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WITNESS PROTECTION IN COUNTRIES EMERGING FROM CONFLICT

INPROL Consolidated Response (07-008)

With contributions from Angela Krueger, Christina Storm, J. O'Neil G. Pouliot, Claudia Baroni, Francis Bremson, Ilias Chatzis, Melinda Lord, Vivienne O'Connor, Charles Briefel, David Kerem, Mark LaLonde, and Michael Hartmann.



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The full text of the responses provided by these INPROL members can be found at <http://www.inprol.org/node/2376>. INPROL invites further comment by members.

Note: All opinions stated in this consolidated response have been made in a personal capacity and do not necessarily reflect the views of particular organizations. INPROL does not explicitly advocate policies.



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WITNESS PROTECTION IN COUNTRIES EMERGING FROM CONFLICT

Background:

Victim and witness cooperation is essential to ensure fair and successful prosecutions, yet often in post-conflict situations, individuals do not want to cooperate out of fear. Providing witness protection is therefore both an expedient for law enforcement as well as a fundamental legal obligation. This poses a significant challenge in countries emerging from conflict where the impunity of powerful perpetrators of politically or ethnically motivated crimes has not been effectively confronted. Investigators and prosecutors who are biased in favor of one of the parties to the conflict, or involved with criminal-political power structures, may also jeopardize the safety of witnesses. While the need to investigate and prosecute serious crimes will arise at an early stage, it can take years to enact legislation to establish effective mechanisms to protect witnesses, including building the capacity and ensuring the integrity of those who implement these mechanisms.

Query:

What short-term strategies and immediate measures can be taken to protect witnesses in criminal trials, as an alternative or complementary to a long-term legislative solution? What other longer-term measures can be employed to protect witnesses?

Response Summary:

In many countries emerging from conflict, the prosecution of serious criminal activity is severely hampered by the reluctance of witnesses to testify at trial because of threats to their lives or those of their families by alleged criminal perpetrators or those acting on their behalf. This includes witnesses' self-imposed censorship due to a fear that they will put their lives, or at least livelihood and social standing at risk, even if there are no explicit threats. Moreover, instead of coercion, the accused perpetrator may offer implicit or explicit favors to the witnesses, ranging from cash payments to promises of future positions or promotions. The need to encourage witnesses to come forward and give testimony exists at each stage, from the initial police investigation through the formal civil law investigation by the judge or investigative prosecutor, to the trial itself.

Even if there is complete protection and encouragement of witness testimony, there is also a need for simultaneous capacity building of police, prosecutor and judicial functionality, integrity and public credibility, along with access and outreach to the citizenry and the development of a functioning defense bar. In most countries emerging from conflict, this requires strong anti-corruption strategies side-by-side with effective strategies to address organized crime and terrorism. There must be, in short, an integrated justice sector strategy, of which witness protection is one important part.

The need to protect witnesses is increasingly recognized in international conventions, as discussed further below. However, these assume that resources and institutional

capacity are sufficient to implement witness protection programs, which is not likely to be the case in a society struggling to escape from vicious internal conflict.

Steps that can be taken to improve the protection of witnesses include:

- vetting;
- monitoring and making accountable police, prosecutors and judges and facilitating training and material assistance, to promote impartial involvement in the investigation;
- prosecution and adjudication of crimes;
- rebuilding police stations, prisons and courthouses to separate witnesses from accused persons, and
- strengthening legislative and executive capacity to enact appropriate protection measures through legislation, regulations, SOPs or guidelines/protocols.

Short-term Measures to Protect Witnesses

Investigators and prosecutors must carefully consider which witnesses need protection. This will depend on the level of risk that they face before, during and after the trial.

(a) Who to protect: Witnesses in serious criminal cases may include victims and bystanders, as well as individuals who have been involved in criminal activity but who are cooperating with police or who have received immunity from prosecution or a mitigation of sentence in return for their testimony. All of these types of witnesses may require witness protection, which includes legislative and regulatory measures to protect revelation of identity, as well as funded programs to temporarily or permanently safely house them. Their family members may also require protection.

