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### Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development

## Report of the United Nations High Commissioner for Human Rights on the Right to the truth\*

### *Summary*

This report is submitted pursuant to Human Rights Council resolution 12/12 of 12 October 2009 entitled “Right to the truth.” Section one of the report reviews various international legal provisions on States’ obligations to protect witnesses, victims and others concerned, and discusses relevant judicial practice and jurisprudence. Section two discusses various witness protection measures and programmes which are available at the international and national levels. Section three explains the key elements which are essential for establishing an effective witness protection programme, while good practices and relevant standards are discussed throughout the report. The conclusion of the report affirms that too few examples of witness protection programmes operating at the national level and relating to investigation and prosecution of gross violations of human rights or serious violations of international humanitarian law exist.

The report recommends that States consider developing comprehensive witness protection programmes covering all types of crimes. However, witness protection within the framework of criminal procedures relating to gross human rights violations or serious violations of international humanitarian law requires certain particular elements. In that regard, the development of a normative framework based on existing legal obligations to enhance common standards and best practices may be useful.

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\* Late submission.

This report also proposes that witness protection measures should be consistent with the principle of the right to fair trial, and an integral part of the justice sector strategy. It also affirms the need to refine the effectiveness of witness protection methods through the provision of adequate financial, technical and political support for national programmes.

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## I. Introduction

1. This report is submitted pursuant to Human Rights Council resolution 12/12 of 12 October 2009 entitled “Right to the truth”, in which the Council requested “the Office of the United Nations High Commissioner for Human Rights to prepare a report, to be presented to the Council at its fifteenth session, on the basis of information, including from States, on programmes and other measures for the protection of witnesses implemented within the framework of criminal procedures related to gross violations of human rights and serious violations of international humanitarian law”. The aim of the report is “to determine the need to develop common standards and promote best practices that would serve as guidelines to States in protecting witnesses and others concerned with providing cooperation in trials for gross human rights violations and serious violations of international humanitarian law”.

2. This report is prepared on the basis of information received from several member States,<sup>1</sup> namely: Albania, Argentina, Azerbaijan, Bulgaria, Canada, Croatia, Cyprus, El Salvador, Finland, Greece, Guatemala, Japan, Kazakhstan, Latvia, Mexico, Montenegro, Norway, Panama, Paraguay, Qatar, Russian Federation, Switzerland, Trinidad and Tobago, Ukraine and Uruguay. The Office of the High Commissioner for Human Rights has also used information received from other sources, including special procedures mechanisms of the Human Rights Council, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, the Special Court for Sierra Leone, United Nations Office on Drug and Crime, United Nations Children’s Fund, the field presence of the Office of the High Commissioner for Human Rights and non-governmental organisations such as the Redress Trust. The report also notes the High Commissioner’s previous report on the right to the truth, which addresses various aspects of the protection of witnesses and other persons involved in trials relating to gross human rights violations.<sup>2</sup>

3. Without appropriate provisions for the protection of witnesses and victims, including their physical and psychological integrity, privacy, and dignity, their reputation and even their lives may be at risk as a consequence of their connection to judicial or non-judicial proceedings. Securing the testimony of witnesses and victims is essential to ensuring that victims obtain justice and the right to know the truth, that those responsible for human rights violations and other crimes are held to account, and that potential abusers are deterred.

4. Section one of the report reviews various international legal provisions on States’ obligations to protect witnesses, victims and others concerned, and discusses relevant judicial practice and jurisprudence. Section two discusses various witness protection measures and programmes available at the international and national levels. Enabling witnesses to come forward to collaborate with justice systems safely requires at least two sets of mechanisms: 1) measures and procedures put in place by the investigating authorities and courts while investigating crimes or taking testimony in the courtroom; 2) protection measures and safeguards provided before, during and after judicial proceedings by formal witness protection programmes. This report discusses both sets of mechanisms. Section three explains the key elements that are essential for establishing an effective

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<sup>1</sup> Information received from Member States is available for consultation at the Office of the High Commissioner for Human Rights.

<sup>2</sup> Report of the Office of the High Commissioner for Human Rights to the Human Rights Council on the Right to the truth (A/HRC/12/19).

witness protection programme, while good practices and relevant standards are discussed throughout the report.

5. The conclusion of the report affirms that considerable policies, legal provisions and draft programmes on the protection of witnesses, victims and others involved in criminal proceedings against organized crime have been developed. Practice at international tribunals and courts shed some light on the protection of witnesses, victims and others involved in trials of crimes under their jurisdictions, more specifically crimes relating to gross human rights violations and serious violations of international humanitarian law. However, there are few examples of witness protection programmes operating at the national level, which relate to trials for gross human rights violations and serious violations of international humanitarian law. The report recommends that States consider developing comprehensive witness protection programmes covering all types of crimes. Protecting witnesses in trials relating to gross human rights violations and serious violations of international humanitarian law may require certain particular elements. In that regard, the development of best practices and common standards would be useful. Witness protection measures should be consistent with the principles of the right to fair trial, and should be an integral part of the justice sector strategy.

## **II. Protection of witnesses, victims and others concerned under international law and jurisprudence**

### **A. Human rights legal framework**

6. While the importance of witness protection in combating organized crime has been widely recognized since the 1970s, its key role of protecting witnesses and victims of gross human rights violations or serious violations of international humanitarian law is often underestimated, overlooked or ignored by governments and international bodies alike. The first step in developing or improving witness protection programmes is to acknowledge that witness protection is not a favour to witnesses, but rather a duty for States.

