CHAPTER 6

IMPLEMENTING WITNESS PROTECTION AT INTERNATIONAL LEVEL

A Comparative Study
CHAPTER - VI

WITNESS PROTECTION AT INTERNATIONAL LEVEL: A COMPARATIVE STUDY

Witness Protection is viewed as a crucial tool in combating crime. Witness protection measures are indispensable in the fight against crime. The ability of a witness to cooperate with the authorities without fear of intimidation or reprisal is essential to maintaining the rule of law. A number of foreign jurisdictions have established such specialized programmes or have developed detailed legislations. In this chapter an attempt has been made to review selected witness protection programs (WPPs) in Australia, United States of America, and Canada and in other countries. This review consolidates and scrutinizes the structure of WPPs in foreign jurisdictions and juxtaposes it against the situation in India. This chapter has been bifurcated into two parts. Part - I deals with the comparative analysis of the characteristics and operations of witness protection programs in selected countries (with special emphasis on Australia, United States of America, and Canada). Part-II deals with the Initiatives at Global Level for Witness Protection

PART –A

COMPARATIVE ANALYSIS OF SELECTED COUNTRIES
(With special emphasis on Australia, United States of America and Canada)

A comparative analysis of the features of witness protection programs in selected countries (with special emphasis on Australia, United States of America, and Canada), as well as the successes and challenges they encounter will help in devising a law for witness protection in India.
6.1. DEFINITIONS:

A few definitions will be useful for this comparative study. Internationally, the terminology used may slightly vary, but for the most part the basic concepts remain the same. The terms “witness,” “witness at risk” and “protected witness” cover several categories of actors:

- a “victim” who can testify and provide evidence,
- an “informer” who brings some evidence to the authorities,
- an “observer of a crime” who was not otherwise involved in the crime,
- an “undercover agent” or an “informant” who has special access to a criminal,
- an “accomplice” in a crime,
- a “repenti” or “pentito” who is willing to give evidence in return for certain considerations.

Most witness protection programs use their own restrictive definition of witnesses based on their own eligibility criteria. The United Nations Convention against Transnational Organized Crime¹ refers to the measures that should be taken by States parties to the convention to protect witnesses, experts and victims. However, it does not define “witness,” expecting states to rely on their own procedural law for such a definition². The Council of Europe defines the term “witness” to mean:

“any person, irrespective of his/her status under national procedural law, who possesses information relevant to criminal proceedings, including experts and interpreters.”³

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² ibid
³ Recommendation Rec (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Strasbourg: Council of Europe, 2005
For purposes of the Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime, the “Witness” or “participant” is defined as:

“any person, irrespective of his or her legal status (informant, witness, judicial official, undercover agent or other), who is eligible, under the legislation or policy of the country involved, to be considered for admission to a witness protection programme”.

In Australia, the Parliament of Victoria has enacted ‘Witness Protection Act, 1991’ (Act 15 of 1991), for the purposes of facilitating the security of persons who are, or have been, witnesses in criminal proceedings the word ‘Witness’ means:

a) a person who has given, or agreed to give, evidence on behalf of the Crown in-
   i. proceedings for an offence; or
   ii. hearings or proceedings before an authority that is declared by the Minister, by notice published in the Government Gazette, to be an authority to which this paragraph applies; or

b) a person who has given, or agreed to give, evidence otherwise than as mentioned in paragraph (a) in relation to the commission or possible commission of an offence against a law of Victoria, the Commonwealth or another State; or

c) a person who has made a statement to the Chief Commissioner of Police, another member of the police force or an approved authority in relation to an offence against a law of Victoria, the Commonwealth or another State; or

d) a person who, for any other reason, may require protection or other assistance under this Act.

In Canada, the Witness Protection Program Act, 1996 defines a witness as:

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5 The Act was amended in 1994 (No. 28/1994) and in 1996(NO. 58/1996)
6 Section 3 of Witness Protection Act, 1991
“someone who gives or agrees to give information or evidence or who participates or agrees to participate in a matter relating to an investigation or the prosecution of an offence”\textsuperscript{7}.

In relation to the investigation or prosecution, the person may require protection because of the risk to their security. For the purposes of the program, the Act also defines a witness as any person who, because of their relationship to the witness, may also require protection\textsuperscript{8}. A person receiving protection under the program is referred to as a "protectee" by the Act\textsuperscript{9}.

A “witness at risk” or “endangered witness” is a witness who is likely to endanger himself or herself by cooperating with the authorities, or a witness who has reasons to fear for his or her life or safety or has already been threatened or intimidated.

A “protected witness” could mean any witness who is offered some form of protection against intimidation or retaliation. In practice, however, this term is generally reserved for witnesses who receive the protection of a formal witness protection program.

6.2. FEATURES OF WITNESS PROTECTION PROGRAMMES

6.2.1. Purpose

Formal witness protection programs offer a way to safeguard the investigation, the criminal trial, and the security of witnesses. Their main objective is to safeguard the lives and personal security of witnesses and collaborators of justice, as well as people close to them. The programs include procedures for the physical protection of witnesses and collaborators of justice such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the new identity and

\textsuperscript{7} The Witness Protection Program Act, Statutes of Canada, 1996, chapter 15, section 2
\textsuperscript{8} ibid
\textsuperscript{9} ibid
whereabouts of such persons. Even if it is not uncommon for a witness to be rewarded for cooperation with law enforcement authorities (financially, by charge reduction as a result of plea bargaining, or leniency at the time of sentencing), witness protection programs are not in principle meant to reward a witness for cooperating with the authorities.

6.2.2. Structure

In many countries, witness protection is largely seen as a police function\(^\text{10}\), whereas in others the judiciary and various government departments play a key role. In Canada, for example, the federal witness protection program is seen primarily as a police program. At the federal level in Canada, the law gives the responsibility of managing the federal witness protection program to the Commissioner of the RCMP (Royal Canadian Mounted Police). At the provincial level, the situation varies. In Ontario, the Ministry of the Attorney General has a special team of police officers seconded from police forces or retired police officers. The provinces of Quebec\(^\text{11}\) and Manitoba operate their own programs and a provincial program is also being proposed in Alberta. In British Columbia, since 2003, Police Services, the RCMP and the municipal police departments of the province have established an Integrated Witness Protection Unit in order to provide a consistent approach to witness protection based on highly trained resources in witness management as well as a system designed to reduce the risk to both the police and the protected witnesses. The unit includes a few officers from municipal police departments and operates under RCMP policies as part of the Source Witness Protection Unit.

In the United States, it is the Office of Enforcement Operations (OEO), in the criminal division of the Department of Justice that makes the decision related to entry into the witness protection program at the federal level. This is

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\(^\text{10}\) Fyfe 2001, Fyfe and Sheptycki 2005: 333

\(^\text{11}\) There is also a municipal protection program in the City of Montreal.
done in consultation with the US Marshals Service which evaluates the risks and is responsible for ensuring the protection of witnesses.

In Queensland, Australia, the witness protection program is operated by the Crime and Misconduct Commission (CMC) which is responsible for both witness protection and protecting public sector integrity, including the investigation of public misconduct. Witness protection is one of the core functions of the CMC. The CMC ensures the long-term safety of witnesses on the program through the use of highly developed methodologies and procedures. As well as providing close personal protection which includes court security, secure relocation, and management of individual welfare needs, CMC also have the legislative capability to change the identity of protected witnesses when it is assessed as necessary and approved by the CMC Chairperson. The CMC Chairperson makes the final decision, on the advice of the Director of the CMC’s Witness Protection Unit, who is an Assistant Commissioner of the Queensland Police Service. The Director chairs the Witness Protection Advisory Committee. It may take up to eight weeks for a person to be formally admitted to the program, but interim protection is usually offered within two days of an application being received, or immediately if necessary.

