

**Protecting Witnesses and Collaborators of Justice
in Terrorism Cases**

Yvon Dandurand¹

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¹ Criminologist, Dean of Research, University College of the Fraser Valley and Senior Associate, International Centre for Criminal Law Reform and Criminal Justice Policy. The author gratefully acknowledges the assistance in preparing this paper of Mr. Mark Lalonde, Managing Partner, Canpro Training Resources Inc. Opinions expressed are those of the author and do not necessarily represent those of the Commission.

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Introduction

This paper identifies the main challenges faced by the criminal justice system in attempting to secure the cooperation of witnesses in the investigation and prosecution of terrorism cases. It also examines the nature and efficiency of various procedural and security measures that can be taken to ensure the protection of witnesses who are at risk of intimidation or retaliation. Part of the mandate of the Commissioner involves considering whether existing practices or legislation provide adequate protection for witnesses against intimidation over the course of the investigation or prosecution of terrorism. This paper reviews various protection issues and identifies some best practices and international trends against which the Canadian situation can be assessed. It does not directly attempt to evaluate the adequacy of existing Canadian legislation, programs, or practices.

In the fight against terrorism, it is crucial for the State to be able to provide effective protection for witnesses. The intimidation of informants and potential witnesses is one of the defining characteristics of criminal organizations and terrorist groups. They function and perpetuate themselves through the manipulation of public fear and they go to great lengths to avoid detection and prosecution. In the interest of a fair and effective criminal justice response to terrorism and other serious crimes, governments must find ways to handle the problem of witnesses at risk and protect them from intimidation.

Witness protection is especially important in the fight against organized crime and terrorism because the closed character of the groups involved makes it very difficult to use traditional investigative methods successfully.² In contrast with other forms of serious crimes, victims of terrorism may themselves have little if any relevant evidence to provide.

² Adamoli, S., Di Nicola, A., Savona, E., and P. Zoffi. *Organized Crime Around the World*. (Finland: European Institute for Crime Prevention and Control 1998), p. 174. Council of Europe. *Report on Witness Protection (Best Practice Survey)*. European Committee on Crime Problems, Committee of Experts on Criminal Law and Criminological Aspects of Organized Crime. (Strasbourg, 24 March 1999). Council of Europe. European Committee on Crime Problems (CDPC). *Draft Recommendation Rec(2005) on the Protection of Witnesses and Collaborators of Justice. Explanatory Memorandum*. (Strasbourg: Council of Europe 2005). Council of Europe. *Protecting Witnesses of Serious Crime – Training Manual for Law Enforcement and Judiciary*. (Strasbourg: Council of Europe Publishing 2006). Finn, P. and Healey, K. M.. *Preventing Gang- and Drug- Related Witness Intimidation*. (Washington: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 1996, p.4). Fyfe, N. *Protecting Intimidated Witnesses*. (Hampshire: Ashgate Publishing Limited, 2001, p. 18). Manning, P. K., Redinger, L.J., and J. Williams. "Recruter, cibler et gérer les informateurs. Lutte antidrogue et crime organisé sur le continent américain", in Brodeur, J.P. and F. Jobard (Eds.), *Citoyens et délateurs – La délation peut-elle être civique?* (Paris: Éditions Autrement, 2005, pp. 155-173, p. 172).

Other physical or material evidence is often also very limited. In that context, the testimonies of some witnesses, by virtue of their personal proximity to the planning or commission of the crime, can greatly assist the authorities in investigation or prosecution.³ The protection of such individuals therefore takes on a great significance, even as it raises a number of practical, ethical and legal issues. It should not come as a surprise then to learn that many of the early programs for the protection of witnesses in Europe and North America were initially developed to respond to specific threats posed by terrorist groups or organized crime syndicates.

1.1 Definitions

A few definitions should be introduced here before proceeding with our discussion of the issues. The terminology often varies from one country to another, but for the most part the basic concepts are the same.

Starting with the concepts of “**witness**”, “**witness at risk**”, and “**protected witness**”, we note that the term “witness” itself covers several categories of actors: a “victim” who can testify and provide evidence, an “informer” who brings some evidence to the authorities, an “observer of a crime” who was not otherwise involved in the crime, an “undercover agent” who may or may not be a police officer, an “informant” who has special access to a criminal or terrorist organization, an “accomplice” in a crime, or a “repent” who is willing to give evidence in return for certain considerations.

The Council of Europe, which has given a lot of attention to witness protection issues in the last several years, defines the term “witness” to mean “any person, irrespective of his/her status under national procedural law, who possesses information relevant to criminal proceedings, including experts and interpreters”.⁴⁻⁵ The “witness at risk”, or “endangered witness”, is a witness who is liable to endanger himself or herself by cooperating with the authorities, or a witness who has reasons to fear for his or her life or safety or has already been threatened or intimidated.⁶ A “protected witness” could mean any witness who is offered some form

³ Council of Europe. *Combating Organised Crime – Best Practices Survey of the Council of Europe*. (Strasbourg: Council of Europe Publishing, p. 20, 2004)

⁴ Council of Europe. *Combating Organised Crime*, p.16.

⁵ “Witness” in the Witness Protection Program Act (S.C. 1996, c. 15, s.2) is defined as “someone who gives or agrees to give information or evidence or who participates or agrees to participate in matters relating to an investigation or the prosecution of an offence”.

⁶ ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation - Final proposal of the ISISC-OPCO-Europol working group on minimum requirements for potential legislation at European Union level, Explanatory Report*. (Italy: Siracusa: International Institute of Higher Studies in Criminal Sciences, 2005). Council of Europe. *Combating Organised Crime*, p. 16.

of protection against intimidation or retaliation. In practice, however, this term is generally reserved for witnesses who receive protection from a formalized witness protection program. In Canada, the *Witness Protection Program Act* refers to these witnesses as “protectees”⁷, a term not typically used in other jurisdictions. For the purpose of that program, the term “witness” may also refer to other persons who, because of their relationship to the witness, may also require protection. Most witness protection legislation and programs recognize the fact that a witness can be intimidated indirectly, such as when his or her family, relatives, or friends are targeted. The expression “people close to witnesses and collaborators of justice”, frequently used in legislation, usually refers to relatives and other persons who are in close relation with the witnesses and find themselves at risk and in need of protection because of that association.

As mentioned before, in cases involving terrorist or organized crime groups, the most significant witnesses are often those who have the opportunity to get close to these groups, either because they belong to them or they have successfully infiltrated them. They include individuals variously characterized as “*pentitis*”, “*repentis*”⁸, “*crown witnesses*”, or “*informants*”⁹. The expression “*collaborator of justice*” is increasingly used internationally to represent all of these categories. It then refers to any person, whatever his/her legal status, who is or was associated with a criminal organization and who agrees to cooperate with competent authorities by providing information and evidence in criminal proceedings concerning that organization or its activities.¹⁰ Informants can become witnesses or protected witnesses, but in practice their role is often limited to providing intelligence as opposed to evidence, thus allowing them sometimes to continue to act as a covert source of information.