7. Victims and witnesses are human beings with the right to protection under all human rights instruments and they do not lose the right to such protection simply by being involved in a judicial or non-judicial proceeding, either as victim or witness. States, however, have the obligation to adopt specific measures to protect the rights of victims and witnesses. A close review of the key human rights treaties and other key instruments reveals few, but clear and unambiguous references to the right of victims and witnesses to be protected from threats and reprisals, and to have their inherent dignity in the pursuit of justice respected. The International Covenant on Civil and Political Rights refers to “respect for the inherent dignity of human persons”<sup>3</sup> and states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, or to unlawful attacks on his honour and reputation.”<sup>4</sup> In accordance with the Covenant, States have a general obligation to undertake necessary steps “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.”<sup>5</sup>

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<sup>3</sup> International Covenant on Civil and Political Rights (CCPR), article 10.

<sup>4</sup> *Ibid.*, article 17.

<sup>5</sup> *Ibid.*, article 2.

8. Regional human rights treaties, such as the African Charter on Human and Peoples' Rights,<sup>6</sup> the American Convention on Human Rights<sup>7</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>8</sup> do not contain explicit mention of States' obligation to adopt specific measures to protect witnesses.

9. However, within the framework of international human rights law, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>9</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>10</sup> the Convention for the Protection of All Persons from Enforced Disappearance<sup>11</sup> and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>12</sup> make clear reference to States' obligation to adopt specific measures to protect witnesses and victims.

10. References to the obligation to protect victims and witnesses can also be found in several key human rights instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>13</sup> the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol),<sup>14</sup> the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,<sup>15</sup> and 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.<sup>16</sup>

## B. International criminal law framework

11. References to the protection of victims and witnesses can also be found in international law related to transnational organized crime. The United Nations Convention against Transnational Organized Crime<sup>17</sup> and its two protocols, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>18</sup> and the Protocol against the Smuggling of Migrants by Land, Sea and Air,<sup>19</sup> address the protection of victims and witnesses of organized crimes.

<sup>6</sup> OAU Document CAB/LEG/67/3 rev.5, 21 ILM 58 (1982).

<sup>7</sup> OAS Treaty Series No.36, 1144 UNTS 123.

<sup>8</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 5, 213 UNTS 22, entered into force on 3 September 1953.

<sup>9</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 13.

<sup>10</sup> In its Concluding Observations, the Committee on the Elimination of Discrimination against Women addressed witness protection under article 6 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). See A/57/38 (SUPP) (2002), paragraph 396; A/57/38 (SUPP) (2002), paragraph 50; A/57/38 (SUPP) (2002), paragraph 311; A/63/38(SUPP), 12/08/2008, paragraph 329; A/61/38(SUPP) 25/08/2006, paragraph 107.

<sup>11</sup> Convention for the Protection of All Persons from Enforced Disappearance (CED), article 12.4.

<sup>12</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC), article 8.1(a).

<sup>13</sup> Declaration, paragraph 6(d).

<sup>14</sup> Istanbul Protocol, paragraph 3(b).

<sup>15</sup> UN Doc. E/CN.4/2005/102 (2005), Add.1, principle 10.

<sup>16</sup> UN Doc. A/RES/60/147, annex, paragraph III(5).

<sup>17</sup> UN Doc. A/RES/55/25, annex 1, articles 24, 25 and 26.

<sup>18</sup> *Ibid.*, annex II, articles 6 and 7.

<sup>19</sup> *Ibid.*, annex III, articles 5 and 16.

12. Witnesses' and victims' right to protection occupies a prominent place in recent international criminal practice and procedure. Ensuring that witnesses can testify in a safe and secure environment is crucial for the implementation of the mandates of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). The statutes and rules of the Tribunal for the former Yugoslavia, the Tribunal for Rwanda and the International Criminal Court contain provisions for the protection of witnesses and victims participating in proceedings.<sup>20</sup> Similarly, the statutes and rules of the Special Court for Sierra Leone (SCSL)<sup>21</sup> and the Extraordinary Chambers in the Courts of Cambodia (ECCC)<sup>22</sup> contain provisions for the protection of victims and witnesses.

### C. Practice and jurisprudence at the international and regional levels

13. The practice and jurisprudence of international and regional human rights bodies, as well as international tribunals and courts demonstrate that the protection of witnesses and victims is the cornerstone on which combating impunity, providing justice and ensuring effective remedy rest.<sup>23</sup>

14. In the case of *Rajapakse v. Sri Lanka*, the Human Rights Committee interpreted article 9, paragraph 1 of the International Covenant on Civil and Political Rights as encompassing the right to protection in order to ensure the enjoyment of the right to security. The Human Rights Committee ruled that the State had violated article 9, paragraph 1 of the Covenant since it had failed to take adequate action to ensure that the author was and continues to be protected from threats issued by police officers since filing his petition in his fundamental rights case.<sup>24</sup> In this case, the State did not provide witness protection, and the complainant went into hiding out of fear of reprisals. The Human Rights Committee observed that article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. The Human Rights Committee concluded that the State party was obliged "to take effective measures to ensure that the author is protected from threats and/or intimidation with respect to the proceedings" and "to ensure that similar violations do not occur in the future."<sup>25</sup> The Human Rights Committee made similar observations in other cases and emphasized that the right to security does not only apply to "formal deprivation of liberty" by way of arrest or detention, and that States are "under an obligation to take reasonable and appropriate measures" to protect individuals whose lives have been threatened.<sup>26</sup>

<sup>20</sup> See ICTY Statute, article 22; ICTR Statute, article 22; Rome Statute, articles 68 and 87.4; also ICC Rules of Procedure and Evidence, rules 16, 50 and 86; ICTY Rules of Procedures and Evidence, rule 34; ICTR Rules of Procedure and Evidence, rule 34.

