# PROTECTION OF WITNESSES AND WHISTLE-BLOWERS: HOW TO ENCOURAGE PEOPLE TO COME FORWARD TO PROVIDE TESTIMONY AND IMPORTANT INFORMATION

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## I. INTRODUCTION

The issue of witness protection has been gaining attention by countries, not only as to how to better protect witness under threat but also how to better assist them during their contact with the criminal justice system. The reasons for the attention may be due both to the increase and globalization of crime which has the affect that countries are looking outward on what other countries are doing that might help them. Additionally, the issue is being raised due to the jurisprudence and practice of the international tribunals and courts[1] (as well as from international and regional human rights bodies. In this regard, justice systems, whether national or international, have in common the need to get people to come forward and provide information and testimony.

Prosecutors depend upon witnesses who are reliable - whose testimony can be accepted as truthful, accurate and complete. The recall of witnesses and their ability and willingness to relate relevant information may be affected by many factors, including age (such as for both child and elderly witnesses), intellectual or physical impairment, language, by their relation with the offender or involvement in the case or offence or due to trauma they have suffered as a victim. Depending upon the situation, we might be able to provide support to the persons to help them overcome their particular obstacle. These factors (recollection, ability and willingness) may also be adversely affected when witnesses are afraid that their cooperation (whether by making a statement to police or testifying in court) will cause the person (s) about whom they are providing information to retaliate and cause harm to them or those close to them (i.e. family members). In such circumstances, we might be able to provide some forms of protective measures that will alleviate their fears. Often both support and protective measures might need to be provided together. So the first point I would like to make is that it is not easy to talk about the issue of witness protection without also talking about assistance measures. They often go hand in hand – because for the most part their aim is to facilitate or enable witnesses to tell fully and truthfully what they know. Although I cannot cite any studies, the experience of practitioners suggests that support, assistance and protection measures yield positive results, instilling confidence in victims and witnesses to come forward and give information or testimony.[2] Moreover, for victims, being able to tell their story with dignity may help in them in their recovery process.

Therefore it is both good practice as well as common sense that criminal justice systems should provide assistance measures to victims and other witnesses in order to facilitate their ability to participate in the criminal justice system and to give the kind testimony that is required for the maintenance of the rule of law.

In recognition of the importance of the testimony of victims and witnesses in relation to organized crime and corruption, both the United Nations Convention against Corruption (UNCAC) and the earlier Convention against Transnational organized Crime (UNTOC) contain provisions regarding the protection of witnesses and victims. The Trafficking and Smuggling Protocols to the UNTOC also contain specific provisions on protection and assistance.

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

[2] UNODC, Good Practices, p. 27.

**A. UNTOC Article 24**

"Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them."

Article 24 notes further that measures envisioned above may include: measures for physical protection, for relocation and for non-disclosure or limitation on the disclosure of information concerning the identity or whereabouts of such person and providing evidentiary rules to permit witness testimony to be given in a manner that ensures their safety such as permitting the use of communications technology and video links.

**B. UNTOC Article 25**

"Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation…" and establish procedures to provide access to compensation and restitution for victims of offences covered by the Convention.

So who is a witness? There are different legal definitions but generally, a witness is a person who has given or who has agreed to give information or evidence or has agreed to participate in a matter relating to an investigation or the prosecution of an offence. For common law countries, with their emphasis on in-court testimony and confrontation, the essence of a witness is that they have or will give testimony. In many jurisdictions, experts can also be deemed witnesses and this would be consistent with the intent of the UNTOC and the UNCAC which specifically mentions experts [3] . Some protection laws also include court personnel (judges, prosecutors, court clerks), the media, and human rights defenders. These persons may come in contact with information about matters relating to the investigation or prosecution of offenses and therefore the state has an interest in affording them protection if needed.

**C. Victim and Witness Assistance**

"Assistance measures aim at supporting a witness to cope with the psychological and practical obstacles of testifying. As noted in the UNODC *Good Practices for the Protection of Witnesses*, recognizing the need to provide for the well-being of victim-witnesses and aware that the admission criteria of witness protection programmes are overly rigid, a number of countries have introduced special witness assistance or support schemes that are distinct from witness protection. Implemented in close cooperation with law enforcement, judiciary and immigration authorities and civil society, such schemes aim to create the conditions that would allow vulnerable witnesses not only to testify in physical security but to avoid revictimization as well.

There should also be services that are provided just to victims to help them in obtaining medical, social, and psychological service that may be provided by the state or by non-governmental organizations and service providers (these often have more financial resources or provide better services than government); and assistance in obtaining compensation and/or restitution where provided for.

