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**STUDY ON COOPERATION
ON THE PROTECTION OF VICTIMS AND WITNESSES**

(Document prepared by the OAS General Secretariat,
Department of Legal Cooperation of the Secretariat for Legal Affairs)

INTRODUCTION

At the Seventh Meeting of Ministers of Justice or other Ministers or Attorneys General of the Americas (REMJA VII), the following recommendation was made:

“That the OAS member states, as necessary, and in full observance of the principles of their legal systems, review domestic laws and enforcement mechanisms with a view towards modernizing the tools to combat current and emerging transnational organized crime challenges, including implementation of laws and other measures:

To ensure the effective protection of victims and witnesses, within the framework of criminal procedures, while at the same time promoting that their relocation become viable, through expedited cooperation mechanisms, in accordance with the principles of their domestic legal systems, and consistent with the provisions of articles 24 and 25 of the UN Convention against Transnational Organized Crime; and to urge the OAS member states that have not yet done so, to adopt the legislation and other measures required to that end, within each of their legal frameworks. For this reason, to request that the Secretariat of Legal Affairs of the OAS General Secretariat, prepare a study which would include proposals to facilitate cooperation between interested states in the area of protection of victims and witnesses, and submit it for consideration at the next meeting of the Working Group on Mutual Assistance in Criminal Matters and Extradition. Additionally, this study will also be presented to the Technical Group on Transnational Organized Crime”.

Bearing in mind the foregoing, this study examines developments internationally, regionally and nationally on this topic, and concludes with suggestions in five areas to encourage cooperation among the member states of the OAS: a) the systematization and dissemination of laws and measures adopted nationally and regionally on this topic; b) the establishment of an updated directory of national authorities responsible for victim and witness protection authorities; c) the establishment of a regional information exchange mechanism, such as the convening of meetings or through the use of electronic means of communication; d) the use of modern means of communication to facilitate the examination of a protected witness and e) development of a model bilateral cooperation agreement.

I. INTERNATIONAL AND REGIONAL DEVELOPMENTS

i. United Nations

The United Nations has several instruments that promote cooperation in this area. Principally, articles 24 and 25 of the United Nations Convention against Transnational Organized Crime,^{1/} require State Parties to the Convention to take appropriate measures within its means to provide effective protection for victims and witnesses, which include, among other measures, special arrangements for giving evidence and the consideration of relocation agreements. In order to assist the States Parties to implement the provisions of this Convention, the United Nations has prepared Legislative Guides for the Convention.^{2/} In addition, the United Nations has prepared a Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime.^{3/} It is intended as a useful reference tool that draws upon the experience of Member States in setting up effective and sustainable programs for the protection of witnesses.

ii. Europe

a. European Union

The European Union has addressed the issue of witness and victim protection through principally two resolutions. Resolution of the Council of 23 of November of 1995 on the Protection of Witnesses in the Fight against Organized Crime^{4/} calls on the Member States to guarantee proper protection of witnesses against all forms of direct or indirect threats, pressure or intimidation, as well as during and after trials. Member States should consider the possibility of giving evidence in a place other than that in which the person is being prosecuted, using audiovisual methods. Resolution of the Council of 20 of December of 1996 on Individuals who Cooperate with the Judicial Process in the Fight against Organized Crime^{5/} provides that Member States are to adopt appropriate measures to encourage individuals who participate or have participated in an association of criminals or other criminal organization of any kind, or in organized crime offences, to cooperate with the judicial process. In terms of witness protection, it calls on the Member states to provide appropriate protection measures, having regard to Resolution of the Council of 23 of November of 1995.

b. Council of Europe

The Council of Europe has touched on this subject through various Recommendations issued by the Committee of Ministers. Recommendation (97) 13 Concerning Intimidation of Witnesses and the

1. United Nations Convention against Transnational Organized Crime, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf

2. Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto, http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf

3. Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>

4. Resolution of the Council of 23 of November of 1995, [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31995Y1207\(04\)&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31995Y1207(04)&model=guichett)

5. Resolution of the Council of 20 of December of 1996, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997G0111:EN:HTML>