<sup>21</sup> SCSL Statute, article 16.4; SCSL Rules of Procedure and Evidence, rule 34.

<sup>22</sup> Law on the Establishment of ECCC, article 33; ECCC Internal Rules (rev.5), rule 29.

<sup>23</sup> For a detailed discussion on the relevant international human rights framework, see REDRESS, *Ending Threats and Reprisals Against Victims of Torture and Related International Crimes – A Call to Action*, December 2009, available at <http://www.unhcr.org/refworld/docid/4c46c73e2.html>.

<sup>24</sup> *Rajapakse v. Sri Lanka* (CCPR/C/87/D/1250/2004), paragraph 9.7.

<sup>25</sup> *Ibid.*

<sup>26</sup> See *Delgado Paez v. Colombia* (CCPR/C/39/D/195/1985); *Bwalya v. Zambia* (CCPR/C/48/D/314/1988); *Bahamonde v. Equatorial Guinea* (CCPR/C/49/D/468/1991), *Cagas, Butin and Astillero v. Philippines* (CCPR/C/73/D/788/1997); *Prince v. Jamaica* (CCPR/C/44/D/269/1987); *Campbell v. Jamaica* (CCPR/C/47/D/307/1988); *Adams v. Jamaica* (CCPR/C/58/D/607/1994).

15. The European Court of Human Rights identifies the right to protection as part of the right to life. In *Kiliç v. Turkey*,<sup>27</sup> the Court observed that there is a “positive obligation on the authorities to protect an individual or individuals whose life is at risk from the criminal acts of another individual and a State must take positive operational measures when the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party.” In some cases, the Court dealt directly with the intimidation of victims and witnesses in the context of interference with article 34 (formerly article 25) of the European Convention on Human Rights which sets out the right of individual petition, and requires the contracting parties to “undertake not to hinder in any way the effective exercise of this right.”<sup>28</sup>

16. The Inter-American Court of Human Rights has similarly addressed protection as a prerequisite for the fulfilment of other rights, including the right to be heard,<sup>29</sup> and the right to an effective recourse.<sup>30</sup> The Court has ruled that failure to provide protection to victims and witnesses impedes effective access to justice under articles 1.1, 8 and 25 in both criminal and civil proceedings. In *La Rochela Massacre v. Colombia*, the Court articulated the integral connection between the obligation to investigate, within the framework of the guarantees of due process, the right to the truth, the right to justice, and the protection of all those involved in the criminal proceedings.<sup>31</sup>

17. Similarly, in *Kawas-Fernandez v. Honduras*, the Court held that by failing to provide protection to the witnesses, the State had “not guaranteed true right to justice for the relatives of the deceased victim.”<sup>32</sup> In addressing protection within the context of articles 1.1, 8 and 25, the Court not only emphasized the obligation of the State to provide protection, but also considered protection as a necessary condition for the effective enjoyment of the right to participate and to be heard.<sup>33</sup> In a number of cases at the Inter-American Court of Human Rights, protection measures have also been seen as the fulfilment of the right to a remedy through the guarantee of non-repetition, and as part of reparation awards.<sup>34</sup>

18. Practice and jurisprudence of international ad hoc criminal tribunals, special hybrid courts and the International Criminal Court have also emphasized the importance of protecting the individuals who are involved in the investigation and prosecution of cases within their jurisdiction. For example, the Appeals Chamber of the International Criminal Court recently ruled that protection should, in principle, be available to anyone put at risk by the investigation of the Prosecutor, and noted that “the specific provisions of the Statute and the Rules for the protection not only of witnesses, victims and members of their families, but also other persons at risk on account of the activities of the Court, are

<sup>27</sup> European Court of Human Rights (ECHR), application No. 22492/93.

<sup>28</sup> See *Aksoy v. Turkey* (ECHR, application No. 21987/93); *Kurt v. Turkey* (ECHR, application no. 15/1997/799/1002); *Sarli v. Turkey* (ECHR, application no. 24490/94).

<sup>29</sup> American Convention on Human Rights, article 8.

<sup>30</sup> *Ibid.*, article 25.

<sup>31</sup> Case of *La Rochela Massacre v. Colombia* (Inter-American Court of Human Rights (IACHR), 2007 C Series No. 163, paragraph 171).

<sup>32</sup> IACHR, case of *Kawas-Fernandez v. Honduras* (2009); *Myrna Mack Chang v. Guatemala* (2003); *Ituango Massacre v. Colombia* (2006).

<sup>33</sup> IACHR, case of *Mapiripan Massacre v. Colombia* (2005).

<sup>34</sup> IACHR, case of *Kawas-Fernandez v. Honduras* (2009), paragraph 193; *La Rochela Massacre v. Colombia*, paragraph 297.



indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.”<sup>35</sup>

### **III. Programmes and measures for protecting witnesses and victims**

19. At this early stage, it should be emphasised that witness and victim protection cannot be viewed in isolation, but must rather be considered a crucial part of a comprehensive system designed to effectively investigate and prosecute perpetrators of human rights violations. Protection measures will be ineffective if other parts of the criminal justice system do not function well. Every step of the process, from investigation through to conviction and punishment, should be analysed to identify ways in which witnesses are placed at risk, and potential reforms designed to limit those risks.<sup>36</sup>

#### **A. Protection of witnesses at the investigation phase**

20. At the investigation phase, there are some basic measures that should be considered for the protection of witnesses and victims, whether such investigations are pursued in a formal criminal investigation or are conducted by quasi- or non-judicial mechanisms. Already at the investigation phase there can be problematic disclosures of identities. When this risk is foreseen by witnesses, they may simply choose not to communicate with investigators. Safeguarding the identity of a witness at the early stage enhances the potential to safely obtaining testimony at a trial without resorting to a formal witness-protection programme.

