



Provisional version

Committee on Legal Affairs and Human Rights

Witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe

Report*

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A. Draft resolution

1. The Parliamentary Assembly, referring to its Resolution 1784 (2011) on “the Protection of witnesses as a cornerstone for justice and reconciliation in the Balkans”, reaffirms that witnesses who stand up for truth and justice must be guaranteed reliable and durable protection, including legal and psychological support and robust physical protection before, during and after the trial.
2. The Assembly recalls that witnesses can be particularly vulnerable to perceived or actual threats and intimidation from perpetrators of crimes against themselves and/or people close to them, especially in cases of organised crime and terrorism.
3. Witness testimony is crucial to the proper functioning of the criminal justice system in any state upholding the rule of law. It is essential for the effective investigation and prosecution of organised crime and terrorism, as it contributes to the dismantling of powerful criminal structures, including transnational ones.
4. Organised criminality with a strong transnational reach has increased in Europe due to globalisation, the abolition of border controls within the Schengen area and the development of new communication technologies. Witnesses requiring protection include not only victims or bystanders of crime, but also criminals. Without the cooperation of so-called “collaborators of justice” and their insiders’ knowledge, effective investigation of serious crimes and dismantling criminal structures would be difficult, or even impossible. That is why sophisticated witness protection measures, including so-called “witness protection programmes”, implying relocation and even the change of identity of the witness or collaborator of justice, have been developed over the last two decades.
5. Several international legal instruments call on states to take appropriate measures to effectively protect witnesses from potential retaliation or intimidation and to enhance international cooperation in this area. The United Nations Convention against Transnational Organised Crime (UNTOC) and the UN Convention against Corruption regulate this matter in cases of transnational organised crime and corruption. Within the Council of Europe, rules concerning witness protection are included in the Criminal Law Convention on Corruption, the Convention against Trafficking in Human Beings, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and the Committee of Ministers’ Recommendations No. R (97) 13, Rec (2001) 11 and Rec (2005) 9.
6. The Assembly notes that, in the context of combatting organized crime and terrorism, although the Council of Europe has already been active in promoting witness protection measures and programmes, many discrepancies exist in their implementation. While certain member states have acquired extensive experience in this field, others appear less active.

* Draft resolution and draft recommendation adopted unanimously by the committee on 30 October 2014.

7. The Assembly deplores the existence of numerous discrepancies in the witness protection schemes and stresses the need for states to cooperate in this area, especially in cases of relocation of witnesses/collaborators of justice from small countries.

8. The Assembly considers that, in order to effectively combat organised crime and terrorism, further steps need to be taken in the area of witness protection. Thus, it calls upon member states to:

8.1. set up, or if need be, to revisit their witness protection mechanisms; witness protection units should cooperate with law enforcement bodies and should be independent from the investigation and prosecution of the relevant case;

8.2. allocate appropriate financial and human resources to bodies dealing with the protection of witnesses;

8.3. reconsider their rules on mitigating sentences and granting immunity from prosecution in cases of organised crime and terrorism in order to provide greater incentives to collaborators of justice to cooperate with the authorities;

8.4. produce statistics on the results of cooperation of witnesses, including collaborators of justice, with the investigative and judicial authorities in cases of organised crime and terrorism, and in particular on the number of convictions based on their testimonies;

8.5. to strengthen international cooperation in the field of protection of witnesses, in particular by:

8.6.1. regularly exchanging information and sharing best practices,

8.6.2. concluding, when appropriate, agreements/arrangements on relocation of witnesses and other protective measures, and

8.6. step up or, if need be, reinforce cooperation with relevant international bodies, including Europol, Interpol and the United Nations Office on Drugs and Crime.

9. The Assembly also recalls that, when setting up and implementing witness protection measures and programmes, member states must respect the right to a fair trial and the right of defence. Any decision to terminate a witness protection measure or programme should be taken only after a comprehensive examination of the existing threats to the life of protected persons.

B. Draft recommendation

1. Referring to its Resolution on witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe, the Assembly recommends that the Committee of Ministers:

1.1. take stock of the implementation of its Recommendation (2005) 9 on the protection of witnesses and collaborators of justice;

1.2. undertake a comprehensive study on the design and operation of witness protection programmes in all Council of Europe member states, in particular with respect to incentives for cooperation of collaborators of justice, in order to harmonise- where necessary - rules for the transnational implementation of such measures;

1.3. encourage member states to collect and share statistics on the results of cooperation of witnesses/collaborators of justice with the investigative and judicial authorities, and in particular on the number of convictions based on their testimonies.

C. Explanatory memorandum by Mr Díaz Tejera, rapporteur

1. Introduction

1.1. Procedure

1. The motion for a resolution on “Witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe” (Doc. 12841)¹ was transmitted to the Committee on Legal Affairs and Human Rights on 23 April 2012.² At its meeting in Paris on 19 March 2013, the Committee appointed me as rapporteur, following the departure from the Assembly of the previous rapporteur Mr Jean-Charles Gardetto (Monaco, EPP/CD). In March 2014, to take stock of the current legal status and practice within Council of Europe member states on this matter, I sent out a questionnaire through the European Centre for Parliamentary Research and Documentation (ECPRD). On 27 May 2014, during its meeting in Helsinki, the Committee held a hearing with three experts:

- Mr Christian Bauer, Project Coordinator for Witness Protection, Europol, The Hague,
- Mr Gábor Ihász, Head of Department, Riot Police, Witness Protection Unit, Budapest, and
- Mr Frank Debije, Chief Inspector, National Police of the Netherlands.

1.2. The increasing role of witness protection measures in combating organised crime and terrorism

2. The motion for a resolution rightly stresses the need “to study carefully the question of the protection of witnesses as an indispensable tool in the fight against organized crime and terrorism in Europe”. For certain types of crime (for example, rape), it is the victims themselves who are often the only witnesses. The impact of crime on its victims can be far-reaching and devastating, leaving great physical and emotional scars.³ It may render these individuals particularly vulnerable to perceived or actual threats and intimidation against themselves or people close to them and thus render them reluctant to testify.⁴ It may also lead to so-called “secondary victimisation”, involving a lack of understanding of the suffering of victims making them feel isolated and insecure.⁵

3. There is growing awareness about the importance of witness testimony in securing convictions in criminal trial proceedings.⁶ As such, reliance on witness testimony is crucial to the proper functioning of the criminal justice system in any state upholding the rule of law. Aside from obvious human rights based incentives for protecting victims and witnesses of serious crimes, such protection is indispensable in order to vanquish organised crime and terrorism through the criminal justice system.⁷ This is because of the critical role of witness testimony in effectively investigating and prosecuting these crimes and thereby dismantling powerful criminal structures that pose a serious threat to the rule of law in many countries. In this context there is no difference between organised crime and terrorist organisations, as both may seriously obstruct justice, by intimidating, harming or bribing witnesses.⁸

4. Globalization has opened the gateway to new challenges, such as the increasing phenomenon of criminality with a strong transnational reach, including organised crime and terrorism. In fact, the dramatic increase in the global prevalence of organised crime over recent years has become a major area of international concern. For instance, the UN Security Council recently noted that “in a globalized society, organised criminal groups and networks, better equipped with new information and communication technologies, are becoming more diversified and connected in their illicit operations, which in some cases may aggravate threats to international security.”⁹ In these circumstances, more and more witnesses requiring protection are not only victims but also criminals (so-called “collaborators of justice” or *pentiti*).