1. Minimum Assistance Measures
   - Information about the rights of victims
   - Information about the roles of actors in the criminal justice system
   - A room where victims and other witnesses can wait before giving testimony so that they do not have to wait what can be hours in close proximity to the accused person and his family or friends to minimize any intimidation or threats
   - Provision of an advocate or person who can accompany a vulnerable witness or children when being questioned and also when testifying
   - Identification of other obstacles to participation in a criminal hearing or trial (such as transportation to the court or child care)

2. Procedural or In-Court Protections

"Procedural measures" are actions that can be requested by law enforcement, the prosecutor or the

[3] United Nations Convention against Corruption, Art. 32 1.

witness that can be taken by the court during testimony to ensure that witnesses may testify free of intimidation or fear for their life. Such measures may include:

- use of a witness pre-trial statement instead of in-court testimony;
- testimony via closed-circuit TV or video conferencing;
- voice and face distortion techniques;
- removal of the accused or the public from the courtroom (closed door session);
- withholding identity or anonymous testimony (usually for a certain period before the trial or hearing).[4]

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

- nature of the crime (sexual, family, organized, gang);
- type of victim (child, victim of sexual assault, an innocent by-stander of a co-defendant);
- relationship with the defendant (family member, no relationship, subordinate or gang member);
- any acts of threat or intimidation;
- degree of fear and stress of the witness;
- importance of the testimony.

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

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

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

*(iii)* *"Measures to limit the witnesses' exposure to the public and psychological stress."* such as by a change of the trial venue, removal of the public from the courtroom (hold the session "*in Camera*") and by having the presence of an accompanying person to provide support for the witness."[5]

These measures may be used alone or in combination for greater protection. It is important to keep in mind that however procedural measures are used, due consideration should be due consideration should be given to balancing the witness's legitimate expectation of physical safety against the defendant' rights to a fair trial.[6]

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

Videoconferencing refers to the real-time transmission of video (visual) and audio (sound) transmission between two locations. It allows the virtual presence of a person in the territory over which the state or entity has jurisdiction.[7] This technology allows for witnesses to testify from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location. In the courtroom setting, it means that a judge, the defendant, the defence counsel and the prosecutor can ask questions of the witness and see and hear the witness's answers and demeanour in *real time transmission*."[8] Videoconferencing equipment can permit the concurrent transmission of computer images, such as documents [and photos] so that video can be displayed on one screen and the computer data on another. In other words, a remote witness can be seen on a big screen while the document being discussed by he witness can be visible simultaneously also to the judge/jury on screen monitors.

Although the taking of remote testimony via videoconferencing is more often used in the context of mutual legal assistance between states, it is also increasingly used to take the testimony of protected

[4] UNODC, Good Practice for the Protection of Witnesses, New York, 2008, p. 5.
[5] UNODC, Good Practices for the Protection of Witnesses, p. 33.
[6] Ibid., p. 33.
[7] Mutual Legal Assistance in Criminal Matters Act, Canada, Article 22.1(1), R. S., 1985c.30 (4th Supp.).
[8] Fredric Lederer, *The legality and practicality of remote witness testimony,* p. 20.

witnesses. In this regard it can be used either to avoid direct contact between the witness and the defendant and hence has value for some vulnerable witnesses. It can be also used when the physical security of a witness at a particular court or jurisdiction cannot be adequately addressed.[9]

Video conferencing technology has advanced to allow for transmission with no interruption or delay and with excellent visual displays. It is deemed reliable and once up and running, relatively easy and cost effective to use. Moreover, the transmissions can be encrypted so as to prevent the identification of both locations of the videoconference.[10] Countries that use video-conferencing all report that the once the courts have some experience using the technology that they welcome it use as a cost and time saving measure. It is an investment that all major courts should make as it can be used also for the purpose of holding meetings between judges or prosecutors in other parts of the country or for training purposes.

In the majority of cases, witnesses do not face a life-threatening situation as a result of being a witness. Generally, they suffer fear of reprisal, verbal threats, intimidation, harassment, property damage and in some cases assault. An assessment should be done to determine what type of measures are required and can be provided.

3. Basic Protective Measures

Basic protective measures, which can be provided by the police or prosecutor, may include:

- applying for temporary restraining orders and asking to have the accused in custody;
- police transportation to and from court;
- enabling contact with authorities by providing a trusted contact point to call;
- providing temporarily a mobile phone or change of phone number,
- use of a safe house or facilitating temporary relocation with friends/family;
- close protection, regular patrolling around the witness's house;
- installation of security devices at the places of residence and work- doors, locks, alarms and video cameras;
- police monitoring of mail and telephone calls;
- provide counseling on methods to enhance one's own safety.

Provisions for 'safe custody' allow a court to order that a woman or child is put in a protective room, which could be a jail or a shelter. Children can be placed in safe custody if there is any reason to believe an offence may be committed against them until the alleged perpetrator's case is concluded. It has been noted that the use of safe custody provisions and consequent deprivation of liberty and restrictions on movement are gender neutral, but, in practice, the provisions have a disproportionate impact on women and girls, and those in poverty. The conditions in the homes/shelters/custody are often not good and there is no proper access to legal aid, and thus no access to legal redress. The Special Rapporteur on Violence Against Women has noted that imprisoning victims and/or witnesses is not only unjust, but puts them at great risk of custodial violence. If homes or shelters are to be used, having guidelines on how to run them are important.

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

It should be noted that protection of any form should never provide a motivation to testify but merely remove or counter the witness' view that he or she is in danger if he or she cooperates. Moreover, no person should ever be forced to accept protection measures. Consent should always be given by a witness.