21. For example, the new Criminal Procedure Code of the Republic of Croatia (2009) reinforced witness protection during the investigation procedure. Similarly, the question of witness protection at the investigation phase is regulated by the Qatar Code of Criminal Procedure. In Switzerland, the law requires the authorities to protect the victim’s person at all stages of the criminal proceedings.

22. The role played by prosecutors or state attorneys in the criminal justice system may also lead to real or perceived risks that may prevent the safe cooperation of witnesses. Prosecutors and state attorneys responsible for investigation should also consider adequate measures to ensure the protection of witnesses and victims.

#### **B. Courtroom measures for the protection of witnesses and victims**

23. To encourage and facilitate the cooperation of witnesses, and to ensure that witnesses can testify free of intimidation or fear for their life, a series of legal protective procedural measures are used by the courts. These measures may include, but are not limited to the following: giving testimony outside the courtroom by closed-circuit television, or out of view of persons capable of creating an intimidating atmosphere, from behind a screen, for example; having one or more persons (other than the accused or his main counsel) removed from the courtroom for the entire duration or part of the trial; testifying under a pseudonym; imposing a publication ban in order to prevent publication,

<sup>35</sup> International Criminal Court, *Prosecutor v. Katanga and Ngudjolo*, 13 May 2008 (ICC-01/04-01/07-475).

<sup>36</sup> Report of the Special Rapporteur on extrajudicial, summary and arbitrary execution (A/63/313), paragraph 15.

dissemination or transmission of any information that might reveal the identity of a victim or witness; appointing counsel to conduct cross-examination when the accused is acting as his or her own counsel; allowing victims under 18 to testify in the presence of a support person. Such courtroom procedures or similar special methods of participation in court proceedings have been introduced in many States, such as in Bulgaria, Canada, Croatia, El Salvador, Finland, Japan, Latvia, Montenegro, Panama and Slovakia.

24. At international tribunals or courts, the scope of application of the courtroom measures and their legal effect are generally considered by pre-trial or trial chambers. Such protection may include measures for safeguarding the privacy of victims and witnesses, provided that these measures are consistent with the rights of the accused.<sup>37</sup>

### C. Formal witness protection programmes

25. Witness and victim protection programmes are formal systems designed to provide a full range of physical protection, psychological support and other assistance to beneficiaries. A best-practice study, prepared by the UNODC,<sup>38</sup> indicated that formal witness protection programmes first came to prominence in the United States of America as a legally sanctioned procedure to be used in conjunction with a programme for dismantling organized crime. In 1970, the Organized Crime Control Act empowered the United States Attorney General to provide for the security of witnesses who had agreed to testify truthfully in cases involving organized crime and other serious crimes.

26. Today, witness protection is viewed as crucial in combating organized crimes. Several countries worldwide have established such specialized programmes. States have included protection provisions in their constitutions,<sup>39</sup> penal codes, or specific witness protection laws. The following are examples of national witness protection programmes reported by States.

27. In Argentina, the National Directorate for the Protection of Witnesses and Persons under Investigation<sup>40</sup> is responsible for protecting complainants and witnesses in criminal trials relating to human rights violations at the federal level. The National Directorate's programme takes action at the request of the judicial authorities in federal investigations of kidnappings, terrorist acts or acts relating to the law on narcotics. In exceptional cases, the Ministry of Justice, Security and Human Rights may include other cases, for example, cases relating to organized crime or institutional violence, or cases for which the political interest or importance makes such action advisable. The programme may also include cases provided for in the Act on Preventing and Punishing Human Trafficking and Assisting its Victims.

28. Decree No. 606/98 established the Truth and Justice Programme which is currently under the direction of the Ministry of Justice, Security and Human Rights. One of the objectives of this programme is to strengthen the mechanisms and procedures for the support, protection and safety of witnesses, victims, lawyers and judicial officials involved

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<sup>37</sup> See ICTY Rules of Procedures and Evidence, rule 75(a); and ICC Rules and Procedures, rules 68, 67, 72 and 88.

<sup>38</sup> UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008.

<sup>39</sup> For example, subsection V, paragraph 2, of section C, article 20 of the Political Constitution of Mexico states that "The Public Prosecution Service shall guarantee the protection of victims, aggrieved parties, witnesses and all those involved in the proceedings. The courts shall oversee full compliance with this obligation [...]."

<sup>40</sup> Established by Act No. 25, 764.

in court cases or investigations concerning crimes against humanity, as well as their relatives. Recently, the National Plan for the Support and Assistance of Complainants, Victims and Witnesses of State Terrorism of the Office of the Secretary for Human Rights, has been transferred to the authority of the Truth and Justice Programme.

29. In Bulgaria, the Protection of Individuals at Risk in Relation to the Criminal Proceedings Act (2004) established new, extra procedural arrangements for the protection of individuals whose testimony, explanations or information are of material importance for criminal proceedings. Under this system, protection is provided by a Protection Board. The programmes cover the following measures: (i) personal physical protection, (ii) property protection, (iii) provisional accommodation in a safe location, (iv) change of place of residence, workplace or educational establishment, or placement in another facility for service of a sentence, (v) complete change of identity.