¹ Doc. 12841 of 23 January 2012.

² Reference 3850 of 23 April 2012.

³ [UNODC website](#).

⁴ Ibid.

⁵ Report by our Committee, *The Protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, Rapporteur Jean-Charles Gardetto, (Monaco, EPP/CD), Doc. 12440, §19.

⁶ [Council of Europe's Committee of Ministers Recommendation R\(97\)13 concerning intimidation of witnesses and rights of the defence](#), adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Ministers' Deputies. See also Council of Europe, *Terrorism: protection of witnesses and collaborators of justice*, Council of Europe Publication (hereafter: CoE *Terrorism report*), 2006, p. 5.

⁷ [UNODC website](#).

⁸ CoE *Terrorism report*, supra note 6, p. 39.

⁹ United Nations Security Council, [Statement by the President, S/PRST/2012/16](#), 25.04.12, p. 2.

5. The Parliamentary Assembly has recently examined the question of witness protection in the Balkans. Resolution 1784 (2011) on “the Protection of witnesses as a cornerstone for justice and reconciliation in the Balkans”,¹⁰ stresses that witnesses who stand up for truth and justice are owed reliable and durable protection. Without it, justice and reconciliation in the Balkans cannot be achieved. This issue is becoming more important in view of the recent developments in Kosovo,¹¹ where at the end of April 2014, the Kosovo Assembly had decided to create a special court, which would investigate war crimes, and claims concerning trafficking in organs harvested from Serbs during the 1998-99 war in the region.¹²

6. As the Assembly points out in its Resolution 1784(2011), witness protection and support must go hand in hand.¹³ Witness support can range anywhere from logistical to psychological assistance throughout the entire length of time that a witness is implicated in the criminal trial process. Protection against retaliation can be required far beyond the trial process, sometimes for the witnesses’ and their families’ entire lives.¹⁴

7. Shortcomings in concrete, reliable and durable witness protection measures are not limited to a specific category of crime (war crimes, however grave) or to a specific region (Balkans). Unfortunately, many countries, including a number of Council of Europe member and observer states, continue to display insufficient witness protection and support measures. While many states have some form of witness protection measures, many are not adequately implemented in practice.¹⁵ There appears to be great divergence in the level of protection, the crimes such protection measures are granted for, and the type of government body administering witness protection programmes (police, other executive bodies, or the judiciary).¹⁶ This report will seek to examine the issue of witness protection in the specific and complex context of organised crime and terrorism and, relying on existing international instruments, to submit some proposals on how these shortcomings could be addressed.

2 Defining the parameters

2.1. Witnesses

8. A witness has been defined by the Committee of Ministers as “any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with the national law.)”¹⁷ As stipulated in the United Nations Office of Drugs and Crime’s *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime*, the status of the person giving testimony can be an informant, a witness, a judicial officer, undercover agent or other.¹⁸

9. Suspects and defendants called “collaborators of justice” also play a significant role in providing testimony leading to the investigation and prosecution of crimes. Committee of Ministers Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice¹⁹ defines a “collaborator of justice” as “any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organisation of any kind, or in offences of organised crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organisation, or about any offence connected with organised crime or other serious crimes.”²⁰ In relation to such persons, co-

¹⁰ Adopted by the Assembly on 26 January 2011, paragraph 3.

¹¹ All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

¹² See also [the statement by the Chief Prosecutor of the EU SITF](#) (Special Investigative Task Force) on investigative findings, of 29 July 2014.

¹³ Supra note 10, § 7.

¹⁴ Ibid.

¹⁵ Supra note 5, §14.

¹⁶ [Witness Protection Programmes: EU experiences in the international context, 28/01/2013](#), Library of the European Parliament, p.5.

¹⁷ Committee of Ministers [Recommendation R\(2005\)9](#) concerning intimidation of witnesses and rights of the defence, adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies.

¹⁸ UNODC, [Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime](#), 2008 (hereafter, *UNODC Good Practices*), p.4. Section I(F)(a) sets out the definition of witnesses as follows: (a) “Witness” or “participant”: 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.

¹⁹ Supra note 17.

²⁰ Supra note 17.

operation is encouraged and compensated with a significant reduction of prison sentences or sometimes even by immunity from prosecution.

2.2. Organised Crime

10. Despite the rapidly growing prevalence of transnational organised crime, and the grave threat to international security, this area of criminal activity is a phenomenon that is not well understood to date.²¹

11. Although many international instruments make some form of reference to the increasing threat of organised crime, the UN Convention against Transnational Organized Crime and the Protocols thereto (UNTOC)²² is the only international convention targeting this criminal activity directly and comprehensively. It establishes, for the very first time, a framework for preventing and fighting organised crime, and laying out a detailed international cooperation model.²³ While the UNTOC does not provide a precise definition of 'transnational organised crime' per se, it does elaborate on which type of criminal activity may fall within its ambit. The UNTOC and its three supplemental protocols criminalize activity ranging from the mere participation in an organised criminal group (art. 5), to crimes committed by these groups, such as money laundering (art. 6), corruption (art. 8), obstruction of justice (art. 23), trafficking in persons, especially women and children (additional Protocol), smuggling of migrants (additional Protocol), and the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (additional Protocol). According to the UN Office of Drugs and Crime, the "guardian of the Convention", the lack of a precise definition is intentional so as to allow for "a broader applicability of the Organized Crime Convention to new types of crime that emerge constantly as global, regional and local conditions change over time."²⁴ The UNODC's *Transnational Organized Crime Assessment* pertinently demonstrates the ever-evolving nature of transnational organised crime and gives an assessment of new forms of such crime, such as cybercrime, maritime piracy, environmental resource trafficking, product counterfeiting, etc.²⁵

12. Despite the lack of a precise definition of the actual forms of crime, "transnational organised crime" can be understood as referring to illicit activity with strong financial incentives carried out in a highly systematic fashion by networks of individuals across state borders. There is currently some debate about whether solutions should focus on the group of individuals engaged in illicit activities or the illicit activities themselves – and the market dynamics – in which groups of individuals are implicated.²⁶ While a proper analysis of this issue is beyond the scope of my mandate, suffice it to say that the investigation and prosecution of organised crime is highly complicated due to the nature of organised crime as an ever evolving, expanding and highly complex global phenomenon.

2.3. Terrorism

13. Terrorism and organised crime share many elements and there is inevitably some overlap in the activities of groups involved in both areas of criminal activity. Terrorist groups often fund their activities by robberies or trafficking in drugs or human beings. Sometimes the general criminal activities end up overtaking the original ideological objectives.²⁷ These transformations of criminal organisations over time from being ideologically-driven to being greed-driven also generate opportunities for investigators to recruit inside informers or even witnesses from inside the organization who are disillusioned by this transformation.