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

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

As a practical matter, most protective measures will not work without a willing (consenting) witness.

In some cases, the threat to a witness will be too great to keep him/her safe by normal police measures. The goal of witness protection programmes is to ensure the safety of a small number of important witnesses before, during and after the trial and this will normally entail relocation and sometimes providing a different identity.

There are countries large enough geographically or in terms of population to relocate within national borders. Most are not or have the problem that due to very specific sub-cultures within regions, anyone from the outside is immediately recognized as not belonging which in turn, leads to people becoming curious. Therefore, for most countries, relocating to another country is the only solution which requires cross border cooperation Witness protection programmes are the subject matter of Part II of this paper.

## II. WITNESS PROTECTION PROGRAMMES

As mentioned in part I of the presentation, witness protection programmes (hereinafter referred to as a WPP) have been developed as a *tool of last resort* in order to protect witnesses whose lives are in danger due to their cooperation with the government. Normally, the type of witness protected by such programmes are collaborating or insider witnesses who are testifying against organized criminal groups that have the means to try to silence such witnesses and where normal protections provided by the police would be insufficient to protect them before, during and after their testimony is provided.

To fully understand how such programmes function as well as their benefits and limitations, we should look at the following issues:

- basic principles and elements of a WWP;
- institutional location of a WWP;
- admissibility criteria;
- why the programmes are mainly concerned with collaborating witnesses;
- rights and responsibilities of the protected person and of the WWP;
- relocation and change of identity and their implications for protected persons;
- international cooperation for relocation of witnesses;
- costs of running and financing of programmes;
- emerging issues for WPPs.

The UNODC *Good Practices for the Protection of Witnesses* manual defines a witness protection programme as: "A formally established covert program, subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities."[11]

Witness protection programmes have been defined by the Council of Europe as: "A standard or tailor-made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice."[12]

The primary objective of any witness protection programme is to safeguard witnesses in cases of serious threat which cannot be addressed by other protection measures in cases of special importance where the evidence to be provided by the witnesses cannot be obtained by other means.

The objectives can be broken down to the following elements:

- to protect persons;
- serious cases of importance to the state
- evidence/information is crucial

[11] UNODC Witness Protection Good Practices manual, p. 5.

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

- only this witness can provide the information/testimony that is required
- witness under serious threat to be in such a programme
- witness is suitable
- last resort – meaning that there are no viable alternatives for keeping the witness safe.

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

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

At minimum, legislation should include:
1. That the programme is voluntary;
2. Application and admission criteria and procedures (which may set out duties of other authorities, such as the prosecuting authority);
3. The authority responsible for the programme's implementation;
4. The rights and obligations of the parties;
5. Types of protection measures that may be used;
6. Criteria upon which a witness may be terminated from the programme;
7. That the programme's operations are confidential and provide for penalties for the disclosure of information about protection arrangements or about the identity or location of protected witnesses;
8. Allow for international cooperation;
9. Report yearly on their work and effectiveness.

**A. Operating Principles**

Witness protection programmes are covert units meaning all information about witnesses and the operational actions taken by the programme must be kept confidential. This will also mean that they need to have their own databases for storing information that can not be accessed by other law enforcement personnel. A WPP will a accounting mechanism that is transparent but that also can maintain the confidentiality of its witnesses. Anything spent on the witness (such as plane tickets) may reveal the witness' true identity or location. Therefore, in order to maintain confidentiality, witness protection programs usually require special procedures for auditing and reporting.

Vetting of staff is also mandatory because the greatest risk of compromise to a programme is the human element. Therefore all staff, including administrative personnel, must be vetted to ensure the highest possible level of security.

**B. Location of the Programme**

Witness protection programmes can be institutionalized in different ways. "For some countries, the police force is the programme's natural environment, as out-of-court protection of witnesses is seen primarily as a police function. For others, separating protection from the investigation is of higher value in order to ensure objectivity and minimize the risk that admission to the programme unwittingly may become an incentive for witnesses to give false testimony that they believe the police or prosecution wants or needs."[13] Where a programme is located within the police force, " the isolation and autonomy (organizational, administrative and operational) of the covert unit responsible for the implementation of

[13] *Good Practices,* p. 45

the programme from the rest of the police force is of great importance."[14] This is not just to just maintain independence from the investigating functions of the police but also to safeguard the integrity of the programme. Police are naturally inquisitive and officials outside the programme may try to seek information which could jeopardize a witness' security or the integrity of the programme. Countries where witness protection is led by the police include, Australia, Canada, Hong Kong Special Administrative Region of China, New Zealand, Norway, Slovakia, and the United Kingdom.

In other countries, programmes are separated organizationally from the police and sit under the equivalent of the Ministry of Justice, the Ministry of the Interior or the State Prosecutor. Examples of countries where the WPP falls under the Ministry of Justice or the prosecuting authority are: Bulgaria, Columbia, the Netherlands, the Philippines, Slovenia, South Africa and the United States.