There is a growing consensus internationally that it is preferable for witness protection to be kept separate from the agency conducting the investigation or prosecution (UNODC 2008, Council of Europe, 2004, 2006a). Following her review of the witness protection system in the province of Québec, Marie-Anne Boisvert also recommended the creation of a separate bureau within the Ministry of the Attorney General (Boisvert, 2005:21). A Council of Europe study of best practices in witness protection concluded that it is important to separate witness protection agencies from investigative and prosecutorial units, with respect to personnel and organization. This is necessary in order to ensure the objectivity of witness protection measures and protect the rights of witnesses. The
independent agency is responsible for admission into the protection program, protective measures, as well as continued support for the protected witnesses. Since the investigative agency is usually most knowledgeable about the criminal background of the applicant, the nature of the investigation, and the crime involved, the agency often assists the protection service in the assessment of the threat to the applicant and his or her immediate relatives (Council of Europe, 2004: 38). The Standing Committee\textsuperscript{13} recommended the establishment of an independent witness protection office at the Department of Justice. Similarly, the ISISC-OPCO-EUROPOL\textsuperscript{14} Working Group recommended that specialized witness protection units be established with adequate administrative, operational, budgetary, and informational technology autonomy\textsuperscript{15}. The group of experts emphasized that such units should not be involved in the investigation or in the preparation of cases where the witness/collaborator of justice is to give evidence\textsuperscript{16}.

A review of existing programs in Europe identified three main necessary characteristics of agencies charged with implementing witness protection:

a) they must cooperate very closely with law enforcement agencies, presumably on the basis of well-defined protocols;

b) the agency (or the part of the law enforcement agency) responsible for witness protection should operate independently of the other elements of the organization to protect the confidentiality of the measures taken to protect a witness; and,

\textsuperscript{13} Standing Committee on Public Safety and National Security 2008:24
\textsuperscript{14} ISISC stands for International Institute of Higher Studies in Criminal Sciences, whilst OPCO stands for Osservatorio Permanente sulla Criminalità’ Organizzata (Monitoring Centre on Organised Crime). Both are located in Siracusa, Italy.
\textsuperscript{15} ISISC-OPCO-EUROPOL 2005: 7
\textsuperscript{16} ISISC-OPCO-EUROPOL 2005: 8
c) the staff dealing with the implementation of the protective measures should not be involved either in the investigation nor in the preparation of the case for which the witness is to give evidence.  

6.2.3. Enabling Legislation

The rules governing the protection of witnesses and others who participate in criminal proceedings are fairly recent. Most programs have a legislative basis, (In Australia law is contained in Witness Protection Act, 1994 and mirror legislations in several states and the Australian Capital Territory, in US it is The Us Federal Witness Security Program (WITSEC) and The Witness Security Reform Act Of 1984 and in Canada it is Witness Protection Programme Act, 1996 but a few, such as United Kingdom, Austria, Belgium, France do not have separate legislation. In the absence of a legislative basis, these are treated solely as a police activity. In some countries, particularly those of the civil law tradition, the legislation dealing with witness protection may also include dispositions concerning agreements of leniency or immunity, as well as dispositions concerning procedural measures to protect witnesses. Part of the enabling legislation in this area often concerns mechanisms to ensure that participants in the program do not use the program to evade civil or criminal liability. Some legislations touch upon the delicate question of whether a witness can be included in a protection program as a reward for giving evidence or providing intelligence.

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17 Piacente 2006:36-9
18 Section 3 of the Witness Protection (Complementary witness protection laws) Declaration 2011 (dated 20 Feb. 2011) provides that the following laws are complementary witness protection laws for the purposes of section 3AA (Section 3AA of the Act provides that for the purposes of the Act, the Minister may declare by legislative instrument that a law of a State or Territory is a ‘complementary witness protection law’ of the Witness Protection Act 1994:

5. South Australia: Witness Protection Act 1996
8. Western Australia: Witness Protection (Western Australia) Act 1996
Another important part of most enabling legislation is that they create an offence for the divulgence of protected information related to the program or the witnesses19.

**6.2.4. Protection Measures**

Existing protection programs do not differ widely in terms of the kind of protection they offer, although there are some differences among them in terms of eligibility criteria and the manner in which protection is offered. There are also some significant differences in terms of who is responsible for their operation. The protection offered by these programs tends to be extended only to witnesses involved in the most serious criminal cases, and not necessarily always in cases involving the most serious threats. This is because the logic behind such programs, given their costs and the need to establish priorities, is based primarily on the desire to facilitate the cooperation of witnesses in order to secure criminal convictions rather than on the premise that the State has an obligation to protect all witnesses or that witnesses have the right to be protected. Most witness protection programs are able to offer similar protection measures depending on the circumstances of the case and the associated risk assessment. They include physical protection, identity change, relocation (sometimes internationally), financial support, and various other support services (counselling, access to medical services, etc.). Some programs have the ability to offer a sum of money in lieu of physical protection, so that the individual may afford to take his/her own precautions.

In **Australia**, the Chief Commissioner of Police may take such action as he thinks necessary and reasonable to protect the safety and welfare of a witness or a member of the family of a witness. Actions which can be taken by the Chief Commissioner are mentioned in sub-section (2), which are as follows:-

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19 UNODC 2008: 9
a) applying for any document necessary;
   i. to allow the witness or family member to establish a new identity; or
   ii. otherwise to protect the witness or family member;

b) relocating the witness or family member;

c) providing accommodation for the witness or family member;

d) providing transport for the property of witness or family member;

e) doing any other things that the Chief Commissioner of Police considers necessary to ensure the safety of the witness or family member.20”

6.2.5. Eligibility Criteria For Protection

Who gets to be enrolled in a witness protection program is partly determined by the threshold eligibility criteria established for each program. The criteria do not establish a right to protection; the decision remains a discretionary one.

In Australia under the National Witness Protection Program (NWPP) the persons who are eligible for protection are:

a) a person who has given (or agreed to give evidence) on behalf of the Crown (or State or Territory) in criminal or prescribed proceedings for an offence;

b) persons who have made a statement in relation to an offence;

c) persons who may require protection and assistance for any other reason; and

d) persons who are related to or associated with such persons.

Considerations: criminal record, psychiatric evaluation, nature and seriousness of offence, nature and importance of evidence, perceived danger to the witness, and the nature of the relationship between witnesses being considered for inclusion into the program.

20 Sub section (1) of section 3A of Victoria Witness Protection Act,1991
State of Victoria:

a) same as above, yet in relation to the commission or possible commission of an offence against the law of Victoria, the Commonwealth, or another State;
b) family members of witnesses also eligible (spouse or domestic partner, parent or sibling of the witness, child of the witness or of the witness’ spouse or domestic partner)

Considerations: threat, risk, medical, psychological, cost assessments. Sentenced and remanded prisoners are not eligible.

State of Queensland:

Persons needing protection from a danger arising:

a) because the person has helped, or is helping, a law enforcement agency in the performance of its functions;
b) because of the person’s relationship or association with such a person (family member or associate)

Other factors considered: witness criminal history, nature of threat, seriousness of the offence, medical assessments, and the extent of the help offered by the witness.

State of South Australia:

Eligibility requirements and considerations for inclusion into the State Witness Protection Program are largely the same as those required by the NWPP.

State of Western Australia:

Eligibility requirements are largely the same as those required by NWPP. Additionally, and according to the Act:

a) unless the contrary intention appears, a person is a witness if, in the opinion of the Commissioner, there is a risk to the safety or welfare of the person for any reason other than those otherwise stated;
b) unless the contrary intention appears, a person is a witness if he or she is related to or associated with a person referred to (above) and in the opinion of the Commissioner, may require protection or assistance under the State Witness Protection Program (SWPP) because of that relationship or association.

**Other factors considered:** criminal record, risk to public, psychiatric examination, seriousness of offence to which evidence will be given, nature and importance of evidence or statement, perceived danger to the witness, nature of the relationship between witnesses seeking inclusion into the program.

In **Canada** under the **Federal Witness Protection Program (WPP):**

a) a person who has given (or agreed to give) information or evidence, or participates (or agreed to participate) in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution;

b) a person who is related or associated with a witness who may also require protection for the reasons referred to in (a).

**Other factors considered:** nature of the risk to the security of the witness, danger to the community if the witness is admitted to the program, nature of the inquiry, investigation or prosecution, importance of the witness, value of the information or evidence, likelihood that the witness will adjust to the program (maturity, judgment, and personal characteristics), program costs, alternative protective measures.

In **United States of America** under the **Federal Witness Security Program:**

a) Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal
activity or other serious offence if it is determined that violence will likely be directed at the witness;
b) also applies to the immediate family members, or persons closely associated with the witness Eligible only for cases being tried in official proceedings in federal courts. Witnesses must testify in court to be eligible for protection under the program.