Rights of the Defence^{6/} gives guidelines on for the protection of witnesses, which the Member States could implement. Among the measures the member states should take into consideration regarding international cooperation are the use of modern means of telecommunication to facilitate simultaneous examination of protected witnesses in the requesting state; assistance in relocating protected witnesses abroad and ensuring their protection; and exchange of information between authorities responsible for witness protection programs. Recommendation (2001) 11 Concerning Guiding Principles on the Fight against Organised Crime^{7/} also provides that member states should make their witness protection programs available to foreign witnesses, through bilateral or multilateral agreements that specify applicable conditions. Finally, Recommendation (2005) 9 on the Protection of Witnesses and Collaborators of Justice^{8/} provides, among other things, provide detailed guidelines containing principles and measures that the member states may take into account when formulating their internal legislation and reviewing their criminal policy and practice. Among the principles contained in the document are those pertaining to international cooperation, such as providing assistance in relocating abroad witnesses and ensuring their protection; facilitation and use of modern means of telecommunication; and cooperation and exchange of best practices among authorities responsible for their programs^{9/}.

II. SUBREGIONAL DEVELOPMENTS

i. Caribbean

Within the Caribbean, there are two instruments that address the issue of witness protection, the Caribbean Mutual Legal Assistance Treaty in Serious Criminal Matters, 2000^{10/} and the CARICOM Agreement Establishing the Regional Justice Protection Programme (1999).^{11/} The Caribbean Mutual Legal Assistance Treaty, under Chapter III, provides provisions on a victim and witness protection program. Each State Party is to adopt appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses. This instrument encourages the use of communications technology, such as video links, which allow for testimony to be given through these means. Consideration is also to be given for entering into arrangements with other State Parties for the relocation of witnesses. The CARICOM Agreement also provides, among other things, for States Parties and the Board of Governors to the Regional Programme to cooperate with each other in the relocation of participants in witness protection programmes.

6. Recommendation (97) 13 Concerning Intimidation of Witnesses and the Rights of the Defence, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=566782&SecMode=1&DocId=574856&Usage=2>

7. Recommendation (2001) 11 Concerning Guiding Principles on the Fight against Organised Crime, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=531010&SecMode=1&DocId=212806&Usage=2>

8. Recommendation (2005) 9 on the Protection of Witnesses and Collaborators of Justice, <https://wcd.coe.int/ViewDoc.jsp?id=849237&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

9. See also Explanatory Report to Recommendation 2005, paragraphs 92 – 97, http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/4_theme_files/witness_protection/Rec%202005_%209%20E%20Explanatory%20memorandum.pdf

10. Caribbean Mutual Legal Assistance Treaty in Serious Criminal Matters, 2000, http://www.caricom.org/jsp/secretariat/legal_instruments/mutual_legal_assistance.pdf

11. CARICOM Agreement Establishing the Regional Justice Protection Programme (1999), http://www.caricom.org/jsp/secretariat/legal_instruments/regional_justice_protection.jsp?menu=secretariat

ii. Central America

In Central America, the countries of Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and the Dominican Republic have entered into the *Convenio Centroamericano para la Protección de Víctimas, Testigos, Peritos y demás Sujetos que Intervienen en la Investigación y en el Proceso Penal, Particularmente en la Narcoactividad y Delincuencia Organizada* (2007).^{12/} This Convention also provides for cooperation among the States Parties, by requiring, in accordance with their domestic legislation, the temporary or permanent relocation of persons for protection to other States; exchange of information and experiences among States Parties; and promoting the use of new technologies.

III. DEVELOPMENTS AT THE NATIONAL LEVEL IN THE OAS MEMBER STATES

Among a review of the legislation of the member states of the OAS, 18 countries have legislation or programs in place for the protection of witnesses and victims.^{13/} However, the Secretariat was able to find limited provisions encouraging international cooperation on this topic in only 3 instances, Argentina, Canada and Colombia.

In the Argentine legislation, Law 25.764 establishes the National Program for the Protection of Witnesses and Persons under Investigation. Under section 9(g), the National Director of said Program has the power to enter into national and international agreements with public or private agencies or institutions.