"In a third group of countries, programmes may fall under the Ministry of Justice and implemented by a multidisciplinary body consisting of high-level representatives of the law enforcement, prosecutorial, judicial and government authorities and sometimes from civil society. That body takes decisions on such matters as admission to the programme and termination. It may also exercise some oversight over implementation of the programme and make budgetary submission to the Government." Italy and Serbia both have this model.[15]

In 2010, the Government of Kenya amended its Witness Protection Bill of 2006[16] and created an independent witness protection agency with a "Advisory Board". The Board consists of the Minister of Justice, the Minister of Finance, the National Security Services, the Commissioner of Police, the Commissioner of Prisons, the Director of Public Prosecutions and the Chairperson of the Kenyan National Commission on Human Rights. The principle function of the Board shall be to advise the Agency generally on the exercise of its powers and the performance of its functions under the Act, particularly as to the formulation of witness protection policies, general administrative oversight, approve budgetary submissions and other functions as may be required under the Act or other law.[17]

**C. Different Parts/Units dealing with Victims and Other Witnesses**

Within these categories, witness protection programmes can further organize themselves to have one sub-unit dealing with victims and another dealing with collaborators of justice (former criminal associates). They may also divide themselves into divisions according to responsibilities, such as for administration, operations, logistics, etc…

In sum, the location of the programme is not important as long as it meets with the principles of:

- separation from investigative agencies;
- operational autonomy from the police;
- confidentiality of operations.[18]

Operational independence is important to avoid conflict of interest with investigating authorities because we always need to keep in mind that the credibility of the witness (to the judge or jury) can be negatively impacted by perception of conflict of interest.

**D. Criteria Necessary for Admission to a Programme**

A request to be admitted to a protection programme can be made, depending upon the jurisdiction, by the witness, a law enforcement agency, a prosecutor or a judge. There should be standard procedures for the information required when making a request. Then the request would generally be forwarded to the decision-making authority with a recommendation on whether or not the request should be accepted. This process ensures that sponsorship from non-prosecution sources includes a knowledgeable analysis of the potential value to the prosecutor of the admissible evidence elicited from the proposed programme

[14] Ibid.
[15] *Good Practices,* p. 46.
[16] UNODC supported the Department of Public Prosecution in the drafting of the amendments.
[17] Kenyan Witness Protection Act Amendment Bill, 2010, Part I B, 3Q (1).
[18] *Good Practices,* p. 46.

candidate. Upon getting a referral request for protection, the witness protection programme or the protection authority (which might be within the MOJ or might be a commission) will conduct an assessment that will look at the following elements:

- Importance of the case;
- Value of testimony – is the testimony important and could it be obtained in another way or from another person;
- Threat and Risk Assessment - the level of the threat and risk it can be carried out;
- psycho-social assessment - the personality and psychological fitness of the person to adjust to and follow the stressful rules of the programme;
- The family situation of the person, such as, number of family members that would need to be included, their ages, any medical issues or special needs, their criminal records, etc.;
- The danger that the person may pose to the public if relocated under a new identity (typically applies to justice collaborators).

As noted in the *Good Practices* manual, "A distinction between "threat" and "risk" should be made. A threat assessment looks at whether the life of the witness is in serious danger, and should address issues such as:

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

A risk assessment examines the chances of the threat materializing and assesses how it can be mitigated. The assessment is conducted according to set standards and using a matrix. Action is taken to reduce the probability of the threat being carried out, for example by using unmarked cars to transport witnesses, resettling witnesses temporarily or providing them with new identities. The assessment is conducted by the witness protection unit and is a key factor in providing tailor-made protection to suit the needs of the witnesses."[19]

**E. Cooperating Witnesses**

Why is a WPP is generally used to protect witnesses who are insiders – criminal associates who become cooperating witnesses (also called justice collaborators, state witnesses, supergrasses and pentiti (Italian for "those who have repented")?[20] This can be answered by looking at why prosecutors need them. As a result of their membership/association, these witnesses can provide crucial information/evidence about those that are more important (hence more culpable) in the organization. which can not be obtained by usual law enforcement measures (surveillance, wire-taps, informants, etc.).

What is their motivation to cooperate? These are people used to looking out for themselves and will not help the government out of good citizenship. It could be for personal reasons, such as betrayal or revenge or resentment, etc. More often, they are facing serious criminal charges themselves. If they agree to cooperate with the prosecution by providing information, they want something in exchange, such as a reduction in sentence and protection for themselves or loved ones while and/or after serving a prison term.

In some cases, they can be offered immunity from prosecution. Immunity from prosecution can be granted in exchange for testimony about a certain event. There are two kind of immunity. Use Immunity prevents the prosecution only from using the witness's own testimony or any evidence derived from the testimony against the witness. It allows the government to prosecute the witness using evidence obtained independently of the witness's immunized testimony. The government should be required to provide that the evidence is bases upon an independent and legitimate source from the immunized testimony.

Transactional (or total or blanket) immunity completely protects the witness from future prosecution for crimes related to his or her testimony. For example, if the witness testified about participating in a drug sale,

[19] *Good Practices,* p. 52.
[20] Ibid, p. 19.

he/she could not thereafter be charged for a crime that stemmed from her immunized testimony. This kind of immunity is very rare.