14. Much like organised crime, certain actors of modern-day terrorism have highly organised multifarious networks and a strong transnational reach and the investigation and prosecution of the terrorist and other crimes they commit poses complex problems.

15. Unlike the case of organised crime, a large number of international and regional legal instruments exist to deal with terrorist offences.²⁸ Most relevant in this context is the Council of Europe Convention on the

²¹ UNODC, *The Globalization of Crime. A Transnational Organized Crime Threat Assessment*, 2010, p. 282.

²² [UN Convention against Transnational Organized Crime and the Protocols thereto, General Assembly resolution 55/25 of 15 November 2000](#), Annexes, and General Assembly resolution 55/255 of 31 May 2001, Annex.

²³ UNODC, <http://www.unodc.org/unodc/en/organized-crime/index.html>.

²⁴ Ibid.

²⁵ Supra note 17.

²⁶ Ibid., Key Findings.

²⁷ See Committee's report on "Inhuman treatment of people and illicit trafficking in human organs in Kosovo", Rapporteur: Dick Marty (Switzerland, ALDE), Doc. 12462 of January 2011.

²⁸ See for instance, *Convention on Offences and certain other Acts committed on Board Aircraft*, 04.12.69, *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 26.01.73, *Convention on the Prevention and Punishment of Crimes against Internationally protected Persons, including Diplomatic Agents*, 20.04.77, *International Convention against the Taking of Hostages*, 03.06.1983, *Convention for the Suppression of Unlawful Acts against the*

Prevention of Terrorism (“Convention No 196”), which recalls “the obligation of all Parties to prevent such offences and, if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature.”²⁹ Significantly, this Convention provides a comprehensive framework for member states regarding “effective measures to prevent terrorism”³⁰ at the national level (art. 3) and as regards international co-operation (art. 4).

16. Convention No 196 does not define a “terrorist offence” explicitly. Instead, it refers to the definitions contained in eleven major international instruments, which set out a range of terrorist offences (unlawful seizure of aircraft, unlawful acts against the safety of civil aviation, crimes against internationally protected persons, taking of hostages, use of nuclear material, terrorist bombings, etc.) as well as the financing of terrorism.

17. Much more relevant, however, than the semantics of the precise definition, is an understanding of the general nature of terrorism as a serious crime on a mass scale (often involving many victims), carried out in a systematic manner by highly organised and complex networks of individuals across national borders. Terrorism crimes are among the most complex to prevent, investigate and prosecute because they are elusive, unpredictable, and are for the most part carried out by highly structured underground terrorist networks.

2.4 *The particular complexity of witness protection in organised crime and terrorism cases*

2.4.1. *The closed nature of organised crime and terrorism networks*

18. The importance of witness testimony in organised crime and terrorism cases is based largely on the “closed nature” of criminal and terrorist networks and the fact that traditional investigative methods are not adequate to respond to these types of criminal activity. This issue is specifically dealt with by the Committee of Ministers’ Recommendation Rec(2005)10 on “special investigation techniques” in relation to serious crimes including acts of terrorism.³¹ In other words, dismantling such groups requires knowledge about actors and activities (including financial), which is difficult to obtain due to the secrecy and obscurity in which many of these networks operate.³² As the Committee of Ministers has underscored in its Recommendation Rec(2005)9, in the areas of organised crime and terrorism, witnesses are subjected to an increased risk of retaliation or intimidation,³³ and are thus particularly vulnerable, such that obtaining reliable information and testimony can prove extremely difficult. Oftentimes so-called “collaborators of justice” or “insider witnesses” (who are intimately familiar with the inner workings of the groups), are in the best position to adequately provide such information, or even the only ones who can. At the same time, they can be easily identified as “traitors” due to the limited number of persons who have access to relevant information.

2.4.2. *The transnational aspect*

19. One of the difficulties in investigating and prosecuting organised crime and terrorism offences is their transnational/cross-border dimension. The repercussions of these crimes are often vast and their effects are felt across the entire globe. In the case of organised crime, for instance, illicit goods coming from one continent can be trafficked across a second so as to be marketed in a third.³⁴ Transnational organised crime infiltrates nearly every aspect of human existence, permeating state institutions, business and politics, generating corruption, and impeding economic and social development.³⁵ Although perhaps not quite as omnipresent as other organised crime, terrorist offences also transcend national borders and much like “classic” organised crime, are carried out by highly structured inter-connected networks on the local, regional and international levels.

20. Given the global scale of organised crime and terrorism – and the strong links between criminal and terrorist networks across state borders,³⁶ coupled with insufficient international cooperation on crucial matters regarding witness protection, the likelihood that witnesses will be discouraged from testifying is high.

Safety of Maritime Navigation, 01.03.92, *Terrorist Bombing Convention*, 23.05.01, *Terrorist Financing Convention*, 10.04.02.

²⁹ Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, Warsaw, 16.V.2005, preamble, § 7.

³⁰ Ibid.

³¹ Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers’ Deputies.

³² Karen Kramer, “[Witness Protection as a key tool in addressing serious and organized crime](#)”, p. 4.

³³ CM Rec(2005)9, S. II, § 5.

³⁴ [UNODC website](#).

³⁵ Ibid.

³⁶ Ibid.

One only has to think of criminal organizations as powerful as Italian or Kosovar Mafia groups or certain terrorist movements linked to Al'Qaida, with highly complex, pluralistic and diversified structures and a transnational reach, to understand such reluctance on the part of a potential witness/collaborator of justice. The UNODC's *Good Practices* manual underscores that while witness protection measures exist in theory, their implementation is often insufficient, notably as regards cross-border cooperation for issues as important as the change of a witness' identity and relocation.³⁷

3. Witness protection and support

3.1. Scope

21. Rules on the protection of witnesses and those who participate in criminal proceedings have been established recently.³⁸ Interestingly, countries that pioneered legislation in this field established protection measures long before, for example Belgium did so in 1921 in relation to offences related to drugs and Italy in the 1970s.³⁹

22. Witness protection can include a great number of measures at any stage of the trial process (that is, before, during and after the trial). Measures at the pre-trial stage can include temporary placement of witnesses in safe houses, imposing injunctions against accused persons to prevent intimidation of witnesses; measures during trial can include the removal of defendants from the court room, or in extreme cases, in camera sessions and reliance on voice or face distortion technology, or even anonymous testimony through a pseudonym.⁴⁰ Following the trial, witness protection measures can include changing the witness' identity or relocating him/her to an unknown place within the same country or to another country altogether. Given the substantial financial cost for the state and the upheaval for the witness and his/her family, however, these witness protection measures (as part of a formally established covert witness protection programme) are resorted to only in exceptional circumstances.⁴¹ It is precisely in the fight against organised crime and terrorism that such exceptional circumstances arise most frequently, as robust and durable witness protection is often the only chance to dismantle powerful transnational criminal networks by prosecuting the "command level".