⁷ S.C. 1996, c. 15, s.2, *Witness Protection Program Act*.

⁸ A report of the Quebec Ministry of Justice defines the word *repentis* in the same way that the Council of Europe has used the word *pentitis*: une personne qui a commis, a participé à la commission d’une infraction, ou a fait partie d’une organisation s’adonnant à des activités illégales et qui, moyennant certains avantages, accepte de témoigner pour la poursuite, relativement à l’infraction commise ou contre l’organisation criminelle à laquelle elle appartient ou à laquelle elle a appartenu (Ministère de la Justice du Québec et Ministère de la Sécurité publique du Québec (2000). Rapport sur l’utilisation des témoins repentis en 1998. Québec: juin 2000, p. 1).

⁹ In French, the word “*délateur*” is often used to translate the word “*informant*”. Its meaning, however, is perhaps more restrictive as it refers more specifically to collaborators of justice who are acting on the basis of their personal interest: une pratique dictée par l’intérêt (Brodeur and Jobard, 2005: 8).

¹⁰ ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*.

In many instances, collaborators of justice have themselves been accomplices in the commission of the crime being investigated or in other related criminal activities. Some of them may be undercover agents who may or may not be police officers. As we shall see later, it would seem that the use of such informants is perhaps as necessary to the successful investigation of terrorist and organized crime activities as it is problematic.

Intimidation can, of course, take many forms even if its fundamental purpose remains the same: to interfere unduly with the willingness of a person to testify freely or to react and retaliate against someone who has given a testimony. The Council of Europe has been defining "**intimidation**" as "any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever. This includes intimidation resulting from the mere existence of a criminal organization having a strong reputation for violence and reprisal, or from the mere fact that the witness belongs to a closed social group and is a position of weakness therein".¹¹

Intimidation can be perpetrated in a number of ways: physical violence, explicit threats of physical violence against the witnesses or someone close to them, direct or indirect implicit threats, property damage, and courtroom intimidation. Intimidation may take the form of an escalating set of threats and actions. It may also involve retaliation after the fact, as a signal to others and a means to deter anyone else from cooperating with authorities.

1.2 Research on Witnesses of Terrorism or Organized Crime

Protecting witnesses and collaborators of justice who are providing evidence and intelligence in terrorism-related cases is crucial to the prevention and control of the activities of terrorist organizations. However, systemic efforts to protect informants and witnesses are relatively recent. In the past, many countries relied on more informal means, often based on the use of the discretionary authority of law enforcement and prosecution officials. Growing concerns with the deficiencies and limitations of existing protection measures in many countries, the cost of existing programs, as well as the legal and ethical issues associated with

¹¹ Council of Europe. *Combating Organised Crime*, p. 16.

some of their more controversial aspects have brought these questions to the forefront.

The United Nations, the Council of Europe and other multilateral organizations have increasingly focused their attention over the last decade on the transnational nature of many serious crimes and terrorist activities. States have recognized the need to engage with each other in a number of exercises to harmonize their legislation and criminal justice practices and to enhance their capacity to cooperate with each other in the fight against international terrorism and organized crime. Conventions and bi-lateral treaties have been ratified to reflect this new commitment. International cooperation initiatives with respect to the identification and use of informants and witnesses, the sharing of intelligence and evidence, and the protection of witnesses, are just a few of the many facets of this trend.

Empirical research on witness intimidation and protection is still very limited and most of the existing literature focuses on witnesses of serious crimes in general. In recent years, a number of comparative reviews of existing programs and measures have been undertaken, usually as a basis for further policy development.¹² Most of them have been content to compare and contrast existing programs and legislations. They usually deplore the lack of empirical evidence on the effectiveness of any of these measures.

When analyzing the possible specificities of acts of terrorism with respect to witness protection, one cannot identify particular features that would justify dealing with witnesses of terrorist crimes differently than witnesses of other serious crimes, particularly those committed by gangs and criminal organizations.¹³ Furthermore, the effective prosecution of terrorist activities frequently involves the prosecution of individuals for serious offences (kidnapping, possession of explosive, assaults, murder, money laundering, etc.) without an explicit reference to their ultimate terrorist design.

¹² See for example: Council of Europe. *Terrorism: Protection of Witnesses and Collaborators of Justice*. (Strasbourg: Council of Europe Publishing, 2006). Law Commission of India *Consultation Paper on Witness Protection*. (New Delhi, August 2004). Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases: An International Review* (Home Office Online Report 27/05). (London: Home Office, 2005). Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", *European Journal of Criminology* 2006, Vol. 3 (3), pp. 319-355.

¹³ That is a conclusion that was also reached by the European Committee on Crime Problems (Council of Europe (2005). European Committee on Crime Problems (CDPC). *Draft Recommendation Rec(2005) on the Protection of Witnesses and Collaborators of Justice*, p. 6.

Because of the very serious consequences of terrorist activities, it makes sense for a society to attach particular importance to the protection of witnesses and others who can help prevent terrorist acts. One should note, however, that many of the strategies to combat organized crime are also relevant to the fight against terrorism. This makes sense because: (1) the intent and purposes of terrorist groups are criminal; (2) terrorist acts are crimes; (3) terrorist groups frequently engage in criminal activities that are not in themselves “terrorist” in nature but are nevertheless essential to the success of their enterprises; and, (4) the methods that they use to intimidate witnesses and others are practically indistinguishable from the methods used by other criminal groups.

Terrorist groups and criminal organizations are not engaged in single criminal acts. These groups are typically involved in numerous and ongoing criminal activities. When it comes to preventing terrorist activities, relying on the mainly reactive nature of the criminal justice system response is not only shortsighted, but also dangerous. Ultimately, the efforts of the justice system must focus not only on responding, through investigations and prosecutions, to crimes already committed, but also on preventing future crimes.¹⁴ It is therefore in the context of proactive, intelligence-based efforts to counter terrorism that the issue of witness protection must be examined.

Since the 2001 terrorist attacks in the United States and the subsequent resolutions of the United Nations Security Council, several anti-terrorism laws were hastily adopted around the world and, in the prevailing atmosphere of panic and international pressure, several law enforcement practices have emerged that have then proved detrimental to human rights, the rule of law and democracy. They have reemphasized the need to ensure that, in adopting measures aimed at preventing and controlling acts of terrorism, governments adhere to the rule of law, including the basic principles, standards and obligations of criminal and international law that define the boundaries of permissible and legitimate action against terrorist groups.

¹⁴ For a discussion of the limitation of the deterrence approach and the need to focus on preventive measures, see: Laborde, J.-P. and M. DeFeo. “Problems and Prospects of Implementing UN Action against Terrorism”, *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 1087-1103. Also: UNODC. *Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-terrorism Instruments*. Terrorism Prevention Branch, United Nations Office on Drugs and Crime, New York, 2006.