Due to the ethical concerns over grants of immunity, some countries provide that the "benefit" to collaborators is not complete immunity for their involvement in criminal activities but rather a sentence reduction that may be granted only at the end of their full cooperation in the trial process. "Legislation and policy in a number of countries clearly separate admission to a witness protection programme from any benefits that participants may be granted by the prosecution or court with respect to past criminal behavior, and they provide that justice collaborators must serve some prison time for their crimes." [21] In these cases they must enter a plea of guilty before they testify to the information provided to the Government and the prosecutor can recommend to the judge a reduction in sentence, which the judge may or may not follow. The plea agreement will require that the witness testify fully and truthfully. Otherwise, any promises by the government can be withdrawn.

It is interesting to note that in the United States, over 90% of witnesses in their witness security programme remain in custody serving long sentences. As a result, the WPP operates in cooperation with the Bureau of Prisons to protect the programme's witnesses.

The rights and obligations of the witness and of the WPP should be set out in a memorandum of understanding. For the witness, obligations normally include:

1. Provide truthful and complete testimony;
2. To comply with the protection authorities' instructions and not to compromise any assistance provided or the confidentiality of the programme;
3. Not commit criminal offenses;
4. Disclose all information about past criminal history;
5. Disclose assets and all financial and legal obligations;
6. Fulfill any legal obligations to third parties prior to entering the programme. Recurring financial obligations can continue to be fulfilled following admission the programme through an intermediary, usually the protection programme.

For the WPP obligations normally include:

1. Carry out all necessary protection measures;
2. Arrange all matters related to relocation;
3. Provide financial support (issue of duration);
4. Provide initial assistance with job training and finding employment;
5. Provide counseling and other social services, including education or language training.

The issue of financial support varies between countries in terms of duration and how it is calculated. Most collaborating witnesses have no legitimate source of income even though they might have money and assets. Some programmes will forfeit all assets that can not be shown to have been legally obtained. So the problem is do you finance them in the lifestyle to which they have lived or if it is illegitimate income, provide them subsistence support. There is also the question of the duration of financial support. A protected witness should not be made better off by being in a programme. The danger with putting a protected witness is a worse financial situation is that they might return to criminal activity. Therefore, the aim of most WPPs is to enable to witness to become self sufficient as soon as possible.

**F. Inter-agency Cooperation**

One of the hardest parts of beginning a WPP is getting cooperation from other agencies upon which it depends for looking after the needs of its witnesses, while maintaining confidentiality. As noted, the WPP will become the intermediary for many aspects of a protected witness' life. Also, change of identity, (whether it is the provision of a new identity or the permanent change of the existing identity) will require documents and the cooperation of other agencies. This cooperation can be attained through memorandums of understanding at the Ministry level or between the WPP with the concerned agency and will require the building of trust and understanding.

[21] *Good Practices,* p. 20.

**G. Relocation and Identity Change - Implications for Witnesses and Family Members**

Some countries with large populations (like the United States and Italy) and/or large geographic territory (like Canada and the United States) can relocate within their territories. Most countries do not have this option and for them relocation (with or without identity change) means sending their protected witness to another country. This has profound a impact on the lives of such witnesses as it means severing all ties to the past and leaving behind family and friends and anything else that might identify or be raced back to the witness. Relocation is especially hard for family members and can result in depression as well as other psychological disorders. Moreover, if the security of a witness is even accidentally compromised, he/she and any family members will have to be relocated and begin again the process of adjustment and reintegration.

So it is the impact on the lives of the protected persons as well as the financial expense of the programmes that makes a WPP a tool of last resort.

Successful relocation will depend upon a number of factors, including:

- Ethnic and cultural background
- Language
- Living standards
- Physical well-being
- Presence of a support system
- Ability to become self-sufficient.

When we speak of relocation to another country we mean with the knowledge and consent of the receiving country. Further we mean that the WPP of the receiving country will take responsibility for protecting the witness from the sending country. How do countries legally establish such cooperation? The most common method, as with other forms of law enforcement cooperation is through agreements either between authorizing agencies (Ministry to Ministry) or directly between witness protection authorities. It can also be done through regional or multi-lateral treaties. The Baltic countries of Estonia, Latvia and Lithuania entered into a tri-lateral treaty for cooperation in witness protection. However, the treaty route is a long and cumbersome process and not recommended. The United Nations Convention against Transnational Organized Crime was used by Slovenia as a legal basis for relocation cooperation while it was amending its protection law to add a provision that gave the protection authority the ability to directly engage in such cooperation.

**H. Obligations for Sending and Receiving Countries**

- Contacts between authorized agencies should respect principles of confidentiality.
- Disclosure of all information, including criminal record, threat level, status and needs of the witnesses; number of persons to be relocated with the witness, the witness' financial status;
- Compliance with immigration laws;
- Agreement as to who covers the financial support and other costs of maintaining the witness;
- Understanding of how the witness will be integrated into the new environment.

