given a statement during investigation to provide testimony under oath in court.<sup>32</sup> These complications will need to be resolved, while ensuring respect for the fair trial rights of the defendant, if and when a new criminal procedural code is enacted. (See Annex II, Section 3.2.2). The draft Criminal Procedure Code also requires the police to provide daily and travel allowances to witnesses and requires the government to make necessary arrangements for the security of such witnesses. The draft also allows a court to arrange security for witnesses who request it in certain cases.<sup>33</sup>

**Draft Witness Protection Legislation:** In 2001-2002, the Narcotics Law Enforcement Unit of the Ministry of Home Affairs, the Nepal Police and the Office of the Attorney General drafted the Witness Protection and Security Act, the text of which was based in part on the United Nations Drug Control Programme Witness Protection Model Bill. It contained standard provisions, including concealing the identity of witnesses, relocating witnesses within and outside of Nepal, creating safe houses for witnesses, setting out criteria for those who will be eligible to receive protection measures, and establishing an appeal procedure for witnesses denied protection. The bill was never sent to Parliament.<sup>34</sup>

In June 2011, two years after the Supreme Court ordered the government to enact a witness protection law, the National Law Commission released a draft bill for public comment before submission to the Ministry of Law and Justice. The bill, entitled "A Bill Produced to Manage the Protection of

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31 A Bill Made to Amend and Consolidate the Laws in relation to Procedure on Criminal Cases, 2067 (2010); A Bill Made to Amend and Consolidate Prevailing Laws in relation to Criminal Cases, 2067 (2010).

32 The Supreme Court has also held that that failure of a witness to be present at trial can render a statement given during investigation inadmissible. *Government of Nepal v. Diwakar Pandit*, Nepal Kanoon Patrika (Nepal Law Journal) 2060, p. 64.

33 INSEC, *Witness Protection: A Study Report* (June 2011), p. 36.

34 Witness Protection and Security Act, 2004/2005.

Witnesses, 2011" was problematic in a number of ways. For instance, it provided an unduly narrow definition of 'witness', offered no guidance for conducting a risk assessment, and lacked an appeal or review mechanism for protection-related decisions. The bill made no reference to human rights or transitional justice. The initial draft of the bill also proposed a mechanism that would be subordinate to district-level committees composed of the district police chief, government attorney and an appointee of the Chief District Officer – calling into question its independence.

**Transitional Justice Legislation:** Draft legislation for a Truth and Reconciliation Commission and a Commission to investigate conflict-era disappearances is currently under consideration by the Parliament.<sup>35</sup> Both bills contain language requiring undefined measures to ensure security, particularly to women and children, and to provide financial assistance to those appearing before the commissions.<sup>36</sup>

Neither bill provides any detail on how protective measures would be provided, nor do they call explicitly for the establishment of a witness protection unit. However, further witness protection measures can potentially be developed through the adoption of regulations pursuant to provisions of the bills, which provide that “provisions related to security, mental and physical wellbeing, confidentiality and protection of dignity of the persons supporting the work of the Commission shall be as prescribed”<sup>37</sup>.

#### **4. Basic Principles for Establishing a Witness Protection Program**

The following principles are drawn from the review of examples and best practices in Annex II and some of the documents that appear in the

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35 A Bill Made to Make Arrangements in relation to Commission on Investigation of Truth and Reconciliation, 2066 (2009); A Bill Made to Make Arrangements in relation to acts of Enforced Disappearance of a Person, 2066 (2009).

36 For example, Section 18 of the draft Truth and Reconciliation Commission Bill states: “If any individual, victim or his or her family member who is to be present to provide statement, testimony or information before the Commission makes a request to it for security and if it is deemed, upon necessary inquiry in this regard, necessary to provide security to such person, the Commission will have to make necessary arrangements for the security of such persons.” Section 19 of the Disappearance Bill (Crimes and Punishment) contains similar language.

37 A Bill Made to Make Arrangements in relation to Commission on Investigation of Truth and Reconciliation, 2066 (2009), Section 18(7).

reference list in Annex III. They apply to transitional justice mechanisms, for which more detailed recommendations appear in the following section, as well as to national programs or other stand-alone mechanisms. While not exhaustive, they provide a basic foundation for the development of a robust witness protection mechanism.

- **Independence:** Any witness protection mechanism must be free from the control or influence of alleged perpetrators of crimes and human rights violations. Protection mechanisms must be separate and isolated from investigative units to avoid compromising sensitive information or the use of protection as leverage in exchange for information. Decisions about entry, termination of service and scope of protection must be scrupulously protected from political manipulation.
- **Neutrality:** Admission into a program should be based on whether witnesses meet defined criteria, rather than political considerations. The witnesses' role, whether victim, innocent bystander or collaborator with the authorities should not be a decisive criterion.
- **Inclusivity:** All of those placed at risk due to their role in an investigation or proceeding should be given support and protection. While this paper refers most frequently to witnesses and victims, participants may also include commission staff, intermediaries, and other individuals. In addition, witness protection should be available from the moment that engagement with the commission increases risk until that risk has been removed.
- **Holistic Approach:** Witness protection measures do not exist in isolation but reflect the overall state of law enforcement or other truth-seeking structures. The work of one agency without the support of other actors involved in the process will be inefficient. Institutional reform as well as the vetting and training of personnel in judicial and investigative agencies are essential.
- **Informed Consent:** Participation in criminal proceedings is not without an element of risk. However, witnesses should be informed in unambiguous terms of the risks, what measures may be taken, and their own responsibilities in mitigating the risks. Participants should then give free and informed consent to any measure applied.

- **Witness-Focused:** Protective measures should be proportionate to the assessed risk, least intrusive to the witness and taken with the best interest of witness in mind.
- **Fairness to Suspects and Defendants:** Protective measures should be consistent with the rights of the accused, including the right to a fair trial in accordance with international standards.
- **Clarity:** A clear legal, procedural, and institutional framework is needed to provide the certainty and predictability necessary to ensure that all parties are aware of the protection measures available before agreeing to testify or cooperate with a criminal investigation.
- **Transparency and Accountability:** The mechanism must be clearly accountable for both its performance and finances, through an oversight mechanism that does not compromise independence or confidentiality.

## **5. Recommendations for a Witness Protection and Assistance Program**

Nepal has witness protection needs in relation to a broad range of crimes and human rights abuses. Certain crimes, such as smuggling of narcotics and corruption, commonly involve threats to victims and witnesses, although they may not constitute human rights abuses. These threats should ideally be addressed by a national witness protection system. At the same time, witnesses and victims of human rights abuses, whether investigated and prosecuted as part of a criminal proceeding or dealt with by a transitional justice process, face immediate risks and have specific protection needs. Witnesses of conflict-related rights abuses are particularly vulnerable as such abuses often involve members of security forces and political leaders, including military and police officers, government officials, and senior members of political parties.

The recommendations in this paper refer primarily to witness protection needs in cases involving human rights abuses with a focus on the establishment of a witness protection and assistance unit dedicated to



servicing transitional justice institutions investigating conflict-related human rights abuses. If both of the proposed commissions run concurrently, a joint protection and assistance mechanism may be able to serve both bodies. In addition to meeting the urgent needs of the commissions themselves, such a unit may serve as a model and a source of expertise for a permanent mechanism for human rights cases, or even a comprehensive national program.

This section draws on the best practices in Annex II to develop recommendations for the establishment of a protection and assistance unit in connection with the proposed truth commission and disappearances commission. Many of the recommendations are applicable to a comprehensive national witness protection programme as well.

### **Determining eligibility for protection**

***Eligibility.*** The unit should provide protection to anyone placed at risk as a result of their interaction with the commissions. Rules and guidelines should provide the unit with clear, precise guidance that allow for inclusion of the following to the maximum extent possible:

- *Family members* of a witness, including parents or guardians of a child witness, dependents, or other relatives.
- *Associates* of a witness even if they themselves do not provide testimony. This may be necessary where there are multiple victims or witnesses to a particular abuse or where crimes were perpetrated against a particular ethnic or religious group.
- *Professionals representing victims and witnesses* including human rights defenders, journalists and lawyers. This group may also include investigating officers, commissioners or the protection unit staff itself.
- *Alleged perpetrators*, criminal suspects, persons convicted and serving a sentence or persons having a criminal record. Such persons may be essential witnesses in cases of enforced disappearances and other violations under consideration by the commissions. Those

not yet convicted should enjoy the presumption of innocence. (See: Annex II, section 1.1.)

## **Structure and operation**

***Independence and neutrality.*** Decisions about eligibility for entry, termination of service and scope of protection must be protected from political manipulation. Given the vulnerability of government institutions to manipulation, any protection mechanism — whether attached to a transitional justice body or serving the criminal justice system as a whole — should retain formal and actual independence from the state security apparatus.<sup>38</sup> Decisions about eligibility for entry, termination of service and scope of protection must be protected from political manipulation.

- The director of the unit might report to the chairs of the commission, who could provide oversight but not be directly involved in individual cases, which should be decided by the unit based on an impartial assessment of threat and risk.
- If police are requested to play any role in providing protection, they must be carefully vetted.
- The unit should also operate completely independent of any investigative units to avoid the possibility that the protection could be used as leverage to coerce cooperation.

***Personnel.*** The director and staff of the witness protection and assistance unit should be appointed by the commissioners based on the following considerations:

- Regulations should set out the qualifications required within the staff of the unit consistent with best practices, and might

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<sup>38</sup> Based on focus groups conducted around Nepal, INSEC concluded that many participants thought the Office of the Attorney General should be primarily responsible for running the program. However, other participants, in particular those who were victims of human rights abuses, felt that responsibility should lie with the National Human Rights Commission or another independent body. INSEC, *Witness Protection: A Study Report* (June 2011), pp. 21-22.

include expertise in: witness protection and security; legal and administrative matters; human rights and humanitarian law; logistics and administration; psychology and psycho-social counselling; children, including the use of child soldiers; elderly persons; healthcare; interpretation and translation; and caste and other forms of discrimination.

- Particular attention should be given to ensure staff capacity to protect and assist victim witnesses of sexual and gender-based violence.
- Applicants should be carefully vetted to ensure they are not associated with human rights abuses.
- Staff who are not part of the witness protection program, but who come into contact with witnesses, such as investigators, should be trained and provided with a good practices manual to ensure they do not expose a witness to further risk.
- The need for the protection mechanism to have its own independent intelligence gathering capacity. (See: Annex II, section 2.2)

**Funding.** The government should ensure, through allocations in the national budget, supplemented by donor support as needed, sufficient funding for the unit. There should be built-in flexibility, allowing for rapid disbursements and access to supplemental funding for emergencies.

**Transparency.** Drawing on best practice, regulations should provide for regular audits of finances and evaluations of effectiveness, without prejudicing the integrity or security of the unit's operations. (See: Annex II, section 2.4, for several options)

### **Safeguards surrounding the initiation and termination of protection services**

**Assessing threat and risk.** A large number of testifying witnesses are likely to require some support from the unit. Protection measures should be based on thorough and impartial threat and risk assessments that evaluate the possible consequences of the witnesses' interactions with an investigation

and commission proceedings. Assessments should consider a full range of factors, including the identity and capabilities of the source of the threat, the nature of the case, and the situation of the witness. (See: Annex II, section 3.2). If needed, information can be obtained from other sources, or if an assessment indicates that risk cannot be reduced to an acceptable level, the necessity of using a particular witness should be re-evaluated. Such assessments should be periodically updated, including after the testimony of a person in court and following the termination of the proceedings in which a person has testified.

***Assessing psycho-social needs.*** Assistance in the form of trauma or other counselling should be based on a separate, standardised individual vulnerability assessment conducted by trained and competent professionals.

***Time period.*** Protection and assistance should be available prior to, during, and following testimony, for as long as the threat remains. Regulations should provide for immediate, interim protection measures as needed even before formal interaction with the commission begins, or while a threat assessment is carried out. There should also be provisions for periodic threat assessments following termination of protection. Witnesses should have the means and information to contact the unit easily at any time.

***Memorandum of Understanding (MoU).*** Formal consent of a witness, victim, family member, or associate to receive assistance or protection is essential, based on an explanation of the threat and risk assessments and the range of measures available. This consent should be documented in a confidential MoU. Clear, consistent and repeated directions on what support the witness can expect to receive should be given throughout the process. Protection and assistance staff may be held liable for breaches of the MoU or gross acts of negligence or other forms of misconduct that result in harm to the witness. (See: Annex II, section 3.4, for suggestions on the contents of an MoU).

***Denial or termination of protection or assistance.*** Regulations should put in place a procedure to ensure that denial or termination of protection services occurs in a fair and reasonable manner that does not expose the witness

to increased risk. This procedure should include a review mechanism that is independent and confidential. Reasonable notification of termination should be provided, and protection should not be terminated while an appeal is pending.

***Post-mandate protection.*** There may be a need for protection of participants in the hearings after the mandates of the commissions have ended. Plans should be in place for transfer of responsibility to a new national program, if one exists, the National Human Rights Commission, or another permanent body. There should also be safeguards for confidential information possessed by the unit after it ends operation.

### **The scope and nature of protection assistance**

A mechanism should provide a wide range of assistance including logistical, legal, financial, medical and psycho-social services. Specific assistance should be available to children, victim-witnesses of sexual and gender-based violence, elderly persons and people with disabilities. Highly trained individuals should provide assistance, as well as civil society or professional organisations.

***Protection measures before and after testimony.*** Regulations should make available a wide range of protection measures, with the director granted discretion to use additional measures where necessary. Special protection measures should be made available during heightened periods of risk, such as during the period that the witness is giving testimony. Measures could include:

- Temporary change of residence and concealment of the witness' whereabouts;
- Close protection, regular patrolling around the witness's house, and police escort for daily activities, protection of the witness' workplace by security personnel, escort to and from the court and provision of emergency contacts;
- Arrangement with the telecommunications company to change the witness's telephone number or to assign an unlisted telephone number;

- Installation of home security devices, such as security doors, alarms or fencing; and
- Provision of warning devices and mobile phones with emergency numbers.

**Mitigating security risks during testimony.** The unit should be empowered to facilitate, recommend or provide:

- Relocation of the hearing venue;
- Contempt provisions in response to threats; and
- General measures concerning the protection of witnesses and victims in and around the premises where testimony is given.

**Identity protection.** The unit should be able to facilitate the protection of a witness's identity – while safeguarding the rights of the accused, including the right to a fair trial in accordance with international standards – through:

- The use of pseudonyms;
- Delaying disclosure of witness identity prior to testimony;
- Expunging names and identifying information from public records;
- *in camera* hearings;
- Audio-video recordings of statements;
- Reading out of statements without the witness being present;
- Distortion of the witness's image or voice while giving testimony;
- The use of screens to hide witnesses, and
- Video-conferencing.

**Minimising trauma.** The unit should be empowered to reduce the risk of re-traumatisation caused by confronting the accused, including:

- Use of a witness's recorded statement;
- An accompanying person for psychological support, especially for children; and
- In the case of children, questioning by a psychologist or social worker.

***Relocation and/or identity change.*** Regulations should include the option of identity change and relocation within the country or abroad for the most extreme protection cases. The government should seek agreements with neighbouring countries to allow relocation within the region if needed.

***Legal sanction for offences against witnesses.*** Acts of violence or intimidation against witnesses or their associates should be criminalised, investigated, prosecuted and punished, as should divulging information with the intent of putting the witness at risk. These offences should not be bail-able and hearings should take place promptly.

# **Annex I: Witness Protection in International Instruments**

This Annex contains a summary of international standards that make direct reference to witness protection issues. While not comprehensive, it is meant to serve as a reference tool for civil society and government actors working to develop witness protection policies and procedures in Nepal.

## **1. International Human Rights Standards and Jurisprudence**

A wide range of international human rights laws and standards are relevant to witness protection. This section will focus primarily on those that relate to the protection of the rights to life, personal integrity, freedom from torture and cruel, inhuman or degrading treatment or punishment, fair trial, the right to a remedy and reparation, and on related legal materials relevant to the State obligation to ensure that effective witness protection mechanisms are put in place.