23. One can distinguish **procedural** and **non-procedural** protective measures. **Procedural protective measures** are those which operate within the scope of criminal procedure and affect its rules (for example, legal assistance to threatened witnesses, full or partial admission of anonymous witnesses, voice/face distortion, telephone- or video-conference, etc.).⁴² They are usually decided by the judge, *ex officio* or at the request of the prosecutor and/or investigating police forces. **Non-procedural protective measures** can be defined as those "which do not affect the rules of criminal procedure and have no influence on the rights of the defence (bodyguards, change of identity intended to operate outside the trial, subsequent change of address and profession, economic and psychological assistance, etc.)".⁴³ According to the Council of Europe's report on "Terrorism: Protection of Witnesses and Collaborators of Justice", the so-called "**witness protection programmes**" conceived for witnesses/collaborators of justice and their relatives fall within this category.⁴⁴ These specific measures will be discussed in turn below.

3.2. International legal instruments

24. The UNTOC contains provisions concerning protection of witnesses and victims (Articles 24-25), as well as measures to enhance suspects' and co-defendants' cooperation with law enforcement authorities (Article 26). In particular, its Article 24 Section 1 stipulates that "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." Such measures may include, *inter alia*, those aimed at guaranteeing the physical protection of witnesses as well as evidentiary rules permitting witness testimony to be given in a manner that ensures the safety of the witness (Article 24 Section 2). Similar provisions on witness protection are contained in the [UN Convention against Corruption](#) (see, in particular its Article 32).

³⁷ UNODC, *Good Practices Manual*, supra note 18, iii.

³⁸ *CoE Terrorism Report*, supra note 6, p. 11.

³⁹ *Ibid.*, p. 12.

⁴⁰ UNODC, *Good Practices Manual*, supra note 18, pp. 1 & 29.

⁴¹ *Ibid.*, pp. 1 & 29. See also: CM Recommendation Rec(2005)9 at § 23.

⁴² *CoE Terrorism Report*, supra note 6, p. 17-18.

⁴³ *Ibid.*, p. 23.

⁴⁴ *Ibid.*, p. 24.

25. The Council of Europe has been actively promoting witness protection standards among its member states. Specific rules concerning witness protection have been included in the Council of Europe Criminal Law Convention on Corruption⁴⁵ (Article 22) and the Convention on Action against Trafficking in Human Beings⁴⁶ (Article 28). Moreover, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters⁴⁷ regulates international cooperation concerning hearings by video conference (Article 9) and telephone conference (Article 10). As regards non-procedural protective measures, its Article 23 stipulates that “where a Party requests assistance under the Convention or one of its Protocols in respect of a witness at risk of intimidation or in need of protection, the competent authorities of the requesting and requested Parties shall endeavour to agree on measures for the protection of the person concerned, in accordance with their national law”. The obligation stemming from this Article (“endeavor to agree”) remains somewhat vague as regards the intended practical effect.⁴⁸

26. Moreover, the Committee of Ministers has issued a number of recommendations, Recommendation No R.(97)13 concerning intimidation of witnesses and rights of defence⁴⁹ and, Recommendation Rec(2001)11 concerning guiding principles on the fight against organised crime,⁵⁰ which calls for witness protection at all levels of the criminal trial process, and Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice, which calls on member states to enhance witness protection measures, urging increased international cooperation in this area. The latter points out a number of legislative and practical measures that should be implemented to ensure that “witnesses and collaborators of justice may testify freely and without being subjected to any act of intimidation”,⁵¹ such as implementing adequate protection measures against witnesses and collaborators of justice and people close to them⁵² and punishing acts of intimidation, where necessary.⁵³

27. The European Union (EU) has given some guidance to its member states concerning witness protection in cases of organised crime.⁵⁴ It has considered harmonising national legislation in this area, but the European Commission did not support this idea in its assessment study of 2007.⁵⁵ In the meantime, practical cooperation between member states has been developed through its law enforcement agency Europol (European Police Office), which, since 2000, has coordinated the European Liaison Network, composed of heads of national witness protection units.⁵⁶ In 2013, Europol has also elaborated its “European Handbook on Witness Protection. Common Criteria and Principles”,⁵⁷ which provides guidance to states on how to create or adapt their national witness protection programmes. Some of its provisions relate to the transnational elements of such programmes.

3.3. *The human rights perspective*

28. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),⁵⁸ the rights of witnesses in criminal proceedings have consistently been balanced against those of the defendants, as guaranteed by Article 6 of the Convention,⁵⁹ and in particular its Article 6 § 3(d), which provides that everyone charged with a criminal offence has the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the

⁴⁵ Adopted on 27 January 1999, ETS No. 173.

⁴⁶ Adopted on 16 May 2005, ETS No. 197.

⁴⁷ Adopted on 8 November 2001, ETS No. 182. It has been ratified by 31 member states and two non-member states.

⁴⁸ *CoE Terrorism Report*, supra note 6, p. 30.

⁴⁹ Supra note 31.

⁵⁰ Adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies, §§ 17 and 18.

⁵¹ Supra note 17, S. II, § 1.

⁵² *Ibid.*, S. II, § 2.

⁵³ *Ibid.*, S. II § 3.

⁵⁴ Supra note 16, pp. 5-6.

⁵⁵ Commission working document on the feasibility of the EU legislation in the area of protection of witnesses and collaborators with justice, COM/2007/0693 final, 13 November 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0693:FIN:EN:PDF>.

⁵⁶ Supra note 16, p. 6.

⁵⁷ The text of this handbook is available with the Secretariat.

⁵⁸ ETS No 5.

⁵⁹ *Ibid.* For instance, see the following cases: *Doorson v. The Netherlands*, judgment of 26 March 1996, §70, Reports 1996-II; *Van Mechelen and Others v. The Netherlands*, judgment of 23 April 1997, § 58, Reports 1997-III; *Jasper v. the United Kingdom* (Grand Chamber), judgment of 16 February 2000.

same conditions as witnesses against him.” The term “witness” has an autonomous meaning in the Convention system, regardless of classifications under national law,⁶⁰ it includes, amongst others, a co-accused,⁶¹ victims⁶² and expert witnesses.⁶³ Article 6 § 3(d) of the Convention requires that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. Any measures restricting the rights of the defense should be strictly necessary; if a less restrictive measure can suffice then that measure should be applied.⁶⁴ According to the European Court of Human Rights (“the Court”), “the admissibility of evidence is primarily a matter for regulation by national law and (...) it is for the national courts to assess the evidence before them”.⁶⁵ The Court’s roles consist not in assessing whether statements of witnesses were properly admitted as evidence, but “rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair”.⁶⁶ The handicaps suffered by the defendant should be sufficiently counterbalanced by the procedure followed by the judicial authorities.⁶⁷

29. The Court has examined numerous cases concerning depositions by anonymous witnesses and it does not preclude reliance on them.⁶⁸ However, the applicant (defendant) should not be prevented from testing the reliability of such witnesses. As stressed in the judgment *Birutis and Others v. Lithuania*,⁶⁹ in which the Court found a violation of Article 6 §§ 1 and 3 (d), no conviction should be based either solely or to a decisive extent on anonymous statements.