The most important element in international cooperation is trust between the protection authorities and understanding of how each conducts its business. In this regard, one of the most useful ways to build trust for new programmes is by forging regional or sub-regional networks. In Europe for example, there is a network of European protection programmes overseen by Europol, the European Police Agency. There is also a sub-European network of countries that cooperate frequently. They have allowed other countries with new programmes who are not yet European Union members to join the network as observers. At least one of these countries reports that this experience was very beneficial for its development. The United States Marshall's Service holds a yearly meeting in different regions of the world for any witness protection authority.

**I. Staffing of a WPP**

A witness protection handler is part physical protector and part social work/psychologist. Witness protection is largely a police type function with a twist. Instead of being in the role of investigator/hunter, the protection case agent or handler must protected persons are manipulative serious criminals. Some

of the persons are sociopaths who will have not much else to do but to manipulate the system in order to get as much as they can out of the programme. In addition to case agents, a WPP needs persons trained in conducting threat assessments as well as persons who can do psycho-social assessments to determine suitability to enter a programme. It may also need people who can made new identity documents.

**J. Financial Costs of a Programme**

As we have seen a WWP needs specialized personnel and this includes the necessity for specialized training. It will also require a covert location and equipment to ensure that it can operate in a covert manner.

A good witness protection law is of little use if there is not funding for the programme to effectively perform its duties. The greatest cost involves relocation. It is said that a programme should have funding to financially support each witness for five years. Each family member of the witness raises the cost. So countries with large extended families will find it more expensive than others. Clearly costs will vary with the standard of living and inflation of countries. A safe rule is to have a reserve fund that can be tapped in addition to the yearly budget as unexpected issues are likely to arise. Some countries use confiscated funds to fund their WPPs. This is fine to supplement programmes but since the amount confiscated in any year can not be predicted, it is not a good idea to solely rely on confiscated assets to fund protection programmes. An example of costs in Serbia are as follows: [22]

**Total costs of witness relocation in Serbia for 1 person per month =1000 EUR (in inner Serbia) to 1500EUR (in Belgrade)**

1. A Apartment rent (furnished, 60m2): 150 – 400 EUR / month
2. Utilities: 100 EUR / month
3. Living costs: 350-500 EUR / month
4. Health services: 1000 EUR per year
5. Language course: 50-150 EUR
6. Computer course: 200-330 EUR
7. Other miscellaneous expenses: 1000 EUR per year
8. Apartment rent (furnished, 60m2): 150 – 400 EUR / month

- Other costs increase depending on the children's age

**Total costs for a 4 person family per month can range from 1500-2200 EUR.**

**K. Concluding Thoughts**

Even with the most limited of resources most countries can do a lot better about making witnesses feel like cooperating by taking the minimal steps to appear to be interested in their needs and welfare. Begin with implementing what your law already allows, such as police and procedural protective measures. These measures when used effectively by trained personnel can provide adequate protection for the vast majority of witnesses in need, keeping in mind that protection measures are just one of other important tools and procedures that should be collectively applied. Doing the above requires special training, for law enforcement personal, prosecutors, and judges, at minimum. Training should also consider the special needs of women and children. There are many good practices and knowledge to be shared along with already developed training so don't invent the wheel, seek support. UNODC and other organizations can provide tools, training, and can point you in the right direction by providing advice on getting what you need. Many basic measures are not costly or require much in the way of additional staff. Waiting rooms and the use of simple barriers as shields in court should not be hard to implement.

If the legal framework is outdated or does not allow for needed measures, establish an interagency task force that can educate itself on what is wrong and/or could be improved. The task force should embrace officials of relevant law enforcement and Judicial bodies, other relevant agencies (immigration) and policy makers and could also include NGOs, academic institutions or other civil society institutions in order that they will understand and support any required changes. Organizations like UNODC will likely to be happy to facilitate such a working group.

[22] This is informal information provided by an official of the Serbian Ministry of Interior at a conference.

1. Recommendations for those Countries considering Establishment of a WWP

WPPs need a legislative basis and then to begin modestly. One of the most common mistakes is to try to protect to many witnesses at the beginning. A few witnesses will allow the programme to gain experience and confidence. Take serious the need to prioritize the kind of cases the protection programme will be used for as well as to properly conduct and use threat assessments. The safety of the witnesses goes hand in hand with the integrity of the programme.

2. In Summary

1) Have a legal basis and develop legislation in consultation with all agencies that will need to be involved to gain early buy-in and understanding;
2) Ensure that there will be funding to begin the programme and that the funding will allow the programme to grow and make mistakes;
3) Begin modestly to develop experience;
4) Prioritize cases;
5) Seek help and training from other WPP. There is no reason to make the same mistakes and you can begin to build up cooperation and trust;
6) If there is no network in your region, start one. UODC will be happy to support such a network;
7) Within the network, look at whether some agreed minimum standards (such as defining living standards and benefits to be received by witnesses) would be useful or look at ways to simplify and expedite procedures

## III. WHISTLE-BLOWER PROTECTION

### A. Who is a Whistle-blower and what do we mean by Whistle-blower Protection?

Now I will look at corruption and the different kind of protective measures that can be provided to the so-called whistle-blower. Often people will talk about witness protection and whistle-blower protection as if they are the same thing. They are different ways of handling a similar need: which is to encourage people to come forward with information about matters that may violate laws or pose a threat to the public health and safety by decreasing the possible obstacles or liabilities that coming forward may have. However, when we refer to whistle-blowers and whistle-blower protection, we are addressing the issue of corruption and fraud in all its many forms. So to understand how whistle-blower protection is different from witness protection, we need to understand whistle-blowing.