International human rights law not only obligates States to refrain from conduct that infringes upon an individual's rights, but also requires measures to be taken to guarantee the realization of those rights. Human rights violations can occur directly through the conduct of State actors and indirectly through a State's failure to exercise due diligence to protect individuals from the actions of private actors.

These obligations have implications for witness protection. Where the life of an individual is at risk because of his or her role as a witness, the State is required to take protective steps to protect the life of the witness. Where a witness is subject to violence or the threat of violence, his or her right to security of person is undermined. Similarly the State is obligated to protect witnesses from acts of torture or other cruel, inhuman or degrading treatment. Protection measures also play a key role in protecting an accused's right to a fair trial and a victim's right to an effective legal remedy.



### **(a) International Covenant on Civil and Political Rights (ICCPR)**

The *International Covenant on Civil and Political Rights* (ICCPR) enshrines the right to life, right to freedom from torture and cruel, inhuman or degrading treatment or punishment, right to personal security, and the right to fair trial.<sup>39</sup> It also obligates States Parties to ensure access to an effective remedy when rights are violated.<sup>40</sup>

On a number of occasions, the treaty-monitoring body attached to the ICCPR, the Human Rights Committee, has affirmed and further developed the protection requirements emanating from States' obligations to respect and ensure these rights.<sup>41</sup> In the case of *Delgado Paez v. Columbia*, the Committee affirmed that States cannot “ignore known threats to the life of persons under their jurisdiction” and must “take reasonable and appropriate” protective measures.<sup>42</sup> In the case of *Rajapakse v. Sri Lanka*, the Human Rights Committee held that the Sri Lanka had violated the right to personal security as a result of its failure to protect the complainant from threats made by police officers or to investigate those threats.<sup>43</sup>

The Committee has also recognised the vital role that witnesses play in fulfilling the right to fair trial and has recommended that effective witness protection mechanisms be established as part of the State's obligation to protect this right.<sup>44</sup> Similarly, the Committee has identified witness

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39 International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976 (ICCPR), Articles 6, 7, 9 and 14.

40 ICCPR, Article 2(3); Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev. 1/Add. 13 (2004) (“General Comment 31”).

41 Human Rights Committee, General Comment No. 31.

42 Human Rights Committee, *Delgado Paez v. Colombia*, Communication No. 195/1985 (12 July 1990), para. 5.5; for general discussion of Article 6, see General Comment No. 6, Article 6, UN Doc. HRI/GEN/1/Rev. 1 (1994) (“General Comment 6”).

43 Human Rights Committee, *Rajapakse v. Sri Lanka*, Communication No. 1250/2004 (5 September 2006), para.9.7.

44 Human Rights Committee, *Concluding Observations on Bosnia Herzegovina*, UN Doc. CCPR/C/BIH/CO/1, (2006), para. 13; and *Concluding Observations on Ukraine*, UN Doc. CCPR/C/UKR/CO/6, (2006), para. 4. See also General Comment No. 32, Article 14: *Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc. CCPR/C/GC/32 (2007) (“General Comment 32”).

protection mechanisms as essential for upholding the provision of the right to a remedy,<sup>45</sup> and has emphasised that the establishment of witness protection mechanisms is integral to protecting many other rights including the right to be free from torture, cruel, inhuman or degrading treatment or punishment,<sup>46</sup> slavery and trafficking.<sup>47</sup>

***(b) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)***

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) explicitly enumerates an obligation to protect victims and witnesses under Article 13: “[s]teps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given”.<sup>48</sup> The CAT codifies the complainant’s right to a remedy under Article 14 and the right to a prompt, impartial investigation under Article 12.<sup>49</sup> The treaty-monitoring body attached to the CAT, the Committee against Torture, has also linked effective witness protection with the obligation to provide an effective remedy including prompt and impartial investigations. The Committee has urged States to create protection mechanisms<sup>50</sup> or improve existing mechanisms.<sup>51</sup> The Committee has welcomed the development

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45 Human Rights Committee, *Concluding Observations on Kosovo*, UN Doc. CCPR/C/UNK/CO/1, (2006), para. 13; and *Concluding Observations on Sri Lanka*, UN Doc. CCPR/CO/79/LKA, (2003), para. 9.

46 Human Rights Committee, *Concluding Observations on Bosnia Herzegovina*, UN Doc. CCPR/C/BIH/CO/1, (2006), para. 13; *Concluding Observations on Kosovo*, UN Doc. CCPR/C/UNK/CO/1, (2006), para. 13; and *Concluding Observations on Sri Lanka*, UN Doc. CCPR/CO/79/LKA, (2003), para. 9.

47 Human Rights Committee, *Concluding Observations on Bosnia Herzegovina*, UN Doc. CCPR/C/BIH/CO/1, (2006), para. 13; and *Concluding Observations on Greece*, UN Doc. CCPR/CO/83/GRC, (2005), para. 10.

48 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, entered into force 26 June 1987 (CAT), Article 13.

49 CAT, Articles 14 and 7, paras. 2 and 3.

50 Committee against Torture, *Concluding Observations on Tajikistan*, UN Doc. CAT/C/TJK/CO/1, (2006), para. 18; *Concluding Observations on Benin*, 2008, CAT/C/BEN/CO/2, para. 10; and *Concluding Observations on Nepal*, UN Doc. CAT/C/NPL/CO/2, (2005), para. 28.

51 Committee against Torture, *Concluding Observations on Croatia*, 2004, UN Doc. CAT/C/CR/32/3, (2004), para. 9; and *Concluding Observations on Costa Rica*, UN Doc. CAT/C/CR/CO/2, (2008), para. 12.

of witness protection mechanisms as a key component in the institutional framework necessary to uphold the obligations enshrined in the CAT.<sup>52</sup>

**(c) Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and its Optional Protocol**

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) prohibits discrimination against women and requires States Parties to take steps to eliminate discrimination in both public and private spheres. Its provisions require States Parties to ensure both *de facto* and *de jure* equality in the enjoyment of rights, to eliminate indirect and direct, formal and substantive discrimination,<sup>53</sup> and to ensure women's equality before the law.<sup>54</sup> The treaty-monitoring body attached to CEDAW, the Committee on the Elimination of Discrimination against Women has affirmed that States are required to prevent, investigate and remedy acts of violence against women,<sup>55</sup> and ensure that women have equal access to remedies, specifically in relation to acts of gender-based violence.<sup>56</sup> In this context, States Parties are required to incorporate a gender perspective in the design and implementation of witness protection measures.

The Committee has made a number of specific findings and observations relevant to witness protection. For example, it has found States Parties to

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52 Committee against Torture, *Concluding Observations on Guyana*, UN Doc. CAT/C/GUY/CO/1, (2008), para. 4; *Concluding Observations on Serbia*, UN Doc. CAT/C/SRB/CO/1, (2009), para. 1; and *Concluding Observations on Kenya*, UN Doc. CAT/C/KEN/CO/1, (2008), para. 4.

53 International Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13, entered into force 3 September 1981 (CEDAW), Articles 2, 3 and 5. See also Committee on the Elimination of All Forms of Discrimination against Women, General Recommendations no. 25, "General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures," UN Doc. HRI/GEN/1/Rev.9 (Vol. II) (27 May 2008); see also Committee on the Elimination of Discrimination against Women, General Recommendation no. 28, "General recommendation No. 28 on the core obligations of State Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women," UN Doc. CEDAW/C/GC/28 (16 December 2010) ("CEDAW General Recommendation 28").

54 CEDAW, Article 15.

55 Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation no. 19, "Violence against Women," UN Doc. HRI/GEN/1/Rev.9 (Vol. II) (27 May 2008).

56 CEDAW General Recommendation 28.

be in violation of the CEDAW where they failed to take targeted operational and legal measures to protect victims of gender-based violence seeking legal remedies.<sup>57</sup> In a number of concluding observations, the Committee explicitly called for adequate witness protection measures, identifying witness protection as an essential element in efforts to realise the right to a remedy.<sup>58</sup> In addition, the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, which established an individual complaint mechanism for CEDAW, explicitly requires States Parties to protect individuals submitting complaints to the Committee.<sup>59</sup>

#### **(d) Convention on the Rights of the Child (CRC)**

The *Convention on the Rights of the Child*<sup>60</sup> (CRC) codifies a range of child rights, including the right to life, bodily and mental integrity as well as the right to be free from torture and other cruel, inhuman and degrading treatment.<sup>61</sup> The treaty-monitoring body attached to the CRC, the Committee on the Rights of the Child, has found witness protection mechanisms to be essential for preventing the violation of the rights of child witnesses.<sup>62</sup> The Committee has also highlighted a child's right to specific protections during court proceedings.<sup>63</sup>

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57 CEDAW Committee, *Yildirim v. Austria*, Communication No. 6/2005, 1 October 2007; *Goeke v. Austria*, Communication No. 5/2005, *AT v. Hungary*, Communication No.: 2/2003, 26 January 2005.

58 CEDAW Committee, *Concluding Observations on Mongolia*, 2008, CEDAW/C/MNG/CO/7, paras. 27 and 28; *Concluding Observations on Russia*, UN Doc. A/57/38(SUPP) (2002), para. 396; *Concluding Observations on Surinam*, UN Doc. A/57/38(SUPP), (2002), para. 50 bis; *Concluding Observations on Mongolia*, UN Doc. CEDAW/C/MNG/CO/7, (2008) para. 27; *Concluding Observations on Iceland*, UN Doc. CEDAW/C/ICE/CO/6, (2009), para. 23; *Concluding Observations on Nigeria*, UN Doc. CEDAW/C/NGA/CO/6, (2008), para. 26; and *Concluding Observation on Cameroon*, UN Doc. CEDAW/C/CMR/CO/3, (2009), para. 31.

59 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999, 2131 U.N.T.S. 83, entered into force 22 December 2000, Article 11.

60 Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, entered into force 2 September 1990 ("CRC").

61 CRC, Articles 6, 19 and 37.

62 Committee on the Rights of the Child, *Concluding Observations on the Philippines*, UN Doc. CRC/C/PHL/CO/3-4, (2009), para. 52.

63 Committee on the Rights of the Child, *Concluding Observations on Sierra Leone*, UN Doc. CRC/C/OPSC/SLE/CO/1, (2010).

The CRC guarantees the right to a fair trial for children or youth accused of crimes. This includes the right to “obtain the participation and examination of witnesses on his or her behalf under conditions of equality.”<sup>64</sup> Children, like adults, have a right to a remedy when their rights are violated. The Committee on the Rights of the Child directly links the right to a remedy to the provision of witness protection for the child as well as witnesses on their behalf.<sup>65</sup> More generally, the Committee has recommended developing or improving witness protection measures to facilitate the rehabilitation of children, especially children who are victims of trafficking or sexual exploitation or abuse.<sup>66</sup>

The *Optional Protocol to the Convention* obligates States to enact measures to protect child victims and witnesses, their families and witnesses on their behalf from intimidation and retaliation.<sup>67</sup> The Optional Protocol also requires States Parties to adapt procedures within the criminal justice system that address a child’s special needs, specifically as a witness.<sup>68</sup>

### **(e) Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**

The *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>69</sup> (ICERD) requires that the “right to security of person and protection by the State against violence or bodily harm, whether inflicted

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64 CRC, Article 40(2(b(iv))); see also Article 40(2(b(iii))).

65 Committee on the Rights of the Child, *Concluding Observations on the Philippines*, UN Doc. CRC/C/PHL/CO/3-4, (2009), para. 52; and *Concluding Observations on Yemen*, UN Doc. CRC/C/OPSC/YEM/CO/1, (2009), para. 49.

66 Committee on the Rights of the Child, *Concluding Observations on Albania*, UN Doc. CRC/C/15/Add.249, (2005), para. 71; *Concluding Observations on France*, UN Doc. CRC/C/15/ADD.240, (2004), para. 55; and *Concluding Observations on Serbia*, UN Doc. CRC/C/SRB/CO/1, (2008), para. 72.

67 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, U.N.G.A. Resolution 54/263, Annex II, 54 U.N.GAOR Supp. (No. 49) at 6, UN Doc. A/54/49, Vol III (2000), entered into force 18 January 2002, Article 8(f).

68 *Ibid.*, Article 8(a).

69 International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195, entered into force 4 January 1969 (ICERD).

by government officials or by any individual group or institution”<sup>70</sup> be guaranteed without discrimination based in race, colour, or national or ethnic origin. Witness protection, like any other form of protection, must be provided to all persons equally regardless of race. The Committee on the Elimination of All Forms of Racial Discrimination has also recognised the importance of witness protection in accessing the right to a remedy, particularly in cases concerning acts of racial discrimination.<sup>71</sup>

***(f) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)***

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*<sup>72</sup> (ICRMW) guarantees the right of migrant workers and members of their families to liberty and security of person, entitling them “to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions”.<sup>73</sup> Such protection includes protection of witnesses who are migrant workers who are at risk of violence, physical injury, threats and intimidation.

***(g) International Convention for the Protection of All Persons from Enforced Disappearance (ICED)***

The *International Convention for the Protection of All Persons from Enforced Disappearance*<sup>74</sup> (ICED) obligates States Parties to ensure that complainants, witnesses, relatives of a disappeared person and their defence counsel,

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70 *Ibid.*, Article 5(b).

71 Committee on the Elimination of All Forms of Racial Discrimination, *Concluding Observations on Guyana*, UN Doc. CERD/C/GUY/CO/14, (2006), para. 21.

72 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, U.N.G.A. Resolution 45/158, Annex, 45 U.N. GAOR Supp. (No. 49A), p. 262, UN Doc. A/45/49 (1990), entered into force 1 July 2001 (ICRMW).

73 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, U.N.G.A. Resolution 45/158, Annex, 45 U.N.GAOR Supp. (No. 49A), p. 262, UN Doc. A/45/49 (1990), entered into force 1 July 2003, Article 16(1) and (2).

74 International Convention for the Protection of All Persons from Enforced Disappearance, U.N.G.A. Resolution 37/194, Annex, 37 U.N.GAOR Supp. (No. 51), p. 211, UN Doc. A/RES/61/177 (2006), entered into force 23 December 2010

as well as persons participating in the investigation, are protected from ill-treatment or intimidation as a consequence of the complaint or any evidence given.<sup>75</sup>

Recognising that perpetrators of enforced disappearances are often State officials, Article 12 explicitly requires States Parties to ensure

that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.<sup>76</sup>

#### ***(h) Convention Against Transnational Organised Crime***

The *United Nations Convention against Transnational Organised Crime*<sup>77</sup> requires States Parties to take appropriate measures to provide “assistance and protection to victims of offences covered by the Convention, particularly in cases of threat or retaliation”.<sup>78</sup> Protection measures include: guaranteeing the physical protection of witnesses; facilitating the relocation and non-disclosure or limited disclosure of a witness’ whereabouts and identity; introducing evidentiary rules permitting testimony to be given in a manner that ensures a witness’ safety; and establishing inter-State agreements on witness relocation. Protection is also made available to relatives and those close to the witness.<sup>79</sup>

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75 ICED, Article 12.

76 *Ibid.*, Article 12(4).

77 United Nations Convention against Transnational Organized Crime, U.N.G.A. Resolution 55/25, Annex I, 55 U.N. GAOR Supp. (No. 49), p. 44, UN Doc. A/45/49 (Vol. I) (2001), entered into force 25 December 2003.

78 *Ibid.*, Article 24 and 25.

79 *Ibid.*, Article 24(1).

**(i) Protocol to Prevent, Suppress and Punish Trafficking in Persons**

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*<sup>80</sup> obligates States Parties to:

- Protect the privacy and identity of victims of trafficking in persons, making legal proceedings confidential if necessary;
- Provide victims with information on relevant court and administrative proceedings;
- Provide assistance to victims to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings;
- Provide for the physical, psychological and social recovery of trafficking victims, including appropriate housing, including providing counselling and information about their legal rights in a language that they can understand;
- Provide medical, psychological and material assistance;
- Provide employment, educational and training opportunities;
- Ensure the physical safety of trafficking victims within its territory; and
- Ensure that the domestic legal system offers trafficking victims a mechanism for obtaining reparations and compensation for their suffering.<sup>81</sup>

**(j) Protocol Against the Smuggling of Migrants By Land, Sea and Air**

The *Protocol against the Smuggling of Migrants by Land, Sea and Air*<sup>82</sup> frames a State's obligation to protect witnesses within the right to life and

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80 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, U.N.G.A. Resolution 55/25, Annex II, U.N. 55 GAOR, Supp. (No. 49) p. 60, UN Doc. A/45/59 (Vol. I) (2001), entered into force 25 December 2003, Article 6(1-6).