Terrorism and extremism of all kinds threaten both the rule of law and the fundamental freedoms of citizens and entire societies. At the same time, the manner in which counter-terrorism efforts are conducted can have serious implications for the rule of law.¹⁵ The high moral ground that State actors enjoy might be lost when their methods are (or are widely perceived as) arbitrary, baseless, discriminatory, or illegal. In 2005, the Council of Europe adopted a set of *Guidelines on Human Rights and the Fight against Terrorism*. They reaffirmed that: “all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision”.¹⁶ All this must be kept in mind, as it is directly relevant to our policies and practices concerning the use of informants and the protection of witnesses and collaborators of justice in the fight against terrorism.

1.3 The Rights of Witnesses

The position of witnesses in most criminal justice systems around the world revolves around responsibilities rather than rights.¹⁷ When it comes to collaborators of justice and informants, their rights are often limited to what they can negotiate with the authorities, obviously from a disadvantaged position. A recent training manual published by the Council of Europe reminds its readers that the criminal law must be sensitive to the specific needs of persons who are subject to the civic duty of providing testimony:

“Prescribing the duty of a witness to give a statement implies that the government has to take responsibility for making the fulfillment of such obligation free from any threat to the witness’ own values – his life, bodily integrity, family or property. Therefore, this responsibility to the state may be seen as the right of the witness to fulfill his obligation to testify freely,

¹⁵ See also: Dandurand, Y. “The Role of the Prosecutors in Promoting and Strengthening the Rule of Law - Working Paper III”, in *Report of the Second Summit of Attorneys General, Prosecutors General and Chief Prosecutors*, Doha, Qatar, November 14-16, 2005.

¹⁶ Council of Europe. *Human Rights and the Fight against Terrorism – The Council of Europe Guidelines*. (Strasbourg: March 2005).

¹⁷ Moody, S. “Vulnerable Witnesses Rights and Responsibilities”. A paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, June 2005, Edinburgh.

meaning without any influence on his statement, without damage and without risk for the witness.”¹⁸

It can be argued that there is a fundamental imbalance between the “rights” of witnesses, who can be compelled to testify, and the “rights” of the state to demand that witnesses respond to summons and subpoenas, testify under oath, and tell the truth. The imbalance is particularly troubling when one considers that most of the decisions made about witnesses, the information or evidence they bring forward, or whether they are compelled to testify depend on police and prosecutorial discretion and are therefore not generally open to public scrutiny. This is why guidelines concerning these practices are important and why the careful monitoring of this somewhat obscure part of the criminal justice process is required. In brief, notwithstanding the legitimate legal, public safety, security, confidentiality, and privacy considerations that must equally be addressed, it is imperative that some greater transparency be introduced with respect to decisions that are made concerning witness protection, the denial of protection in certain cases, as well as the general use of informants and collaborators of justice. It is also important to ensure that witnesses have access to legal advice and representation with respect to these decisions and the processes that lead to them.

2. Witness Intimidation and Obstruction of Justice

Obstruction of justice includes many different offences, including witness tampering and intimidation¹⁹, jury tampering, and intimidation of justice officials²⁰. There is very little systematic research on witness or jury tampering, in part because it is difficult to establish when and how frequently it occurs. Knowing the details and prevalence of such incidents could certainly contribute to our understanding of what kinds of measures could be taken to protect witnesses and jurors (including the cost-effectiveness of witness protection programs).

¹⁸ Council of Europe. *Protecting Witnesses of Serious Crime*, p. 16.

¹⁹ Roadcap, S. “Obstruction of Justice”, *American Criminal Law Review*, 2004, Vol. 41 (2), pp. 911-945.

²⁰ Laborde, J. *État de droit et crime organisé*. (Paris: Dalloz, 2005, p. 33).

There is a lack of empirical data on the nature, scope and consequences of witness intimidation. Estimating the extent of the intimidation that occurs in order to prevent the reporting of a crime to the authorities or to deter witness cooperation with the police is plagued with difficulties.²¹ As the main purpose of intimidation is to prevent people from going to the authorities, it is not surprising that there is so little empirical evidence on the nature and scope of witness intimidation taking place in Canada or elsewhere.

Official data are being gathered on individuals who are charged with or convicted of various offences of witness intimidation or causing harm to a witness, but the usefulness of that data is severely limited. Witnesses who are successfully intimidated do not inform the police and, if they are already cooperating with the authorities, they withdraw their cooperation and usually hide the fact that they have been pressured to do so. Even when witness intimidation is suspected, it is often difficult to prove that it took place.²² Also, it is common practice in the compilation of most police-based crime statistics to only include the most serious offence in what is considered a reportable "incident" and, as a result, incidents of witness intimidation are not counted as such when they are accompanied by or also constitute a more serious offence (as in the case of aggravated assaults, use of explosives, or murder).

Nevertheless, we know from accounts given by police and prosecutors that threats to witnesses are common when organized criminal groups are involved and that they often have a serious impact on the prosecution of crime.²³ In fact, as was recently reported by Dedel, a number of small-scale studies and surveys of police and prosecutors suggest that witness intimidation is pervasive and increasing²⁴ and, clearly, a number of experts are convinced that there is increasing violence and intimidation by organized criminal groups.²⁵ In the British Crime Survey of 1998, 15 percent of respondents who had been victimized and had some knowledge of the offender, reported that they had later been victims of intimidation, and in the majority of these cases (85%) the intimidator

²¹ Fyfe, N. *Protecting Intimidated Witnesses*, p. 30. Maynard, W. *Witness Intimidation: Strategies for Prevention* (Crime Detection and Prevention Series: Paper No. 55). (London: Home Office, Police Research Group, 1994, p. 4).

²² Council of Europe. *Combating Organised Crime*, p. 21.

²³ Council of Europe. *Combating Organised Crime*, p. 15. Fyfe, N. *Protecting Intimidated Witnesses*. Finn, P. and K. M. Healey. *Preventing Gang- and Drug- Related Witness Intimidation*, p. 1.

²⁴ Dedel, K. *Witness Protection*. Problem-Oriented Guides for Police Series, No. 42. (Washington (D.C.): United States Department of Justice, Office of Community Oriented Policing Services, July 2006, p. 5).

²⁵ Council of Europe. *Combating Organised Crime*, p. 21.

was the original offender.²⁶ In the survey of the impact of intimidation on crime reporting in the U.K, it appeared that fear of intimidation or retaliation deters a greater number of witnesses than victims from reporting, whereas actual intimidation is reported more often by crime victims than by crime witnesses.²⁷

2.1 Patterns of Intimidation

Intimidation can be overt or implicit (when there is a real but unexpressed threat of harm).²⁸ Witnesses can also experience fear and feel intimidated when they are in no actual danger. Just as it is well known that there is no perfect correlation between fear of crime and risk of criminal victimization, neither is there a perfect correlation between the fear experienced by witnesses and the real risk of their victimization as a result of collaboration with the authorities.