**Other factors considered:** Criminal history, psychological evaluation, seriousness of the case, risks to the public assuming if witness is relocated, whether the need for testimony outweighs the risk of danger to the public, alternatives to providing protection, whether protection will infringe on the relationship between a child who would be relocated and that child’s parent who would not be relocated. Protection not provided if the Attorney General deems that the risk of danger to the public outweighs the need for that person’s testimony.

**Commonwealth of Massachusetts:**

Massachusetts Attorney General or District Attorney may apply for funds to protect:

a) “critical witness”: any person who is participating in a criminal investigation and who is reasonably expected to give testimony that is, in the judgment of the prosecuting officer, essential to a criminal investigation or proceeding;
b) “endangered persons”: the relatives, guardians, friends, or associates who are reasonably endangered by such person’s participation in the criminal investigation or proceeding.

**Other factors considered:** The nature of the criminal investigation or prosecution, nature of danger, cost of services.

The criteria summarized above revolve around the level of threat to the individual, the individual’s personality and psychological fitness, the danger that
the offender may pose to the public if relocated under a new identity, and the critical value of the information or testimony provide by the individual.21

6.2.6. Threat Assessment and the Requisites for Protection

The level of risk faced by a witness dictates the nature and extent of the protective measures that must be taken. For instance, most witness protection programs have a requirement that a serious risk to the witness be established before protection services are offered. A proper threat assessment is necessary for appropriately and strategically allocating limited protection resources. A threat assessment is a set of investigative and operational activities designed to identify, assess, and manage persons who may pose a threat of violence to identifiable targets. One can distinguish among three major functions of a threat assessment:

1) the identification of a potential perpetrator;
2) the assessment of the risk of violence posed by a given perpetrator at a given time; and,
3) the management of both the subject and the threat that he or she poses to a given target22.

There are situations, such as when there has been a failed attempt on the life of a witness, where the evaluation is relatively straightforward. However, threat assessments are not always that simple and rely by no means on a simple or standard process. While a group that makes or poses a threat may be identified, not all potential aggressors are, or can be, identified. Risk assessments may be based on information that has questionable validity and reliability. Management of the aggressors or potential aggressors may be difficult if they cannot be identified, cannot be located, or are operating in another country. In addition, the predictive capacity of threat assessment models is not absolute. The secretive nature of the

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21 UNODC 2008: 61
22 Fein 1995: 3
groups who are involved, contextual vagaries, and the often ambiguous and unconfirmed nature of the intelligence gathered by security agencies make it extremely difficult to arrive at reliable conclusions.

In theory, threat assessments are based on a number of factors, including:

- the potential vulnerability of the witness (age, gender, physical and mental condition);
- the proximity of the witness to the offender;
- the nature of the crime or crimes that were committed;
- the characteristics of the accused, including his/her criminal history,
- whether or not he/she has access to weapons,
- whether he/she is known to belong to a terrorist or criminal organization;
- whether his/her alleged accomplices are still at large;
- evidence of past attempts at intimidating witnesses or justice officials; and
- the presence and nature of any direct threat that might have been made by the suspect or his/her known associates.

In many instances, the nature of the potential risk is subject to change and too complex to be readily assessed by any simple method. If the potential exists for a witness to be threatened or harmed, then there is a level of risk. The challenge is in identifying, analyzing, validating, evaluating, and quantifying the risk(s). Risk is contextual, dynamic, and exists along a continuum of probability. Assessments should therefore be conducted periodically and their results should be shared with the witnesses so that they have a realistic understanding of the dangers they potentially face, without invalidating their feelings of fear and anxiety.

\[23\] Fyfe and McKay 2000a, Fyfe 2001
\[24\] Dedel 2006: 21
\[25\] Borum et al. 1999
\[26\] Council of Europe 2006b, Dedel 2006: 20
6.2.7. The Rights of Protected Witnesses under the Program

The rights of protected witnesses may include internal appeals or challenges to decisions made by the witness protection agency, civil action, judicial review of decisions, and complaints to mechanisms of civilian oversight of the police. However, protected witnesses are rarely in a strong enough position to affirm these rights.

Vulnerable witnesses and informants are typically not in an advantageous position to negotiate the terms of their cooperation with the authorities. The authorities may or may not always honour these terms and when they do not, there are very few recourses available to the witnesses. This is even more problematic for witnesses who are denied protection when the police are unable or not prepared to proceed with a given case or when they decide that they no longer need a particular witness. As many of the decisions concerning witness protection and the use of informants are still left to the discretion of the police or prosecutors, it is important to balance these discretionary decision making powers with adequate protection for the rights of the individual witnesses and informants.

6.3. Control and Management of Witness Protection Programs

6.3.1. Control

Among the witness protection programs covered under this comparative study, the majority are provided by specialized units within national or regional police forces. As is the case in Australia, Australia’s National Witness Protection Program (NWPP) is operated by the Australian Federal Police (AFP). Accordingly, the Commissioner is responsible for the program and is permitted to enter into arrangements with a number of ‘approved authorities’ to ensure that sufficient protection is provided to witnesses. In addition to the National program, Australia has State and Territory witness protection schemes which are generally consistent with one another, but not necessarily managed in the same way. In
Victoria, South Australia, and Western Australia, witness protection is provided by the relevant State Police whereby the Chief Commissioners serve as the “approved authority.” In contrast, Queensland’s witness protection program is governed by the Chairperson of the Crime and Misconduct Commission. However, it is also worth noting that witness protection officers under this scheme are primarily police officers who have received specialized training.

In **United States** the process for admission into the WPP is not automatic and involves input from several sources. Currently, entrance into the WPP is determined by the **Office of Enforcement Operations (OEO)** in the Criminal Division of the Justice Department. Final determinations are made by the **Attorney General (AG) or AG designee**.

In **Canada** the Witness Protection Programme Act, 1996 identifies the **Commissioner** of the RCMP as the administrator of the Program, however, responsibilities for various protective processes such as admission to the Program and termination from the Program have been delegated to the Assistant Commissioner of Federal and International Operations.

In contrast, some countries operate a single protection scheme that is not grounded in any legislation. As a result, the law enforcement agency responsible enjoys complete autonomy and decision making authority. In Ireland, for example, the witness security program is administered by the Garda Crime and Security Branch which is operated by the Garda Special Detective Unit (SDU). New Zealand’s police witness protection program does not appear to be bound by specific legislation, but public information about the program suggests that there is a strong relationship between the Police Force and the Department of Corrections with the recognition that a majority of witnesses in the program have been

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27 Under Section 2 of the Act “Commissioner” means the Commissioner of the Force

28 The **Witness Protection Program Act, Statutes of Canada, 1996**, chapter 15, section 5 “Subject to this Act, the Commissioner may determine whether a witness should be admitted to the Program and the type of protection to be provided to any protectee in the Program”. 
associated with criminal groups and are offenders themselves.\textsuperscript{29} Other types of governing structures do exist such as in South Africa and the Philippines where witness protection is administered through the respective national prosecution authority, and protection services are provided by the police. In Kenya, decisions are made by the Office of the Attorney General, and operations are provided by a multi-agency task force.

\textbf{6.3.2. Reporting Requirements}

Witness Protection Programs that are grounded in legislation tend to have clearer management guidelines and usually identify the main center of responsibility for the program and specify the reporting requirements. According to subsection 30(2) of \textit{Australia’s Witness Protection Act 1994}, an annual report on the general operations, performance and effectiveness of the NWPP must be submitted to both Houses of Parliament. Importantly, this report is prepared “in a manner which does not prejudice the effectiveness or security of the NWPP”\textsuperscript{30} and so program details and case information are not included. While the report describes the significance of some of the clauses in the Act, and explains how the overall program is managed, the only details relate to annual expenditures and the number of active operations for the reporting period. Put together by the AFP, the report is formally submitted to Parliament by the Minister for Home Affairs.

A similar organizational structure and reporting relationship is in place in \textbf{Canada} where Section 16 of the Witness Protection Program Act requires the submission of an annual program report in order to ensure transparency, yet without compromising witness safety. This reporting requirement ensures that program information is recorded on a regular basis, yet it also leaves room for more in-depth reviews into program operations. In March 2008, for example, the Standing Committee on Public Safety and National Security presented a review of

\textsuperscript{29} New Zealand House of Representatives 2008, New Zealand Police 2008
\textsuperscript{30} Australian Federal Police 2009
the federal witness protection program to the House of Commons\textsuperscript{31}. It is important to recognize, however, that organizational structures and reporting requirements are not always as clear and well-defined as in Australia and Canada.