30. In Croatia, the Witness Protection Act (2003) regulates the requirements and proceedings for the provision of protection and aid to persons who have been put at risk on account of their statements in criminal proceedings, as well as persons close to them. The Act prescribes protection, aid and physical protection measures provided to witnesses and victims of crime outside the courtroom. The witness protection programme is implemented by the Department of Witness Protection of the Ministry of Interior.

31. In Cyprus, the Law for the Protection of Witnesses, adopted in 2001, defines the types of witnesses requiring assistance, the measures that can be adopted for the protection of witnesses, and the Plan for the Protection of Witnesses and Collaborators of Justice which is executed under the supervision of the Attorney General. The Plan includes protection of the witness and his/her family with security guard and/or security escort, relocation of witness and his/her family to another city or village, and confidentiality concerning his/her whereabouts, relocation abroad, change of identity, special arrangement for the detention of collaborators of justice.

32. In El Salvador, the Section for the Protection of Witnesses, Judges and Victims was created within the National Civil Police Unit for the Protection of Persons of Importance in August 1997, with a mandate to provide full protection to witnesses and their families. However, over time, it became obvious that a witness protection programme was needed and that it should be underpinned by a formal legal framework. Accordingly, legislation on the protection of victims and witnesses was drafted in 1998. It envisaged procedures such as change of identity with issuance of authentic documents, and relocation, including to a place of residence outside the country. In 2005, the Office of the Attorney General recorded 12 murders of witnesses who were providing information at trial. Before the creation of the programme, witness protection had been the responsibility of the National Civil Police, although it did not receive any specific budgetary allocation for that purpose. Witnesses testifying under a plea-bargain agreement (*testigos criteriados*) lived at National Civil Police headquarters in special cell "homes" shared with others in similar situations. Public safety has been a priority for several administrations in El Salvador. With a view to reducing crime rates, which were rising in a climate of impunity, born of intimidation and fear, the Government decided to create a special programme to protect victims and witnesses. On 25 May 2006, the Witness and Expert Witness Protection Scheme was reformed. The scheme established under the Criminal Code was superseded by the Victim and Witness Protection Act, which entered into force on 22 September 2006, and the Victim and Witness Protection Programme was established. The implementing regulations for the Victim and Witness Protection Act were adopted in October 2007.

33. In Montenegro, the Law on Witness Protection regulates the conditions and the procedures for providing protection and assistance to the witness outside the court. Such protection is provided with the consent of the witness or persons close to him or her. The witness protection programmes are implemented by a commission which comprises a judge

of the Supreme Court, a deputy of the Supreme State Prosecutor, and the Head of the Protection Unit.

34. In Paraguay, Law 1562/00 establishing the Public Prosecution Service contains a specific provision on witness protection. According to article 10 of the Act, “the Public Prosecution Service shall protect persons who, by collaborating with the administration of justice, run the risk of incurring some form of injury, especially in the case of punishable acts connected with organized crime or related to abuse of authority or violations of human rights. To that end, it shall run a permanent protection programme for witnesses, victims and its own officials.” Policies and programmes on witness protection are implemented through the Witness and Victim Care Centre which runs nine facilities.

35. In Uruguay, the President of the Republic, in consultation with the Minister of the Interior, issued a decree in 2000 authorizing the implementation of a programme to protect witnesses and informants giving evidence on alleged offences.

36. In Romania, the Ministry of Administration and Interior established the National Witness Protection Office in 2002. This Office coordinates the activities of the General Inspectorate units of the Romanian Police involved in witness protection, and manages the necessary funds for developing the witness protection programme. It also maintains and implements various protection and assistance measures.

37. In Switzerland, 26 federal entities (cantons) are currently responsible for the protection of witnesses. All the cantonal codes of criminal procedure regulate witness protection. The Federal Code of Criminal Procedure (Systematic Compendium (SC) 312.0), which regulates proceedings at the level of the Confederation, also contains provisions aimed at protecting witnesses when they give testimony. A standardized federal code of criminal procedure is due to enter into force on 1 January 2011. It will contain more detailed measures concerning the protection of witnesses.

38. In Trinidad and Tobago, the Justice Protection Act 2000 provides for the establishment of the agencies that comprise Trinidad and Tobago Justice Protection Program, which include an administrative centre, an investigative agency and a protection agency.

#### **D. Inter-State cooperation and regional initiatives**

39. Inter-State cooperation and assistance are normally based on the principle of reciprocity. Countries that are willing to accept relocated witnesses from other countries expect to have their own vulnerable witnesses accepted in other countries as well. Various countries with witness protection programmes contemplate such a possibility. For instance, the Witness Protection Acts of Canada and South Africa allow the respective responsible authorities to enter into reciprocal agreements with foreign Governments to admit foreign nationals into the witness protection programme.<sup>41</sup> Witness protection is provided on a cost-recovery basis. This type of arrangement would be of enormous interest for states pursuing strategies to fight impunity. Other forms of cooperation could be envisaged, such as the exchange of best practices, particularly given the novelty of the field, exchange programs for members of witness protection agencies, information-sharing and training programmes.

40. Though a State’s priority should be to strengthen its domestic system first, it could also bring the issue of witness protection to the international and/or regional forum. For example, the Nordic countries have established a working group which work towards

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<sup>41</sup> Canada, Witness Protection Program Act, S.C. 1996, c. 15, article 14.2.

common standards, and cooperate in specific areas. The agreement on cooperation in protecting victims and witnesses among the Baltic States was developed in 2000. The Central America Integration System has developed the Covenant for the Protection of Victims, Witnesses, Experts and Other Participants in the Criminal Investigation and Prosecution, Particularly in Drug Trafficking and Organized Crime. Europol coordinates a European Liaison Network that is made up of the heads of specialist witness protection units. It has drafted the Basic principles in the European Union police cooperation in the field of witness protection, focusing on relocation issues.