The risk of collaborating with the justice system is heightened by the power wielded by those involved in the commission of the crime, their ability to intimidate or suppress the witnesses and informants, and the relative inability of the justice system to offer full protection to those witnesses.²⁹

Many researchers now distinguish between “case-specific” and “community-wide” intimidation³⁰, although it is also clear that case-specific intimidation can also reinforce community-wide intimidation. Community-wide intimidation involves “acts that are intended to create a general sense of fear and an attitude of non-cooperation with police and prosecutors within a particular community”.³¹ This can become particularly important for some communities when terrorist supporters

²⁶ Tarling, R., Dowds, L., and T. Budd. *Victim and Witness Intimidation: Findings from the British Crime Survey*. (London: Home Office, Research, Development and Statistics Directorate, 2000).

²⁷ Maynard, W. *Witness Intimidation: Strategies for Prevention*, p. 12.

²⁸ Finn, P. and K. M. Healey. *Preventing Gang- and Drug- Related Witness Intimidation*, p.1.

²⁹ Boisvert, Anne-Marie. *La protection des collaborateurs de la justice: éléments de mise à jour de la politique québécoise – Rapport final présenté au ministre de la Sécurité publique*. (Québec, Juin 2005, p. 8).

³⁰ E.g., Healey, K.M. *Victim and Witness Intimidation: New developments and Emerging Responses*. (Washington (D.C.): U.S. Department of Justice, National Institute of Justice, October 1995). Fyfe, N. and H. McKay. “Desperately Seeking Safety: Witnesses’ Experiences of Intimidation, Protection and Relocation”, *British Journal of Criminology*, 2000, Vol. 40, pp. 675-691. Fyfe, N. *Protecting Intimidated Witnesses*.

³¹ Dedel, K. *Witness Protection*, p. 4.

attempt to compromise potential witnesses and expose them to potential prosecution for associating with terrorist elements. Fear of discriminating against one's own ethnic group because of its alleged sympathy for a cause is also a factor. Fear, however, is not the only factor contributing to the reluctance of witnesses to step forward; strong community ties and a deep-seated distrust of law enforcement may also be strong deterrents to cooperation.³² Community-wide intimidation is especially frustrating for the police and prosecutors because, while no actionable threat is ever made in a given case, witnesses and victims are still effectively discouraged from testifying.³³

To further complicate matters, witness intimidation can occur indirectly in at least two other ways: it can be committed by a third party, someone who was not directly involved in the crime being investigated or prosecuted; and, it can target someone close to the witnesses instead of the witnesses themselves (e.g. intimidating the spouse of a witness or other family members). In fact, it is often sufficient for the intimidators to display their knowledge of the witnesses' families, their whereabouts, or life habits to increase pressure on the witnesses.³⁴ In the case of serious offences, witnesses typically have a strong sense of fear stemming from what they know of the accused and their associates.³⁵ This feeling, in turn, can easily be reinforced by subtle or veiled threats.

Experts also distinguish between "low-level" intimidation and the very serious and often life-threatening experience of other witnesses and their families often in relation to organized criminal or terrorist groups. The number of witnesses who fall in the latter category is relatively small in comparison to the number of witnesses who face low-level intimidation, but the former group is the one who tends to receive the most attention from law enforcement and justice officials. Both forms are encountered in the way in which terrorist and criminal groups typically maintain entire groups or communities in fear of reprisals and retaliation.

Low-level community-wide intimidation frequently takes place within vulnerable, disenfranchised, or segregated communities that have fallen

³² Healey, K. M. *Victim and Witness Intimidation*, p. 1.

³³ Finn, P. and K.M. Healey. *Preventing Gang- and Drug- Related Witness Intimidation*, p. 2.

³⁴ Fyfe, N. *Protecting Intimidated Witnesses*, p. 84.

³⁵ Fyfe, N. *Protecting Intimidated Witnesses*, p. 45.

prey to the influence of radical groups or criminal organizations. The widespread intimidation of potential witnesses and informers within a community as a whole can take place when it is infiltrated and eventually controlled by radical elements or criminal gangs. One must understand that that kind of intimidation is particularly hard to detect and especially difficult to combat. For example, Bolan described how the intimidation of the Indo-Canadian community was a factor in defeating the efforts of investigators and prosecutors in the Air India case: "For fifteen years, intimidation had been a successful tactic to silence potential witnesses".³⁶ The Report of the Honourable Bob Rae on Outstanding Questions with Respect to the Bombing of Air India Flight 182 refers to "evidence of a culture of fear within communities that has stopped people telling the truth about what happened".³⁷ In that case, various forms of low-level intimidation and ostracism were reinforced by violent retaliation and even murder.

Generally speaking, threats are much more common than actual physical violence.³⁸ Most intimidation is neither violent nor life-threatening, but even a perception that reprisals are likely can be distressing and disruptive to witnesses and potential witnesses.³⁹ It is not unusual for innocent bystander eyewitnesses to have knowledge of crucial incriminating evidence that could put them at risk of intimidation or retaliation. Low-level intimidation may be quite effective in preventing them from coming forward to assist law enforcement. In fact, some studies of witnesses' experience of intimidation suggest that there is a greater incidence of "low-level" intimidation than is generally assumed.⁴⁰ Unfortunately, there is no reliable Canadian data on either type of intimidation.

During their evaluation of the Strathclyde Police witness protection program, Fyfe and McKay interviewed 14 protected witnesses. Witnesses described how, before they received police protection, they had their house "petrol-bombed", had a shotgun put to their head, were run over by a car, or received threats that their children would be kidnapped or

³⁶ Bolan, K. *Loss of Faith – How the Air-India Bombers Got Away with Murder*. (Toronto: McClelland & Stewart Ltd., 2005, p. 239).

³⁷ Rae, Bob. Lessons to be Learned. The Report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, on outstanding questions with respect to the bombing of Air India Flight 182. (Ottawa: Air India Review Secretariat, 2005, p. 3).

³⁸ Dedel, K. *Witness Protection*, p. 3.

³⁹ Dedel, K. *Witness Protection*, p. 6.

⁴⁰ Bruce, D. "Danger, Threats or Just Fear: Witness intimidation in three Gauteng courts". *South African Crime Quarterly*, 13, 2005, 23-28.

injured.⁴¹ Although such incidents were occasionally isolated attempts at intimidation, they were more frequently part of a sequence of escalating threats that became more violent and dangerous over time. In most incidents, fortunately, the threat against the witnesses was not realized.⁴²

In terms of where intimidation tends to take place, it is clear that it is not confined to the courtroom or court building. In terms of the timing of intimidation, it is apparent that witnesses are vulnerable at all stages of the legal process, from the moment they witness a crime or report it to the police to when they give evidence in court.⁴³ Some research indicates that intimidation begins immediately after the police's initial contact with the victim or witness.⁴⁴ In fact, even after they have testified, witnesses can remain vulnerable to retaliation for a long time, as the retaliation is often intended to send a message to other witnesses or community members who may be considering cooperation with the authorities. One often hears of home-grown law enforcement theories about when witnesses are presumed to be most vulnerable, e.g. at the time of disclosure, or when a witness is getting close to testifying. In truth, we still know far too little about patterns of intimidation, particularly when they involve organized crime groups or terrorists, to say anything about them with any certainty.