6.3.3. Decisions to Offer Protection: Factors to Be Considered

Decisions to offer protection and the factors that are considered in reaching such decisions differ among countries and programs. In some cases the responsibility for these decisions rests with a single individual or agency, and in others the decisions require careful consideration by multi-agency taskforces or witness protection boards.

In Australia, a Witness Protection Coordinator applies to a Witness Protection Committee for the placement of a witness in the NWPP. This committee is comprised of the Deputy Commissioner of National Security, as well as two senior AFP officers. Together, these make recommendations to the AFP Commissioner on the entry and exit of witnesses in the program\textsuperscript{32}. As is the case in Ireland, Australian investigating officers, as well as those preparing submissions to the Committee, are excluded from the decision-making process for that particular witness’ placement in the program\textsuperscript{33}. This separation of responsibilities is an important feature of a number of programs included in this study as it ensures that decisions are made as objectively as possible.

Where witness protection programs are administered by the Department of Justice, Attorney General, National Prosecuting Authority, or other agencies other than police forces, witness protection boards, committees and units are often put in place. As in the US Federal Witness Security Programme (WITSEC), applications for witness protection are submitted from the various United States Attorneys' offices and Organized Crime Strike Forces across the country. In

\textsuperscript{31} Standing Committee on Public Safety and National Security 2008
\textsuperscript{32} Australian Federal Police 2009: 4
\textsuperscript{33} ibid
addition to the sponsoring attorney's application, the case agent from the investigative agency provides a threat assessment through his federal headquarters for OEO review. In rendering its decision, the OEO therefore takes into consideration information from the United States Attorney, the investigative agency, and the United States Marshals Service. The relevant information includes the importance of the testimony, the possibility of obtaining the desired testimony from someone else, a psychological evaluation of the prospective witness to determine the risk to the community to which the witness will be relocated, and a recommendation by the Marshals Service assessing the suitability of the witness for the program. Prisoner witnesses can also apply to the OEO (Office of Enforcement Operation) for protected testimony. The Bureau of Prisons is responsible for protection of prisoner witnesses while incarcerated. The Marshals Service would provide secure transportation to and from court and safe testimony. Provided sponsorship is available, prisoner witnesses can also apply for protection upon release from prison.\footnote{Morris, The Witness Security Program, 8 THE PENTACLE 2 (1988)}

In \textbf{Canada} it is necessary for a law enforcement agency to recommend the candidate for the program\footnote{The \textit{Witness Protection Program Act}, Statutes of Canada, 1996, chapter 15, paragraph 6(1)(a).}. The candidate must also provide the Commissioner with information\footnote{The \textit{Witness Protection Program Act}, Statutes of Canada, 1996, chapter 15, paragraph 6(1)(b). The Commissioner can authorise a member of the Force who holds a rank no lower than Chief Superintendent to decide whether to admit a witness to the program: The \textit{Witness Protection Program Act}, Statutes of Canada, 1996, chapter 15, subsection 15(a).} that will allow him or her to consider the following factors:

- the nature of the risk to the security of the witness
- the danger to the community if the witness is admitted to the program
- the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness in the matter
- the value of the information or evidence given or agreed to be given or of the participation by the witness
• the likelihood of the witness being able to adjust to the program considering the witness's maturity, judgment, personal characteristics and family relationships
• the cost of maintaining the witness in the program
• alternative methods of protecting the witness without admitting the witness into the program
• such other factors as the Commissioner deems to be relevant\textsuperscript{37}

Witness protection personnel also determine what kind of protection may be required for the informant during and after the investigation\textsuperscript{38}.

Regardless of whether the decision to offer protection is made solely by a Police Commissioner, an Attorney General, or else by a board or committee, the criteria considered for program admission seems to be fairly standard. In nearly all the programs included in this study, decisions for inclusion are taken after first analyzing the specific aspects of each situation. Several factors are typically considered to determine the suitability of a witness for admission into a protection program. They include:

(i) the seriousness of the offence(s) involved;
(ii) the importance of the evidence the witness can offer and whether the witness can be expected to offer a credible and significant testimony;
(iii) whether the witness is essential to a successful investigation and prosecution and is committed to testifying;
(iv) the level of risk the witness is facing and whether there is a direct and significant threat to the life and safety of the witness, or persons close

to him/her; and, the availability and suitability of options other than full protection\textsuperscript{39}.

The initiative to consider an individual for admission into a protection program usually comes from the police, often at the request of the person concerned and most often after a threat assessment. In countries where that decision does not belong to the police, a different procedure exists for reviewing applications/requests for admission into the program. In such cases, the request for protection must include information on the nature of the investigation, the role of the candidate in the criminal activity, and the danger or threat faced by the individual. Some countries rely on a central “assessment board” while others rely on prosecution authorities. In some countries, the prosecution service is hardly, if ever, involved in the decision. Often, the protection service is not represented officially in the decision-making body, but gives information and advice to it.

When admission into the program requires a formal approval process, provisions are usually made to authorize some temporary protection measures in urgent circumstances. In addition to considering the seriousness of the threat involved, most witness protection programs consider the suitability of the witness to “fit” in the program, whether the witness is stable or has significant emotional, psychological and chemical dependency/abuse issues, or whether they will compromise the protection program. The costs of the measures also enter into consideration. Prior to acceptance into the witness protection program, the police typically conduct a biographical review of the witness to identify and assess both the level of threat to his/her person and people close to him/her, and any encumbrances that may hinder their entry into the program. Oftentimes, an in-depth interview of the witness forms part of that assessment. The interview serves

\textsuperscript{39} The European Union has proposed similar admission criteria in their draft European program for the protection of witnesses in terrorist and transnational organized crime cases.
to help determine the suitability of the candidate for entry into the program, assess the likelihood that they will succeed in the program, and identify who else might be at risk of harm should the witness testify. In the case of individuals who are involved in a criminal lifestyle, the interview is also used to debrief the witness on crimes they may have knowledge of or involvement in.

All individuals involved must voluntarily agree to enter the program. This is important because protected witnesses must play an active role in ensuring their own safety and preventing harm to themselves and persons close to them⁴⁰. Once an individual is accepted into the program, a certain amount of planning is required and a “protection plan” is developed to put in place a number of measures commensurate with the level of threat and the various people involved (witnesses and people close to them).

6.3.4. Protection Agreements

Protection agreements are fundamental components of most witness protection programs since these can serve as legal contracts between witnesses and the State. However, this is not always the case. In many European programs, the agreement takes the form of a memorandum of understanding and, properly speaking, do not constitute a contract in the sense that the protected witness cannot derive any rights from it⁴¹. Usually, all protected individuals, the witnesses or informants and the persons close to them, are required to sign the agreement. However, note that in many programs the individuals may not, for security reasons, receive a copy of the agreement⁴². This is because complete secrecy with regard to the measures being implemented must be maintained.

⁴⁰ Council of Europe 2004: 26
⁴¹ Council of Europe 2004: 30
⁴² Council of Europe 2004: 31
In Australia under the Witness Protection Act 1991 of Victoria\textsuperscript{43}, the Chief Commissioner must enter into a memorandum of understanding (MOU) with the witness. The memorandum of understanding must set out the basis on which the witness is included in the Victorian Witness Protection Programme and details of the protection and assistance that are to be provided and should also contain a provision that protection and assistance may be terminated if the witness commits breach of a term of the MOU. An MOU must be signed by the witness or by a parent or guardian or other legal personal representative of the witness if the witness is under the age of 18 or otherwise lacks legal capacity to sign.

In the **Canadian federal program**, witnesses sign a formal contract with the government. Each agreement is individually negotiated and articulates what the government will do by way of support and protection of the witness in return for the witness testifying at trial. As mentioned earlier, the witness is not provided automatically with the assistance of legal counsel. The agreement specifies the obligation of the protection service to protect the individual and his/her relatives, as well as the duration of the protection measures. The duration of the protection measures may depend upon risks as evaluated by the protection service. The agreement also outlines the obligation of the witness to keep secret his/her former identity, old address, role in criminal proceedings, etc.; refrain from activities that would increase the risk against them; cooperate fully in the criminal proceedings; try to find employment quickly; and make arrangements for outstanding accounts, contracts and financial obligations. The agreement explains clearly the conditions under which the protection will be ended.