(b) When to protect: Police resources are finite and can only be made available to protect witnesses who are at serious risk of intimidation or harm. In each case, it will be a matter of professional judgment on the part of investigators and prosecutors as to whether witness protection effectively manages the risk, taking into account factors such as:

- the nature of the alleged crime (Is it serious enough to warrant protection?)
- the nature of the threat (Has an overt and credible threat already been made against the victim?)
- the relationship between the witness and alleged perpetrator (Is there a relationship that gives the alleged perpetrator access to the witness? Does the alleged perpetrator have access to the witness through associates or through other suspects who have not yet been apprehended?)
- the status of the alleged perpetrator (Has the alleged perpetrator been released on bail?)
- the criminal record of the alleged perpetrator (Does he/she have a history of violence or reprisals?)
- the importance of the testimony to be given by the witness (Does it implicate an individual or a larger organized group? How important is the evidence to the

overall success of the trial? Is the testimony credible? Can the same evidence be presented by another means or another witness? Has the witness agreed in writing to testify at the trial?)

- the psychological state of the witness (Is he/she likely to be intimidated into refusing to testify? Does he/she have problems with drug abuse, alcoholism, mental disorders, or an inability to appreciate the need for security? Was the witness involved in the crime and also at risk of flight?)
- the period in which the witness is likely to be at risk (How long might the risk continue after the trial?)

(c) How to protect: There are several measures that can be undertaken expeditiously to improve witness security.

- **Policing Strategies** Police officers can be trained to adopt pre-emptive strategies at the investigation stage that reduce the likelihood of witness intimidation. These include:
 - (i) standard investigation procedures that protect the identity of potential witnesses. This would include a policy not to broadcast witness particulars over police radio when officers are dispatched to an investigation; handing out business cards to potential witnesses at the crime scene (rather than conducting on-site interviews, unless that is absolutely necessary); and interviewing witnesses later at a location other than their home or the police station;
 - (ii) deployment of police officers of appropriate ethnicities to serve ethnic communities and to strengthen ties with leaders who may have influence over community members disposed to violence; and
 - (iii) greater emphasis on investigation of reports of witness intimidation. This would also engender trust in the police and encourage reporting of other crimes.
- **Close Protection** Once a witness has been identified as being at risk, he/she can be placed under close protection. This may be provided by police or military units and may involve around-the-clock physical protection of the witness and his/her family members. It may also include placing the witness in a safe house or other secure location or transporting the witness to another city to minimize risk before and during the trial.

The composition and level of training of a close protection team will vary according to the nature and level of the threat. The team may include members who are responsible for surveillance and security of static locations, such as courthouses and residences, and those responsible for securing the safety of vehicles, communication and other infrastructure. Teams must be tailored to the specific requirements of the mission area. For example, while police may be suited to a relatively urban area such as Kosovo, personnel with military experience may be better suited to working in rural areas of Afghanistan. Team members can be seconded from donor governments, raised from international forces in the mission or contracted from private security companies.

Close protection does not generally require legislative amendments, although it will usually require standard operating procedures so that the police or military unit can quickly determine the level of threat and coordinate the protection operation. A police force may opt to establish a separate witness protection unit if many witnesses are likely to be at risk. In 2001, a Witness Protection Unit was established in Kosovo under the authority of the UN Mission in Kosovo (UNMIK) Police Commander.

- **Change of Infrastructure** Donor assistance can be sought to bring about relatively simple enhancements to infrastructure that offer better protection to witnesses. For example, pre-fabricated containers can be used at police stations and courthouses to create separate waiting and interview facilities to ensure that witnesses do not come into contact unnecessarily with the alleged perpetrator before and during the trial. More complex infrastructural changes, such as creating separate entrances to buildings or even building new facilities, may only be realistic over the longer-term.
- **Trial Observation** Another method of protecting witnesses is observation of the trial by independent monitors. This only offers limited protection as a monitor can merely report to local and international authorities and the media on the conduct of the trial, including any threats or intimidation but cannot actually secure the physical safety of witnesses. Effective observation may be enough in some circumstances to deter threatening behavior. If a judge is aware that a trial is being monitored, he/she may also refrain from unnecessary delays or continuances that require the witness to come to court several times. However, trial observation is not appropriate in every case. Careful consideration should be given to whether drawing attention to aspects of the trial might put the witness at greater risk.