Intimidation can have a profound impact on the witnesses themselves. For those who were also victims of the crimes being investigated or prosecuted, it comes as a second wave of victimization, distress and fear. Using material from in-depth interviews with witnesses, Fyfe and McKay also observed how difficult the experience of intimidation is as, and also the experience of relocation, when this becomes necessary to protect a witness. The latter seriously affects the physical and psychological health of witnesses.⁴⁵

⁴¹ Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses: A Study of the Strathclyde Police Witness Protection Programme", *Policing and Society*, 2000, No. 10, pp. 277-299.

⁴² Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses", p. 292. Fyfe, N. *Protecting Intimidated Witnesses*, p. 35.

⁴³ Fyfe, N. *Protecting Intimidated Witnesses*, p. 45.

⁴⁴ Fyfe, N. *Protecting Intimidated Witnesses*, p. 35. Maynard, W. *Witness Intimidation: Strategies for Prevention*.

⁴⁵ Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses".

2.2 Identifying Witness Intimidation

Identifying the witnesses who are at risk can be an issue. The police play a critical role in the early identification of these witnesses and the number of intimidated witnesses is perhaps underestimated because of the lack of attention given to identifying incidents.⁴⁶ One should obviously not assume that witnesses who are being intimidated come forward and ask the police or the prosecutors for protection. Divulging to the authorities that they are victims of threats or violence is itself something that they are being dissuaded to do. Identifying witness intimidation is therefore very important and must occur at the earliest time possible, both in order to protect the victim or in order to protect the integrity and viability of an investigation or prosecution. All agencies involved in dealing with a witness or potential witness (or their relatives and friends) must know what to do in such circumstances and be prepared to do their part. They all share a responsibility in this regard.⁴⁷ We shall also refer later to the importance of having a reliable threat or risk assessment process as the cornerstone of an effective witness protection system.

2.3 Preventing Intimidation

Intimidation is difficult to prevent, particularly when the suspect, who knows the identity of the victim or a witness, has not yet been apprehended.⁴⁸ Some research indicates that intimidation begins immediately after police contact with the victim or witness.⁴⁹ In addition to the obvious role of the police in preventing intimidation and harm to witnesses, the courts, prosecution services, witness and victim assistance services, and prison authorities all have important roles to play in reducing incidents of intimidation. Working relationships between these agencies and the police must be strengthened and good practices must be identified, disseminated, and adopted. Using the example of the Salford Witness Support Service, which is based on strong inter-agency cooperation, Fyfe argues that it is possible for law enforcement agencies and their partners to produce a clear message to both witnesses and

⁴⁶ Burton, M., Evans, R., and Sanders, A. "Implementing Special Measures for Vulnerable and Intimidated Witnesses: The Problem of Identification". *The Criminal Law Review* (March), 2006, pp. 229-240, p. 232).

⁴⁷ Whitehead, E. *Witness Satisfaction: Findings from the Witness Satisfaction Survey 2000*. Home Office Research Study 230. (London: Home Office Research, October 2001, p. ix).

⁴⁸ Maynard, W. *Witness Intimidation: Strategies for Prevention*.

⁴⁹ Maynard, W. *Witness Intimidation: Strategies for Prevention*.

potential intimidators that action is being taken to ensure that witnesses can speak up, knowing that help and support are available if they fear or are subject to intimidation.⁵⁰

The focus of current protection measures tends to be on the very important witnesses who are at high risk of victimization. Some witnesses or potential witnesses may have small but important elements of evidence to contribute to an investigation or prosecution. Neglecting the potential for the intimidation of these other witnesses who can assist the police or prosecutors in many small but significant ways can be detrimental to the success of an investigation or prosecution. Since a successful prosecution is often the result of a case carefully built, piece by piece, on the basis of various elements of proof, one cannot always discern at the outset which evidence will be crucial and which will eventually prove trivial. It is important not only to understand the lower levels of intimidation that affect witnesses and prevent them from aiding the police, but also to identify police procedures and practices that might reduce the incidence of intimidation.⁵¹

The sheer complexity of witness intimidation means that a range of measures is required to tackle the problem.⁵² Reducing the risk of intimidation is possible by minimizing the risk of witnesses being identified when they are reporting a crime or offering a statement, and by protecting their anonymity and privacy. Protection programs and measures often exist for witnesses who are exposed to serious threats and danger, but there is far less attention given to measures to address low-level threats or community-wide forms of intimidation.⁵³ A second tier of protection measures must exist also. This can include practical means such as offering witnesses the use of alarms, calling devices and other crime prevention devices; offering quick access to police assistance and other services; conducting a security audit of an individual's home; giving witnesses the option of visiting the police station instead of being interviewed where they live or work and other means of reducing the likelihood of contact between them and offenders; transporting them to and from work, school, or the court; keeping witnesses separately from offenders whenever they must be at the police station or in the court

⁵⁰ Fyfe, N. *Protecting Intimidated Witnesses*, p. 48.

⁵¹ Maynard, W. *Witness Intimidation: Strategies for Prevention*, p. 3.

⁵² Fyfe, N. *Protecting Intimidated Witnesses*, p. 47.

⁵³ Brouwer, G. E. *Review of the Victoria Police Witness Protection Program*. Report of the Director of the Office of Police Integrity. (Victoria (Australia): Victorian Government Printer, P.OP. No. 145, July 2005, p. 8).

house; offering them emergency or short-term relocation as required; or seeking “no-contact” court orders on their behalf.⁵⁴ In any given case, a combination of several of these measures is usually required. As the witness’ situation evolves, the risk may change and must be reassessed and a different set of measures may become necessary.

We should also add that a number of approaches to witness protection do not involve direct police protection. They include greater police emphasis on investigation of reports of witness intimidation; the use of police officers from the relevant ethnic groups to serve identifiable cultural communities; and developing closer, deeper, and long-term ties within diverse communities and within community groups and organizations. When individuals and communities know, trust and respect their local police, they are more likely to come forward. If it is known and believed that police will take effective action to protect victims and witnesses, then this too will encourage greater reporting. Not surprisingly when police are remote, detached from the community, and appear unwilling or unable to offer meaningful protection to victims and witnesses, then community cooperation dissipates.

Finally, responding firmly to any incident of witness intimidation is also necessary in order to prevent future intimidation. The frequency with which offenders are charged with intimidation or obstruction of justice varies widely from one jurisdiction to another. Yet, it is necessary to prosecute vigorously offenders who harass, threaten, injure, or otherwise intimidate witnesses and potential witnesses. Severe sentences for witness intimidation and the revocation of probation or parole may help stop intimidation. However, it is often hard to find out whether intimidation is taking place and, even when it is known that it is taking place, it is often difficult for prosecutors to file charges of intimidation or obstruction of justice because the perpetrator is not identifiable or sufficient evidence cannot be gathered.⁵⁵

3. The Use of Informants and Collaborators of Justice

Law enforcement authorities increasingly need to rely on the testimonies of co-defendants and accomplices willing to cooperate and provide

⁵⁴ Dedel, K. *Witness Protection*.