30. Despite the fact that the Court does not explicitly require to take into account the interests of the witnesses, including the victims, their life, liberty, security or other interests coming within the ambit of Article 8 (protection of the private and family life) may be at stake. Since these rights/interests are protected by other (than Article 6) substantive provisions of the Convention, this means that states “should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled”.⁷⁰ That is why, for example, in the case of *R.R. and Others v. Hungary*, which concerned the removal of five applicants (a man accused of participation in a drug-trafficking mafia from Serbia, his wife and their three children,) from a witness protection scheme following a breach of its conditions by the “collaborator of justice”, the Court found a violation of Article 2 of the Convention (right to life). It held, in respect of the four applicants – the perpetrator’s wife and three minor children - that there existed an identifiable risk of life-threatening vengeance from criminal circles and that the authorities had failed to address and avoid such a risk; the availability of an emergency phone number and the occasional visits by police officers were not satisfactory measures in this respect. Interestingly, the Court also considered that adequate protection, including proper cover identities if necessary, would need to be ensured to the four applicants by the state in order to satisfy their obligations under Article 46 of the ECHR concerning implementation of Court judgments (so-called “individual measures”). The judgment is now pending for execution before the Committee of Ministers: at its 1179th DH meeting in September 2013 and its 1208th DH meeting in September 2014, the Committee of Ministers considered that the information provided so far by the Hungarian authorities was insufficient to conclude that the applicants had been provided adequate protection.⁷¹

4. Witness protection programmes

31. The first witness protection programmes (WPP) were established in the US in the 1970s in the context of fight against Italian-American mafia groups and have served as a model for other countries. Secret and permanent relocation of witnesses and their families, often coupled with identity change, constitutes its core element.⁷² The United Nations Office on Drugs and Crime (UNODC) defines WPPs as “formally established covert programme(s) subject to strict admission criteria that (provide) for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities”.⁷³

⁶⁰ *Damir Sibgatullin v. Russia*, § 45; *S.N. v. Sweden*, § 45.

⁶¹ See, for example, *Trofimov v. Russia*, § 37.

⁶² *Vladimir Romanov v. Russia*, § 97.

⁶³ *Doorson v. the Netherlands*, §§ 81-82.

⁶⁴ *Van Mechelen and Others v. the Netherlands*, § 58.

⁶⁵ *Doorson v. the Netherlands*, § 67.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, § 72 and *Jasper v. the United Kingdom*, § 52.

⁶⁸ See, for example, *Doorson v. the Netherlands*, § 69.

⁶⁹ *Birutis and Others v. Lithuania*, Application nos. 47698/99 and 48115/99, judgment of 28 March 2002, § 32.

⁷⁰ *Ibid.*, § 70.

⁷¹ See [state of execution](#) of the said case.

⁷² *Supra* note 16, p. 3.

⁷³ *Good Practices Manual*, *supra* note 18, p. 5.

32. Recommendation Rec(2005)9 of the Committee of Ministers defines a “protection programme” as a “standard or tailor made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice”. The report “Terrorism: Protection of Witnesses and Collaborators of Justice”⁷⁴ specifies that the implementation of a protection programme might be governed either by a contract (less frequently; on its basis the protected person can make representations and appeal to a judge or another authority if he/she considers that his/her rights have been jeopardised) or a memorandum of understanding (a code of conduct not giving rise to directly enforceable rights).

33. Recommendation Rec(2005)9 contains a number of indications on the adoption and implementation of protection measures and programmes (see its §§ 10-28). Its paragraph 11 explicitly stipulates that “no terrorism-related crimes should be excluded from the offences for which specific witness protection measures/programmes are envisaged”. Paragraphs 12 and 13 specify the main criteria that should be taken into account when deciding upon adopting such measures: involvement of the person to be protected in the investigation and/or in the case, relevance of the contribution, seriousness of the intimidation, willingness and suitability to being subject to protection measures or programmes and the availability of other evidence. Proportionality between the nature of the protection measures and the seriousness of the intimidation of the witness/collaborator of justice should be ensured (paragraph 14). Although innocent witnesses and collaborators of justice being subjected to the same kind of intimidation should be entitled to similar protection, any protection measures concerning them should take into account the particular characteristics of the matter and the individual needs of the person(s) to be protected (paragraph 15).

34. Paragraph 22 of the Recommendation specifies that “where appropriate, witness protection programmes should be set up and made available to witnesses and collaborators of justice who need protection. The main objective of these programmes should be to safeguard the life and personal security of witnesses/collaborators of justice, and people close to them, aiming in particular at providing the appropriate physical, psychological, social and financial protection and support”.

35. As regards protection programmes implying dramatic changes in the private life of the protected person (such as relocation and change of identity), paragraph 23 of the Recommendation indicates that they should be applied to witnesses and collaborators of justice who need protection beyond the duration of the criminal trials where they give testimony. Such programmes may last for a limited period or for life; they should be adopted only if no other measures are deemed sufficient to protect the witness/collaborator of justice and persons close to them. They require the informed consent of the protected person and an adequate legal framework (paragraph 24).

36. The Recommendation also addresses some criteria concerning the staff dealing with the implementation of protection measures (paragraph 28): it should be afforded operational autonomy and should be involved neither in the investigation nor in the preparation of the case where the witness/collaborator of justice is to give evidence. On the one hand, an organisational separation between these functions is highly recommended, on the other hand, an adequate level of cooperation/contact with or between law-enforcement agencies should be ensured in order to successfully adopt and implement protection measures.

37. The recently published “White Paper on Transnational Organised Crime” of the European Committee on Crime Problems (CDPC)⁷⁵ (hereinafter referred to as “the White Paper”) deals in detail with the implementation of witness protection programmes and collaboration of co-defendants and incentives for cooperation. In a general manner, this document concludes that there are enough legal structures in place and that the main problems concerned their implementation.⁷⁶ It deplores, however, the lack of updated studies and statistics about exact figures on the number of convictions based on statements made by protected witnesses.⁷⁷

38. The White Paper points out the need to separate witness protection agencies from investigative and prosecutorial units and highlights three characteristics that a witness protection agency should have: cooperation with law enforcement agencies; independence of the organizational branch of the agency from that which ensures confidentiality of the witness; and, the above-mentioned need for independence from the

⁷⁴ CoE *Terrorism Report*, supra note 6, p. 49.

⁷⁵ [White Paper on Transnational Organised Crime](#) of 28 May 2014, CDPC (2014)11.

⁷⁶ *Ibid*, p. 32.

⁷⁷ *Ibid*, p. 33.

investigation/prosecution.⁷⁸ It also emphasizes the voluntary character of the consent of the protected person and notes that no legal rights arise from protection contracts and that in some cases protected persons do not even receive a copy of the contract, for security reasons. The minimum length of the witness participation in a protection programme is two years and the average duration is between three and five years.⁷⁹ The White Paper also states the need to recognize pre-trial statements as evidence in certain circumstances in order to protect the witness without inhibiting the functioning of justice.⁸⁰

39. The White Paper also focuses on **incentives for the co-operation** of co-defendants in criminal proceedings. Offering protection from retaliation and intimidation for this category of persons is often not sufficiently motivating. Other “advantages” – such as a mitigated sentence, entering into an agreement or being granted immunity from prosecution – could be more convincing.⁸¹ UNTOC encourages its states parties to consider providing for the possibility of mitigating the punishment of co-accused cooperating in the investigation or prosecution (“in appropriate cases”) or granting immunity (“in accordance with fundamental principles of its domestic law”) from prosecution to “a person who provides substantial cooperation in the investigation or prosecution” (see Article 26, Sections 2 and 3).