First, it is helpful to note that organized crime and corruption/fraud have some common element. Both are generally motivated by some economic or material benefit or gain. The other thing they have in common is that they both thrive in secrecy. Penetrating organized crime requires informants, undercover law enforcement agents and insiders who decide to cooperate with authorities.

Corruption and fraud also operate in a kind of secrecy which can be due to the limited number of people with access to information about the conduct. Whenever a risk arises that the activities of an organization (public or private) have gone wrong, it is usually the people working for the organization who first know about it. While employees are the people best placed to raise concerns and so enable the risk to be removed, stopped or replaced, they also often have the most to lose. Professor Pamela Bucy, of the University of Alabama, makes the compelling point in, *Information as a Commodity in the Regulatory World* that:

"What has changed in recent years is the nature of the wrongdoing the regulatory world seeks to control. Because of the information revolution created by computerization and the interconnectedness resulting from globalization, massive fraud, and corruption and graft of every kind are easier to commit and harder, if not impossible, to detect. More ominously, the impact of such wrongdoing is more pervasive and more cataclysmic than ever before. In short, the stakes are higher.

This new world requires a more effective regulatory response. An indispensable component of such a response is information from knowledgeable persons about the wrongdoing committed by others for economic gain. Without such information, public regulation is doomed to too little, too late, and too expensive in public resources."

Corruption and fraud, both public and private, committed in one country can and more often do have an adverse affect in another country. Due to its transnational nexus, there is the need to combat it across borders. All international and regional anti-corruption conventions/instruments provide provisions for the protection to whistle-blowers and witnesses.

One of the main international corruption instruments with whistle-blower provisions is the UN Convention against Corruption (UNCAC). It, however, does not define the concept of a whistle-blower. Instead it refers to "any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention."[23]

In fact there is no agreed definition as there is a variety of laws and with some very different means. But some common elements are that whistle-blower is

- a person with privileged access to data or information;
- the disclosure is made to an internal entity or to external entities, such as regulatory bodies, ombudsmen, anti-corruption entities, law enforcement agencies or the media;
- with the purpose of evaluating/assessing the risk, threat, conduct so that it can be removed, stopped or reduced.[24]

A person may "blow the whistle" internally within the organization, to an external entity such as a regulatory body, ombudsmen, or anti-corruption entity; to law enforcement or to the media. Depending upon the information provided, the entity to which they report, the nature of the problem, the whistle-blower may be just someone who like an informant gives information without having his or her identity disclosed. However, unlike an informant, most whistle-blowers are persons who disclose not for any private benefit but in order to benefit the larger community. In many cases, whistle-blowers receive no benefits for their disclosure. However, some anti-corruption laws do provide rewards for those that disclose wrongdoing, mainly for fraud and corruption. A whistle-blower can also become a witness.

**B. What kind of Protection do Whistle-blowers need? What is the Problem?**

Whistle-blowers can be subjected to informal discrimination or harassment or ostracized by peers and management. They can be demoted or moved to less desirable locations, lose jobs, or face discrimination by future employers. It also can be illegal to disclose the information about the conduct, especially if blowing a whistle would require the disclosure of information classified under national security laws and would be a illegal to reveal. Thus whistle-blowers can be charged with crimes or with violating employment agreements for divulging information, or public laws which might make the information they disclose a crime. In some cases they may face threats and physical danger. In such cases, they may be eligible for admission to a witness protection programme.

**C. What kind of Protections can Whistle-blowers be provided?**

1. Anonymity

Some whistle-blower laws provide for the protection of the identity of the whistle-blower. This is important in cases where the employee feels that there will be retaliation if they disclose information. The New Zealand Public Disclosure Act requires who receive protected disclosures use their best efforts not to disclose identifying information unless it is "essential to the effective investigation, essential to prevent risk to public health or public safetly, or it is essential having regard to the principles of national justice. However, confidentiality may provide a false sense of security since there is likely only a small number of people in an organization who would be aware of the disclosed wrongdoings so it would not be difficult to identify them. Often protections apply to individuals who identify themselves as part of their disclosure.

Anonymity may be useful in jurisdictions where the legal system is not strong or there are concerns

[23] Other significant international instruments are: the Organization for Economic Co-Operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (1999); Council of Europe Criminal Law Convention(1998) - Article 22-protection for those who report criminal offences and witnesses; and the Inter American Convention Against Corruption(1996) - Article III, Sec.8-protection of public servants and private citizens who report corruption.