81 *Ibid.*, Articles 6 (1)-(6).

82 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, U.N.G.A. Resolution 55/25, Annex III, 55 U.N. GAOR, Supp. (No. 49) p. 65, UN Doc. A/45/49 (Vol. I) (2001), entered into force 28 January 2004.



the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>83</sup> The Protocol specifically obligates States Parties to protect smuggling victims from violence inflicted upon them as a result of being smuggled.<sup>84</sup> States Parties are also obligated to take into account the special needs of women, children and those who are detained or criminally charged on the basis of being a smuggled migrant.<sup>85</sup>

### ***(k) Other International Standards***

Other international standards are important for clarifying the content of legal obligations relating to witness protection found in international treaties and conventions.

The United Nations *Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power*<sup>86</sup> states that:

[t]he responsiveness of judicial and administrative processes to the needs of victims should be facilitated by [...] taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf from intimidation and retaliation...<sup>87</sup> Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.<sup>88</sup>

The *UN Principles on Extra-legal Executions*, and the *UN Principles on the Investigation of Torture* require that complainants, witnesses, those

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83 *Ibid.*, Article 16(1).

84 *Ibid.*, Article 16(2) and (3).

85 *Ibid.*, Article 16 (4) and (5).

86 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N.G.A. Resolution 40/34, Annex, 40 U.N. GAOR Supp. (No. 53) p. 214, UN Doc. A/RES/40/34, (1985)

87 *Ibid.*, Principle 6(d).

88 *Ibid.*, Principle 4.

conducting an investigation and their families be protected from violence, threats of violence or any other form of intimidation.<sup>89</sup>

The *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* provides that “[e]ffective measures shall be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission”.<sup>90</sup>

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* recommends that States take measures

[...] to minimise the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims.<sup>91</sup>

The *Guidelines on Justice in Matters involving Child Victims and Witnesses*, Resolution 2005/20 of the Economic and Social Council, recognise that children “may suffer additional hardship when assisting in the justice process”, that they “are vulnerable and require special protection

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89 United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Resolution 1989/65, Annex, 1989 U.N. ESCOR Supp. (No. 1), p. 52, UN Doc. E/1989/89 (1989), Principle 15; and UN Principles on the Investigation of Torture, U.N.G.A. Resolution 55/89, Annex, UN Doc. A/Res/55/89 (22 February 2001), Principle 3(b).

90 Updated set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, (8 February 2005), Principle 10 (“Impunity Principles”).

91 United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N.G.A. Resolution 60/147, Annex, UN Doc A/Res/60/147 (21 March 2006), Principle 12(b) (“Right to a Remedy”).

appropriate to their age, level of maturity and individual special needs”, and “that girls are particularly vulnerable and may face discrimination at all stages of the justice system”.<sup>92</sup> The Guidelines provide that “where the safety of a child victim or witness may be at risk, appropriate measures should be taken to ... protect the child from such risks before, during and after the justice process.”<sup>93</sup>

The *UN Basic Principles on the Independence of the Judiciary* state that judges shall decide matters before them without “pressures, threats or interferences.”<sup>94</sup>

The *UN Basic Principles on the Role of Lawyers* states that lawyers must be able to, “perform all of their professional functions without intimidation, hindrance, harassment or improper interference” and that lawyers “shall not suffer, or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.”<sup>95</sup> Article 18 further states that “[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.”<sup>96</sup> The Principles require adequate protection from the authorities when a lawyer’s security is threatened as a result of their work.<sup>97</sup>

The *UN Basic Principles on the Role of Prosecutors* includes an obligation for States to ensure “that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper

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92 Guidelines on Justice in Matters involving Child Victims and Witnesses, U.N. ECOSOC Resolution 2005/20, Annex II, 7(a, b, c).

93 *Ibid.*, XII (32).

94 United Nations Basic Principles on Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan Italy from 26 August to 6 September 1985 and endorsed by U.N.G.A. resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, UN Doc. A/CONF.121/22/Rev.1, p. 59, Principle 2.

95 United Nations Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1, p. 118 (1990), Principle 16.

96 *Ibid.*, Principle 18.

97 *Ibid.*, Principle 17.

interference or unjustified exposure to civil, penal or other liability”<sup>98</sup> and that if “their personal security is threatened as a result of the discharge of prosecutorial functions... prosecutors and their families shall be physically protected by the authorities.”<sup>99</sup>

## **2. International Courts, Regional Bodies and UN Special Procedures**

### ***(a) International Tribunals and Special Courts***

In response to violations of international criminal and humanitarian law in the former Yugoslavia and Rwanda, the Security Council, exercising its authority under Chapter VII of the UN Charter, established two *ad hoc* international criminal tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 under United Nations Security Council resolution 827.<sup>100</sup> The United Nations International Criminal Tribunal for Rwanda (ICTR) was established in 1994 under United Nations Security Council resolution 955.<sup>101</sup> The *Rome Statute for the establishment of an International Criminal Court*, creating a permanent international criminal court, was signed in July 1998, and entered into force on 1 July 2002. In addition, specialised hybrid tribunals, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC), have been established through bilateral agreements with the UN. Victim and Witness Support units exist in each of these tribunals, providing support to victims and witnesses throughout the investigative and trial process. Within the domain of international criminal law, witness protection has come to be viewed as an essential component of the justice process.

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98 United Nations Basic Principles on the Role of Prosecutors, adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1, p. 189 (1990), Principle 4.

99 *Ibid.*, Principle 5.

100 United Nations Security Council Resolution 827 of 25 May 1993, UN Doc. S/Res/827, para 2.

101 United Nations Security Council Resolution 955 of 8 November 1994, UN Doc. S/Res/955, para 1.

**International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).** The Statutes for the ICTR<sup>102</sup> and ICTY<sup>103</sup> incorporate victim and witness protection within their rules of procedure and evidence. Provisions include *in camera* hearings and the protection of a victim's identity. The tribunals have also established witness protection programs that continue to be a source of important lessons learned for witness protection programs globally.

**Rome Statute of the International Criminal Court (ICC).** Article 43(6) of the Rome Statute of the International Criminal Court required the Registry to set up a Victims and Witnesses Unit to provide, in consultation with the Office of the Prosecutor, "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."<sup>104</sup>

Article 68 of the Rome Statute sets out some of the assistance and protection mechanisms available such as *in camera* and video-link hearings. Article 68(1) requires that measures not be "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."<sup>105</sup> This article also stipulates that the Court take appropriate measures, not only in regard to the physical security of victims and witnesses but also to protect their "psychological well-being, dignity and privacy."<sup>106</sup>

**Special Court for Sierra Leone (SCSL).** The Statute establishing the Special Court for Sierra Leone states that:

The Registrar shall set up a Victims and Witness Unit within the Registry. This Unit shall provide,

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102 Statute of the International Tribunal for Rwanda, 33 I.L.M. 1598 (1994); and adopted by the United Nations Security Council on 8 November 1994, UN Doc. S/Res/955, Article 21.

103 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by Security Council on 25 May 1993, UN Doc. S/Res/827, see also UN Doc. S/25704, p. 36, Annex (1993) and S/25704/Add.1 (1993), Article 22.

104 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force 1 July 2002, Article 43(6) ("Rome Statute").

105 *ibid.*, Article 68(1).

106 *ibid.*, Article 68(1).

in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.<sup>107</sup>

**Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC).**

The ECCC has a Victims' Unit, which has responsibility for

[...] the safety and well-being of victims who participate in the proceedings. This involves ensuring that victims properly understand the risks sometimes inherent in such participation, as well as providing them with protective measures and other assistance, like psychosocial support.<sup>108</sup>

***(b) Regional bodies***

Article 7 of the Inter-American Convention on the prevention, punishment and eradication of violence against women requires that States Parties

condemn all forms of violence against women and agree to [pursue,] ... (d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damage her property; (f) establish fair and effective legal procedures for women who have

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107 Statute of the Special Court for Sierra Leone, established pursuant to United Nations Security Council resolution 1315 of 16 January 2002, UN Doc. S/Res/1315 (2000), Article 16(4).

108 Website of the Extraordinary Chambers in the Courts of Cambodia, [www.eccc.gov.kh/english/victims\\_unit.aspx](http://www.eccc.gov.kh/english/victims_unit.aspx).

been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such measures.<sup>109</sup>

The *Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court of Human and Peoples' Rights* states that:

[a]ny person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.<sup>110</sup>

Article 25 of the *Rules of Procedure of the Inter-American Commission on Human Rights* provides that “[i]n serious and urgent situations, the Commission may on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case.”<sup>111</sup> The *African Commission on Human and Peoples' Rights', Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* contains similar language.<sup>112</sup>

The Council of Europe has also recognised the “right [of witnesses] to not be subject to any undue interference or by placed at personal risk” and urges that governments of member States take legislative and practical measures “to ensure that witnesses, collaborators of justice may testify freely and without being subject to any act of intimidation”.<sup>113</sup>

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109 *Inter-American Convention on the prevention, punishment and eradication of violence against women* (9 June 1994), Chapter 3, Article 7((d) and (f)).

110 Protocol to the African Charter on the establishment of an African Court of Human and Peoples' Rights, OAU Doc. OAU/LEG/AFCHPR/PROT (III), entered into force 25 January 2004, Article 10(3).

111 Inter-American Commission on Human Rights, Rules of Procedure, approved by the Commission during the 137<sup>th</sup> regular period of sessions, 28 October to 13 November 2009.

112 The African Commission on Human and Peoples' Rights', Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247 (2001).

113 Council of Europe Committee of Ministers, Recommendations to member states on the protection of witnesses and collaborators of justice, 20 April 2005, preamble and Article 2(1) ("Council of Europe, Recommendation").

**(c) United Nations Special Procedures**

Since 2006, UN special procedures have made frequent reference to the importance of witness and victim assistance and protection mechanisms.

- The Special Rapporteur on extrajudicial, summary or arbitrary executions in his reports on Brazil,<sup>114</sup> Democratic Republic of the Congo,<sup>115</sup> Guatemala,<sup>116</sup> Kenya<sup>117</sup> and the Philippines;<sup>118</sup>
- The Special Rapporteur on trafficking in persons, especially women and children, in her reports on Bosnia Herzegovina,<sup>119</sup> and Lebanon;<sup>120</sup>
- The Special Representative of the Secretary General on human rights defenders in her report on Guatemala;<sup>121</sup>
- The Representative of the Secretary General on the human rights of internally displaced persons in his report on Bosnia Herzegovina;<sup>122</sup>
- The Special Rapporteur on the sale of children in his report on Albania,<sup>123</sup> Mexico<sup>124</sup> and the Ukraine;<sup>125</sup>
- The Special Rapporteur on the independence of judges and lawyers in his report on Tajikistan;<sup>126</sup>

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114 A/HRC/11/2/Add.2 (SR Summary Executions, 2009), para. 94.

115 A/HRC/14/24/Add.3 (SR Summary Executions, 2010), para. 114.

116 A/HRC/11/2/Add.7 (SR Summary Executions, 2009), para. 45.

117 A/HRC/11/2/Add.6 (SR Summary Executions, 2009), para. 105 and 106.

118 A/HRC/8/3/Add.2 (SR Summary Executions, 2008), para. 71.

119 E/CN.4/2006/62/Add.2 (SR Trafficking, 2005), para. 88.

120 E/CN.4/2006/62/Add.3 (SR Trafficking, 2006), para. 94.

121 A/HRC/10/12/ADD.3 (SRSG HR Defenders, 2009), para. 93.

122 E/CN.4/2006/71/Add.4 (RSG IDPs, 2005), para. 58.

123 E/CN.4/2006/67/Add.2 (SR Sale of Children, 2006), para. 120.

124 A/HRC/7/8/Add.2 (SR Sale of Children, 2008), para. 79.

125 A/HRC/4/31/Add.2 (SR Sale of Children, 2007), para. 76.

126 E/CN.4/2006/52/Add.4 (SR Independence of Judges, 2005), para. 91.



- The Special Rapporteur on slavery in the report on Brazil;<sup>127</sup>
- The Special Rapporteur on torture in his report on Sri Lanka;<sup>128</sup>
- The Special Rapporteur on violence against women in her report on Mexico;<sup>129</sup> and
- Special Rapporteurs on the Democratic Republic of the Congo on the need to extend protection to human rights defenders.<sup>130</sup>

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127 A/HRC/15/20/Add.4 (SR Slavery, 2010), para. 120.

128 A/HRC/7/3/Add.6 (SR Torture, 2008), para. 91.

129 E/CN.4/2006/61/Add.4 (SR Violence against Women, 2006), para. 69.

130 A/HRC/10/59 (Joint Report, 2009), para. 114.

## Annex II: Best Practices for the Development of a Witness Protection Framework

This Annex presents best practices from around the world for witness protection in cases involving human rights violations and are the basis for the recommendations in the main body of the report. The annex focuses on four areas: (i) determining eligibility for protection; (ii) structure and operation of a witness protection mechanism; (iii) safeguards surrounding the initiation and termination of protection services; and (iv) the scope and nature of protection assistance.

This review draws on the post-conflict experiences of many countries including Bosnia Herzegovina, Colombia, Croatia, Guatemala, Indonesia, Kenya, Kosovo, Peru, Serbia and Montenegro, South Africa and Sri Lanka. It also relies heavily on several key documents, including the *UN Office of Drug and Crime Control Good Practices Manual*<sup>131</sup> and *Model Witness Protection Bill*,<sup>132</sup> the *Santiago Guidelines of 2008*<sup>133</sup> and the work of Chris Mahony on witness protection in Africa.<sup>134</sup> (See: reference list in Annex III).

### 1. Eligibility for Protection and Assistance

Witness protection legislation should clearly set out the different types of witnesses who are eligible for witness protection measures. It is essential to decide in advance whether a particular mechanism will offer services to witnesses who are criminally charged or convicted; witnesses in non-criminal proceedings; witnesses of different types of offences; witnesses to

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131 United Nations Office on Drugs and Crime, *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, 2008 (“*Good Practices*”)

132 UNDCP Model Witness Protection Bill, 2000 (“*Model Witness Protection Bill*”)

133 The *Santiago Guidelines on Witness and Victim Protection* (June 2008) are the outcome of a meeting of experts and prosecutors, organised by Attorney General’s Office of Spain, the Office of the Public Prosecutor of Chile, Ibero-American Association of Public, United Nations Office on Drugs and Crime (UNODC) and EUROSOCIAL Justice (“*Santiago Guidelines*”).

134 Mahony, C., *The justice sector afterthought: Witness protection in Africa*, 2010, Institute for Security Studies, p. 167

the planning of an offence; and witnesses who have not yet testified, are currently testifying or have testified. Decisions will also need to be made regarding the inclusion of associates of the witness; individuals associated with groups vulnerable as a result of the case; and the inclusion of other actors involved in the case, such as judges, prosecutors and lawyers.

The International Criminal Court (ICC)'s protection mechanism is not limited to testifying witnesses, but rather extends to “all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”<sup>135</sup> For the purposes of its protection policy, a “witness” includes a person who has started the process of providing a formal witness statement, or whom the ICC's Office of the Prosecutor (OTP) has identified as a potential witness in the proceedings. Under this definition, the unit may offer protection and assistance to witnesses as well as screened individuals who have not yet given a statement.

One threshold question for the OTP is whether the available protection measures are sufficient to manage the risk to the witness. The OTP has a policy of not interacting with a person at risk if the protection tools are not adequate to mitigate or manage the risk, and will seek alternative means of gathering evidence. It will only proceed with a witness at risk in exceptional circumstances where no adequate alternative evidence is available, collection cannot be postponed, and the person decides to continue cooperation after having been properly informed of the lack of sufficient protection measures.