40. The authors of the White Paper rightly point out that most member states of the Council of Europe have generic provisions concerning mitigation of punishment in their Criminal Codes. Usually, the mitigating of a sentence is left to the discretion of the court and it depends not only on the degree of the co-defendant’s cooperation, but also on the seriousness of the crime and the guilt of the accused.⁸² However, these generic provisions are not always adapted to cases of transnational organised crime and only few member states have specific provisions on plea bargaining or pre-judicial cooperation (e.g. Azerbaijan, Estonia, Switzerland, the UK).⁸³ As regards immunity from prosecution, the White Paper notes that several member states do not provide for such a possibility in case of organised crime offences (e.g. Bulgaria, Finland or Switzerland), despite the fact that relevant international instruments advocate this solution.⁸⁴

41. As stressed at the hearing in Helsinki in May 2014 by one of our experts, Mr Bauer, witness protection programmes have become an important tool in combatting organized crime and terrorism in Europe since the 1990s, when Germany established a witness protection programme. Since then, they have become a commonly agreed tool in the 28 EU member states, although there is still room for improvement in some countries. As pointed out by Mr Debije, the first witness protection unit in the Netherlands was established in 1995 and it is now deals with over 400 protection programmes. Over the years, once the fight against organized crime and terrorism intensified, the character of protected witnesses has changed and the number of perpetrators of crime protected under the programmes has increased. While co-operating with the police, collaborators of justice often tended to manipulate its staff and that was why witness protection schemes had to be reshaped over the last few years, by including a psychosocial perspective. Thus, the Dutch witness protection unit focuses on training its staff on the psychological aspects of witness protection and supports research in this area. A study carried out in the Netherlands revealed, amongst others, that nearly 80% of witnesses (*sensu largo*) had been convicted for having committed at least one crime; about 30% had been diagnosed as having an anti-social personality disorder and about 60% of the overall population concerned by the programmes (i.e. witnesses and their relatives) showed signs of psychological problems and personality disorder. This research also proposed a new psychosocial model of witness protection, showing the relationship between the individual characteristics of witnesses, the sources of their stress, their coping strategies and subsequent behaviour. The model makes a distinction between so-called “push” and “pull” witnesses: the former are “pushed” to the WPP, as they have to chose between cooperating with the authorities or being killed or seriously harmed, while the latter have more options and consider entering a WPP as only a business deal with the authorities. They quickly adapt to new circumstances and have more problems with complying with strict rules and procedures. WPPs with the participation of “pull” witnesses should be as short as possible, since such witnesses generate conflicts. Mr Debije also stressed that not only the witness protection unit, but also other stakeholders were responsible for managing “pull witnesses”, who were able to manipulate their entourage.

42. Mr Ihasz pointed out that most of the witnesses involved in WPPs “had already betrayed someone”, that they were often unemployed, had no legal income, had unclear legal relationships and sometimes exhibited antisocial behaviour. They could even have exaggerated demands towards the authorities,

⁷⁸ Ibid, p. 33.

⁷⁹ Ibid, p. 34.

⁸⁰ Ibid. See also §9 of the CoM Rec.(97)13 and §17 of the CoM Rec.(2005)9).

⁸¹ Ibid, p. 36.

⁸² Ibid, p. 37.

⁸³ Ibid.

⁸⁴ Ibid.

although the latter were making enormous efforts in order to reintegrate them into the society. If a witness failed to cooperate, the authorities were allowed to terminate the programme. However, a new issue arises in this context, as shown by the Court judgment *R.R. and Others v. Hungary*: to what extent can an exclusion of a witness from a WPP because of his/her disobedience be compliant with the right to life as guaranteed in Article 2 of the ECHR? This is a new question that will soon have to be addressed by competent instances, with the increase of the number of WPPs and cases of exclusion from such programmes.

5. Current practice in Council of Europe member states

5.1 The questionnaire

43. In order to obtain further information on witness protection frameworks adopted by member states, specifically in relation to the fields of organised crime and terrorism, and the challenges in implementing such frameworks, in March 2014, a questionnaire was sent to the parliamentary delegations of member states, via the European Centre for Parliamentary Research and Documentation (ECPRD). Thirty three member states replied to this questionnaire: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, the Netherlands, Norway, Poland, Portugal, the Republic of Moldova, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Spain and Sweden. Denmark informed the Secretariat that, for various reasons, it would not reply. Moreover, two observer states - Canada and Israel – provided information concerning their witness protection mechanisms. The replies received are summarised below.

5.2 Replies from member states

A. Does your country's legal framework provide specifically for witness protection in the field of organised crime and terrorism? If so, how does this protection differ, if at all, from other criminal cases?

44. The majority of Council of Europe member states have no specific witness protection provisions relating to witnesses of terrorism or organised crime (Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Lithuania, Luxembourg, Montenegro, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Serbia, Slovenia, Sweden and Spain). In most of these countries, witness protection measures are regulated in the Code of Criminal Procedure and in a special legislation on witness protection (a draft law on this subject-matter is now pending in Finland). Many countries affirmed to have established or to be able to establish witness protection programmes on the basis of special witness protection legislation (Belgium, Croatia, the Czech Republic, France, Georgia, Germany, Hungary, the Republic of Moldova, Montenegro, Poland, Portugal, Romania, Slovenia and Sweden) or the practice of the police bodies (Austria, Ireland Lithuania and Norway). In Iceland, there are no legal provisions regulating witness protection.

45. Although many member states do not explicitly provide separate protection for witnesses in organised crime or terrorism cases, the functioning of domestic frameworks can result in such protection being afforded. In some member states, there are specific frameworks for victims and witnesses of human trafficking, potentially relevant to the field of organised crime. In some circumstances, these provisions are no different from those relating to other witnesses (Georgia). However, in France, victims of human trafficking are automatically provided a 30 day residence card which is then subject to renewal or revocation. Additionally, protection afforded to victims of terrorism, as in the Republic of Moldova, or to "shielded witnesses", as in the Netherlands, is of practical relevance to the witnesses of terrorist activities.

46. In Italy, Act 82 of 1991 contains framework legislation on protection of witnesses and collaborators of justice in cases of organised crime and terrorism and provides for a range of witness protection measures. In Croatia, the Witness Protection Act mentions "organised crime" as one of the four types of crimes to which witness protection is applicable; the law also lists crimes "against the Republic of Croatia", those "against values protected by international law" and those that may result in a 5-year prison sentence or a more serious punishment and it does not make a distinction between the four types of crimes when it comes to its application. Special protection is specifically afforded to individuals in relation to terrorism and organised crime in Greece and Slovakia. In Greece, the system provides these witnesses with both procedural protection during the criminal proceedings and special police protection outwith the proceedings. The measures adopted are proportionate to the threat faced by the individual witness. Such protection outwith proceedings is generally not available to other witnesses; however the protection during proceedings is available to witnesses irrespective of the crime involved. In Slovakia, the Witness Protection Act applies to

endangered individuals who have witnessed either crimes which carry sentences of life imprisonment, or crimes that relate to organised crime or terrorism. The protection, including physical police protection and potential identity changes, is identical irrespective of which category the witness falls into. Further protections contained within the Criminal Procedure Code, including, *inter alia*, non-disclosure of identity and notification of the whereabouts of the accused, are available to all endangered witnesses irrespective of the crime.