In the **United States**, for example, the legislation that governs the Federal Witness and Security Program (WITSEC) has very clear guidelines as to what needs to be included in any MOU between the Attorney General and the prospective witness. Put simply, this agreement clearly outlines the responsibilities

\textsuperscript{43} Section 3B
and expectations of both parties as long as the witness is in the program. In the case of the WITSEC Programme, these responsibilities include, but are not limited to: the agreement of the witness to testify in the appropriate proceedings; the agreement of the person not to commit any crime; the agreement of the person to take all necessary steps to avoid detection; the agreement to comply with legal obligations and civil judgments; the agreement of the person to disclose all outstanding legal obligations; the agreement to disclose all probation or parole responsibilities; and the agreement to regularly inform the appropriate program official of their activities and current address.\footnote{44} Importantly, the MOU also describes the nature and degree of protection which will be provided to the witness, the procedures to be followed if the agreement is breached, as well as the procedure for filing and resolving grievances regarding the administration of the program.\footnote{45}

While this degree of detail is not necessarily made explicit in all the relevant legislation, it is clear that in countries with fairly developed programs such as Canada, Australia and New Zealand, an official contract is drawn up between the witness and the relevant authority before admission into the program is finalized. Accordingly, when the contract is breached, the authorities can discharge the witness from the program. However, a number of cases have shown that this is not automatic. In Australia, Victoria police failed to oust “166” from the program despite claims that the witness had breached the terms of their contract. Thus, it appears that where these agreements do exist, there is nevertheless a “grey area” where authorities are expected to weigh the risks of maintaining the secrecy of the program and the security of a former witness at the expense of public safety and undermining the integrity of the program.

\footnote{44} US Code, Title 18 “Crimes and Criminal Procedure”, Part II, Chapter 224 “Protection of Witnesses”\footnote{45} Ibid
The duration of a witness participation in a protection program cannot always be determined at the beginning of the process. Participation in the program is in large part determined by the length of the investigation and the criminal proceedings. On average, the minimum length of the witness participation in a protection program is two years \(^{46}\) and the average duration is between three and five years in the three programs reviewed in the best practices document prepared for the Council of Europe\(^ {47}\). “The general principle is that a protected witness should be enabled to live a normal life as much as possible and as soon as possible”\(^ {48}\). After that, the witness protection agency will let participants leave the program and take care of themselves again, the moment this can be done safely.

However, according to the UNODC, experience has shown that even after the end of the formal protection program, some form of care must still be provided, because the threat against the person rarely disappears completely\(^ {49}\).

### 6.3.5. Termination of Protection

The protected witness can typically withdraw from a protection program voluntarily or their participation may be terminated by the agency. Typically, an involuntary termination occurs when the protected individual commits a new offence or is otherwise not in compliance with the protection agreement, including for having compromised his/her new identity. Proper notification of a decision to terminate the protection must be communicated to the individual in question and he or she needs to have an opportunity to challenge or appeal the decision\(^ {50}\).

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\(^{46}\) Heijden 2001  
\(^{47}\) Council of Europe 2004: 36  
\(^{48}\) Council of Europe 2004  
\(^{49}\) UNODC 2008: 74  
\(^{50}\) Section 16 sub section (1) of Witness Protection Act, 1991 of Victoria states that protection and assistance provided to a person under the Victorian Protection Programme shall be terminated by the Chief Commissioner on the request made by that person in writing that it be terminated. The protection and assistance may also be terminated by the Chief Commissioner if-

- the person deliberately breaches a term of MOU or a requirement or undertaking relating to the programme; or
representation should ideally be available in such circumstances. In reality, however, this is not always the case.\textsuperscript{51}

In most cases, protection ceases because witnesses have chosen to remove themselves from the program. While the reasons span from a lack of trust and confidence in protection programs to witnesses being unwilling to abide by restrictive measures, authorities need to pay close attention to the reasons for voluntary removal as this can be considered a measure of program effectiveness. These are difficult situations to manage. Other protection measures may be offered, but in the end it is impossible to offer effective protection to someone who is not willing to cooperate with the program. In Italy, it has been noted that many witnesses withdraw because of a lack of attention to psychological support and anxiety\textsuperscript{52}. Unfortunately, this is a very important aspect of any witness protection program, particularly since participants are not only dealing with very serious threats to their security and well-being, but also with the stress of “disappearing” from family, friends, and livelihoods. In fact, in the United States “mental distress has resulted in an above average suicide rate for protected witnesses which means, ironically, that the greatest danger to the safety of protected witnesses may be themselves”\textsuperscript{53}.

In countries such as Kenya, Jamaica and the Philippines, witness protection programs are not as publicly trusted, and it is felt that many witnesses

\begin{itemize}
\item[b)] the person’s conduct or threatened conduct is, in the opinion of the Chief Commissioner, likely to threaten the security or compromise the integrity of the programme; or
\item[c)] the circumstances that gave rise for the need for protection and assistance for the person ceased to exist.
\end{itemize}

The Chief Commissioner shall notify his decision to terminate protection and assistance to the concerned person. After receiving the notification, the concerned person may, within 28 days, apply in writing to the Chief Commissioner for a review of the decision. If the Chief Commissioner after the review confirms the decision, the concerned person may within 3 days, appeal to the deputy Ombudsman.

If under the Victorian Witness Programme, a person has been provided with a new identity and, thereafter, protection and assistance to the person under the programme are terminated, then the Chief Commissioner may take such action as is necessary to restore the person’s former identity.

\textsuperscript{51} Standing Committee on Public Safety and National Security 2008: 27
\textsuperscript{52} Allum and Fyfe 2008
\textsuperscript{53} ibid
refuse to participate, fearing for their personal safety and security. This is especially problematic where there is a real lack of confidence in the impartiality of the police.\footnote{Amnesty International 2009}

As was mentioned earlier, the protection of a witness is most often regulated by a formal agreement which is made between the participant and the relevant authority. Accordingly, the continuation of the protection is governed by that agreement. Thus, protection termination can take a number of forms. First, where a participant breaches a term of their protection agreement, assistance services may be immediately terminated. In fact, almost all of the countries covered in the present study have clear rules in this regard. Some programs will also terminate protection where it is discovered that the participant knowingly gave misleading or false information about themselves, or the case at the time their application was being considered. In Israel, when witnesses violate the conditions of their protection they are not only discharged from the program, but they can also be indicted and required to return the money already invested in protecting them.

The length of time during which protection is extended is not always predetermined, if it is it may be subject to periodic reviews. In \textit{Europe}, the minimum duration of the protection is generally determined by the length of trial proceedings, on average between three and five years\footnote{Council of Europe 2004: 36}. In \textit{Canada} and \textit{Norway}, for example, protection is deemed to be for life unless the terms of the protection agreement are breached. Other programs reserve the right to decide when to terminate protection. In \textit{South Africa}, protection is provided for only as long as the perceived threat is deemed to exist, and then for a following a six-week phasing out period, after which protection is terminated\footnote{Amnesty International 2009}. Similar clauses exist in \textit{Australia}, \textit{Jamaica}, and the \textit{Philippines} where the relevant authority has the right
to decide when the circumstances which gave rise for the need for protection have ceased. Where decisions to admit or terminate protection are concerned, some countries have taken additional precautions to ensure that this is managed at the highest level. In **Australia**, these decisions cannot be delegated below the position of Deputy Commissioner of the AFP\textsuperscript{57}.

Methods of involuntary termination need to be more closely explored since cases such as this have a negative effect on the perceived credibility of witness protection programs in the eyes of the public, particularly for potential applicants. One way of addressing this is to ensure that appropriate appeal procedures are in place. However, there is always the risk that a witness who has been involuntarily removed from witness protection will go to great lengths to undermine the security and/or integrity of the program.

The European Union draft program for the protection of witnesses in terrorist and transnational organized crime cases proposes that protection of a witness may be terminated if he or she compromises themselves by:

(i) committing a crime;

(ii) refusing to give evidence in court;

(iii) failing to satisfy legal or just debts;

(iv) behaving in a manner that may compromise his or her security and/or the integrity of the program; and,

(v) stepping outside the guidelines or rules laid down as part of the protection program or by contravening the terms set out in the written agreement (protection pre-entry agreement).