### ***1.1 Witnesses who are criminally convicted or charged***

Some laws provide for unique protection measures for this category of witnesses. In a study on witness protection associated with the prosecution of war crimes perpetrated in the Balkan states, Human Rights Watch found that “[m]any crimes will be impossible to prove unless former members of the military, paramilitary, or police units testify against

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<sup>135</sup> International Criminal Court, Rules of Procedure and Evidence, adopted by the Assembly of States Parties, First session, New York, 3-10 September 2002, UN Doc. PCNICC/200/1/Add.1 (2000), Rule 17(2)(a) (“ICC Rules of Procedure and Evidence”)

their comrades.”<sup>136</sup> In a conflict or post-conflict scenario this category of witnesses could include:

- Members of an armed non-state group who witness crimes while in detention. The most common example is a detainee becoming a witness to his or her own torture, or to the torture or extrajudicial killing of other detainees; or
- “Justice collaborators,” a term frequently used in the organised crime setting. In the conflict or post-conflict setting, this would include individuals, usually from a non-state armed group or demobilised army, who have surrendered or been captured and who have decided to assist the authorities. Also included in this category are members of state security forces testifying against members of their own units.

Legislation throughout the world deals with the issue in a variety of ways.

- In **Thailand**, a defendant in the same matter is not eligible for witness protection. However convicted persons or persons charged in unrelated criminal matters are not explicitly banned from witness protection.<sup>137</sup>
- In **Peru**, the protection scheme applies to persons who may be the subject of preliminary investigations in a criminal proceeding, in addition to those who have been accused or convicted of specific crimes.<sup>138</sup>
- In **Colombia**, the Protection Programme can provide services to persons who have been charged, tried or convicted of a crime as long as they possess information that is useful to an investigation; that prevents or ends ongoing criminal activity or the commission of other crimes; that dismantles criminal organisations; or that

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136 Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia Herzegovina, and Serbia and Montenegro*, October 2004, p. 20 (“Human Rights Watch, *Justice at Risk*”).

137 Witness Protection Act BE 2546 (2003) of Thailand, Section 3 (“Thailand Act”).

138 Law 27378 of Peru, Article 2.

assists in identifying assets and other sources of finance for criminal organisations. Persons in detention are not eligible.<sup>139</sup>

- In **Indonesia** and **Hong Kong**, an individual's criminal record is part of the eligibility criteria considered for witness protection.<sup>140</sup> Under the Hong Kong law, "crimes of violence, and whether that record indicates a risk to the public if the witness is included in the witness protection program" are taken into consideration.<sup>141</sup>
- The Council of Europe Committee of Ministers Resolution on witness protection states that "appropriate measures should be adopted to protect witnesses and collaborators of justice against intimidation".<sup>142</sup>
- At the **ICC**, witnesses are eligible for protection measures regardless of whether they have been convicted. This circumstance, however, may be taken into consideration by the Victims and Witnesses Unit to evaluate whether the person is likely to abide by the rules of the protection program.<sup>143</sup>

These national and international examples generally recognise that in conflict and post-conflict countries it is important that protection is available to those who are criminally convicted or charged. The well-documented patterns of custodial torture and ill treatment in many countries that have experienced conflict make the provision of protection to those accused and convicted essential.

Protection measures should be made available to charged and convicted witnesses, including protection while in detention, protection for their families while they are detained and international relocation options,

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139 Resolution of the Office of the Attorney General of Colombia No. 0-5101 of 2008, Article 4.6.

140 Law of the Republic of Indonesia Number 13 Year 2006 on Witness and Victims Protection, Article 28(d) ("Indonesian Law"); An Ordinance to provide for the establishment of a programme for the protection of certain witnesses and persons associated with witnesses, No. 269 of 2000, Section 4(3(a)) ("Hong Kong Ordinance").

141 Hong Kong Ordinance, Section 4(3(a)).

142 Council of Europe, *Recommendation*, Article 10.

143 International Criminal Law Service, expert review comments (June 2011).

although most countries are reluctant to receive convicted offenders.<sup>144</sup> Croatian law establishes protection measures (such as relocation within the prison system, or facilitation of presence in court by a Protection Unit) for the accused or convicted.<sup>145</sup> However, witnesses who are charged or criminally convicted in a separate or related crime are not always guaranteed witness protection. Their known or potential criminality is often taken into account when deciding if they can be granted access to witness protection measures and the type of measures they can receive.

## **1.2 Witnesses in non-criminal proceedings**

Witnesses may also be at risk in non-criminal proceedings, including include civil proceedings, judicial inquests, and commissions of inquiry.

**Civil proceedings.** In a conflict or post-conflict setting the State may deliberately obstruct criminal proceedings by failing to investigate crimes or failing to bring indictments or charges against the perpetrator, particularly where powerful individuals and institutions are implicated. In such cases victims may sometimes pursue remedies in civil courts.

**Military tribunals.** A State may invoke the jurisdiction of military tribunals to shield military personnel from being tried before civilian courts. Even where military jurisdiction is legitimately established, these cases are likely to give rise to witnesses protection needs.

**Judicial inquests.** Judicial inquests may also present risks to witnesses. For example, in the Sri Lankan inquest into the death of 17 aid workers in August 2006, family members were too frightened to attend hearings or testify. Recognising the risk to witnesses, the magistrate who initially heard the inquest allowed witnesses to provide information in his chambers.<sup>146</sup>

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144 UNODC, *Good Practices*, pp. 20-21.

145 *Witness Protection Act, 2003*, Official Gazette no. 163/2003 ("Croatian Law"), Articles 17 and 27. Article 27 states that an individual being prosecuted for a criminal offence committed prior to a change of identity will be tried for that offence with her/his real identity and that the Protection Unit will ensure the individual's presence in court.

146 Muttur Magistrates Court, Case No. B.R. 843/06, 7 March 2006.

**Commissions.** National human rights commissions and post-conflict commissions of inquiry take a variety of forms (including transitional justice institutions) and are another form of non-criminal proceeding for which witness protection is essential. Whether the commission has the power to recommend prosecution or not, individuals with vested interests in preventing the truth from emerging may threaten witnesses to ensure that they are not implicated in past crimes.

Notwithstanding the need for witness protection in non-criminal proceedings, especially in countries affected by internal armed conflict or complex emergencies, in many jurisdictions, vulnerable witnesses in non-criminal quasi-judicial or administrative proceedings, such as civil proceedings, military tribunals, judicial inquests and commissions of inquiry, are either excluded from protection or their status is ambiguous. Other jurisdictions extend protection to witnesses in non-criminal proceedings.

- In **Bosnia Herzegovina**,<sup>147</sup> **Croatia**,<sup>148</sup> **Guatemala**<sup>149</sup> and **Peru**,<sup>150</sup> witness protection is limited to criminal investigations and proceedings.
- The UNDCP model law,<sup>151</sup> **Kenyan**<sup>152</sup> and **Hong Kong law**<sup>153</sup> offer protection to a wide range of persons, including in non-criminal proceedings. The **Kenyan** law also provides assistance and protection to witnesses who “give evidence in a prosecution or inquiry before a court or tribunal outside of Kenya”.<sup>154</sup>

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147 Bosnia Herzegovina: Witness Protection Programme Law, (Official Gazette of Bosnia Herzegovina No. 29/04), (“Bosnian Law”), Articles 1 and 2.

148 Croatian Law, Article 1 and Article 2(1).

149 Guatemala: *Law for the protection of the sujetos procesales (participants to a proceeding) and persons linked to the administration of criminal justice*, Decree No. 70-96, Article 2 (“Guatemalan Law”).

150 Law 27378 of Peru, Article 21.1.

151 *Model Witness Protection Bill*, Part 1(2)(c)(iii).

152 The Witness Protection (Amendment) Act (2010) (“Kenyan Amendment Act”), Article 4, Repeal and replacements of Section 3, new Part 1(3)(1)(a) to (d).

153 Hong Kong Ordinance, Part 1(a)-(d).

154 Kenyan Amendment Act, Article 4, Repeal and replacements of Section 3, new Part 1(3)(1)(d).

- In the **Philippines**,<sup>155</sup> protection is limited to felony cases, but includes quasi-judicial bodies.
- **South African** law<sup>156</sup> allows for assistance and/or protection in proceedings involving a very wide range of offences; proceedings before a commission or tribunal; proceedings under the Inquests Act, 1959; proceedings relating to an investigation conducted by the Complaints Directorate; or proceedings referred to in Chapters 5 and 6 of the Prevention of Organised Crime Act, 1998.
- Under **Colombian** law, the Protection Programme can include witnesses in investigations carried out by the *Procuraduría General de la Nación* (an independent body responsible for disciplinary proceedings against State officers and employees) if those investigations concern serious allegations of misconduct by State officers or allegations of aiding or abetting illegal armed groups or criminal organisations.<sup>157</sup> In addition, the law requires a protection programme (with temporary protective measures) to be put in place in cases of human rights violations and breaches to international humanitarian law irrespective of whether or not criminal, disciplinary and administrative proceedings have been commenced.<sup>158</sup>

The OHCHR's 2009 report to the Human Rights Council on the right to the truth emphasises the need to extend witness protection beyond criminal proceedings to "other accountability mechanisms, including those of a quasi- and non-judicial nature, such as human rights commissions and truth and reconciliation commissions".<sup>159</sup> Similarly, the Special Representative on the situation of human rights defenders in her report on Indonesia stated

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155 An Act Providing for a Witness Protection, Security and Benefit Programme and for Other Purposes, Republic Act No. 6981, Section 3 ("Philippines Act").

156 Witness Protection Act 112 of 1998, as amended by Prevention and Combating of Corrupt Activities Act 12 of 2004 and Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Section 1 "Definitions." ("South Africa Act")

157 Law 418, 1997, Article 75 ("Colombian Law").

158 *Ibid.*, Articles 81-82.

159 Office of the High Commissioner for Human Rights, *The Right to Truth*, UN Doc. A/HRC/12/19, Twelfth session, Agenda item 2.



that protection should extend to individuals that provide information in non-criminal cases.<sup>160</sup>

The *Basic Principles and Guidelines on the Right to a Remedy* recommend that protection should be available in regard to “judicial, administrative, or other proceedings that affect the interests of the victims.”<sup>161</sup> Likewise, the *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* call for “[e]ffective measures [to] be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission.”<sup>162</sup>

As a general principle, protection measures should be based on an identified level of risk, independent of the type of proceedings. If a risk has been identified, protection should be extended to witnesses in non-criminal proceedings, including civil cases, inquests, military tribunals, and commissions, even if the violation is not criminalised domestically.

### **1.3 Witnesses to non-criminal or less serious offences**

In many jurisdictions, the nature and scope of protection afforded to witnesses is determined in part by the nature of the offences involved. For instance, the *Organised Crime Convention* requires that witness assistance and protection be provided in cases involving “serious” offences (with possible sentences of four years).<sup>163</sup>

This could exclude vulnerable witnesses in non-criminal proceedings as well as witnesses of crimes that do not carry high sentences but present a serious threat to victims and witnesses, such as domestic violence cases.<sup>164</sup> Witnesses to crimes or violations of international human rights law that have not been incorporated into domestic law (such as enforced disappearance)

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160 *Report of the Special Representative of the Secretary-General on the situation of Human Rights Defenders on her mission to Indonesia*, UN Doc. A/HRC/7/28/Add.2, (January 2008).

161 Right to a Remedy, Principle 12(b).

162 Impunity Principles, Principle 10.

163 UNODC, *Good Practices*, p. 26.

164 *Ibid.*

may also be precluded from accessing protection. Crimes that may not be viewed as “serious offences”, such as destruction of property, may take on a more serious dimension under international criminal law when committed as part of a widespread or systematic attack against a particular group of people.

In his report on witness protection in Africa, Chris Mahony notes the benefits of a phased approach, particularly where the justice system as a whole lacks competence and independence. He notes that witness protection programs that focus first on “crimes of a non-politically sensitive nature would establish the protective framework for prosecution of more politically sensitive crimes upon reform of the criminal justice system.”<sup>165</sup>

Examples of legislation limiting protection to “serious” offences include:

- The **Philippines** law limits protection to cases involving grave felonies.<sup>166</sup>
- In **Hong Kong**, the authorities take into account the “seriousness of the offence”.<sup>167</sup>
- **Croatian** law allows protection only in cases that involve grievous crimes, crimes with elements of violence, and organised crime.<sup>168</sup>
- In **Peru**, protective measures can be adopted only in criminal proceedings related to a specific range of serious crimes, which include crimes against humanity, genocide, enforced disappearance and torture.<sup>169</sup>

Other countries allow the protection mechanism to exercise discretion to provide services in ‘non-serious’ cases, for example:

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165 *supra* note 133, Mahoney, *Witness Protection in Africa*, p. 167.

166 Philippines Act, Section 3(a).

167 Hong Kong Ordinance, Part II 3(c).

168 Croatian Law, Article 3.

169 Law 27378 of Peru, Articles 1 and 7.

- **Thai** law provides for “special protection measures” in certain cases,<sup>170</sup> but allows the Witness Protection Bureau to provide protection in other cases it deems appropriate.<sup>171</sup>
- **South African** law limits protection and assistance to a schedule of offences, but allows the director of the unit to provide protection in any case if he or she deems it necessary.

The **Guatemalan** law, **Indonesian** law and the **Colombian** law do not limit protection to any specific category of offences.

- The **Indonesian** law provides special assistance to victims of serious human rights violations.<sup>172</sup>
- The **Colombian** law requires witnesses of human rights violations and breaches of international humanitarian law to be included in the Protection Programme irrespective of whether or not a criminal proceeding has been initiated.<sup>173</sup> In addition, the Colombian Law states that “special protection” will be provided to witnesses, victims and participants to criminal proceedings involving alleged human rights violations and breaches to international humanitarian law, “when the security of those persons so requires”.<sup>174</sup>
- The **Council of Europe** Committee of Ministers Resolution does not limit witness protection to particular offences. However, the focus is largely on organised crime, terrorism and violations of international humanitarian law. The resolution also states that “no terrorism-related crimes should be excluded from the offences” eligible for witness protection.<sup>175</sup>

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170 The Thai Act includes cases related to national security, narcotics, money laundering, anti-corruption, customs, sexual offences related to luring of a person for the sexual gratification of another, organised crime and crimes punishable by a minimum ten year sentence.

171 Thailand Act, Section 8.

172 Indonesian Law, Article 6.

173 Colombian Law, Article 67.3.

174 *Ibid.*, Article 79.1.

175 Council of Europe, *Recommendation*, Article 11.

### **1.4 Witnesses to the planning of an offence or human rights violation**

Witnesses will sometimes provide information to the authorities regarding the planning of an offence. Assistance and protection should be available to such witnesses as part of broader policies to prevent crime and human rights violations.

Legislation has addressed this issue in a variety of ways:

- Under the **UNDCP Model Witness Protection Bill**, a witness includes a person who “has made a statement, or who has given or agreed to give evidence in relation to the commission or possible commission of a serious offence.”<sup>176</sup> The **Kenyan** and **Hong Kong** laws follow this example.<sup>177</sup>
- The **South African** law explicitly includes witnesses to “any conspiracy, incitement or attempt to commit any offence” referred to in its Schedule.<sup>178</sup>
- The **Colombian** law defines a witness as a person who has knowledge of the commission of a crime “or of any other circumstance which might be relevant for proving criminal responsibility.”<sup>179</sup>
- **Bosnia Herzegovina, Colombia, Croatian, Guatemala, Thailand, Indonesia, Peru, and the Philippines** do not explicitly include or exclude protection issues arising from testimony regarding planned offences.

### **1.5 Availability of protection before and after testimony**

The need for witness assistance and protection arises before, during, and after the witness testifies (including post-sentence or acquittal). It is triggered from the first interaction creating the risk until that risk is

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176 *Model Witness Protection Bill*, Part I (2)(c)(i).

177 Kenyan Amendment Act, Article 4, Repeal and replacements of Section 3, Part I (3)(b); Hong Kong Ordinance, Part 1 (definition of “witness” (b)).