B. What are the greatest challenges – legal and/or logistical – regarding the implementation of the witness protection measures?

47. The issue of balancing the rights of the defence with that of the witness in situations where anonymity had been granted was raised by a number of states (the Czech Republic and France) and specifically with regards to Article 6(3)(d) of the ECHR and the defendant's right to confront a witness by Germany. Within the majority of member states there were safeguards that attempted to find such a balance. Such measures included provisions requiring anonymous testimony to be corroborated (France, Hungary and Portugal), the ability to challenge the granting of anonymity (the Czech Republic and France), and provisions ensuring the defence's ability to question the witness (the Czech Republic, France and Poland).

48. The need for a system to not re-victimise certain witnesses was a logistical issue raised in Austria. Further to this, the need to have separate appropriate systems relating to innocent witnesses and collaborators of justice was highlighted within Slovenia. Montenegro mentioned the difficulty in defining the notion of a "close person". The Netherlands pointed out the need to have more clarity in the law about the content of the agreements concluded with witnesses and the duration of the protection.

49. Many countries raised the psychological and socio-economic difficulties encountered by witnesses, such as separation from their families and unemployment (Croatia, Italy, the Netherlands, Norway and Slovenia) or a lack of motivation coupled with a lack of trust in the authorities and their confidentiality measures (Serbia and Slovakia). The Irish media reported about some witnesses preferring to serve a term of imprisonment rather than being relocated to another country.

50. Certain logistical problems were raised including institution building (Montenegro and Slovenia) and a lack of funding and/or human resources (Croatia, Poland and Serbia). Further logistical issues related to the small size of the member states' territory. Greater international cooperation was needed by Croatia, Estonia and Slovenia in order to have an effective and functioning system of witness protection and relocation. Effective relocation was not practical within such a small territory.

51. Finally, the prominence of social media results in greater difficulties for the witness protection programmes in the Netherlands and Slovenia when creating new identities for individuals.

C. Has your country in the past or does your country currently deal with witness protection issues on a transnational level? If yes, what are/have been the greatest challenges with regards to implementing the witness protection measures?

52. There are a number of instruments relevant to transnational witness protection that cover varying geographical regions. [The Police Cooperation Convention for South-East Europe](#) is a tool that aims to enhance cooperation in the exchange of individuals involved in witness protection programmes. The countries involved (Albania, Bosnia and Herzegovina, Hungary, the Republic of Moldova, Romania, Serbia and "the former Yugoslav Republic of Macedonia") also exchange information that is relevant to the continuation of witness protection programmes within the contracting states. Additionally, the contracting states undertake to establish national central units to focus upon the international elements of domestic witness protection programmes. There were no comments relating to the effectiveness of this instrument or any challenges concerning its implementation.

53. [The agreement on the cooperation in the area of witness protection \(2012\)](#) is similar in its effect to the abovementioned instrument. Austria, Croatia, the Czech-Republic, Estonia (joined in 2013), Hungary, Poland, Romania and Slovenia, agreed to increase cooperation in this field and provide information in furtherance of such programmes, alongside improved training for relevant personnel. The contracting states agreed to set up National Contact Points in order to run the national witness protection programme. Poland highlighted that any international framework should include such bodies that aim to cooperate with sharing of information, training and the facilitation of direct requests for protection from other contracting parties.

54. The Norwegian domestic system adheres to the guidance afforded by Europol on the establishment, or adaptation, of domestic witness protection programmes. Additionally, Croatia are involved with the Europol witness protection network that regularly holds conferences and shares information in order to

further harmonise processes and procedures relating to transnational witness protection programmes. No specific challenges were noted in relation to the Europol guidance or network.

55. The most common form of transnational cooperation was in relation to individual memoranda of understanding (MoUs) that would be agreed upon between states in relation to specific cases and requests for assistance with witness protection. With such a system the issue of relocating a witness to a state that uses another language was highlighted within Ireland.

56. Generally, the main challenge relating to witness protection at a transnational level is the differing systems and standards used in member states. The need for greater harmonisation of such elements, and for greater institutional and judicial cooperation, was raised by Croatia, Montenegro and Poland.

6. Strengthening witness protection measures in Europe

6.1. *Strengthening international co-operation regarding witness protection measures as a key element in the fight against organised crime and terrorism*

57. While improvements have been made on this front over recent years,⁸⁵ the realization that organised crime and terrorism cannot be exclusively investigated and prosecuted on a national level is vital for improving international cooperation between states.⁸⁶ Without such co-operation, the effective relocation of witnesses, especially those coming from small states, would be difficult to achieve.

58. UNTOC and its protocols call on states to implement effective witness protection measures and to enhance international cooperation in this field. Article 24 Section 1 of UNTOC provides that states parties shall consider entering into agreements or arrangements with other states for the relocation of witnesses. As regards collaborators of justice, states parties “may consider entering into agreements or arrangements, in accordance with their domestic law” concerning mitigating punishment and/or granting immunity from prosecution (Article 26 Section 5). A provision similar to that of Article 24 Section 1 of the UNTOC is contained in the UN Convention against Corruption (Article 32 Section 3).

59. This crucial element has also been recognized in the Committee of Ministers’ Recommendation Rec(2005)9,¹ which reiterates the need to employ a “common approach in international issues related to the protection of witnesses and collaborators of justice”, and in particular to ensure a sufficient exchange of information between the relevant authorities.⁸⁷ The Committee of Ministers sets out concrete objectives, such as, for example, providing assistance in the relocation abroad and protection of witnesses at risk, collaborators of justice and persons close to them; facilitating and improving modern communications technology, such as video-conferencing; cooperating and exchanging best practices with existing networks of national experts; and to cooperate with international criminal courts.⁸⁸ This Recommendation also emphasizes that measures promoting international cooperation should be adopted and implemented “in order to facilitate the examination of protected witnesses and collaborators of justice and to allow protection programmes to be implemented across borders”,⁸⁹ such as for instance, assistance in relocating protected witness, collaborators of justice and persons close to them and ensuring their protection.⁹⁰

60. The need for a pan-European approach to witness protection measures, despite the differences in current organisational structures, was recently reiterated in the White Paper⁹¹ and the European Parliament’s Report on organized crime, corruption and money laundering.⁹² It was also invoked by our experts, who recalled that Europol was currently working on harmonising procedures and programmes in this field and was co-operating with some non-EU countries, including the Russian Federation and Turkey.

⁸⁵ *Ibid.*, §13; *CoE Terrorism Report*, supra note 6, p.10.

⁸⁶ *CoE Terrorism Report*, supra note 6, p. 10.

⁸⁷ In its § 29.

⁸⁸ In its § 32.

⁸⁹ *Ibid.*, § 30.

⁹⁰ *Ibid.*, § 32.

⁹¹ Supra note 75, p. 34.