Longer-term Measures to Protect Witnesses

- (a) **Procedural Protection:** Procedural witness protection measures may need to be implemented through legislative amendment of criminal procedure laws. Specific legislative provisions are required in order to specify who is eligible for procedural protection, how the prosecution or defense should apply for such protection, whether and under what circumstances a judge should conduct a hearing to decide upon an application, and the nature of the protection available.

Procedural protection measures can be controversial if they are prejudicial to the defense (e.g. by denying the defense the right to confront a witness) and should only be used where strictly necessary. Before making a decision, a court should give the defense the right to be heard as to why procedural protections are not appropriate.

Procedural protection measures include provisions that give a court power to:

- allow for pre-trial detention or a custodial sentence of the alleged perpetrator;
- issue a restraining order to prevent the alleged perpetrator from coming into contact with victims and witnesses;

- order non-disclosure to the accused and his/her lawyer of any records that identify the witness until a reasonable period prior to the trial. This may include the power to assign a pseudonym to the witness;
- hear testimony from witnesses who require protection as early as possible during the proceedings;
- conceal the witness during trial (e.g. by videotaped examination of the witness prior to trial; placing the witness behind a screen at trial; the use of voice modification technology, or examination of the witness by the judge in chambers or by closed-circuit television);
- control the questioning of witnesses to prevent intimidation or harassment during the proceedings. The judge may also be given power to sanction threatening behavior by issuing a warning or by imposing a fine or custodial sentence;
- temporarily remove the accused from the courtroom during certain testimony;
- close court sessions to the public;
- redact (or remove sensitive information from) court documents; and
- order non-disclosure of the identity of the witness to the public and/or expunge from the public record of the court any information that could identify the witness.

Examples of procedural protections can be found in [UNMIK Regulation 2001/20](#) in Kosovo and in the Law on Protection of Witnesses under Threat and Vulnerable Witnesses (2003) of Bosnia and Herzegovina.

Other administrative and legislative measures will also be required. For example, courts will need to develop administrative procedures for the storage of sealed court records. Supplementary criminal laws with penalties for failure to comply with procedural protection measures must be enacted. Legislation requiring prison officials and law enforcement agencies to inform victims or other witnesses of the release of the perpetrator at the end of his/her sentence may also offer further protection.

Careful consideration should be given to the resources required for implementing procedural witness protection, particularly where new technology is involved. Police, prosecutors, judges and lawyers will require training on the substantive, procedural and operational aspects of witness protection. These costs may be prohibitive in countries emerging from conflict and not sustainable without donor assistance.

(b) Formal Witness Protection Programs: Witness protection programs are usually coordinated by police. They may involve relocation of the witness to another city, as well as allocation of a new identity and provision of other assistance (such as new housing and employment) to witnesses after a trial. Formal witness protection requires legislation to establish who qualifies as a witness, the procedures to assess risks, and safeguards regarding physical and informational security while the witness is participating in the program. A model witness protection bill was drafted by the UN Office for Drug Control and Crime Prevention in 2000 and is available in the Compilation of Resources Section [below](#).

In some cases, such as Kosovo, witness protection has extended to cross-border relocation. International relocation is normally reserved for the most serious of

cases, given its costs, impact on the participant and level of cooperation required between states. It can either involve resettlement of a witness to another country and/or placement of that person in a formal protection program in the receiving country. According to Art. 24(3) of the UN Convention against Transnational Organized Crime and Art. 32(3) of the UN Convention against Corruption, States Parties can enter into agreements for cross-border relocation in relation to witnesses who give testimony concerning offences covered by the respective Conventions.¹ International relocation is usually based on regional or bilateral agreements to cooperate on witness protection, or on more informal memoranda of understanding concluded directly between police forces or other law enforcement agencies in the countries concerned.

Additional Considerations in Implementing Witness Protection

Police investigations in countries emerging from conflict may involve improperly and illegally coerced statements from witnesses, and confessions from suspects, in violation of international standards and national laws. The police or interrogator (or, in some countries, the investigating prosecutor or judge) may have fabricated witness and suspect statements. Suspects may be detained and charged with crimes in order to be forced to pay the police or prosecutor a bribe to gain release, as part of a larger extortion scheme, or simply at the behest of a powerful warlord whom the witness has offended.