178 South Africa Act, Schedule, Section 16.

179 Colombian Law, Article 67.2

removed.<sup>180</sup> This continuity is particularly important in post-conflict settings in which individuals responsible for crimes may occupy positions of power and thus pose a threat to witnesses. At key stages of the proceedings and at regular intervals after they are finished, the risk level should be reassessed and decisions taken about whether or not to extend protection measures. If a lower level of risk is identified, it may also be possible to replace existing protective measures with lesser measures that adequately manage the residual risk.

The *Basic Principles and Guidelines on the Right to a Remedy* includes a recommendation for States to take measures

[...] to minimise the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, *before, during and after* judicial, administrative, or other proceedings that affect the interests of victims”.<sup>181</sup> (emphasis added).

Most jurisdictions provide for protection against risks before, during and after formal proceedings.

- In **South Africa**, assistance and protection are available to a “person who is or may be required to give evidence, or who has given evidence in any proceedings.”<sup>182</sup>
- **Kenya** and **Hong Kong** follow the UNDCP model law: “a person who has given or agreed to give evidence.”<sup>183</sup>

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180 OHCHR’s *Right to Truth*, referring to lessons learned in Sierra Leone, highlights the need for pre-testimony and testimony assistance protection and assistance, para. 53; UNODC, *Good Practices*, p. 27.

181 UN, *Right to a Remedy*, Principle 12(b).

182 South Africa Act, Section 1, “Definitions.”

183 *Model Witness Protection Bill*, Part I (2(c(i))); Kenyan Amendment Act, Article 4, Repeal and replacements of Section 3, new Article 3(1)(a); Hong Kong Ordinance, Part 1(a).

- In **Bosnia Herzegovina**, the law addresses risks associated with a witness's "willingness to testify". The law highlights the need for assistance and protection "if the danger is only realised after the termination of criminal proceedings and if the danger is a result of having testified during the proceedings".<sup>184</sup>
- In **Croatia**, any "endangered person" is entitled to assistance and protection if his or her testimony is "important... for the criminal proceeding". The law does not limit protection to specific stages of the proceedings.<sup>185</sup>
- The **Philippines** law provides protection before, during and after testimony.<sup>186</sup>
- In **Peru**, the prosecutor is responsible for making decisions about protective measures before the trial, while the judge is responsible while "a criminal proceeding is ongoing".<sup>187</sup>

### **Protection prior to the filing of a formal complaint or agreement to testify**

Without protection from this early stage, witnesses and victims may be reluctant to cooperate with investigators. Protection needs should therefore be considered prior to investigators first approaching a witness.

The *Santiago Guidelines*<sup>188</sup> recommend:

- *Immediate protection* "prior to threat assessment in order to protect the life and integrity of the candidate for protection", and
- *Regular protection* "when a candidate conditions his/her cooperation with the judicial system to the provision of protection."<sup>189</sup>

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184 Bosnian Law, Article 2(2)

185 Croatian law, Articles 1 and 2(1).

186 Philippines Act, Section 3.

187 Peru: Decree No 020-2001-JUS, Articles 6 and 7.

188 *Santiago Guidelines*.

189 *Santiago Guidelines*, Chapter 2(3).

Immediate protection would cover witnesses who have not yet agreed to cooperate with a judicial or quasi-judicial process.<sup>190</sup> The Council of Europe Committee of Ministers Resolution recommends that protection be available before, during and after the trial<sup>191</sup> and goes on to recommend that “protection measures could be adopted on an urgent and provisional basis before a protection programme is formally adopted”.<sup>192</sup>

### 1.6 Family members or other associates of the witness

Witness protection laws commonly require that protection be available to family members and associates of the witness, although definitions of these terms may vary:

- **Indonesian** law limits protection to “family”<sup>193</sup> of the witness or victim; i.e., “people who are blood-related in a direct line upward, downward, and sideways to the third degree of generations, or due to marriage, and/or dependents”.<sup>194</sup>
- **South African** law uses the term “related person” defined as “any member of [the witness’s] family or household of a witness, or any other person in a close relationship to, or association with such witness.”<sup>195</sup>
- **Thai** law includes the possibility of protection for the “witness’s husband, wife, progenitor, descendant, or person with a close relationship to the witness” whose security is affected by the person becoming a witness.<sup>196</sup>

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190 The Indonesian law opens the door to this kind of early protection: “[w]itness means people who can provide information for the purpose of investigation, litigation, prosecution, and examination in court proceedings on an offence...” (*emphasis added*). However, a later article clarifies that assistance and protection begins only after the “investigation stage starts.” Indonesian Law, Article 8.

191 Council of Europe, *Recommendation*, Article 2.

192 *Ibid.*, Article 25.

193 Indonesian Law, Article 31.

194 *Ibid.*, Article 1(5).

195 South Africa Act, Section 1, “Definitions.”

196 Thailand Act, Part 1, Section 7.

- **Croatian** law provides broad powers to the “endangered person” to define who should be considered for inclusion in the protection scheme with her/him in addition to the members of his/her household.<sup>197</sup>
- **Bosnian** law limits protection to “family members” as defined in the Criminal Procedural Code of Bosnia Herzegovina and persons otherwise close to the witness.<sup>198</sup>
- Under the Rules of Procedure of the **Sri Lankan** Presidential Commission’s Witness Protection Unit “a member of the family, next of kin, dependent, significant others” could be provided protection because of their association with a witness.<sup>199</sup>
- Under **Guatemalan** law, protection is extended to any person “related to the beneficiary and endangered for the same reasons”.<sup>200</sup>
- **Colombian** law allows for “integral protection and social assistance” for blood relatives up to the fourth degree, relatives in general up to the second degree of kinship and the spouse or life partner when they face risk as a consequence or on the occasion of their participation in a criminal proceeding.<sup>201</sup> The “Programme of Protection and Assistance to Victims, Witnesses and Participants to the Criminal Proceeding, as well as Officers of the Office of the Attorney General” covers family members and dependents of the witness “when their relationship with the protected person is proven to bring about situations of risk or threat”, subject to technical examination by the Office for Protection and Assistance.<sup>202</sup>
- According to **Peruvian** law, protective measures can be adopted in cases of serious risk to the life, freedom or property of the beneficiary or his/her spouse or life-partner, progenitors, descendants, brothers or sisters.<sup>203</sup>

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197 Croatian Law, Article 2(2).

198 Bosnian Law, Articles 2(2) and 2(3).

199 Rules of Procedure of the Sri Lankan Presidential Commission’s Witness Protection Unit.

200 Guatemalan Law, Article 12

201 Colombian Law, Article 67.1

202 Colombia: Resolution of the Office of the Attorney General No. 0-5101 of 2008, Article 2.2

203 Peru: Law 27378, Article 21.2



- The amended **Kenyan** law provides protection to relatives of a witness, those who require it on account of a testimony given or “for any other reason which the Director may consider sufficient”.<sup>204</sup>
- The **UNDCP model bill**<sup>205</sup> and the **Hong Kong** law<sup>206</sup> extend protection to anyone who “because of his or her relationships to or association with a person [who meets the definition of witness in the law] may require protection or other assistance”.

### **1.7 Other non-witness individuals and groups**

Non-witnesses may require assistance and protection, such as judges, commissioners, defence lawyers, prosecutors, investigating officers, or expert witnesses. International law and standards obligates the State to protect security and justice sector actors. Existing domestic legislation may in some cases provide protection measures for some or all of these actors. However, such measures may be inadequate in countries where serious human rights violations continue to occur.<sup>207</sup> In serious cases, it may be necessary to make available the full range of protections available under witness assistance and protection legislation to such actors.

## **2. Structure and Operation of a Witness Protection Mechanism**

This section provides guidelines for the establishment of a witness protection programme, including governance structures, recruitment of staff, funding, and financial accountability. The United Nations has developed principles to help guide the establishment of witness protection mechanisms.<sup>208</sup> The 2008 *Santiago Guidelines* have expanded on these principles. In post-conflict settings, additional measures may be necessary to address threat

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204 Kenya Amendment Act, Section 3(b(2)).

205 *Model Witness Protection Bill*, Article 2(c)(ii).

206 Hong Kong Ordinance, Section 2 Part 1(e).

207 See, for example, the recommendation of the Special Representative on the situation of human rights defenders about the inclusion of experts among those who can seek protection under the Indonesian law (UN Doc. A/HRC/7/28/Add.2, para. 27).

208 UNODC, *Good Practices*, pp. 45-58.

levels exacerbated by weak rule of law institutions, a lack of political will to address impunity, and a continuing risk of conflict.

## **2.1 Institutional independence and accountability**

Any protection mechanism must be able to protect witnesses from threats and intimidation, and be accountable through transparent oversight mechanisms when it fails to perform its role effectively. The mechanism cannot therefore fall under the control or influence of alleged perpetrators of crimes or human rights violations.

Although methods for achieving independence vary, there is general agreement among the UNODC, OHCHR, and other expert bodies about the necessity of "[...] (a) separation [of the protection function] from the investigation; (b) confidentiality of procedure and operations; and (c) organisational autonomy from the regular police."<sup>209</sup>

According to a 2009 OHCHR report, the “prevailing wisdom” regarding the appropriate nature and scope of authority for witness protection, requires that it “be disconnected from individual prosecutors, investigators or defence counsel, in order to carry out their assessments in an objective way.” The OHCHR endorsed the recommendation made in 2005 by the Council of Europe that

[...] staff dealing with the implementation of protection measures should be afforded operational autonomy and should not be involved either in the investigation or in the preparation of the case where the witness/collaborator of justice is to give evidence. Therefore, these functions should be separated organisationally. However, an appropriate level of cooperation/contact with or between law-enforcement agencies should be ensured in order to successfully adopt and implement protection measures and programmes.<sup>210</sup>

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209 *Ibid.*, p. 46.

210 Office of the High Commissioner for Human Rights, *Right to the Truth*, para. 51 (citing Council of Europe, *Recommendation*).

The UNODC<sup>211</sup> describes, without endorsing, a range of options for delegating authority for witnesses assistance and protection, including overall management by the chief executive of the police force;<sup>212</sup> the ministry of justice, the ministry of the interior or the state prosecutors office, with overall management vested in the chief executive of the respective institution;<sup>213</sup> or a multidisciplinary body with representation from law enforcement, prosecutorial, judicial and government authorities.<sup>214</sup> The *Santiago Guidelines* recommend that witness assistance and protection programs be located within the prosecutor's office. Other options include linking the protection programme to an arm of the police or establishing a stand-alone body.

A range of witness protection mechanisms exist globally, with varying levels of effectiveness and conformity with the basic principles of independence and accountability.

- **Bosnia Herzegovina** established a Witness Protection Department under the State Investigation and Protection Agency (SIPA), reporting annually to the Director of SIPA and the Minister for Security.<sup>215</sup>
- In the **Philippines**, the Department of Justice is responsible for the witness protection program.<sup>216</sup>
- In **Thailand**, the Witness Protection Bureau is under the administrative control of the Ministry of Justice, an institutional affiliation that would need to be assessed so as to identify potential conflicts of interest.<sup>217</sup>

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211 UNODC, *Good Practices*, pp. 45-46.

212 For example, in Australia, Austria, Canada, Hong Kong, New Zealand, Norway, Slovakia, and the UK.

213 For example, in Colombia, the Netherlands, the Philippines, South Africa, the US.

214 For example, in Italy, cited in UNODC *Good Practices*, p. 46.

215 Bosnia Law, Articles 3, 4, and 15.

216 Philippines Act, Section 2.

217 Thailand Act, Section 13. According to one report, despite the existence of the Witness Protection Office, police maintain near total control over what protection is offered and how. Asian Legal Resource Centre *Thailand: End police control of witness protection, new report urges*, Press Release, Asian Legal Resource Centre, ALRC-PL-003-2006.

- In **Hong Kong**, the Independent Commission Against Corruption (ICAC) can take over witness protection duties from police where a conflict of interest arises. The ICAC does not rely on outside agencies, and can control all aspects of protection, independent of the police.
- **South Africa** established an Office for Witness Protection under a single Director within the Department of Justice, with ministerial discretion to establish branch offices.<sup>218</sup>
- **Guatemala** established an Office for Protection (*Oficina de Protección*) that reports periodically to the Board of Directors (*Consejo Directivo*) and is part of the Attorney General's office.<sup>219</sup>
- In **Colombia**, the Protection Programme is run by the Office for Protection and Assistance, with the Office of the Attorney General empowered to coordinate and establish general guidelines. The Office has autonomy in the evaluation of the level of risk, the decisions regarding the adoption of measures of protection and their termination.<sup>220</sup>
- In **Peru**, the Office of the Attorney General is responsible for establishing a programme for the protection of witnesses and victims, in collaboration with the Ministry of Interior and the judiciary.<sup>221</sup> The Office of the Attorney General also appoints, jointly with the Ministry of Interior, the Police Special Unit for Investigation, Verification and Protection that is in charge of investigations and the implementation of protective measures.<sup>222</sup>
- In **Kenya**, the witness protection programme was originally designed to run out of the Office of the Attorney General. However, in 2010 the Kenyan Parliament adopted an amendment, creating an independent witness protection agency<sup>223</sup> reporting

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218 South Africa Act, Articles 2(1), Article 3(1) and 2(2)(a).

219 Guatemala Law, Articles 3, 5 and 6.

220 Resolution of the Office of the Attorney General No. 0-5101 of 2008, Article 1.

221 Decree No 020-2001-JUS, Article 2.

222 Law 27378 of Peru, Final Provision I; Decree No 020-2001-JUS, Articles 11 and 12.

223 Kenyan Amendment Act, Article 5, Insertion of new Part 1A(A(3A)).

to a Board comprising the ministers of justice and finance, the director-general of the National Security Intelligence Service, the police commissioner, the prisons commissioner, the director of public prosecutions, and the chairperson of the Kenyan National Commission on Human Rights.<sup>224</sup>

In post-conflict countries, where perpetrators often continue to hold positions of power that potentially allow them to manipulate witness protection bodies, establishing a fully independent mechanism becomes increasingly important. The **Indonesian** law is one example of an attempt to achieve this structural separation. It establishes an independent Victim and Witness Protection Agency directly accountable to the President and reporting annually to the House of Representatives. Parliament appoints seven members with relevant professional experience, who are served by a secretariat.<sup>225</sup> Reporting directly to the Prime Minister or President removes several layers at which security of witness could be compromised. However, it does not eliminate the problem of interference, and the witness protection agency has needed to advocate continuously for its independence. To ensure independence and professionalism, oversight in any form should therefore focus on broad operational direction and accountability, rather than individual cases of witness protection and assistance.

## **2.2 Staffing**

Witness protection must be multi-faceted to ensure effective protection as well as prevention of further trauma and re-victimisation. The UNODC has developed detailed recommendations regarding criteria for staffing witness protection programs.<sup>226</sup> These recommendations, reinforced by the *Santiago Guidelines*, are applicable to witness protection in post-conflict countries with some additional considerations. The recommendations include:

**Qualifications:** Staff will be required in a wide range of disciplines, with adequate professional experience in their field and adequate security clearance.

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224 *Ibid.*, Insertion of new Part 1A (B(3P(2))).

225 Indonesian Law, Chapter III.

226 UNODC, *Good Practices*, 47-49.

**Psychological profile:** Recruitment should be based on an assessment of the candidates that indicates, among other traits, a high level of integrity and the ability to maintain confidentiality.

**Full-time force:** The core staff should be full-time, although part-time staff may be used for physical protection against low-level threats and at the regional or local level.

**Volunteer force:** Employment within a witness assistance and protection programme should not be compulsory. There should be a mix of genders, ages, and personalities reflective of the society at large.

**Tenure:** Staff should be retained in the programme for longer periods than would usually be the case in other departments.

**Salaries and benefits:** Because staff will often be on call constantly, and be required to respond to emergencies and work long hours, some programs provide additional salary and benefits.

**Training:** There should be regular, multidisciplinary training that is coordinated and standardised at a national level.

**Outsourcing:** Some services may be outsourced to professionals or NGOs, such as medical care, while psychological support is usually kept in-house. Outsourcing must not compromise confidentiality.