⁵⁵ United States Department of Justice . *New Directions from the Field: Victims’ Rights and Services for the 21st Century*. (U.S.A: Office for Victims of Crime, 1998, p.8).

evidence against their former associates.⁵⁶ Although some may argue that there is insufficient evidence to verify the effectiveness of that particular approach⁵⁷, the use of criminal informants and accomplices is often depicted as essential to the successful detection and prosecution of terrorism and organized crime.⁵⁸ This is why various international agreements and conventions actively promote the development of a capacity to utilize these methods.⁵⁹ In civil-law countries in particular, many of these procedural changes to criminal law have been difficult and have therefore been implemented cautiously. Laborde describes these changes necessitated by the fight against organized crime as “une révision déchirante des principes procéduraux classiques”.⁶⁰

Quite a few observers of this recent willingness to encourage the use of informants and collaborators of justice have noted that the practice is not without important issues, whether it is on the basis of moral or ethical concerns, criminal law principles, the integrity of the police agency itself, or the question of the poor reliability of the information and evidence the informants provide.⁶¹

Because of the importance of “accomplice testimony” in cases involving organized crime and terrorism, plea-bargaining and offers of immunity or leniency often play a crucial role in the gathering of evidence and the

⁵⁶ Council of Europe. *Combating Organised Crime*, p. 22. Schreiber, A.J. “Dealing with the Devil: An Examination of the FBI’s Troubled Relationship with its Confidential Informants”. *Columbia Journal of Law and Social Problems*, 2001, vol. 34(4), pp. 301-368.

⁵⁷ Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*. Fyfe, N. and J. Sheptycki. “International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases”.

⁵⁸ E.g., Laborde, J. *État de droit et crime organisé*. (Paris: Dalloz, 2005).

⁵⁹ E.g., *United Nations Convention Transnational Organized Crime*, 2000. Also, Council of Europe, *Recommendation REC(2001)11 of the Committee of Ministers to member states concerning guiding principles on the fight against organized crime*. Strasbourg, September 2001.

⁶⁰ Laborde, J. *État de droit et crime organisé*.

⁶¹ Beernaert, M.-A. “De l’irrésistible ascension des ‘repentis’ et ‘collaborateurs de Justice’ dans le système pénal”, *Déviante et Société*, 2003, No. 27(1), pp. 77-91. Cohen, H. and R. Dudai. «Human Rights Dilemmas in Using Informers to Combat Terrorism: The Israeli-Palestinian Case», *Terrorism and Political Violence*, 2005, No. 17, pp.229-243. Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*. Harris, G.C. “Testimony for Sale: The Law and Ethics of Snitches and Experts”, *Pepperdine Law Review*, 2000, Vol. 28 (1), pp. 1-74. Norris, C. and C. Dunnigham. “Subterranean Blues: Conflict as an Unintended Consequence of the Police Use of Informers”, *Policing and Society*, 2001, Vol. 9, pp. 385-412. Montanino, F. “Unintended Victims of Organized Crime Witness Protection”, *Criminal Justice Policy Review*, 1987, Vol. 2 (4), pp. 392-408.

successful prosecution of these cases.⁶² Therefore, in practice, witness-protection measures, as a means to elicit cooperation from criminal informants, are intertwined with other measures such as plea-bargaining, immunity from prosecution, and reduced sentences. Legislation creating the “pentiti” appeared in Italy in the 1970s to help in the fight against the Red Brigades and, later, the Mafia.⁶³ It recognized the possibility of exempting a criminal/accomplice from punishment when the information he provided to the authorities prevented an infraction that could have resulted in human death or serious injuries or granting leniency (reduction of punishment) to help identify the criminals responsible for an offence. Other countries imitated the example, often because they themselves were facing some serious terrorist threats (e.g. France in 1986).⁶⁴ In Europe (e.g. Italy, Germany, Ireland), many of these measures were first developed in response to terrorism and political violence (as a response partly to the difficulty of getting evidence and intelligence concerning tightly knit groups and the need therefore to obtain the collaboration of insiders/accomplices). The use of these measures varies from country to country. However, not all countries (e.g. France and Japan)⁶⁵ have provisions in their systems for plea-bargaining and offers of immunity. In some countries these practices are not allowed while in others they do not have a statutory basis. Authorities must therefore rely on the use of discretion at various levels of the system.⁶⁶

Informants have progressively become the property of the police agency, as opposed to the individual investigator.⁶⁷ Formal agreements are often

⁶² In the USA, it is possible for the prosecution to decide not to prosecute a witness for a crime he/she has committed. In practice, this is rarely offered. In the rare cases where immunity is offered, it is only granted after the collaborator had rendered his/her collaboration. In a number of European states (Germany – with the consent of the court – Hungary, Greece, Moldova, Belgium, and Latvia), it is possible for the prosecutors to dismiss charges against an offender who has collaborated or stay the proceedings against him (see: Piancete, N. “Analytical Report”, in Council of Europe, *Terrorism: Protection of Witnesses and Collaborators of Justice*, (Strasbourg: Council of Europe, 2006, pp. 7-65, p. 15). Because of the wide discretion they offer to prosecutors, witness immunity statutes in the USA often raise issues regarding their perceived and actual legitimacy (Fyfe, N. and J. Sheptycki . *Facilitating Witness Co-operation in Organised Crime Cases: An International Review*, p. iv).

⁶³ La Spina, A. “The Paradox of Effectiveness: Growth, Institutionalisation and Evaluation of Anti-Mafia Policies in Italy”, in Fijnaut, C. and L. Paoli (eds.) (2004). *Organized Crime in Europe -Concepts, Patterns and Control Policies in the European Union and Beyond*. (Dordrecht: Springer, 2004, pp. 641-676, p. 645).

⁶⁴ Lameyre, X. and M. Cardoso, “La délation en droit pénal français, une pratique qui ne dit pas son nom”, in Brodeur, J.P. and F. Jobard (eds.). *Citoyens et délateurs – La délation peut-elle être civique?* (Paris: Éditions Autrement, 2005, pp. 144-154, p. 147).

⁶⁵ Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*, p. 3.

⁶⁶ Fyfe, N. and J. Sheptycki. “International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases”, pp. 335-337.

⁶⁷ Brodeur, J.P. and F. Jobard (Eds.). *Citoyens et délateurs*, p. 10.

struck between the informant and the police clarifying the obligations of both parties. One problematic aspect of these arrangements concerns the future criminal activities of informants.⁶⁸ In recent months, the matter has become a matter of public attention in the case of Richard Young, an R.C.M.P. informant who became a protected witness and then committed homicide, leading to calls for greater public scrutiny of the R.C.M.P. witness protection program.⁶⁹ The House of Commons' Public Safety Committee has since instigated a review of the existing program and legislation.⁷⁰

There remains a need to provide a tight framework for the management of informants, in the form of guidelines, statutory regulations, or increased independent oversight.⁷¹ Clark argues that, because of the high-risk nature of the relationship between informants and their handlers, such a relationship should always be the subject of intrusive and intelligence-led supervision and surveillance.⁷² In cases potentially involving matters of national security, where public scrutiny of law enforcement activities is more difficult, there is an even greater need for independent oversight of practices relating to the use of informants and collaborators of justice.