This makes independent investigation crucial to achieving justice for detainees. An essential precondition is the existence of a sufficiently numerous independent and functioning defense bar. When defense attorneys are able to speak with witnesses proposed by the prosecution, corrupt practices, false claims or poor investigation are more likely to be exposed. Defense attorneys and those witnesses proposed by the defense may also face intimidation, coercion, or risks to life and wellbeing simply because they challenge the government's case or testify against the police or other government actors. These issues should be considered when deciding whether protection measures are effective in promoting justice, particularly in a country emerging from conflict that is in the process of rebuilding its justice system.

International Standards

There are a number of international instruments which recognize the need to protect witnesses from intimidation, threats and harm. These include:

¹ The UN Office on Drugs and Crime (UNODC) has developed a witness protection manual ("[Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime](#)"), covering procedural witness protection and the establishment of covert witness protection units. The manual discusses cross-border relocation at greater length, including the common terms of cooperation in international relocation (such as disclosure of information relating to the witness, reciprocity and compliance with immigration and asylum laws). The manual is an important resource as it also discusses the experiences in witness protection from different geographical regions and legal systems. It is available in the Compilation of Resources Section [below](#). UNODC is also developing a model witness protection law for Latin America and a model agreement on international cooperation in the area of witness protection. In 2008, expert group meetings will be held to universalize the model law and finalize the model agreement.

- the [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) which was adopted by the UN General Assembly in 1985. According to the Declaration, states should take measures to “minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation” (Art. 6(d)).
- the [UN Convention against Transnational Organized Crime](#) of 2000 and its three Protocols. States Parties are required to take appropriate measures to “provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings” who give testimony concerning offences covered by the Convention (money laundering, corruption, trafficking in persons, smuggling of migrants etc) and for their relatives and other persons close to them (Art. 24).
- the [UN Convention against Corruption](#) of 2003. States Parties shall take appropriate measures in accordance with their domestic legal system and within their means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences covered by the Convention (money laundering, bribery of public officials, embezzlement or misappropriation by a public official, abuse of functions, illicit enrichment etc) and for their relatives and other persons close to them (Arts. 32, 37(4)).
- the [UN Economic and Social Council Resolution 2005/20](#) adopts Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. These Guidelines (in the Annex to the Resolution) contain provisions ensuring that children involved in the criminal justice process as victims and witnesses are treated fairly and are subject to special protection, including protection from intimidation, threats or harm.

International Criminal Trials

Experience in international criminal trials for gross violations of human rights has highlighted the need to arrange for the protection of victims and witnesses who appear before them. Each of the statutes of the major international criminal tribunals made provision for witness protection.² Witness protection can be particularly difficult when the court is located in the country where the breaches of international law allegedly took place (such as the Special Court for Sierra Leone).

Witness protection in international trials can also be costly, and the best methods are still being determined by the judges who preside over these international criminal tribunals. However, according to the UNODC manual “[Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime](#)”, there are several common elements of the protection programs of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda:

² Statute of the International Criminal Tribunal for the former Yugoslavia (Art. 22); Statute of the International Criminal Tribunal for Rwanda (Art. 21); [Rome Statute of the International Criminal Court](#) (Arts. 43(6) and 68); Statute of the Special Court for Sierra Leone (Art. 16(4)), and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Art. 33).

- **Special witness protection units.** These tribunals have special units under the authority of the court registrar to provide protection to witnesses. This includes physical protection and security, as well as counseling, medical and psychosocial care and assistance for victims and witnesses who are at risk because of their testimony.
- **Responsibility for witness protection measures.** The special units are responsible for implementing witness protection measures under the authority of the registrar (non-procedural measures) or the judge or chambers itself (procedural measures). At the International Criminal Tribunals for the former Yugoslavia and Rwanda, the units make independent determinations in relation to the needs of witnesses and the measures to be used. The unit at the International Criminal Court provides its services in consultation with the Office of the Prosecutor. The services offered by all of the units are available equally to prosecution and defense witnesses.
- **Cooperation of States.** The international tribunals do not have territorial jurisdiction or their own law enforcement capacity, and rely on the cooperation of States to ensure close protection measures before and during trial. After testimony is given, the units can arrange for the resettlement of witnesses, including relocation to another country, if other States have agreed to receive witnesses.