41. To date, most inter-state and regional cooperation in witness protection seems to occur in the context of fighting organized crime, terrorism and corruption. This practice could also be meaningful in the context of national or international prosecutions or investigations for gross human rights violations and serious violations of international humanitarian law.

#### **IV. Key elements of a witness protection programme within the framework of criminal procedures related to gross human rights violations and serious violations of international humanitarian law**

##### **A. Issues to be addressed in the law**

42. UNODC good-practices report discusses key elements of witness protection programmes involving organized crime, including the legal framework for setting up such programmes.<sup>42</sup> The specific nature of witness protection must be carefully examined when considering investigation and prosecution of gross violations of human rights and serious violations of international humanitarian law. In the context of prosecutions dealing with organized crime, witnesses often include system insiders. The opposite is almost invariably true for witnesses of human rights violations, who are mainly victims of such crimes. The Special Court for Sierra Leone, for example, reported that 60 per cent of witnesses admitted to its witness and victim protection program were victims, 3 per cent child soldiers, 6 per cent international experts and 31 per cent insiders.<sup>43</sup>

43. Key elements of a legal framework for witness and victim protection are discussed in the paragraphs below, with focus on the specific needs of witness protection programmes in trials related to gross violations of human rights and serious violations of international humanitarian law.

##### **(i) A comprehensive system**

44. The first decision to be made is whether to build a comprehensive programme, or, taking into account the specificities of human rights violations, a separate program for such cases. It would be highly desirable to establish a comprehensive program which can then be articulated in such a way as to take into account specificities. There are mainly two reasons to support such choice: 1) in order to make efficient use of State resources, it would be preferable to create one institution to deal with all witness protection needs; 2) a

<sup>42</sup> UNODC, Report on Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, pp. 19–22, 43–47.

<sup>43</sup> See Special Court for Sierra Leone, *Best-Practice Recommendations for the Protection & Support of Witnesses*, 2008.

comprehensive program would be less controversial and more appealing to a broader spectrum of actors within society.

**(ii) Participants**

45. The definition of “witness” may differ according to the legal system under review. Witnesses can be classified into three main categories: a) justice collaborators; b) victim-witnesses; c) innocent bystanders. Practice generally limits admission to witness protection to witnesses and members of their family or persons close to them. Some countries also admit other categories of people whose link to a criminal case may put their lives in danger, such as judges, prosecutors, undercover agents, intermediaries and interpreters.

46. A witness protection programme should be designed to protect individuals who cooperate with national and international extraordinary accountability mechanisms, including those of quasi- and/or non-judicial nature, such as human rights and truth commissions and commissions of inquiry.<sup>44</sup> For example, Kenya’s Witness Protection Law provides for, among others, persons “who need protection from a threat or risk which exists on account of his being a crucial witness in a prosecution or inquiry held before a court, commission or tribunal outside Kenya.”<sup>45</sup>

**(iii) Placement of the programme**

47. There are many options regarding the state structure under which a witness protection programme should be placed, including the Police Department, Office of the Prosecutor/Attorney General, Ministry of Justice, the Judiciary, a joint commission comprising various institutions or an independent authority. While some States establish witness protection programmes as units within the police force, that approach is not appropriate or less effective for programmes designed to facilitate cases against State agents involved in human rights abuses.<sup>46</sup>

48. In 2009, the High Commissioner for Human Rights issued a statement on witness protection in which she recommended that “a system of witness protection independent from State mechanisms may be better suited to inspire the confidence and trust of all those concerned. Such a system could be funded by the State, but not closely controlled by the machinery of State organs.”<sup>47</sup> Kenya has recently amended its Witness Protection Law, and established an independent witness protection authority.<sup>48</sup>

49. Another option would be to appoint officials from key institutions of the criminal justice system to a committee responsible for administering or overseeing the programme. In Italy, for example, decisions on admission to the witness protection programme are taken by a central commission comprised of the Under Secretary of State at the Ministry of the Interior, two judges or prosecutors, and five relevant experts.<sup>49</sup> Another option may be to assign a special dedicated unit to work exclusively on human rights and international crime

<sup>44</sup> Human Rights Council resolution 12/12 (A/HRC/RES/12/12) encourages governments to develop witness protection programs for judicial and non-judicial proceedings, such as human rights commissions, truth commissions, etc.

<sup>45</sup> Kenya, Witness Protection (Amendment) Act 2010, article 4.1(d).

<sup>46</sup> See Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions (A/63/313).

<sup>47</sup> UNHCR, Introductory Remarks by Navanethem Pillay, OHCHR Expert Meeting on Witness protection for successful investigation and prosecution of gross human rights violations and international crimes, September 2009, available at [www.unhcr.ch](http://www.unhcr.ch).

<sup>48</sup> Kenya, Witness Protection (Amendment) Act (2010).

<sup>49</sup> Italy, Law No. 82 of 15 March 1991 (revised in 2001) cited in UNODC, Report on Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, p. 14.

cases. In Argentina, a new witness protection bill proposes the establishment of a dedicated unit to address witness protection issues relating to trials for crimes against humanity.<sup>50</sup>

50. No matter the placement of the witness protection agency, the law should ensure that the witness protection body enjoys full organizational and financial independence in the exercise of its functions.

**(iv) Staff selection and vetting process**

51. The law should explicitly indicate the process for selecting staff to work in the agency, which should be based on strict criteria of competence and integrity. A broader vetting process may also enhance the security of witnesses, and would be important particularly in post-conflict situations where the State takes the initiative to deal effectively with past abuses of human rights.