Brodeur and Jobard, using the example of the Air India case, noted that police agencies and intelligence services tend to have different attitudes towards informants and protected witnesses.⁷³ The police use both, but often have a preference for witnesses who can help produce evidence (as opposed to only information or intelligence). Intelligence services, which must rely heavily on human intelligence (HUMINT) while dealing

⁶⁸ Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*. Also concerning exceptions for the criminal liability of informants, see: Dandurand, Y., Plecas, D., and D. C. Préfontaine. *Statutory Exemptions from Criminal Liability for Law Enforcement Officers*. (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy, 2001).

⁶⁹ McArthur G. and G. Dimmock, "The secret agent who conned the Mounties: Richard Young's cruel charade", *Globe and Mail, and Ottawa Citizen*, March 22, 2007. Also: Editorial, "The Excessive Secrecy of Witness Protection", *Globe and Mail*, April 7, 2007.

⁷⁰ Also: Dimmock, G., "MPs launch probe into R.C.M.P.'s witness protection program", *Ottawa Citizen*, March 30, 2007.

⁷¹ Clark, R. "Informers and Corruption", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 38-49, p. 49). Harris, G.C. "Testimony for Sale". Williamson, T. and P. Bagshaw. "The Ethics of Informer Handling", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 50-66, p. 63). Schreiber, A.J. "Dealing with the Devil", p. 360, Tak, P.J.P. "Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti". *European Journal of Crime, Criminal Law and Criminal Justice*, 1997, Vol. 5 (1), pp. 2-26, p. 25.

⁷² Clark, R. "Informers and Corruption", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 38-49, p. 49).

⁷³ Brodeur, J.P. and F. Jobard (Eds.) *Citoyens et délateurs*, p. 15.

with closed criminal or terrorist organizations, tend to have reservations about their informants becoming protected witnesses, in part because their testimony may reveal too much about the services' own practices. When protection must be extended, intelligence agencies may have to rely on other agencies in order to offer effective protection to their informants. Such practices are obviously shrouded under a thick veil of secrecy and it is therefore quite difficult to ascertain how effective or fair they really are.

One must remember that the reputation of an investigative agency or an investigator to protect their informants directly impacts their ability to recruit them. Failure to protect them can result in a lack of trust in law enforcement, thus resulting in fewer informants.⁷⁴ The need to protect informants often presupposes protecting their identity and taking measures to ensure the non-disclosure of informant information. The recruitment and handling of informants and collaborators is often problematic.⁷⁵ So are some of the controversial methods that are sometimes used by law enforcement to compel criminals to cooperate (e.g., various forms of blackmail, entrapment, and techniques to compromise them in relation to criminal organizations or their own accomplices and put them at risk or place them in precarious positions⁷⁶). There are also difficulties also with cases involving an agent who is infiltrating an organization and to whom various deceitful or empty promises may have been made explicitly and implicitly during the investigation. For these reasons and many others, several experts insist that "investigation practices" and "prosecution practices" must be kept totally separate from "witness protection practices".⁷⁷

4. The Vulnerability of Certain Individuals and Groups

In England, a lot of work has been done in recent years to respond to the needs of "vulnerable and intimidated witnesses". Most of this work has been focused on facilitating the testimony of children and adults with mental or physical disabilities, but it also addresses the concerns of witnesses who feel intimidated either by the justice system itself or

⁷⁴ Mallory, S.L. *Informants: Development and Management*. (Nevada: Copperhouse Publishing, 2000, p. 73).

⁷⁵ Boisvert, Anne-Marie. *La protection des collaborateurs de la justice*, p. 22.

⁷⁶ In French, one refers to the "précarisation des contrevenants"

⁷⁷ Boisvert, Anne-Marie. *La protection des collaborateurs de la justice*, p. 23.

by some individuals.⁷⁸ Groups identified as “vulnerable” share many common experiences and a number of factors may prevent them from becoming effective witnesses, including factors that make the experience particularly traumatic because of the nature of the crime or the character of the accused, problems with the nature of the criminal justice process and the various procedural requirements, and sometimes, an imbalance of power between the witness and the defendant, particularly when the latter belongs to a dangerous organization.⁷⁹ Criminal groups often go to great lengths to maintain their victims in a constant state of vulnerability and powerlessness. This is often the case, for example, with illegal immigrants illegally smuggled into the country and potentially subject to deportation. Their vulnerability to deportation can be purposefully manipulated and exploited by terrorist groups.

As an international phenomenon, terrorism has undergone many mutations. One of them is the growing reliance of terrorist organizations on their ability to obtain support through deception, coercion, and other means from diasporas, recent immigrants, and other religious or minority groups found in democratic and tolerant countries such as Canada. Canadians have become much more aware of how the vulnerability of certain minority groups in Canada increases the vulnerability of the country as a whole and that of its allies. The Canadian Security Intelligence Service Public Report for 1999 pointed out that Canadians mirror the population of the globe, therefore when violence grips some region torn by conflict, it often resonates in Canada⁸⁰.

It is useless to deny the significance of the support that is sometimes provided to a terrorist organization by mobilized segments of a diaspora or a network of immigrants. Terrorist groups are known to rely on overseas-based communities both for support and for managing

⁷⁸ Kitchen, S. and R. Elliott. *Key Findings from the Vulnerable Witness Survey*. (London: Home Office, 2001). Home Office. *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*. (London: Home Office, 1998). Home Office. *Consultation Paper: Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children*. (London: Home Office, 2000, Communication Directorate. Home Office. *Key Findings from the Vulnerable Witness Survey*. Findings 147. (London: Home Office, Research Development and Statistics Directorate, 2001). Home Office. *Vulnerable Witnesses: A Police Service Guide*. (London: Home Office, 2002).

⁷⁹ Reid-Howie Associates. *Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions*. Central Research Unit Crime and Criminal Justice Research Findings No. 60. (Edinburgh: Scottish Executive, 2002, p. 2).

⁸⁰ CSIS, 1999 Public Report.

their insurgent infrastructure. A typical infrastructure disseminates propaganda, raises funds, recruits, trains, and procures and ships technologies and weapons to its theatre of conflict. While some members of communities voluntarily contribute economically and participate politically in the activities of terrorist groups, many others are coerced into collaboration through the use of threats and violence either against themselves or against others in their home country.

It is apparently often the case that ethnic communities living in ethnic enclaves are less inclined to integrate with their host societies and thus become more susceptible to insurgent indoctrination and vulnerable to intimidation by terrorists and other criminals. Anything that contributes to the isolation or ghettoization of these groups increases the likelihood that they could be intimidated, victimized, recruited or exploited by criminal or terrorist organizations.