In the Colombian legislation, Resolution No. 28 of 1996^{14/} establishes the program for protection of witnesses, victims, persons involved in proceedings, and officials of the entity. Under section 10 of this Resolution, the Attorney General may request the support of international institutions that have similar protection programs for officials, victims, witnesses and persons involved in proceedings whenever it is necessary to move them to other countries. Moreover, Resolution No. 377 of 2003,^{15/} which introduces regulations on and restructures the Program for protection of witnesses, victims, and persons involved in disciplinary proceedings, under its section 1, provides that when circumstances warrant, witness protection may include relocation to another foreign jurisdiction, in coordination with international institutions that provide protection in said foreign jurisdiction.

In the Canadian legislation, the Witness Protection Program Act,^{16/} under section 14 provides that the Commissioner, who administers the Program, 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. Similarly, reciprocal agreements may be entered with an international criminal court or tribunal to enable a witness of those proceedings into the Program. In order to be admitted, the consent of the Minister of Citizenship and Immigration is required in order to be admitted into Canada and into the Program.

12. *Convenio Centroamericano para la Protección de Víctimas, Testigos, Peritos y demás Sujetos que Intervienen en la Investigación y en el Proceso Penal, Particularmente en la Narcoactividad y Delincuencia Organizada* (2007), http://www.sica.int/busqueda/busqueda_archivo.aspx?Archivo=conv_20839_2_25012008.htm

13. These countries being Argentina, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Mexico, Peru, the United States, Uruguay and Venezuela.

14. Resolution No. 28 of 1996, http://int.juridico.oas.org/spanish/mesicic2_col_resolucion_0028_1996.pdf

15. Resolution No. 377 of 2003, http://int.juridico.oas.org/spanish/mesicic2_col_resolucion_377_2003.pdf

16. Witness Protection Program Act, <http://laws.justice.gc.ca/en/W-11.2/index.html>

As well, only the Canadian legislation contains provisions that allow for the use of videoconference for the taking of testimony.

The Canadian Criminal Code,^{17/} under section 714.2, allows for a court to receive evidence given by a witness outside Canada by technological means, unless a party to the proceedings can show that receiving this type of evidence would be contrary to the principles of fundamental justice. Conversely, section 714.3 allows a court to order a witness in Canada to give evidence by means of technology if the court is of the opinion that it would be appropriate considering all the circumstance, including, among others, the location and personal circumstances of the witness. In addition, section 22.1 of the Mutual Legal Assistance in Criminal Matters Act^{18/} provides that a person whose evidence is required as a witness in a criminal proceeding in the requesting state can be compelled to provide a statement by means of technology.

The practice of the United States in allowing for witness testimony via videoconferencing can be found mostly in bilateral mutual legal assistance treaties. For example, under article 6 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America (2003), the Contracting Parties are to take such measures as may be necessary to enable the use of video transmission technology between each Member State and the United States for the taking of testimony in a proceeding for which mutual legal assistance is available of a witness or expert located in a requested State.

IV. SUGGESTIONS TO FACILITATE COOPERATION BETWEEN STATES IN THE TOPIC OF WITNESS AND VICTIM PROTECTION

There appears to be an international trend to encourage international cooperation among States in the area of witness protection. In following this trend, Member States may consider the following: a) the systematization and dissemination of laws and measures adopted nationally and regionally on this topic; b) the establishment of an updated directory of national authorities responsible for victim and witness protection authorities; c) the establishment of a regional information exchange mechanism, such as the convening of meetings or through the use of electronic means of communication; d) the use of modern means of communication to facilitate the examination of a protected witness and e) development of a model bilateral cooperation agreement. It is these aspects in which suggestions will be made on this topic.

a. Systematization and dissemination of laws and measures on the topic adopted nationally and regionally

The majority of the member States of the OAS have regulated important aspects on the protection of victims and witnesses, in various degrees, through legislation or other measures, as briefly described under Section C of this study. The member states may mutually benefit from these developments, identifying the legislative elements or measures contained in these regulations that may be useful to complement or strengthen their own system. This may be carried out by consulting a portal containing national and regional laws, measures and policies on the topic, similar to the work undertaken by the General Secretariat of the OAS under the Framework of the MESICIC in relation