The ICC's Rules of Procedure recommend staff with expertise in areas such as (a) witness protection and security; (b) humanitarian and criminal law; (c) logistics administration; (d) psychology in criminal proceedings; (e) gender and cultural diversity; (f) children, in particular traumatised children; (g) elderly persons; (h) persons with disabilities; (i) social work and counselling; (j) healthcare; and (k) interpretation and translation.<sup>227</sup>

#### **Additional staffing considerations: Working with trauma**

Post-traumatic stress disorder is common among victims of conflict-related crimes. It is therefore essential that witness protection programs

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227 Rule 19, Expertise in the Unit, ICC Rules of Procedure and Evidence.

in post-conflict countries recruit staff with experience in assisting victims of trauma.

The **Rome Statute** explicitly includes provisions requiring that the ICC's Victims and Witnesses Unit has staff with expertise in trauma, including trauma related to sexual violence.<sup>228</sup>

The *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* similarly states that “[s]ocial workers and/or mental health-care practitioners should be authorised to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault.”<sup>229</sup>

Lessons learned from the SCSL underscore the need of female medical personnel to treat survivors of gender-based violence.<sup>230</sup> The SCSL has recommended that only investigators and attorneys with experience and specialised training working with children handle such cases in order to prevent or minimise their trauma, and that all investigators and attorneys receive training in child rights, child protection and interviewing children.<sup>231</sup>

Some additional considerations when staffing a witness protection programme in a post-conflict country include:

- Technical advice and support during programme establishment from experts familiar with post-conflict witness protection needs and strategies;

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228 Rome Statute, article 43(6).

229 *Impunity Principles*, Principle 10(b).

230 The Special Court for Sierra Leone, *Best-Practice Recommendations for the Protection & Support of Witnesses: An evaluation of the witness & victims section of the special court for Sierra Leone* (2008) (“SCSL, *Best Practices*”), p. 25. The Coalition on Women’s Human Rights in Conflict Situations recommended that the “ICTR should fill the position of ‘gender advisor’ in order to ensure the presence of an overseer for gender training for all of the relevant staff”. Coalition on Women’s Human Rights in Conflict Situations, *The Protection of Women as Witnesses and the ICTR* (2002).

231 Included in the *Principles and Procedures for the Protection of Children in the Special Court*, Special Court of Sierra Leone, cited in War Crimes Studies Centre, *Child Witnesses at the Special Court for Sierra Leone* (2006) (“War Crimes Studies Centre, *Child Witnesses*”), p. 18.

- Conflict and cross-cultural sensitivity and technical capacity (including, where necessary, the use of neutral international interpreters and staff) to respond to issues regarding ethnic, religious, geographic or other group identification;
- Vetting of staff to exclude perpetrators or their associates;
- Ensuring that any members of affiliated institutions (i.e. the police) do not jeopardise witness assistance and protection; and
- Protection measures and responsibilities for the protection of staff of the witness protection program.

### **2.3 Funding**

A well-designed witness protection programme should have adequate and flexible funding. Staff must have ready access to funds as witness needs arise for food, accommodation, and transport. In addition, a portion of the funds should be earmarked for urgent protection cases that may involve costly relocation.<sup>232</sup>

In many cases funding is inadequate. For example, the International Group of Eminent Persons mandated to observe the Presidential Commission of Inquiry in Sri Lanka, found that the body “does not have sufficient funds to offer adequate assistance to those in need of protection from possible retaliation for appearing before the Commission”.<sup>233</sup>

The UNODC recommends that, at the regional level, countries establish a joint fund to “help fund witness protection programs and promote cross-border cooperation”.<sup>234</sup> Such an arrangement could be beneficial in South Asia, as Bangladesh, India, Nepal and Sri Lanka are all considering the establishment of witness assistance and protection programs that must address relocation problems as well as cross-border crime.

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232 UNODC, *Good Practices*, p. 51.

233 International Group of Eminent Persons, Public Statement, 15 April 2008.

234 UNODC, *Good Practices*, p. 51.



The UNODC's analysis of the cost of providing witness protection services suggests that while such services are expensive to supply, funding arrangements can be developed to keep costs manageable.<sup>235</sup>

- The **Philippines**, a country with a population of around 80 million, has an annual witness protection and assistance budget of around USD 614,000. Extra money may be available from emergency funds.
- In **South Africa**, the annual budget for 2006-2007 was USD 7.5 million, which covered around 250 witnesses and 300 related persons. Participation in the programme averages two and a half years.
- In **Thailand**, the yearly witness protection budget is approximately USD 500,000, with about 100 participants.

The ICC applies a number of assessment measures intended to reduce the strain on the protection system (as well as on the protected persons). These include:

- Applying protective measures proportional to identified risks, and least intrusive to the lives of the person at risk and their families;
- Minimising the time period during which protective measures are taken;
- Considering recourse to participation in the ICC Protection Programme as a measure of last resort; and
- Providing all relevant information to persons entitled to protection for them to take an informed decision on whether to engage with the Prosecution.<sup>236</sup>

In post-conflict countries, costs may be much greater during the formation and operation of truth and reconciliation mechanisms or tribunals. While the regular budget for a protection programme should come from the State

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235 *Ibid.*, pp. 52-53.

236 International Criminal Law Services, expert review comments (June 2011).

budget, in such extenuating circumstances donors funds or supplementary funding may be sought.

## **2.4 Transparency**

The Santiago Guidelines emphasise the importance of ensuring that “information provided with regard to operational expenses reflects only general information and not data that can be linked to the identity or location of witnesses.” The UNODC<sup>237</sup> outlines several different options for balancing transparency in financial reporting:

- In **Hong Kong** receipts are cross-referenced to secret files.
- In **New Zealand** two special police auditors with security clearance are authorised to check accounts.
- In the **Philippines** a special dispersing officer is appointed.
- In **South Africa** the audit is done by the Auditor-General, whose staff has top secret clearance.
- The **Kenyan** law states that accounts shall be kept in accordance with the information security policy of the witness protection agency and that annual accounts will be audited in accordance with the Public Audit Act “without prejudicing the integrity or security of the Agency’s operations”.<sup>238</sup>

## **3. Initiation and Termination of Protection and Assistance**

This section sets out guidelines for determining who should receive services from a witness protection and assistance program, and under what circumstances it would be permissible to terminate services. It presents guidance on the establishment of an admissions authority; criteria for admission; appeals procedures for admission; informed consent prior to admission; termination of protection; and review of termination.

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237 UNODC, *Good Practices*, p. 58.

238 Kenyan Amendment Act, Article 5, Insertion of new Part 1A, (A(3K(1) and (2))).

### 3.1 Authority to grant entry to the program

Authority to grant protection and assistance must be delegated by legislation to members of a witness protection unit, or to other officials; for example, a minister, police commissioner, attorney general or to a multidisciplinary body. Whatever the mechanism, political decisions must not undermine the functional independence and technical assessments of the programme.<sup>239</sup> In many countries this power is granted to government officials:

- In **Thailand**, the Minister of Justice is given this responsibility.<sup>240</sup>
- In the **Philippines**, the Department of Justice has the responsibility.<sup>241</sup>
- In **Hong Kong**, the Police Commissioner and the Commissioner of the Independent Commission against Corruption designate an “approving authority” who establishes the programme and decides who will be accepted into it.<sup>242</sup>
- In **Peru**, the prosecutor or the adjudicating judge (where the trial has already begun) takes the decisions, *ex officio* or upon request, to provide protective measures.<sup>243</sup>

In a post-conflict setting, there are particularly strong arguments for vesting the authority in members of an independent witness protection unit, given the likelihood of a conflict of interest where state actors and their associates are alleged as perpetrators.

Countries where admission decisions are made within the witness protection programme include the following:

- In **Bosnia Herzegovina** the Witness Protection Department is given the power to make decisions regarding admission. However, while

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239 UNODC, *Good Practices*, p. 60.

240 Thailand Act, Section 9.

241 Philippines Act, Section 3.

242 Hong Kong Ordinance, Part II, Section 4.

243 Law 27378 of Peru, Article 21.2.

criminal proceedings are underway they must cooperate with the Prosecutor's Office.<sup>244</sup>

- In **South Africa**, the Director of the Office for the Protection of Witnesses is given responsibility for admissions.<sup>245</sup>
- In **Guatemala**, the Director of the Office for Protection gives final approval for admission. The prosecutor in the criminal proceeding can, *ex officio* or upon request, file the dossier to the Office for Protection, for the Office to process and submit it to its Director.<sup>246</sup>
- In **Colombia**, the Director of the Protection Programme is vested with the authority to decide admission to the Program.<sup>247</sup>
- In **Kenya**, decisions are made by the Director of the witness protection agency.<sup>248</sup>
- At the **ICC**, the Victim and Witnesses Unit is exclusively responsible for the risk assessment that informs a decision to admit a person into the protection program. The Registrar then decides whether a person enters the program based on the administrative impact of the decision, but cannot amend the risk assessment itself.<sup>249</sup>

### **3.2 Criteria for receiving protection**

The OHCHR's report *Right to Truth* states that it is important to develop eligibility criteria that is flexible, objective and transparent.<sup>250</sup> Most laws define criteria against which a witness's application is assessed before admission to a witness protection programme:<sup>251</sup>

- The level of threat to the applicant's life, freedom or property that is linked to a applicant's interaction with the judicial proceedings;

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244 Bosnia Law, Article 3(1).

245 South Africa Act, Article 10 and 11.

246 Guatemalan Law, Article 10.

247 Colombia: Resolution of the Office of the Attorney General No. 0-5101 of 2008, Article 18.

248 Kenyan Amendment Act, Article 7, Repeal and replacements of section 5, new 5(1).

249 International Criminal Law Services, expert review comments (June 2011).

250 OHCHR, *Right to Truth*, para. 50.

251 Including in Bosnia Herzegovina, Hong Kong, the Philippines, Indonesia, Kenya Peru and Guatemala.

- The reasonable certainty of the risk to which the applicant is exposed;
- The foreseeability of acts of reprisal or intimidation, or the fact that acts of reprisal or intimidation have already happened;
- The applicant's personality/personal situation and psychological fitness;
- The danger that the applicant, particularly if a former collaborator of the defendant, may pose to the public if relocated under a new identity;
- The critical value of the applicant's testimony for the prosecution and the impossibility of gaining such knowledge elsewhere;
- The importance of the case in dismantling criminal organisations or identifying persons involved in other crimes related to the offence under investigation; and
- The gravity of the crime.

Admission criteria in post-conflict countries should also evaluate:

- Institutional affiliations of the alleged perpetrator and associated actors, past and present and the current capabilities of the individual or institution;
- Whether the case is high profile and emblematic of patterns of violations, thereby increasing the threat level and challenge of mitigating risks;
- The level of impunity, general lack of law and order, influence of corruption and armed groups; and
- International or domestic pressure for a genuine investigation and prosecution. If this pressure is significant, it increases likelihood of threats yet also affords some protection. The complex interplay between these factors requires skilful, contextualised analysis.

### **3.3 Assessing threat and risk**

Properly assessing the threat and risk to an individual is the cornerstone of the work of a witness and victim protection mechanism. All major decisions - including entry, termination, and scope of protection - must be made on the basis of an independent threat/risk analysis. When an investigation begins (or even prior to this if possible), an assessment should be made of the general level of threat to persons interacting with the court. Witness protection may also be required as an immediate, interim measure while an individual assessment is being carried out.<sup>252</sup>

A *threat* is the possibility that someone will harm somebody else's physical or moral integrity or property. The level of threat is estimated by assessing the desire of a source of threat to engage in a potentially harmful activity; the expectation, or subjective level of confidence of the source of the threat successfully carrying out a potentially harmful activity; the resources, or means available to the identified source of the threat to carry out a potentially harmful activity; and the information available to a source of threat to carry out a potentially harmful activity. The *risk* to a witness is determined by weighing this threat against the likelihood of harm and the consequence of that harm.

The Commission for Risk Evaluation of **Peru** follows a three-step risk assessment: (1) information-gathering and analysis on each case (police files, criminal files, criminal record of people involved and interviews); (2) characterising the risk: high risk, medium risk, low risk; and (3) making a profile of the perpetrator of the threats, through oral and written sources.<sup>253</sup>

In **Colombia**, for admission to the Protection Programme there must be an extraordinary, serious and imminent risk to the fundamental rights of the applicant. The law defines "an extraordinary risk" as one that is (i) specific, (ii) concrete, (iii) present, (iv) relevant, (v) serious, (vi) clear and

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252 UNODC, *Good Practices*, p. 62.

253 Luis Rocca Torres, *Sistematización de experiencias de la CVR en evaluación de riesgos y protección de víctimas y testigos*, Curso Básico Evaluación de Riesgos y Autoprotección de la Coordinadora Nacional de Derechos Humanos, Lima, 2 June 2005.

perceptible, (vii) exceptional, and (viii) disproportionate.<sup>254</sup> For that risk to exist, the life or integrity of the witness or his/her family must be under threat as a consequence of the witness' knowledge of circumstances relevant to the commission of a crime. A series of objective and subjective criteria must be fulfilled:

- Reality of the threat;
- Individuality of the threat;
- Specific situation of the person under threat
- Context of the threat (e.g. whether the area where the applicant lives is an area with a high level of conflict, and whether there is an adequate law enforcement presence)
- Imminence of the danger.<sup>255</sup>

### ***3.4 Independent intelligence capacity***

It is advisable that a witness protection mechanism has its own independent capacity for collecting intelligence information for use in its threat and risk assessment. When witnesses and victims of human rights violations involving State actors is involved, the normal State apparatus for collecting and analyzing intelligence information may be unreliable, and could endanger witnesses and victims.

The international tribunals have set up models for the sharing of intelligence information between the witness protection and prosecutorial branches of the tribunals, taking into account issues of protection and confidentiality. At the ICC, the OTP and the VWU have agreed on the principle of full sharing of security-related information. Where a source cannot be shared due to the confidentiality of the investigations or the neutrality of the VWU, the information itself and the source should be available for the risk assessment.

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<sup>254</sup> Resolution of the Office of the Attorney General No. 0-5101 of 2008, Article 5.

<sup>255</sup> *Ibid.*, Article 4.4.

In Chris Mahoney's analysis of the ICTR, he identified under-developed intelligence-gathering capacity as a major weakness in the effectiveness of the witness protection unit. He recommended a review, not only of witness protection staff capacity but also staff with investigatory roles for the prosecutor, who in the case of the early ICTR lacked the capacity to prevent disclosure of witness' identities. He also emphasised the importance of access to local intelligence and an understanding of local culture and languages as key to successful protection.<sup>256</sup>

### ***3.5 Informed consent to enter witness protection***

Full, prior and informed consent of witnesses is critical for their successful participation in a witness protection program. Consent is normally documented in a memorandum of understanding (MoU) setting out mutual expectations between the State and the witness, and including any family members or associates that will be covered in the agreed measures. Translation may be necessary to ensure full comprehension. The signed document should be kept confidential and maintained in a secure facility, but should be accessible to the witnesses.

The undertakings must be reasonable, avoiding expectations that cannot be met or misunderstandings about mutual commitments. The 2006 Presidential Commission of Inquiry in Sri Lanka ran into problems when its public announcements exaggerated its capacity to protect witnesses.<sup>257</sup>

The review of the Special Court of Sierra Leone recommended that “[w]itness protection and support units ...ensure clear guidelines are in place regarding what witnesses will receive at all stages of the testimony process, with particular attention to the post-testimony phase” and that they “[d]eliver clear, consistent and repeated directions on what the witness can expect to receive—and ensure the witness receives this”.<sup>258</sup>

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256 *supra* note 134, Mahony, *Witness Protection in Africa*, pp. 164-168.