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

about physical harm or social ostricization.

2. Employment Status Protections

The most important protections that whistle-blower laws can provide is prohibit discrimination and ensure that any harms to the employment status of the person are remedied immediately. The definitions should be broad enough to catch any possible retaliation.

The South African Protected Disclosures Act Section 1(VI) sets out an extensive list of harms that are prohibited:

(a) being subjected to any disciplinary action;
(b) being dismissed, suspended, demoted, harassed or intimidated;
(c) being transferred against his or her will;
(d) being refused transfer or promotion;
(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
(f) being refused a reference or being provided with an adverse reference, from his or her employer;
(g) being denied appointment to any employment, profession or office;
(h) being threatened with any of the actions referred to in paragraphs (a) to (g) above; or
(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;

An important issue is the burden of proof. The question is whether the employee is required to make the often very difficult showing (with little chance of getting evidence) that the dismissal was a result of making the disclosure, or placing the burden on the organization to show that the decision is legally justified and not based on their whistle-blowing.

In South Africa, a dismissal following a disclosure is deemed to be an "automatically unfair dismissal".

In the United States, the agency has the burden to show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure".

In the United Kingdom, the burden of proof depends on the length of employment of the employee. If they have been an employee for more than one year, than the employer must prove the dismissal had nothing to do with the disclosure; if they have been employed less than one year, the employee must prove that it did.

3. Compensation & Rewards

Compensation can be provided for real and emotional harm. Most whistle-blowing laws provide for compensation to the whistle-blower in cases where they have suffered harms that cannot be remedied by injunction. This includes lost salary but can also include money for suffering. Often, the laws use discrimination statutes to determine harm from harassment.

Some anti-corruption laws also allow for rewards for disclosing fraud and corruption. In Korea, those who discriminate against whistle-blowers are punished. And a financial reward is given if the disclosure of corruption leads to increase in revenue or prevents loss in a public organization. The amount ranges from 4% to 20% of the amount of money increased, recovered or saved.

The Kenya Revenue Authority rewards persons who blow the whistle on those evading tax with the reward being a certain percentage of the amount recovered as tax.

4. A Concluding Thought

This presentation has looked at different forms and mechanisms of the protection of persons who provide information, either for ongoing investigations, prosecutions or to report public or private wrongdoing. I

would like to conclude with a passage, entitled "*Why Information Matters*" taken from an article titled, *Rewarding whistleblowers as good citizens, Response to the Home Office consultation*, by Public Concern at Work, a UK based organization:

"For any law to be enforced, the courts or state need information about its breach. It is safe to assume that those people who are victims of a breach will have good reason to report the matter or pursue a private claim for compensation. The difficulty of relying on this route is that it can only be taken after the event when damage has been done. Another way that laws are enforced is by the authorities obtaining information from perpetrators who have been or believe they are soon to be caught and who, in exchange for the evidence that secures the conviction of their collaborators, are offered immunity or reduced sentences.

A third way is to enable, reassure and encourage those people who are neither victims nor perpetrators but who witness wrongdoing that they can or should challenge it themselves or report it to the authorities. Such conduct is part of the fabric of most communities and of most successful societies. It is often viewed as part of one's human obligations and, ethically, it is based on the maxim of *do unto others as you would be done by*. However, where a state seeks to harness and govern this ethic to strengthen its own power at the expense of that of the society – as most tyrannies and totalitarian regimes have by encouraging anonymous informing direct to the authorities – it invariably leads to the destruction of the society and subsequently of the state.

In most cases, the police are able to enforce the law and clear up crime only with information from victims, from perpetrators and/or from witnesses or good citizens. As to this last group, the criminal courts have long had a power to give rewards to good citizens who openly help stop, detect or prove a crime, but this operates as an expression of gratitude for - rather than an inducement to - such conduct. More recently in the UK, Crimestoppers was established to offer a convenient, anonymous route for witnesses/good citizens to tip off the police about crimes. While it advertises rewards of up to £1000 for successful tip-offs, only 4% of those eligible claim theirs."

Crimestoppers was established in 1985, by businessman Michael Ashcroft who, as a result of the murder of a Police Constable, suggested to the Metropolitan Police Commissioner that he could offer money for a reward for anybody coming forward with information. It was believed that many people knew who had committed the crime but were afraid to speak up.

From this event the idea grew into the concept of the partnership of business, the media and the police running an organization whereby people with information about crimes and criminals could pass that information to the police safely.

Crimestoppers' success depends on being seen by the public, communities, partners and all donors to be independent. This means that all publicity material, commentary and presentation show them as independent from the police and importantly, that nobody can make them reveal the identity of a caller.

In 23 years, Crimestoppers has never given the police the details of a caller in spite of being under great pressure at times to do so; this position is respected by senior police officers who recognize the long term damage that could be done by "breaking" anonymity.

Crimestoppers has grown internationally and is seeks to share their experience with others.

UNODC supports Crimestoppers as a good example of public private partnership against crime and as yet another means of enabling the public to share important information with government authorities by guaranteeing anonymity or in some cases to give rewards for crimes that have already taken place.