\textsuperscript{57} Australian Federal Police 2009: 5
The protection may also be terminated if it is determined that the threat no longer exists\(^5^8\). Severe violations of the conditions under which the witness was admitted into the program may lead to sanctions and warnings and, sometimes, that is sufficient.

### 6.3.6. Human Resources and Training

AFP officers deployed to Australia’s Witness Protection Program are required to undergo a specialized training program each year referred to as the WP Skills Maintenance Training Program\(^5^9\). Repeated training in this area enhances and maintains necessary operational skills which are necessary to the performance of the witness protection scheme. In addition to operational training, these officers are also expected to attend national and international conferences since this “allows the AFP to benchmark its witness protection activities against other agencies”\(^6^0\).

In the **United States**, the *Witness Security and Protection Grant Program Act* of 2009 allows for state and local witness protection programs to receive technical assistance from the US Marshals Service which is responsible for protecting witnesses under the Federal WITSEC programme\(^6^1\).

While this piecemeal information indicates that specialized training is provided to officers responsible for operating witness protection programs, there is not a lot of publicly available information on the nature and effectiveness of this training.\(^6^2\)

In fact, Australia’s NWPP annual report purposely leaves out information such as base salaries of the Witness Protection personnel operating the program.

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\(^{58}\) ISISC-OPOCO-EUROPOL 2005  
\(^{59}\) Australian Federal Police 2009: 5  
\(^{60}\) ibid  
\(^{62}\) One notable exception is the Council of Europe Training Manual for Law Enforcement and the Judiciary (Council of Europe 2006b)
“so as to not disclose the number of Federal Agents involved in providing Witness Protection services” 63. Other sources, such as the US Marshals Service, are more forward with the information they provide on the number of personnel administering witness protection programs64. What is clear, however, is that some notable efforts are being made to share best practices, technical expertise, and training policies among those agencies responsible for operating witness protection programs. For example, the US Marshals Service hosted the first-ever Witness Security Symposium in 2006 in an effort “to expand the international community of witness security experts.”65 Subsequent symposium’s have since taken place and other information sharing forums have been initiated by the EU, Europol, the OAS, and UNODC.

6.3.7. Costs of Programmes

In Australia’s NWPP costs of protective services are shared between the AFP and other approved authorities depending on who referred the witness to the program. In other words, the AFP is only responsible for the costs of AFP sponsored witnesses in the NWPP. Other agencies with witnesses in the NWPP are, by arrangement with the AFP, responsible for all other costs including those related to the security and subsistence needs of their witness and the composite payments, taxes, travel and accommodation expenditure by AFP Witness Protection Federal Agents who supervise the agency sponsored witness66.

A similar reporting method is used by the RCMP in Canada, and financial information conveyed in the Witness Protection Program Annual Report does not include the salaries of RCMP members, the cost of investigations, or subsequent legal costs. In other words, figures which are reported only present a fraction of

63 Australian Federal Police 2009: 10
66 Supra note 63
the cost of protecting witnesses\textsuperscript{67}. Among the many factors that influence the costs of witness protection programs, the following are usually noted:

- whether the witness has a family that also needs protection,
- the length of time the witness spends in temporary accommodation,
- the witness’ standard of living, the changing nature of the threat against the witness, and
- the entitlement of the witness to financial assistance\textsuperscript{68}.

The high costs of protection programs explain why their use remains limited to serious crimes and strategically important cases. Funding these programs out of regular police budgets is not always sufficient. This may lead to decisions which are primarily and perhaps inappropriately based on protection costs and shrinking resources, as opposed to the rights of witnesses or the requirements of the justice system.

\textbf{6.3.8. International Cooperation and Relocation}

Because many criminal organizations operate quite efficiently across national borders, the threat they represent to witnesses and collaborators of justice is not confined within national borders. Physical and psychological intimidation of witnesses and their relatives can take place in a variety of contexts. Furthermore, witnesses may need to move to another country or return to their own country during lengthy criminal proceedings. Finally, there are cases where a State, because of its size, means or other circumstances, may not be able to ensure the safety of witnesses on its own.

For all these reasons, cooperation in the protection of witnesses and their relatives has become a necessary component of normal cooperation between prosecution services. Furthermore, international cooperation may also be required at times in order to protect interpreters, the prosecutors themselves, and/or other

\textsuperscript{67} Standing Committee on Public Safety and National Security 2008: 19
\textsuperscript{68} Fyfe and McKay 2000: 287
judicial and correctional personnel. To ensure greater international cooperation in offering effective witness protection at home or across borders, law enforcement and prosecution agencies often need to develop arrangements with other jurisdictions for the safe examination of witnesses at risk of intimidation or retaliation.

In the **Canadian legislation**, the *Witness Protection Program Act*, article 14, provides that the Commissioner of the RCMP may enter into reciprocal agreements with the government of a foreign jurisdiction to enable a witness of that jurisdiction to be admitted in the Program. Another type of interagency collaboration exists where formal bi-lateral or even regional agreements are concluded between governments or witness protection agencies to ensure that protection is upheld by all relevant authorities. In some cases, where a witness may have to move from a country to another, the responsibility for providing protection may be transferred accordingly. For example, Australia’s Commonwealth, State and Territory witness protection laws are such that arrangements can routinely be made among the respective protection providers. 69

International cooperation is particularly important in protection cases where witnesses must be relocated to another country. A growing number of countries are therefore recognizing the importance of enabling the inclusion of foreign nationals into their programs.

Section 10 and 10A of **Australia’s Witness Protection Act 1994** acknowledges that foreign nationals or residents can be considered for inclusion into the NWPP at either the request of the appropriate foreign authority, or else the International Criminal Court (ICC). Importantly, the decision to admit a foreign national requires the attention of the Minister of Home Affair who decides if it is appropriate to refer the request from the foreign authority to the Commissioner of

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69 For the U.S.A. (Abdel-Monem 2003)
Accordingly, two conditions must be met, namely that the foreign witness has been granted an entrance visa for Australia, and that the foreign authority referring the witness has agreed to cover the costs of protection and assistance to be provided by the AFP.

The **Organization of American States** (OAS) has also supported and encouraged greater cooperation in the area of witness protection, particularly as this relates to relocation agreements among member states. A recent study provides a number of notable suggestions in this regard. More specifically, these are:

- a) the dissemination of practices adopted nationally and regionally as these relate to the protection of witnesses;
- b) the establishment of a directory of national authorities responsible for witness protection;
- c) the establishment of a regional information exchange mechanism (convening meetings through electronic means of communication);
- d) the use of modern means of communication to facilitate the examination of a protected witness; and,
- e) developing a model bilateral cooperation agreement.

According to the OAS, eighteen member states have legislation which provide for witness protection programs, yet only Argentina, Canada and Colombia formally encourage international cooperation (OAS 2009: 4). Evidently, this is an area with significant room for improvement. If witness relocation programs are to be effective, authorities will need to make a concerted effort to improve

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70 Australian Federal Police 2009: 8  
71 Australian Federal Police 2009: 9  
72 OAS 2009: 5
international cooperation, particularly as it relates to information protection and witness relocation.

Effective and reliable witness protection programs have proven their value as essential tools in the fight against serious crime. Nevertheless, in many countries, there remain persistent concerns about some of the deficiencies and limitations of existing protection measures, the growing cost of existing programs, as well as the legal and ethical issues associated with some of their more controversial aspects. The level of risk faced by a witness dictates the nature and extent of the protective measures that must be taken. For instance, most witness protection programs have a requirement that a serious risk to the witness be established before protection services are offered. It is seen that most WPPs are managed by national or regional police forces, and most programmes are legislatively based. Better oversight, evaluation, and protection of the interests of witnesses are identified as a need in most jurisdictions.