257 Amnesty International, *Twenty Years of Make Believe: Sri Lanka's Commissions of Inquiry* (June 2009), p. 32.

258 SCLS, *Best Practice*, p. 2.



According to the European Committee on Crime Problems, an MoU should include:

- Confirmation of free choice of the individual to enter the program;
- The goal of the protection programme;
- The obligation of the protection service to take the necessary measures to protect the individual and his/her relatives;
- The fact that the duration of the protection measures depends upon the assessed risks;
- The obligation of the individual to keep his or her former identity, old address, role in the criminal proceedings and details of the protection programme secret;
- The obligation of the individual to restrain from any activities that could enlarge the risk for herself, her relatives, or the staff of the protection programme;
- The obligation of the witness to co-operate fully in the criminal proceedings;
- Arrangements for outstanding accounts, mortgages, contracts and other financial obligations of the witness of victim; and
- The conditions under which participation will end, including a diminished threat, failure to follow the rules, commission of a crime, or any act that could endanger the individual, her relatives, or the protection programme.<sup>259</sup>

There is a range of practice internationally as to whether or not an MoU constitutes a legally binding contract. The principle question is whether or not State officials can be held liable for harms resulting from action or inaction in violation of the MoU. Liability is excluded by statute in some

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<sup>259</sup> European Committee on Crime Problems, Committee of Experts on Criminal Law and criminological aspects of organised crime (PC-CO), *Report on Witness Protection (Best practice survey)*, Restricted PC-CO (1999) 8 REV, Strasbourg (24 March 1999).

jurisdictions for harms arising in relation to the good faith discharge of duties.<sup>260</sup> However, in some countries, an MoU is legally binding and its implementation subject to judicial review.<sup>261</sup>

### **3.6 Termination of assistance**

The relationship between a victim or witness and the State may continue for an indefinite period, after formal proceedings have concluded. Circumstances may change and new threats may arise. Even if financial assistance is discontinued, other protection measures may still be required.

On the other hand, early termination of financial and other assistance may arise if the original terms of the MoU are not met, or if the witness decides to withdraw from the programme due to hardship or other personal considerations. In the latter case, there may be ways for the programme to continue a lesser level of protection through coordination with local authorities.

The UNODC describes the standard reasons for early termination of assistance, all of which must be explained to the witness prior to the initiation of the program. They may include that:<sup>262</sup>

- Security is compromised by the actions of the witness or his or her inability to honour obligations.
- The witness violates the rules laid down in the memorandum of understanding.<sup>263</sup>
- The witness refuses to give evidence in court.<sup>264</sup>

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260 Statutory exclusions of liability exist in the U.S. (Federal Criminal Code and Rules, Title 18, Chapter 224, Sections 3521(a)(3)); Hong Kong Ordinance, Section 16.

261 UNODC, *Good Practices*, at 65.

262 UNODC, *Good Practices*, at 73-74.

263 For example, a serious breach of the MoU can lead to termination of protection in the Philippines (Philippines Act, Section 6).

264 In Thailand, termination is possible if the refusal to testify is deemed “irrational” by authorities, Thailand Act, Section 12(4).

- The seriousness of the threat against the witness's life has lessened.

Some jurisdictions further elaborate on grounds for early termination. In **Croatia**, for example, the following constitute grounds for termination:<sup>265</sup>

- Expiry of the contract between the protection unit and the witness;
- A criminal proceeding has been brought against the included person;
- An included person turns down an offer of employment; or
- A foreign country requests the termination of the protection of an included person who has been relocated to its territory.

### **3.7 Right to review**

Administrative or judicial review of decisions by a protection authority is permitted in many jurisdictions. A key issue in these cases is the need to maintain independence and confidentiality while extending consideration of sensitive information to the appeal body. Examples include:

- In **South Africa**, the witness may appeal for review to the Minister of Justice.<sup>266</sup>
- In **Hong Kong**, a review board has jurisdiction to consider decisions regarding entry, termination, or specific protection measures, including identity-change.<sup>267</sup>
- In **Thailand**, appeals are made to a court of first instance (but not to a district or military court).<sup>268</sup>

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265 Croatian Act, Article 41.

266 South Africa Act, Article 14.

267 Under the Hong Kong Ordinance, the review board is composed of an officer who is more senior than the approving authority designated by the chairman; two members who are not public officers; and may also include additional members determined by the chairman (Part III, Sections 13 and 14).

268 Thailand Act, Part 5, Section 20.

- In **Kenya**, the Amendment Act provides for a Witness Protection Appeals Tribunal, the members of which are not necessarily Government representatives.<sup>269</sup>

## **4. The Scope and Nature of Protection and Assistance**

To the extent possible, witnesses should be protected without dramatic changes to the living conditions that they are accustomed to. Three types of assistance and protection mechanisms are usually available, each responding to a particular threat level identified in the risk assessment. Each type of assistance and protection needs to be clearly identified in statutory frameworks and related regulations.

*Witness Assistance:* This assistance is primarily meant to prevent re-traumatisation, and to protect a witness's capacity to provide effective testimony. Providing such assistance is not the same as protecting physical security. Witnesses' needs will need to be individually assessed.<sup>270</sup>

*Protection measures:* These are security measures that can be considered up to a certain threat level as an alternative to identity change or relocation.

*Identity change and relocation:* This step involves more permanent and life altering witness protection measures such as identity change and/or relocation.

### **4.1 Witness assistance and counselling**

Assistance programs support witnesses who have decided to cooperate with a justice process. They provide logistical, legal, financial, medical and psycho-social services to ensure that a witness's welfare is not adversely affected by testifying. Particularly important are measures to minimise the emotional impact of testifying and avoid re-victimisation.

Such measures are especially important in conflict and post-conflict countries because judicial and quasi-judicial justice processes are heavily

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269 Kenyan Amendment Act, Article 5, Insertion of new Part 1A (B(3U)).

270 UNODC, *Good Practices*, p. 28.

dependent on witness testimony, in part due to limited capacity to collect and analyse forensic evidence.<sup>271</sup> In addition, in a post-conflict environment, the risk of being re-traumatised is high, particularly for children and victim-witnesses of sexual and gender-based crimes.

The review of the work of the Victim and Witness Section of the Special Court for Sierra Leone describes witness assistance in detail. The majority of witnesses required protection and assistance primarily during testimony period. The assistance services provided during this period included:

- Accommodation for the witness (and sometimes dependents) in secure quarters, with 24-hour electricity, TV, and other simple forms of entertainment;
- Food, toiletries and other basic requirements;
- Financial allowance as recompense for lost wages;
- An initial medical assessment, and all medical provisions;
- 24-hour support from a psychosocial support officer at the accommodation facility, and provision of counselling and emotional support;
- A briefing to ensure familiarisation with the courtroom and its procedures; and
- Psychosocial support during the witnesses' preparation with their legal team.<sup>272</sup>

The ICC Rules of Procedure also provide for a range of assistance measures including:

- Assistance in obtaining legal advice and representation, and providing legal representatives with adequate support, assistance and information,<sup>273</sup>

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271 Evidence of this is found in the review of the Special Court for Sierra Leone. SCSL, *Best Practice*, p. 5.

272 *Ibid.*, p. 6.

273 ICC Rules of Procedure and Evidence, Rule 16(b).

- Gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings;<sup>274</sup>
- Assisting victims and witnesses in obtaining medical, psychological and other appropriate assistance;<sup>275</sup> and
- Regard to the needs of children, elderly persons and persons with disabilities.<sup>276</sup>

Where trained professionals are available to offer support, witnesses are more willing to report crimes, cooperate with prosecutors, and offer reliable testimony.<sup>277</sup> For this reason, civil society organisations and professionals, such as doctors, nurses, psychologists, with specialised skills play a key role in providing these kinds of assistance. For example, in the United Kingdom, an organisation called Victim Support provides the following witness services:

- General information on criminal proceedings;
- Psychological support;
- Accompanying witnesses to court and the use of a side entrance to enter and leave the court building;
- Arrangements for waiting facilities separating witnesses for the prosecution from the defence witnesses and the public;
- Parking and drop-off arrangements; and
- Communicating additional witness requirements on the day of the trial.<sup>278</sup>

Based on lessons learned from the experiences of the ICTR, the Coalition on Women's Human Rights in Conflict Situations recommends that extra

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274 *Ibid.*, Rule 16(c).

275 *Ibid.*, Rule 17(2)(a)(iii).

276 *Ibid.*, Rule 17(3).

277 See: for example, Kelly Dedel, *Witness Intimidation, Problem-oriented Guides for Police, Problem-Specific Guides Series No.42*, U.S Department of Justice, Office of Community Orientated Policing Services (July 2006).

278 Cited in UNODC, *Good Practices*, p. 28.

steps be taken in the initial investigation phase to ensure that the welfare of potential witnesses is not harmed. The Coalition urges that the investigator acquire a detailed knowledge of (i) the domestic and international law and standards in regard to sexual violence; (ii) the possible stigma attached to sexuality and sexual violence in the area; (iii) the local or national structures that may be able to provide assistance to victims of torture, including rape. The report also recommended that psychological support be made available to any women who are interviewed.<sup>279</sup>

Experience from Sierra Leone's Special Court shows that special care should be taken at the initial investigation stage to ensure confidentiality and anonymity of child witnesses.<sup>280</sup> The *Guidelines on Justice in Matters involving Child Victims Witnesses of Crime* clearly lay out the content of children's right to receive effective assistance in a range of areas (financial, legal, counselling, health, social and educational services, physical and psychological recovery services)<sup>281</sup> and the types of professionals who should provide such services.<sup>282</sup> The Principles and Procedures for the SCSL also recommend taking care to ensure the full and informed consent of child witnesses and their parents or guardians.<sup>283</sup>

The OHCHR report on the right to the truth recommends that there should be separate divisions within a witness protection unit for witness assistance and witness protection.<sup>284</sup> This will help ensure that staff with particular skill-sets concentrate their work in their areas of expertise.

#### **4.2 Protection measures**

An assessment may determine that intimidation and harassment fall short of an immediate threat to life or can be addressed effectively without resorting to significant intervention.<sup>285</sup>

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279 Coalition on Women's Human Rights in Conflict Situations, *The Protection of Women as Witnesses and the ICTR* (2002).

280 War Crimes Studies Centre, *Child Witnesses*, p. 18.

281 *Guidelines on Justice in Matters involving Child Victims Witnesses of Crime*, Section IX.

282 *Ibid.*, Section XV.

283 War Crimes Studies Centre, *Child Witnesses*, p. 18.

284 Office of the High Commissioner for Human Rights, *Right to the Truth*, A/HRC/12/19, 21 August 2009, para. 53.

285 UNODC, *Good Practices*, p. 29.

## **Prevention**

Many systems require persons involved in the judicial process to use best practices to prevent risks. At the **ICC**, the parties to the proceedings and the **VWU** employ the following best practices to reduce security risks:

- Identifying a secure method of establishing contact;
- Limiting the number of contacts;
- Where appropriate, using intermediaries to initiate contact with an individual and assist in arranging meetings;
- Explaining relevant security issues and procedures to the individual in advance or at the start of any interaction or meeting;
- Creating a viable cover story for the individual to explain travel;
- Selecting a suitable interview and meeting locations;
- Following any interactions, assuring that the individual has a reliable means to activate protection services and contact the Prosecution and the **VWU** if a security need arises; and
- Adhering to a high level of confidentiality, restricting access to information within the Prosecution and the **VWU** on a need-to-know basis.

## **Security measures**

Security measures can be taken to protect a witness either before relocation and identity change or instead of relocation and identity change. The **UNODC**'s report lists a range of protection measures, including.<sup>286</sup>

- Temporary change of residence to a relative's house or a nearby town and concealment of the witness' whereabouts;
- Close protection, such as regular patrolling around the witness's house, and police escort for daily activities, possible protection of the witness' workplace by security personnel, escort to and from the court and provision of emergency contacts;

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286 **UNODC**, *Good Practices*, pp. 29-30.



- Arranging with the telephone company to change the witness's telephone number or assign him or her an unlisted number;
- Monitoring the mail and telephone calls;
- Installing security devices, such as security doors, alarms or fencing;
- Providing warning devices and mobile phones with emergency numbers;
- Minimising public contacts with uniformed police; and
- Using discreet premises to interview and brief the witness.

Some laws also provide discretion to provide any other protection measures if necessary. For example, the **Colombian** Law allows a range of measures, including physical protection, social assistance, change of identity and of residence and all the temporary or permanent measures that might be necessary for preserving the physical and moral integrity and the integrity of the family unit of the witness.<sup>287</sup>

To reduce the risk to witnesses moving to and from court and in public areas nearby, there should be separate and secure waiting areas for witnesses, the use of pagers to avoid long waiting periods, and the use of video monitoring in public areas around courtrooms. The **Colombian** law provides that every time a witness has to appear before any authority, the Attorney General or the head of the Office for Protection and Assistance to Victims, Witnesses, and Officers of the Office of the Attorney General must establish adequate mechanisms without prejudice to the protection of his or her identity.<sup>288</sup>

Recognising heightened risk during the period of giving testimony, the Witness and Victim Section of the Special Court of Sierra Leone provided a 24-hour guard at a secure accommodation. Only essential staff were given access, and visitors were not allowed. Witnesses were able to leave the compound but their movements were monitored by security personnel.<sup>289</sup>

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287 Colombian Law, Article 69.1. See also Guatemalan Law, Article 8 (e).

288 Colombian Law, Article 74.

289 SLCS, *Best Practice*, p. 6.

The ICC created an IRS, which is a 24-hour emergency response system for persons facing a serious threat of imminent harm as a result of their interaction with the Court. It includes, but is not limited to, the immediate removal of a person at risk whenever feasible, placement in a temporary safe location with constant close personal protection if required, and other immediate, temporary local protective measures, in collaboration with local service providers if required.<sup>290</sup>

Specific categories of vulnerable witnesses such as children (especially former child soldiers), victims of torture or sexual assault, and victims suffering mental health problems, should be guaranteed special protection provisions. The Special Court for Sierra Leone in particular recommends discretion in attempts to locate child witnesses in order to avoid exposing them to security risks.<sup>291</sup> The Court also recommends only approaching the most resilient child witnesses, and only those who are already resettled with their families or communities.<sup>292</sup>

A further consideration is protecting in-custody witnesses who may be at risk from other inmates, such as the defendant or associates, especially in cases of organised crime. Witnesses may also be at risk whilst receiving treatment in hospital. Armed escorts or guards should be available where necessary. The *Guidelines on Justice in Matters involving Child Victims Witnesses of Crime* recommend: “court ordered restraining orders; pre-trial detention of the accused; ‘no contact’ conditions in bail agreements; placing the accused under house arrest.”<sup>293</sup> The implementation of such recommendations, especially when applied to a broader range of cases, must respect the due process rights of the accused.

### **Procedural measures**

In addition to the above measures, court-ordered protection measures, often implemented in response to motions for witness-related protection made at the beginning of a trial or proceeding, can mitigate the risk of a

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290 International Criminal Law Service, expert review comments (June 2011).

291 War Crimes Studies Centre, *Child Witnesses*, p. 18.

292 *Ibid.*

293 *Guidelines on Justice in Matters involving Child Victims Witnesses of Crime*, Section XII(b)(c) and (d).

witness being identified or exposed to harm. This section presents three broad categories of procedural protection measures to (i) protect identity, (ii) prevent re-traumatisation, and (iii) protect physical security. Use of these measures will depend on the nature of the testimony, the seriousness of the alleged offence, the age of the witness, and the behaviour of the accused and his or her associates. Drawing largely on the practices of the ICTY, the UNODC<sup>294</sup> and others<sup>295</sup> propose the following measures:

### *Protecting identity*

- Ensuring legal representation of victims and witnesses, permitting proper protection of witness during examination;
- The use of pseudonyms or delaying of the disclosure of identity (including to accused and defence counsel) prior to trial<sup>296</sup> or during the entire proceeding,<sup>297</sup> and expunging names and identifying information from public records;
- Preventing the identification of victims and witnesses to the public and media, including limitations on the media during court proceedings;<sup>298</sup>
- Temporarily excluding the defendant during court proceedings; conducting hearings *in camera* and closed hearings; using audio-video recordings of statements; reading statements at trial without the witness being present;<sup>299</sup> distorting a witness's image or voice at

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294 UNODC, *Good Practices*, pp. 31-41.

295 Coalition on Women's Human Rights in Conflict Situations, *The Protection of Women as Witnesses and the ICTR*, 2002; UNICEF Serbia, *Good Practice in Juvenile Justice: Promoting Legislation to Protect Child Victims in Criminal Proceedings*; EU-led Stability Pact for South Eastern Europe Task Force on Trafficking in Human Beings, *Special Protection Measures for Trafficking Victims Acting as Witnesses*, Portoroz, Slovenia, 26-27 March 2003.