**(v) Eligible crimes**

52. The law should identify the crimes for which witness protection measures should be envisaged. Such crimes should include all gross violations of human rights and serious violations of international humanitarian law, since perpetrators of such violations may be in official positions which allow them to harm or intimidate witnesses.<sup>51</sup>

**(vi) Mandate to protect and assist**

53. The mandate of the agency should include protection, in the form of provision of physical security, and necessary assistance, such as psychological, medical and legal assistance, which witnesses may need. These two aspects are inter-related, and an approach excessively focused on physical security has been found to alienate witnesses. At the same time, the distinction between protection and assistance should not be blurred, and witness protection agencies should establish separate sub-entities to deal with each aspect, so that witnesses know exactly where to go to address their needs.

54. Witness protection programmes in many States often limit their programmes to relocation and change of identity, leaving other measures to ordinary police services, while the laws of some States contain an exhaustive list of protection measures available, from concealment of the identity of the witness in judicial acts prior to the trial to change of identity and relocation. Indeed, a broad range of measures is necessary if the programme is to protect witnesses of human rights violations, who are usually not inclined to accept measures which radically alter their lives, such as relocation. Moreover, witnesses' mistrust of regular security services, particularly in a post-conflict society, renders it preferable for a specialized agency to take charge of all witness protection measures. However, the law should be more explicit in providing for perpetrator-focused protection measures, including the investigation of threats, control of the activities of the accused who is not in detention, and other mechanisms to prevent and neutralize the threat, whenever possible, rather than shield the witness.

<sup>50</sup> Argentina, Programa nacional de protección de personas en situación de peligro en procesos penales, No. de expediente 6526-D-2008, Trámite Parlamentario, 168 (20/11/2008).

<sup>51</sup> Human Rights Council resolution 12/12 (A/HRC/RES/12/12) encourages States to provide effective protection to witnesses of all human rights violations.

**(vii) Relocation**

55. Relocation should be considered as a last resort measure in a witness protection programme. In such a case, international cooperation and formal agreements between the requesting State or organization and the proposed accepting State must be concluded.<sup>52</sup>

**(viii) Procedure and criteria for admission/exit**

56. The law should specify very clearly the procedure and criteria for admitting — or refusing admission to — a person in the programme. Regarding admission criteria, those indicated in the United Nations Office on Drugs and Crime Draft Model Law on Witness Protection may be considered.<sup>53</sup> Usual criteria include seriousness of the crime, public interest in the prosecution of the facts limited to the legal tradition involved, importance of the witness' testimony, ability of the person to adapt to the programme and its measures, among others. In human rights cases, the profile and history of the alleged perpetrators must also be considered.

**(ix) Agreement between programme and witness**

57. The law should provide for the signing of an agreement between the programme and the witness. Such agreement should contain all the rights and obligations of the witness, and the conditions for exiting the programme. The conclusion of a clear agreement would contribute to creating a climate of trust between the parties.

**(x) Appeal process**

58. The law should provide for the possibility of appeal with regard to the administrative decisions of the programme. While the need for confidentiality, which may be invoked to justify the absence of an appeal process, is understandable, the decisions of the witness protection body have a significant impact on the lives of witnesses, and they should be allowed to have their case heard by a different authority. A fair appeal process would contribute to dispelling the perception of arbitrariness with regard to the decisions of the witness protection body. Various positive examples support this proposal. In South Africa, for example, any person who feels aggrieved by any decision of the Witness Protection authority may apply to the Minister of Justice to review the decision or steps concerned.<sup>54</sup> In Kenya, the Witness Protection Law provides for the establishment of a Witness Protection Appeals Tribunal.<sup>55</sup>

**(xi) Threat assessment and investigation**

59. The law should clearly specify the body responsible for the threat assessment process. A multi-disciplinary team, with strong investigative capacity, should be established within the agency to deal specifically with threat assessment and investigation.

**(xii) Reporting obligations**

60. Best practices indicate that an annual report of the witness protection programme should be submitted to a higher authority, usually the Parliament, in a manner that does not prejudice the effectiveness and security of the witness protection agency and its activities.<sup>56</sup>

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<sup>52</sup> For more on "relocation" see A/HRC/12/10, paragraphs 55–59.

<sup>53</sup> UNODC, Draft Model Law on Witness Protection, 2008.

<sup>54</sup> South Africa, Witness Protection Act 112 (1998), article 14.

<sup>55</sup> Kenya, Witness Protection (Amendment) Act (2010), article 3U.

<sup>56</sup> See Australia, Witness Protection Act (1994), No. 124, article 30.



Such reporting obligations ensure accountability and a measure of control on the activities of the agency by democratic institutions.

**(xiii) Role of civil society and other institutions**

61. The law should acknowledge the enormous contribution that civil society can make, particularly in providing assistance to witnesses. Cooperation and coordination with civil society organizations should be explicitly provided for in the law. Such activities should be strengthened and funded. Other institutions, such as national human rights institutions, could also provide valuable assistance.<sup>57</sup>

**B. Special measures for child witnesses and victims of sexual and gender-based violence**

62. Child witnesses and victims of sexual and gender-based violence require especially sensitive treatment due to the particular trauma and alienation that they may have suffered.<sup>58</sup> The law should provide for such special measures. The witness protection agency should have the authority to engage specialized personnel and establish specific procedures to deal with these vulnerable witnesses. Several United Nations documents could be useful to legislators and policy-makers in ensuring that the law reflects their needs.<sup>59</sup> Moreover, judges should regularly make use of special in-court protection measures to protect particularly vulnerable categories of witnesses, applying less restrictive criteria than in ordinary circumstances.