There is very little research on the effectiveness of existing programs, and the evidence relating to their cost effectiveness is very weak. Nevertheless, subjective evidence of their success in obtaining convictions in cases where protected witnesses are used is generally positive. Each year, only a few witnesses are offered the opportunity to participate in a formal witness protection program. Of these, some decide not to accept the protection offered. In fact, the great majority of witnesses who feel threatened do not participate in a witness protection program, choosing to remain under the responsibility of local police services. Many of them decide to move and relocate somewhere not very far from where they used to live, sometimes because they think that this is the only effective way to protect themselves and their family (Fyfe 2001: 104). They may also change jobs, move their children to another school, stop frequenting certain places (places of worship, restaurants, etc.), and change their normal mode of transportation (e.g. avoid public transportation, drive different routes, etc.). Many rely temporarily on
friends and relatives for assistance, temporary accommodation they can offer, even though they are hesitant to ask for that kind of help for fear of compromising someone else’s safety.

*Is the Protection Provided by These Programs Enough?*

Many witnesses elect not to participate in witness protection programs for a variety of reasons, among them the knowledge that these programs are imperfect and the associated fear that this protection might fail. The media in Canada, Australia, and the United States have all included articles about the difficulties faced by those living under new identities. In some cases, these have even highlighted the stories of those being ‘kicked-out.’

Canadian police and politicians have expressed fears that fewer prospective witnesses are opting for the federal program because the rules are too strict, the prospect of losing protection once it has been granted is also of great concern. This is particularly troubling when news reports detail cases where protected witnesses are injured and/or killed. In May 2004, Australian media paid close attention to the story of Terence Hodson and his wife who were murdered in their safe house after helping Victoria Police. In April 2009, the Irish Times reported the story of Roy Collins who is believed to have been shot in a revenge killing after a family member gave evidence in court against a gangland member in 2005. Echoing the concerns over the safety of protected witnesses in other countries, the article bluntly asks, “If Roy Collins could be shot dead while his family was being given Garda protection, is anybody really safe?”

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74 Ibid.


It should be recognized that most witness protection programs and law enforcement agencies with which they are associated are understandably careful about the information they make public about current operations and methods. As it has been shown, the cases that are brought to the attention of the media tend to become public because of some kind of program failure which can bias the perception that people have of these programs. Having said this, a review of media reports across selected countries did not uncover any legitimate news articles in favour of abolishing witness protection schemes. In fact, media coverage in many countries such as India, Israel, Colombia, Mexico, Kenya, the Philippines and South Africa has been exclusively concerned with either the need for establishing a witness protection program, or else the need for strengthening the one already in place.

PART-B
INITIATIVES AT GLOBAL LEVEL FOR WITNESS PROTECTION

6.4. ICC (INTERNATIONAL CRIMINAL COURT)


The rights of victims and witnesses under the Rome Statute of the International Criminal Court (ICC) are much broader and more complete than other ad hoc tribunals. Protections afforded to witnesses can be found in Article 68: Protection of the victims and witnesses and their participation in the proceedings, Article 69: Evidence, and Article 75: Reparations to victims. Under Article 43, the Registry is charged with the creation of a Protections of Victims and Witnesses Unit. This unit deals with and assesses the situations of witnesses coming to the ICC. If protection is necessary, this unit determines what kind of protection is necessary and how much is required. Due to the influence and work
put in by the Women’s Caucus and many other state delegations, the text of the Rome Statute has a much stronger gender perspective.\textsuperscript{77} This is especially important in the context of the Victims and Witnesses Unit since sexual violence has been an increasing point of tribunal prosecution.\textsuperscript{78} Overall, witnesses enjoy an expanded role in proceedings and greater protections in the ICC, and this is evidenced in the legislative intent of the Articles of the ICC Statute. It was noted by the organization Human Rights Watch, when it addressed the Preparatory Commission for the ICC, that although the job of the Prosecutor not only involves the pursuit of the case against the accused, but also the protection of victims and witnesses.\textsuperscript{79} They also noted, however, that in most cases the actions of the Prosecutor will be dictated by what is necessary to secure a conviction of the accused.\textsuperscript{80} It is for this reason that the rights and protections for victims and witnesses were so clearly discussed and defined in the statute, to ensure their place in the operation of the court.

**6.4.2. Protection of Victims and Witnesses and Their Protection during the Proceedings\textsuperscript{81}**

Article 68 articulates important protections and gives victims and witnesses more complete protection than in other tribunals.\textsuperscript{82} Much more extensive than the ad hoc tribunals, Article 68 includes the duties of the Prosecutor to protect victims, as well as the ability to keep information confidential and witnesses anonymous for the purposes of safety and protection.\textsuperscript{83} More importantly, however, Article 68(3) provides for the participation of victims in the proceedings.\textsuperscript{84} This is important

\textsuperscript{77} Sadat, Leila Nadya. The International Criminal Court and the Transformation of International Law 85 (2002)
\textsuperscript{78} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Article 68
\textsuperscript{82} Rome Statute, Art. 68
\textsuperscript{83} Id.
\textsuperscript{84} Id.
because, not only does Article 68 codify many of the rights and protections earned throughout the trials of the ICTY and the ICTR, it provides victims a direct voice into the legal proceedings. This transforms the role of victim from spectator to substantive third party. In this case, the victim is free to choose a legal representative. The victim can then communicate with the court through the legal representative, but only in a limited role depending on the determination of the Chamber. The Chamber may limit the victim’s intervention into the proceedings to written observations. However, the legal representative has the power to examine witnesses, experts, and the accused in the interests of the victim to formulate the written observations. Those observations can then be communicated to the Prosecutor, or if necessary the Defense, in order to put the views of the victim forward during trial. This way, although not a true “party” to the case, the victim has an established legal channel into the proceedings, and can make their voice and opinions heard to the court.

6.4.3. Methods of Testimony

Article 69 covers testimony that can be given outside of the trial forum. This includes audio/video recordings and the ability to testify through a third party. This includes privileges of confidentiality and anonymity when testifying. The article states:

_The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in_

86 Id.
87 Id. at 1405-6.
88 Id.
89 Article 69
90 Rome Statute, at Art. 69
accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.  

All of the things that needed a ruling on a motion in previous tribunals is now included in the article itself. The language of Article 69 is far more expansive in the description of evidence, which allows a greater number of protections to be specifically stated, rather than simply inferred from previous rules of evidence in the ICTR.

6.4.4. Reparations to Victims

Article 75, using in part Article 79, creates a mechanism for victims to collect reparations from the convicted. Article 75 states:

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

This is important because it is the first time a tribunal has established principles on any kind of punishment outside of imprisonment. The Court can order that reparations be paid through a victim’s Trust Fund set up through Article 79 of the Rome Statute. The ICC can also levy the reparation against an individual, not just a state, once that individual is convicted. Representatives of the victims and their families will also have input as to the reparations as well.

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91 Id.
92 Articles 75 and 79
93 Id.
94 Id.
96 Rome Statute, at Art. 75
97 Id. at Art. 79
court has the sole discretion over the availability and scope of the Trust Fund.\(^9\) In order for a victim to receive reparations from the Trust Fund, they must submit certain information including an application, a description of the injury or loss, the location and date of the injury, and if possible the identity of those the victim believes could be responsible.\(^9\) The reasons for this seem to be twofold: first, the information ensures the legitimacy of the claim and the reparations provided, and second, it allows victims to bring claims for reparations before the court without having to appear in person.\(^1\)

6.5. **ICTY (INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA)**

The Tribunal has a special unit—the Victims and Witnesses Section (VWS)—dedicated to supporting and protecting all witnesses, whether they are called by the prosecution, defence or chambers. This independent and neutral body provides all the logistical, psychological and protective measures necessary to make their experience testifying as safe and as comfortable as possible.\(^1\) The majority of witnesses who testify at the Tribunal do so in open court. However, if they feel it is necessary to protect the witness’ security or privacy, the prosecution and defense can ask the court to apply protective measures. These measures are enshrined in the Tribunal’s Rules of Procedure and Evidence (RPE) (Rule 75 and Rule 69). The Statute of the Tribunal, in line with the major legal systems around the world, states that the International Tribunal:

"shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity".\(^1\)

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\(^9\) Id.