296 Council of Europe, *Recommendation*, Article 17.

297 See: *Prosecutor v. Tadic*, No. IT-94-1-T, 10 August 1995, Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia; see also Council of Europe, *Recommendation*, Articles 18 to 21; and Rule 69 of the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (June 1995).

298 See: Council of Europe, *Recommendation*, Article 17.

299 See generally: Gerald Gahima, *Testimony before the House Armed Services Committee on the Practice of International Criminal Tribunals and their Relevance to Military Commission in Light of Hamden v. Rumsfeld*, United States Institute for Peace (26 July 2006).

trial; using screens to hide witnesses, video link allowing testimony from a separate location; giving evidence before a commissioner or judge;

- Using the address of the office of the prosecutor as for service of process.<sup>300</sup>

### *Minimising trauma*

- Using a witness' pre-trial statement or preliminary hearing statement without summoning the witness before the court;<sup>301</sup>
- Allowing an accompanying person to be present for psychological support, especially important for child-witnesses;
- Prohibiting the defendant from cross-examining the witness or victim;
- Avoiding confrontation of the witness with the accused in the case of child witnesses;
- Prohibiting improper or aggressive cross-examination by the defence;
- Limiting the number of times a child witness may be examined;<sup>302</sup>
- Having the presiding judge, psychologist, pedagogue or social worker ask questions to a child or other vulnerable witness.

### *Mitigating security risks*

- Changing the venue of the trial;

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300 Law 27378 of Peru, Article 22.4

301 This is also recommended by the Council of Europe Committee of Ministers: "using statements given during the preliminary phase of the procedure as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the witnesses/collaborators of justice or to people close to them; pre-trial statements should be regarded as valid evidence if the parties have, or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the contents of the statement during the procedure". Council of Europe, *Recommendation*, Article 17.

302 See Committee on the Rights of the Child, *Concluding Observations on Sierra Leone*, UN Doc. CRC/C/OPSC/SLE/CO/1, (2010), para. 37, which raises concern regarding the lack of a formal limit on the number of interviews to which a child may be subjected.

- Charging contempt or obstruction of justice for threatening behaviour in court; and
- Increasing general security measures in and around the premises of the tribunal.

### *Witness anonymity*

The use of witness anonymity is perhaps the most extreme method of identity protection, and its use has been controversial. In 1995 in *Prosecutor v. Tadic*, the ICTY, set out a five-part test used to decide when witness anonymity is permissible.<sup>303</sup>

- (1) There must be an existence of a real fear for the safety of the witness;
- (2) The prosecution must show that the witness's testimony is sufficiently relevant and important to the case;
- (3) There must be no *prima facie* evidence of a witness's unworthiness in any way;
- (4) There is no witness protection programme in existence; and
- (5) There are no less restrictive protection measures available.

Furthermore, where the identity of the witnesses was not disclosed to the defendant:

- (1) Judges must be able to observe the demeanour of the witness in order to assess the reliability of the testimony;
- (2) Judges must be aware of the identity of the witness;
- (3) The defence must be allowed ample opportunity to question the witness on matters unrelated to his or her identity or his or her current whereabouts;

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<sup>303</sup> *Prosecutor v. Dusko Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ICTY Trial Chamber (10 August 1995), Case No. IT-94-1, para. 62 to 66.

- (4) The identity of the witness must be disclosed where there is no longer any reason to fear for his or her safety.

However, this decision came at an early stage of the first case at the ICTY, and it has not been followed again. The ICTY and the ICC have repeatedly found witness anonymity to be in violation of international standards concerning the fairness of the proceedings and right of the accused.<sup>304</sup>

The Council of Europe Committee of Ministers has also set out guidelines for witness anonymity:

18. Any decision to grant anonymity to a witness in criminal proceedings will be made in accordance with domestic law and European human rights law.
19. Where available, and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal justice and the rights of the parties. The parties should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.
20. Any decision to grant anonymity should only be taken when the competent judicial authority finds that the life or freedom of the person involved, or of the persons close to him or her,

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304 International Criminal Law Services, expert review comments (June 2011).

is seriously threatened, the evidence appears to be significant and the person appears to be credible.

21. When anonymity has been granted, the conviction should not be based solely, or to a decisive extent, on the evidence provided by anonymous witnesses.<sup>305</sup>

The *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* emphasises the need for measures to protect identity of witnesses during commissions of inquiry, stating that:

Information that might identify a witness who provided testimony pursuant to a promise of confidentiality must be protected from disclosure. Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission. Requests to provide information to the commission anonymously should be given serious consideration, especially in cases of sexual assault, and the commission should establish procedures to guarantee anonymity in appropriate cases, while allowing corroboration of the information provided, as necessary.<sup>306</sup>

### *Local protective measures*

Local protective measures enhance the security of a person's place of residence, and may render relocation unnecessary. Depending on the risk profile, the infrastructure and the resources available, the following may be appropriate local protective measures:

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305 Council of Europe, *Recommendation*, Articles 18 to 21.

306 *Impunity Principles*, Principle 10(d).

**Increased patrolling:** request national authorities, such as the police, to increase their mobile presence in specific areas to enhance the security for persons living there.

**Neighbourhood watch schemes:** engage local communities to promote community oriented programs in compliance with the applicable legal framework and in consultation with competent authorities. Such programs aim to provide a safe and secure environment and to deter and prevent any suspect intrusion into the neighbourhood.

**Increased residential security measures:** apply physical security improvements to a person's surroundings, such as improved doors, locks, alarm systems or communication mechanisms.

**Close protection:** request national authorities or other authorised security providers to provide a guard service in compliance with national law.

### *Video conferencing*

Witness testimony through video-conferencing is not necessarily at odds with an accused's right to a fair trial if still afforded the opportunity to cross-examine the witness. Rule 71(d) of the ICTY Rules of Procedure and Evidence allows testimony to "be given by means of a video-conference."<sup>307</sup> In *Prosecutor v. Delalic, Mucic, Delic & Landzo (Part I)*, the ICTY Trial Chamber allowed witnesses to testify by video-conferencing on the basis that the testimony was sufficiently important to make it unfair to proceed without it. It insisted, however, that the accused should not be prejudiced in the exercise of his right to confront the witness.

Article 18(18) of the Organised Crime Convention calls on States Parties to "make use of video-conferencing as a means of facilitating the taking of testimony from witnesses residing in a different State Party's jurisdiction".<sup>308</sup> Video conferencing may be combined with image and voice distortion measures to increase witness anonymity as necessary.<sup>309</sup> The

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307 Rule 71(d), Rules of Procedure and Evidence, The United Nations International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32/Rev.22.

308 Cited in UNODC, *Good Practices*, p. 38.

309 *Ibid.*, pp. 37-38.



Council of Europe Committee of Ministers also recommended the use of video-conferencing as well as audiovisual recording of statements made by witnesses and justice collaborators during the preliminary phase of the procedure, while taking into account the right of the accused to challenge the evidence given by a witness.<sup>310</sup> The Committee on the Rights of the Child has drawn attention to the importance of ensuring “child witnesses and victims the possibility of giving testimony by video or audio”.<sup>311</sup>

### **Self-protection measures**

Some countries provide assistance to low-risk witnesses to aid them in their own self-protection, without entry into a protection program. This may include the provision of financial support to relocate.<sup>312</sup> However, experience has shown that making payments to witnesses at risk is rarely sufficient for them to protect themselves. Financial payments should only be made within a broader protection strategy, and should be recorded and disclosed to the defence.

When a risk is linked closely to the area where the person is staying, assistance may be needed to move to a safer location. The assistance provided should consist of limited financial and logistical support. Prior to providing this assistance, the feasibility and modalities of the move, including its short-term impact and long-term consequences, should be assessed.

### **4.3 Relocation and/or identity change**

Relocation and/or identity change are reserved for high-risk witnesses. Identity change is usually carried out after a proceeding has ended and is limited to those witnesses whose life cannot be protected by any lesser measure. The effectiveness of this measure depends in part on its combination with relocation, including the use of safe houses. Both relocation and identity-change may be necessary in conflict and post-conflict countries, but witnesses will often remain at risk due to the relatively small

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310 Council of Europe, *Recommendation*, Article 17.

311 Committee on the Rights of the Child, *Concluding Observations on Sierra Leone*, CRC/C/OPSC/SLE/CO/1, 2010, para. 37.

312 UNODC, *Good Practices*, p. 41.

size and close-knit nature of communities in some of these countries. In the most extreme circumstances, witnesses will need to be relocated to a foreign country.

Agreements with foreign countries can help to protect witnesses when the State is unable or unwilling to provide sufficient protection against reprisals for their participation in criminal or other proceedings. Even where relocation abroad is an option, it is important to select countries where witnesses will not be exposed to continuing threats as a result of international networks of terrorist groups, organised crime syndicates or armed groups. The UNICEF Guidelines on the protection of child victims of trafficking draw attention to the potential need for trafficked children's international relocation and resettlement due to the risk of retaliation from traffickers against whom evidence has been provided. The Guidelines further recommend measures to ensure the security of the child's family members in the country or place of origin, transit or destination.<sup>313</sup> A final consideration is the need to include measures to assist the victim or witness to return to normal life in their home country once the threat level has fallen to an acceptable level.

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313 UNICEF, *Guidelines on the protection of child victims of trafficking*, 2006, para. 10.4.

## Annex III: Annotated Reference List

### General guidance on witness protection legislation

Council of Europe Committee of Ministers, Recommendation Rec(2005) to member states on the protection of witnesses and collaborators of justice, 20 April 2005.

*\*\*Provides recommendations on all areas of witness protection legislation, with focus on organised crime, terrorism and violations of international humanitarian law.*

Santiago Guidelines on witness and victim protection, June 2008.

*\*\*The outcome of a meeting of experts organised by the Attorney General's Office of Spain, the Office of the Public Prosecutor of Chile, Ibero-American Association of Public, United Nations Office on Drugs and Crime (UNODC) and financially supported by EUROsocial Justice. The focus on the role of the Attorney General's office in the provision of protection will not be applicable to all country situations.*

United National High Commissioner for Human Rights, *Report on the Right to Truth*, A/HRC/12/19, 2009 and United National High Commissioner for Human Rights, *Right to the Truth*, A/HRC/15/33, 2010.

*\*\*These two reports complement the UNODC Good Practice report by shifting the focus of witness protection from organised crime to human rights violations. The reports are brief and do not provide an in-depth analysis of all aspects of witness protection legislation. They do however reflect current intergovernmental thinking on the issue of witness protection.*

United Nations Drug Control Programme Model Witness Protection Bill, 2000.

*\*\*The model legislation developed by the UNDCP (now the UN Office on Drugs and Crime) is a useful starting point for drafters of witness protection legislation. However, it is somewhat outdated and focuses narrowly on protection of witnesses in organised crime cases.*

## **Witness protection in practice**

Mahony, C., *The justice sector afterthought: Witness protection in Africa*, 2010, Institute for Security Studies.

*\*\*Mahony's book provides a detailed analysis of the practical and political aspects of witness protection experiences in Africa. It will significantly assist drafters to understand how their legislative decisions will affect the operation of a witness protection program. It is a particularly useful resource for those in post-conflict countries or where special courts or commissions are being established.*

Newham, Gareth, *Keeping the wolves at bay: Issues and concerns in establishing a witness protection programme in South Africa*, Centre for the Study of Violence and Reconciliation (South Africa), October 1995.

*\*\*Among the earlier critical writing on witness protection, Newham's article provides an analysis of the witness protection needs and responses in South Africa. The article is useful beyond the African context.*

United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime*, 2008

*\*\*UNODC's Good Practices report is essential reading for drafters of witness protection legislation. While the focus of the report remains on organised crime, its in-depth review and analysis of legislation and experiences from around the world, and is the most comprehensive to date. Legislative drafters will need to contextualise and build on the recommendations in the report to ensure legislation responds to the needs of witnesses in their own countries.*

The Special Court for Sierra Leone, *Best-Practice Recommendations for the Protection & Support of Witnesses: An evaluation of the witness & victims section of the special court for Sierra Leone*, 2008

*\*\*This study of the lessons learned from the Witness and Victims Section of the Special Court of Sierra Leone is a very practical examination of what works in the delivery of witness protection. Its findings will be particularly useful for those drafting legislation establishing witness protection programs*

*in association with special commissions or courts in post-conflict countries, and has a useful focus on witness assistance.*

Torres, Luis Rocca, *Sistematización de experiencias de la CVR en evaluación de riesgos y protección de víctimas y testigos*, Curso Básico Evaluación de Riesgos y Autoprotección de la Coordinadora Nacional de Derechos Humanos, Lima, 2 June 2005

## **Child witnesses**

*Guidelines on Justice in Matters Involving Child Victims and Witnesses*, Resolution 2005/20 of the Economic and Social Council, XII (32)

*\*\*Detailed guidance on the protection of children who are victims and witnesses. Many of the guidelines are applicable to all types of witnesses and should be applied more broadly than child victims and witnesses.*

Special Court of Sierra Leone, *Principles and Procedures for the Protection of Children in the Special Court*

*\*\*These Principles should be considered by all drafters of witness protection legislation, especially in post-conflict contexts with special commissions or courts.*

UNICEF, *Guidelines on the protection of child victims of trafficking*, 2006

*\*\*Detailed guidance on the protection of children who are victims of trafficking. However, many of the guidelines are applicable to adult victims of trafficking and apply broadly.*

War Crimes Studies Centre, *Child witnesses at the Special Court for Sierra Leone*, 2006

*\*\*A detailed and practical review of protection of child witnesses by the Witness and Victims Section of the Special Court of Sierra Leone. This report is essential reading, especially in contexts where children have been directly involved in the conflict, including having been perpetrators themselves, or have been specifically targeted during a conflict.*

## **Female witnesses**

Coalition on Women's Human Rights in Conflict, The protection of women as witnesses and the ICTR, 2002

*\*\*A review of the protection of female witnesses at the ICTR. The report provides detailed recommendations in regard to the protection needs of women in a post-conflict setting.*

Inter-American Convention on the prevention, punishment and eradication of violence against women "Convention of Belem do Para", 9 June 1994 at the 24<sup>th</sup> regular session of the General Assembly.

## **Legal basis for witness anonymity**

*Prosecutor v. Tadic*, No. IT-94-1-T, 10 August 1995, Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia.

Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (June 1995), Rule 69 and 90.

Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, Rule 71.

## **Legislation, regulations and rules of procedure**

**Bosnia Herzegovina:** *Witness Protection Programme Law*, (Official Gazette of Bosnia Herzegovina No. 29/04).

**Cambodia:** Law on the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC) (Amended), 2004 and Internal Rules.

**Colombia:** Law 418, 1997 and Resolution of the Office of the Attorney General No. 0-5101 of 2008.

**Croatia:** *Witness Protection Act, 2003, Official Gazette no. 163/2003.*

**Guatemala:** *Law for the protection of the sujetos procesales (participants to a proceeding) and persons linked to the administration of criminal justice, Decree No. 70-96.*

**Hong Kong:** *An Ordinance to provide for the establishment of a programme or the protection of certain witnesses and persons associated with witnesses, "Witness Protection Ordinance", No. 269 of 2000.*

**Indonesia:** *Law of the Republic of Indonesia Number 13 Year 2006 on Witness and Victims Protection.*

**International Criminal Court:** *Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, and Rules of Procedure of the International Criminal Court.*

**Kenya:** *The Witness Protection (Amendment) Act, 2010.*

**Peru:** *Law 27378.*

**Philippines:** *An Act Providing for a Witness Protection, Security and Benefit Programme and for Other Purposes, Republic Act No. 6981.*

**Rwanda:** *Statute of the International Criminal Court for Rwanda and Rules of Procedure.*

**Sierra Leone:** *Statute of the Special Court of Sierra Leone.*

**South Africa:** *Witness Protection Act 112 of 1998, as amended by Prevention and Combating of Corrupt Activities Act 12 of 2004 and Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.*

**Thailand:** *Witness Protection Act BE 2546 (2003) of Thailand.*

**Former Yugoslavia:** *Statute of the International Criminal Court of the former Yugoslavia and Rules of Procedure.*