Compilation of Resources:

This Consolidated Response draws from many of the following resources, which are useful reference tools for policing practitioners. All listed documents with a hyperlink are uploaded to the INPROL Digital Library.

RESOURCES ON STANDARDS FOR WITNESS PROTECTION

Selected International Standards

- [United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (1985)
- [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances](#) (1988)
- [UN Economic and Social Council Resolution 1989/57](#) (1989) (implementing the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power)
- [Rome Statute of the International Criminal Court](#) (1998)
- [United Nations Convention against Transnational Organized Crime](#) (2000)
- [Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime](#) (2001)
- [Statute of the Special Court of Sierra Leone](#) (2002)
- [United Nations Convention against Corruption](#) (2003)
- [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime](#) (2003)
- [Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime](#) (2004)

- [Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea](#) (2004)
- [UN Economic and Social Council Resolution 2005/20](#) (2005)
- [Updated Statute of the International Criminal Tribunal for the former Yugoslavia](#) (2007)
- [Updated Statute of the International Criminal Tribunal for Rwanda](#) (2007)

Other resources

- [“Handbook on Justice for Victims”](#), United Nations Office for Drug Control and Crime Prevention, 1999
- [“Protection of Witnesses in the Criminal Justice System”](#), Organization for Security and Cooperation in Europe (OSCE), Mission in Kosovo (March 2002-April 2003)
- [“The Protection of Witnesses”](#), Gregory Lacko, The International Cooperation Group, 2004
- OSCE Mission to Bosnia and Herzegovina Trial Monitoring Manual, 2004
- [“Witness Protection in Canada: the Current State and Suggested State”](#), Mark LaLonde, 2006
- [“Combating Serious Crimes in Post-Conflict Societies: A Handbook for Policymakers and Practitioners”](#), Colette Rausch (ed), USIP Press, 2006 (This Consolidated Response relies extensively on this source of information and INPROL extends its thanks and acknowledgement to the authors).
- [“Model Codes for Post-Conflict Criminal Justice”](#), Volume 1: Model Criminal Code (2007) and Volume 2: Model Code of Criminal Procedure (2008), Vivienne O’Connor and Colette Rausch (eds), USIP Press.
- [“Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime”](#), UNODC, 2008. (This Consolidated Response relies extensively on this source of information and INPROL extends its thanks and acknowledgement to the UNODC).

Related INPROL Materials

- [INPROL Discussion Forum on Police & Prosecutor Cooperation SOPs](#), December 2006.

Examples of Witness Protection Provisions and Programs

- [UNDCP Model Witness Protection Bill](#) (2000)
- [Bosnia and Herzegovina \(Law on Protection of Witnesses under Threat and Vulnerable Witnesses\)](#) (2003))
- [Canada](#)
- [Kosovo](#) ([UN Mission in Kosovo Regulation No. 2001/20](#) On the Protection of Injured Parties and Witnesses in Criminal Proceedings (2001) – as amended by UNMIK Administrative Direction 20002/25 and UNMIK Regulation No. 2002/1)
- [Montenegro](#)
- [Philippines](#)
- [Thailand](#)
- [United States](#)

USEFUL INTERNET RESOURCES

- European Institute for Crime Prevention and Control (<http://www.heuni.fi>)
- Europol (The European Police Office) (<http://www.europol.europa.eu>)
- International Criminal Court (<http://www.icc-cpi.int>)
- International Criminal Tribunal for the former Yugoslavia (<http://www.un.org/icty>)
- International Criminal Tribunal for Rwanda (<http://69.94.11.53>)
- International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme (<http://www.ispac-italy.org>)
- National Center for State Courts (<http://www.ncsconline.org>)
- Penal Reform International (<http://www.penalreform.org>)
- Special Court for Sierra Leone (<http://www.sc-sl.org>)
- United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (<http://www.unafri.or.ug>)
- United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (<http://www.unafei.or.jp/english/index.htm>)
- United Nations Department of Peacekeeping Operations, Peacekeeping Best Practices Section (<http://www.peacekeepingbestpractices.unlb.org/pbpu>)
- United Nations Interregional Crime and Justice Research Institute (<http://www.unicri.it>)
- United Nations Office on Drugs and Crime (<http://www.unodc.org>)
- United States Department of Justice (<http://www.usdoj.gov>)

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