⁹² [Report of 26th September 2013](#). It promotes the idea of introducing “pan-European rules on the protection of witnesses, informers and those who cooperate with courts” (§125, xviii).

6.2 Towards a new legal instrument?

61. According to the report “Terrorism: Protection of Witnesses and Collaborators of Justice”, there are several lacunae in the international legal framework concerning protection of witnesses. Neither the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters nor the UNTOC regulates international cooperation concerning protection of collaborators of justice and of persons close to witnesses and collaborators of justice at risk. No binding instrument expressly establishes cooperation on the following issues:

- adoption and implementation of procedural protective measures other than hearings by video or telephone conference in another country,
- adoption and implementation of non-procedural protective measures other than relocation to another country
- costs related to the implementation of procedural and non-procedural protective measures (other than hearings by video or telephone conference and relocation to another country) to be adopted and/or implemented in another country.⁹³

62. As recalled in the above-mentioned report,⁹⁴ the Final Report of the PC-PW from 2003⁹⁵ proposed the establishment of a fund aimed at covering all the expenses related to relocation and to other protective measures, as well as to the training of staff. The fund could partially be financed by the proceeds and assets seized from the perpetrators of crimes and would help less wealthy countries cover the expenses related to relocation and protection of witnesses/collaborators of justice and their relatives.

63. In its Recommendation 1952 (2011) on “The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans”, the Assembly called upon the Committee of Ministers to “instruct the European Committee on Crime Problems (CDPC) to undertake a feasibility study on whether the protection and support of witnesses could be the subject of a future Council of Europe convention”.⁹⁶ The Committee of Ministers, however, did not see the benefit of preparing such a feasibility study and was of the opinion that “the required improvements relate to the implementation level”.⁹⁷

64. The White Paper proposes numerous measures to be taken in order to reinforce witness protection in cases of transnational organised crime. It states that the Council of Europe should analyse the differing approaches to witness protection in Council of Europe member states and try to “find out why the witness programmes do not work as efficiently as they should in the realm of TOC”.⁹⁸ A study carried out to this effect should include a number of issues, including an assessment of the implementation of Recommendation Rec(2005)9, the necessity to create a separate legal regime for the protection of witnesses and that of collaborators of justice, the rights of witnesses in witness protection programmes, institutional issues, etc.⁹⁹ As regards incentives for co-defendants cooperation with law enforcement authorities, the White Paper invites the Council of Europe to carry out a more in-depth study on this issue, with a focus on various forms of plea bargaining and on international agreements on the transnational application of such measures, and to adopt a recommendation or a binding legal instrument to promote harmonised measures in this field.¹⁰⁰

7. Conclusion

65. Given the seriousness of terrorism and organised crimes, both in terms of the profound effects on the witnesses, and in light of the complexity of investigating and prosecuting them due to their closed nature and transnational reach, it is crucial to have strong, reliable and durable witness protection measures. Indeed, these measures represent an indispensable tool in the fight against organised crime and terrorism in Europe. The nature of these transnational crimes dictates that such measures must be coordinated and coherent among Council of Europe member states if they are to be effective. While “[e]xperience has shown that in witness protection there are no easy solutions”,¹⁰¹ understanding the dynamics of organised crime and terrorism, and the crucial role of witness testimony therein, constitutes a solid first step to formulating an

⁹³ *CoE Terrorism Report*, supra note 6, pp. 31-32.

⁹⁴ *Ibid*, p. 32.

⁹⁵ [PC-PW \(2003\)17](#)

⁹⁶ Paragraph 3.2

⁹⁷ Reply from the Committee of Ministers adopted at the 1122nd meeting of the Ministers’ Deputies (28 September 2011), Doc. 12734, paragraph 4.

⁹⁸ *Supra* note 75, p. 34.

⁹⁹ *Ibid*, p. 35.

¹⁰⁰ *Ibid*, p. 38.

¹⁰¹ UNODC, *Good Practices*, supra note 18, p. iii.

adequate response both nationally and as part of a coordinated multilateral response among Council of Europe member states.

66. There is a continued need to improve national legislation providing such protection and support among Council of Europe member states, as has already been emphasized by the Assembly's Resolution 1784 (2011). While most Council of Europe member states have some basic form of witness protection measures,¹⁰² there are great variations between them,¹⁰³ and a number of countries' measures remain insufficient, due to lack of trust from the population (given the well-known infiltration of state bodies by organised criminals in certain countries), or due to inadequacies in the legal framework, the funding, logistical capacities, or coordination and cooperation between relevant actors.¹⁰⁴

67. Measures to combat international organized crime used nowadays differ from those used in the 1980s, due to globalisation and computerisation processes. To dismantle criminal organisations, including transnational ones, the use of traditional procedural and non-procedural measures is not sufficient. New methods of ensuring witness protection and support, such as witness protection schemes based on the newest research results in the field of psychology and criminology, are needed. These schemes will involve more frequently the participation of suspects or co-defendants, as without their "insiders'" knowledge" the infiltration of terrorist or other organized crime groups would be impossible in most cases. In order to encourage them to come forward and co-operate with law enforcement agencies and the judiciary, adequate witness protection measures at all stages of the trial process (both procedural and non-procedural) and beyond are indispensable. Nevertheless, incentives, such as the mitigating of sentences or granting of immunity from prosecution should be given, in accordance with domestic law.

68. Taking into account the transnational character of many criminal organisations, relocation of witnesses/collaborators of justice is of crucial importance and should be possible at short notice. Despite the existence of a general international legal framework in this respect, certain standards still need to be established, especially bearing in mind the difficulties experienced by smaller member states.

69. Any witness protection programme should be based on cooperation between a witness protection unit and the endangered/protected person, who must always join the programme voluntarily. Such a programme should be a measure of last resort because of its significant impact on the private life of the protected person and those close to him or her. Witness protection schemes should, however, always strive to respect the right to a fair trial and the right of defence, as guaranteed in Article 6 of the European Convention of Human Rights. A witness protection unit/agency should cooperate with law enforcement bodies and should be independent from the investigative and prosecutorial bodies.

70. The efficiency of witness protection programmes in combatting organized crime and terrorism requires certainly more resources, which might be difficult to obtain in times of economic and financial crisis. It also needs more international collaboration in the management of such schemes, including under the existing multilateral agreements. Europol, which has acquired extensive experience in this area, could be of help by providing its advice and facilitating international cooperation not only within the EU area, but also outside it.

71. As stated in the White Paper, there seem to be enough international legal instruments in the field of witness protection for the time being, and the major problem lies in their implementation. However, bearing in mind the fact that witness protection schemes are a relatively recent measure, it would perhaps be useful to conduct more studies (based on conviction statistics) on their implementation at the European level and reflect on the possibility of elaborating a more comprehensive international legal framework, which would specifically focus on such measures. The Council of Europe, which has been active in promoting protection and support for witnesses and collaborators of justice, could have a leading role in carrying out such an expert study and propose new legal instruments, if need be.

¹⁰² *CoE Terrorism Report*, supra note 6, p. 10.

¹⁰³ PACE Resolution 1784 (2011), supra note 10, § 12.

¹⁰⁴ *Ibid.*, §12.