\(^1\) http://www.icty.org/sid/158
In addition, Rule 69 of the Tribunal's Rules of Procedure and Evidence (RPE)\textsuperscript{102} stipulates the following:

a) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001)

b) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001)

c) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 75 of the RPE\textsuperscript{103} envisages a range of measures that can be ordered by the Judges to protect witnesses' identities:

1) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (Amended 15 June 1995, amended 2 July 1999) IT/32/Rev. 45 75 8 December 2010

2) A Chamber may hold an in camera proceeding to determine whether to order:
   a) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (Amended 12 Nov 1997)

\textsuperscript{102} Rule 69 Protection of Victims and Witnesses (Adopted 11 Feb 1994)
i) expunging names and identifying information from the Tribunal’s public records; (Amended 1 Dec 2000, amended 13 Dec 2000)

ii) non-disclosure to the public of any records identifying the victim or witness; (Amended 28 Feb 2008)

iii) giving of testimony through image- or voice-altering devices or closed circuit television; and

iv) assignment of a pseudonym;

1. closed sessions, in accordance with Rule 79;

2. appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. (Amended 30 Jan 1995)

3) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F). (Amended 12 Dec 2002)

4) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

Once protective measures have been issued in respect of a victim or witness, only the Chamber granting such measures may vary or rescind them or authorise the release of protected material to another Chamber for use in other proceedings. If, at the time of the request for variation or release, the original Chamber is no longer constituted by the same Judges, the President may authorise such variation or release after consulting with any Judge of the original Chamber who remains a Judge of the Tribunal and after giving due consideration to matters relating to witness protection. All members of the public, including journalists, are subject to the Trial Chamber's orders. Any violation of such an order, especially matters relating to the protection of witnesses, could constitute a contempt of
court, and as such, incur a penalty as stipulated by Rule 77 of the Rules of Procedure and Evidence.¹⁰⁴

6.6. ICTR (INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA)

The ICTR Statute provides for protection of victims and witnesses under

- Article 14: Rules of Procedure and Evidence,
- Article 16: The Registry,
- Article 19: Commencement and Conduct of Trial Proceedings, and
- Article 21: Protection of Victims and Witnesses.¹⁰⁵

Each of these articles plays an important role in the protection of witnesses in the ICTR. Paragraph 1 of Article 19 in the ICTY Statute states:

*The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.*¹⁰⁶

Article 19 is reflective of the Tadic court in that the notion of a fair trial does not only apply to the accused, but to the witnesses and victims as well. This is a marked evolution from the tribunals in Nuremberg and Tokyo, where only the rights of the accused were considered essential to a fair trial¹⁰⁷.

Article 16 creates the Registry for the ICTR.¹⁰⁸ The Registry is divided into four divisions, one of which being the Witnesses and Victims Support Section.¹⁰⁹ The Witnesses and Victims Support Section of the ICTR is implemented through

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¹⁰⁶ Id.
¹⁰⁹ Directive for the Registry for the International Criminal Tribunal for Rwanda
the Rules of Procedure and Evidence adopted in Article 14. The ICTR Statute provides similar protections to those of the ICTY, however, with some notable improvements.

Article 21 of the ICTR Statute provides for protection of witnesses and victims through the Rules of Evidence and Procedure. This article is what procedurally represents a step forward in the way international tribunals treat witnesses. Found both in the ICTR and the ICTY, Article 21 puts the procedural limitations on the rights of the accused and balances them with the rights of witnesses in order to create a fair public trial. Such an article was not present in the Nuremberg or Tokyo tribunals, and is the legal recognition the court needed in the Tadic case to justify the extensive protection afforded to those, and future, witnesses.

Article 14 of the ICTR Statute adopts the Rules of Procedure and Evidence for the tribunal. Rule 34 of those rules provides for a Witnesses and Victims Support Section within the tribunal to deal with the issues associated with victim’s testimony. In the ICTR, the role of the Victims and Witnesses Support Unit is similar to that of the ICTY’s Victims and Witness Unit. However, recent amendments to the Rules show how the role of the Victim and Witness Support Unit has been expanded and how the understanding of the nature of some of the core crimes has changed. This gender-specific language has been added to Rule 34:

A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in

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110 Id.
111 Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR Res. 955, (1994) [reproduced in the accompanying notebook at Tab 1.]
112 Momeni, Mercedeh, Balancing the Procedural Rights of the Accused against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia, 41 How. L. J. 155 (1997)
It is only now in the aftermath of such widespread use of rape as a war crime that the long term psychological effects are having an impact on the procedure of the tribunal. Like the ICTY Rules, the ICTR Rules provided that a Victims and Witnesses Support Unit be created to "recommend the adoption of protective measures for victims and witnesses" and to ensure that victims and witnesses receive relevant counseling and support. Rule 34 of the ICTR Rules, however, also provided that the relevant support included "physical and psychological rehabilitation" and that the staff should also "develop short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family."70 This shows an evolution in the role of Witness and Victim Units in ad hoc tribunals. The long term effects of testifying are considered alongside the immediate concerns.

6.7. UNCTOC (UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME) (or PALERMO CONVENTION)115

The provisions for Protection of witnesses contained in the Article 24 of Convention are:

(i) 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.

115 Convention Between the UNITED STATES OF AMERICA and OTHER GOVERNMENTS Done at New York November 15, 2000 http://www.state.gov/documents/organization/128277.pdf
(ii) The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

a. Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, nondisclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

b. Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means. Convention Annotation: Many witnesses are too young or too frightened to speak openly in court in front of their traffickers. This section provides a means to allow testimony from another location and yet still permit defendants’ attorneys to cross-examine the witnesses.

(iii) States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

(iv) The provisions of this article shall also apply to victims insofar as they are witnesses.

The provisions for Assistance to and Protection of Victims contained in the Article 25 of Convention are:

(i) 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.
(ii) Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

(iii) Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

6.8. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

The United Nations Convention against Corruption recognizes the importance of informants and witnesses in combating corruption and has included special provisions in the Convention to address these matters. Article 32 of the Convention states as follows:

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

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or

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116 Protection and Treatment of Witnesses and Informants under the United Nations Convention against Corruption and under Canadian Law http://www.icelr.law.ubc.ca/
117 The Convention can be found at www.undoc.org/. China ratified the Convention on January 13, 2006
118 Article 32 of the Convention Against Corruption is entitled "Protection of Witnesses, Experts and Victims"
limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defense.


The good practices which were launched in February 2008 provide a comprehensive picture of available witness protection measures and offer practical options for adaptation and incorporation in the legal system, operational procedures and particular social, political and economic circumstances of UN Member States. They have been developed in a series of regional meetings with the active participation of expert representatives from law enforcement, prosecutorial and judicial authorities of Member States. They reflect experience from different geographical regions and legal systems, together with existing literature, previous and ongoing work by UNODC as well as other international and regional organizations. The good practices identified take a holistic approach to witness protection. They examine a series of measures that may be undertaken to safeguard the physical integrity of people who give testimony in criminal
proceedings from threats against their life and intimidation. These measures provide for a continuum of protection starting with the early identification of vulnerable and intimidated witnesses, moving through the management of witnesses by the police and enactment of measures to protect their identity during court testimony and culminating with the adoption of the exceptionally severe measures of permanent relocation and re-identification.

In the development of the good practices, UNODC consulted with more than 60 Member States and international organizations such as Europol, International Criminal Court, International Criminal Tribunal for former Yugoslavia, International Criminal Tribunal for Rwanda, Interpol, Southeast European Cooperative Initiative (SECI), Regional Center for Southeast Europe, Sierra Leone Special Court as well as United Nations Asia and Far East Institute (UNAFEI) and United Nations Interregional Crime and Justice Research Institute (UNICRI). UNODC has developed a model law on witness protection for Latin American countries. It was developed by an experts group held in Santiago, Chile with the participation of officials from Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, El Salvador, Honduras, the International Association of Prosecutors, the International Criminal Court, the Organization of American States, Panama and Peru. The model law was finalized and published in Spanish under the banner of UNODC and OAS and was launched officially in the annual conference of the Ibero-American Association of Attorney General Offices (AIAMP) in Madrid, Spain in October 2007.

There are no internationally accepted formal standards for witness protection. Several guiding principles have been articulated over the last decade by the Council of Europe (Council of Europe 2005). Some of them are referred to in the present study. 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. The UNODC has also published a handbook on good practices for the protection of witnesses in criminal proceedings involving organized crime. UNODC good-practices report discusses key elements of witness protection programmes involving organized crime, including the legal framework for setting up such programmes. As mentioned earlier, at least two major United Nations conventions, against organized crime and against corruption, call for the development of witness protection measures and for greater international collaboration in witness protection.