17. Canada Criminal Code, <http://laws.justice.gc.ca/en/showtdm/cs/C-46>

18. Mutual Legal Assistance in Criminal Matters Act, <http://laws.justice.gc.ca/en/showtdm/cs/M-13.6>

to the protection of those who report acts of corruption.^{19/} The member states may consider establishing a similar website whereby national and regional laws, measures and policies on victim and witness protection may be consulted. Member states may find that such a portal may assist in facilitating this type of information exchange.

b. Establishment of an updated directory of national authorities

The member states of the OAS may also consider the establishment of an updated directory of national authorities responsible for victim and witness protection programs.

The aforementioned portal for the systematization and dissemination of laws and measures on the topic may also contain this directory, which would be useful for the facilitation of information exchange.

c. Establishment of a regional information exchange mechanism

The member states may consider establishing a mechanism to exchange information directly among the national authorities responsible for victim and witness protection programs. Mechanisms that may be considered are direct communication through an electronic network or the holding of regular meetings among these authorities.

To illustrate, other regions already have in place an informal network to hold meetings for the exchange of information on good practices, discussion on the status of witness protection and the development of good practice policies for witness protection. For example, Canada and the United States participate in such a network, the Europol network of experts on witness protection, Similar efforts have been initiated in other regions, such as the Australasian Heads of Witness Protection Forum established in Asia and the Pacific.^{20/}

d. Encourage use of modern means of communication

Member states may also consider using modern means of communication, such as videoconferencing, to facilitate examination of a protected witness in the court of a requesting state. The member states of the OAS may consider providing in their legislation, when appropriate, that witness testimony be allowed through videoconferencing or other adequate means, without prejudicing the rights of the defendant, including the right to due process. This would allow for live examination of protected witnesses and victims or when the appearance of the protected person in the criminal court of the requesting state is other wise impossible, difficulty or costly.

e. Model bilateral cooperation agreement

Member states may consider entering into bilateral cooperation agreements in order to provide assistance in relocating protected witnesses and victims abroad. In order to facilitate member states who would be interested in entering into such an agreement, consideration may be given for the drafting of a model agreement in this regard, which may include the following aspects:

19. Mechanism for the Follow-Up on the Implementation of the Inter-American Convention against Corruption. This can be found at the following website:

20. Explanatory Report to Recommendation 2005, *supra* note 9, at paragraph 95.

- i. The physical protection of not only the witness, but the witnesses' family and other closely related persons;
- ii. Procedures for the relocation of a witness in the receiving country;
- iii. Prohibitions on revealing the identity of a protected witness.^{21/} Common conditions in these agreements include: contact limited between authorized agencies to maintain confidentiality; disclosure of all information relating to the witness or victim, such as criminal record, financial situation and civil liabilities; inclusion of reciprocity; and compliance with immigration law.^{22/}
- iv. Responsibility of sending and receiving authority;
- v. Measures that ensure that the competent authority of the country of origin may relocate witnesses to a receiving country, when it is necessary for an investigation or conduct any other necessary proceeding;
- vi. Negotiation over financial costs of receiving a witness;
- vii. Issues related to integration of the protected victim or witness, such as finding employment and language courses, if applicable.
- viii. Standards of behavior that must be observed by witnesses and their families or those related to the witness, while located in the receiving country;
- ix. Situations or circumstances that allow for excluding witnesses from the protection program of the receiving country;
- x. Procedures and measures to resolve problems or difficulties that may arise in the formation of an agreement.

21. UN Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime provides that these agreements are typically found in two forms, a) a regional or bilateral agreement on cooperation in witness protection or in combating specific crimes such as organized crime, drug trafficking and terrorism; and b) special agreements or memorandum of understanding concluded directly between police forces, prosecutor's offices or other judicial and law enforcement authorities, *supra* note 3 at pg. 82.

22. *Ibid.*, pg. 84.