**C. Some key operational issues**

**(i) Funding**

63. The cost associated with setting up and operating a witness protection programme may be a deterrent to countries. Budgets differ from State to State,<sup>60</sup> depending on living costs, population size, crimes rates and other factors, and cost variations also result from several factors, including law enforcement activities, individual circumstances of the witness to be relocated, needs and safety of their family and close friends. However, cost must be weighed against benefits, which include combating impunity, strengthening rule of law and democracy, shorter investigation, more efficient prosecution, thus ensuring justice and integrity of the justice system. Even in absolute figures, witness protection is usually a small percentage of the total police or judicial budget in States where such programmes exist.

<sup>57</sup> UNODC Draft Model Law states as follows: “In implementing the Program, the Protection Authority may enter into agreements with individuals, the private sector, private institutions and non-governmental organizations to make use of their services.”

<sup>58</sup> For further information see Report of the Office of the High Commissioner for Human Rights to the Human Rights Council on the Right to the truth (A/HRC/12/19).

<sup>59</sup> OHCHR, Guidelines for Action on Children in the Criminal Justice System; Human Rights Council resolution 9/11-Right to the truth; Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, (A/HRC/10/16).

<sup>60</sup> For example, South Africa’s National Treasury allocated a fixed annual budget of 55 million rand (approx. US\$7.5 million) for the period 2006–2007 to the Witness Protection Programme. Source: UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crimes*, p. 52; also South Africa, National Prosecuting Authority, Witness Protection Programme Unit, Annual Report 2004–2005 (Pretoria).

64. Basic costing for a witness protection program includes one-time expenses to set up the programme, such as for equipment and premises, relocation costs, staff salaries and other remunerations and benefits, travel expenses, allowances for witnesses and psychological assessments and counselling. Adequate and regular funding should be provided by state budgets to ensure the programme's sustainability and the availability of resources for the duration of protection. In some cases, government budgets make fixed yearly allocations to their protection programmes. Special funds should be earmarked for emergency use, for example, an unforeseen increase in the number of witnesses entering the programme. At the regional level, the establishment of joint funds to help finance a witness protection programme and promote cross-broader cooperation could be considered.<sup>61</sup>

(ii) **Training capacity**

65. Although the witness protection mandate may be unified at the national level in one institution, many actors will continue to be involved in witness protection. Judges and prosecutors may not have adequate knowledge on how to handle vulnerable witnesses, or assistants (of judges and prosecutors) taking witnesses' initial statements may also lack basic training. The witness protection agency should create a strong training and capacity-building unit to keep its staff abreast of developments in the field, but also to train those persons who come into contact with vulnerable witnesses. Such training activities could gradually be integrated into the curricula of national judicial training institutions and involve, among others, Bar Associations.

## V. Conclusion and recommendations

66. **Witness protection should start long before a trial is conducted. In fact, measures taken during the first stages of investigation play a crucial role for the protection of witnesses. Failure to adopt effective measures to protect witnesses at the investigative stage and in prosecutorial arrangements, and thereby give them reason to trust that their safety will be ensured during the process, may result in many cases against perpetrators of human rights never reaching trial stage.**

67. **Traditionally, formal witness protection programmes have a mandate to ensure the preservation of evidence contained in witnesses' statements or anticipated testimonies and to offer protection in order to facilitate witness participation in judicial proceedings. In the specific context of trials for human rights violations, witness protection needs to be understood differently. First of all, witnesses to human rights violations are frequently victims of the crimes to which they testify, rather than co-perpetrators or former associates of the accused perpetrators. Secondly, human rights crimes are perpetrated by State actors or individuals associated with State or State-like powers. In some cases, individuals who subsequently occupy State positions, such as rebel leaders or their associates, are alleged perpetrators. They are individuals who are or have been in a position of power and can exert considerable influence. As such, the witnesses testifying against them are particularly vulnerable. States therefore have additional obligations towards victims and witnesses in such cases, and traditional witness protection programmes are usually not designed to meet those particular needs.**

68. **Considerable development of policy, legal and programming aspects of protection of witnesses, victims and other persons involved in criminal proceedings**

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<sup>61</sup> UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crimes*, pp. 50–51.

against organized crime has been noted. Indeed, practice at international tribunals has shed some light on the protection of witnesses, victims and others involved in trials for crimes related to gross violations of human rights and serious violations of international humanitarian law. However, there are few examples of witness protection programmes operating at the national level in respect of trials involving human rights violations.

69. States need to consider developing comprehensive witness protection programmes covering all types of crimes, including gross human rights violations and serious violations of international humanitarian law. Furthermore, witness protection in human rights trials requires some particular elements. In this regard, the development of a normative framework based on existing legal obligations aimed at enhancing common standards and best practices may be useful. The objective is to serve as guidance to States in protecting witnesses and others concerned with providing cooperation in trials for gross human rights violations and serious violations of international humanitarian law.

70. The protection of witnesses should be considered from the initial police investigation through to the actual trial. In this regard, capacity-building of police, prosecutor and judicial institutions is needed, and the integrity and public credibility of these institutions must be ensured. In short, a justice sector strategy must be developed, of which witness protection is an important part.

71. The effectiveness of witness protection methods should be ensured through the provision of adequate financial, technical and political support for programmes at the national level. The Human Rights Council can play an important role in conveying this message. The expertise of regional institutions should also be taken into consideration in finding ways of international collaboration.

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