The tightening of counter-terrorism measures, in particular border control measures to prevent the movement of terrorists and other criminals, has also had an impact on the lives of illegal migrants and residents. Refugees and illegal immigrants are often automatically assumed to be security threats⁸¹. Although there may often be little official sympathy for the situation of these illegal immigrants, they constitute nevertheless a very vulnerable group. Anything that contributes to the further alienation and isolation of these individuals can indirectly facilitate their exploitation by terrorist groups. Furthermore, these illegal residents/immigrants normally have strong and immediate ties to other members of the same immigrant community. What happens to them and how they are treated can also contribute to feelings of alienation, exclusion and vulnerability within the community as a whole. Criminal and terrorist groups are of course known to blackmail illegal residents and their relatives (even if they are themselves legal residents) by threatening to denounce them to the authorities.

Within the last few years, the Canadian Parliament has adopted a new immigration and citizenship law, as well as major changes to the *Criminal Code* and other federal statutes to combat organized crime⁸², and a comprehensive *Anti-Terrorism Act*⁸³. Various aspects of these

⁸¹ Huysmans, J. "The European Union and Securization of Migration", *Journal of Common Market Studies*, 2000, 38 (5).

⁸² Bill C-24, December 18, 2001.

⁸³ Bill C-36, December 18, 2001.

laws have raised issues for many vulnerable groups which have expressed their concerns.⁸⁴ They have asked for greater protection, especially from discriminatory stereotypes that associate minority groups and religions with terrorism. They have also argued that their own vulnerability has been directly increased by some specific counter-terrorism measures. As was acknowledged by the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Because terrorism investigations today are focused on specific communities there is an understandable concern that individuals and groups as a whole may feel unfairly targeted"⁸⁵

Many measures adopted to combat terrorism can have detrimental effects on the situation of vulnerable groups. Their precise impact is an empirical question that has yet to receive some attention. However, it can be readily acknowledged that measures such as those adopted to authorize preventive arrests and short-term preventive detention introduce some real apprehensions within vulnerable communities. The same is true, for example, of the ability of the authorities to compel individuals to be examined in court during an investigation of a terrorist crime or conspiracy, possibly without providing for their effective protection after they have produced evidence. In the *Air India* case, R.C.M.P. Deputy-Commissioner Gary Bass suggested that resorting to the use of investigative hearings would allow those reluctant to come forward the protection they needed to tell the truth. He is quoted as saying: "The investigative hearing process offered the potential for individuals inclined to cooperate, but afraid of retribution, a vehicle to explain their cooperation within their community, by being able to explain that they had no choice but to testify truthfully."⁸⁶ However, that view is hard to defend since compelled witnesses are still exposed to potential retaliation by terrorists who would certainly continue to expect them to withhold the truth during their testimony. Furthermore, any investigative hearing would have been subject to a rebuttable open court principle.⁸⁷

Several of these measures clearly add to the already existing feelings of vulnerability and insecurity of members of vulnerable groups. They also

⁸⁴ For example: Canadian Islamic Congress. *Canada's Relations with Countries of the Muslim World*, A Position Paper presented to the House of Commons Standing Committee on Foreign Affairs and International Trade by the Canadian Islamic Congress, May 6, 2003.

⁸⁵ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report on the Events Relating to Maher Arar*, Ottawa: Public Works and Government Services Canada, 2006, p. 357.

⁸⁶ Quoted by Bolan, K., "R.C.M.P. official meets Air India families", *Vancouver Sun*, March 05, 2007.

⁸⁷ In *Re Vancouver Sun* [2004] 2 S.C.R. 332, two judges dissented and raised concerns that openness might result in risk to the safety of witnesses and other third parties.

convey a conflicting message by suggesting to those with information about potential terrorists that volunteering it to the authorities could result in their finding themselves subject to an investigative hearing, a preventive arrest or a charge under a broad array of new terrorism offences.

Nikos Passas⁸⁸ observed that the discourse of a “war on crime” or a “war against terrorism” “paves the ground for the acceptance of ‘collateral damage’”. The hardship imposed on vulnerable groups by criminal/terrorist organizations as well as by our collective response to these activities is just too easily dismissed as part of that necessary “collateral damage”. One of many forms of collateral damage may be a distrust of law enforcement and security officials by those within the affected communities that may have information that would be useful either to preventing or prosecuting terrorism.

Counter-terrorism strategies do not typically address the need to offer active protection to these vulnerable groups. A legalistic/instrumentalist approach to this question tends to prevail. As a result, the services of State protection programs are extended to victims of intimidation and exploitation in their capacity as witnesses and informants, but only to the limited extent that their participation is required by the justice system itself. Otherwise, intimidated individuals tend to be left to their own devices. One must therefore ask whether or not it is fair to expect members of these vulnerable groups to stand up alone against terrorist and criminal organizations without any assistance from the State.

In the fight against terrorism, recent immigrants and other minority groups that have potential ties with insurgent groups in foreign countries often find themselves on the front line of the struggle. Unfortunately, they are too easily labelled as part of the problem, as opposed to part of the solution i.e. as potential informants or witnesses. Their intimidation and exploitation by transnational terrorists and other criminal organizations is a pressing issue that does not receive enough attention. According to some observers, what policy makers have failed to grasp is that in a country such as Canada, several minority ethnic communities can find themselves on the front lines of a dangerous struggle, the victims of terrorists seeking money and support for their cause. Critics of current

⁸⁸ Passas, N. “Cross-Border Crime and the Interface Between Legal and Illegal Actors”, *Security Journal*, 2003, 16 (1), pp. 19-37.

policies contend that Canada welcomes refugees from war-torn lands, and then abandons them once they have arrived⁸⁹.

Vulnerable groups frequently fear, not without cause, that sufficient protection will not be extended to them by law enforcement agencies if they request it or if they decide to denounce their oppressor or collaborate with law enforcement. In any case, they tend to entertain serious doubts about the amount of protection that can be offered to their relatives still in their country of origin.

We must find ways to strengthen the resiliency of these vulnerable groups and help them resist the pressure and intimidation to which they are often subjected by terrorists and criminals.

5. Protection Measures

Physical, economic and psychological intimidation of witnesses and their relatives can and does take place in a variety of contexts. The successful prosecution of organized crime activities and acts of terrorism usually requires that effective measures be taken for the protection of witnesses, victims, and collaborators of justice. Effective protection of witnesses and collaborators of justice includes legislative and practical measures to ensure that witnesses can testify freely and without intimidation. These measures include the criminalization of acts of intimidation, procedural measures, the use of alternative methods of providing evidence, physical protection, relocation programs, permitting limitations on the disclosure of information concerning witness identity or whereabouts, and in exceptional circumstances, protecting the anonymity of the person giving evidence.

5.1 Assessing the Threat and the Need for Protection

Authorities are often powerless to prevent witness intimidation. For one thing, ensuring proper protection for witnesses implies that the risk is identified and properly assessed. The level of risk faced by the witness dictates the nature and extent of the protective measures that must be

⁸⁹ Bell, S., "A Conduit for Terrorists", *National Post*, September 13, 2001. On the Tamil, for example, the Tamil community has been intimidated in Canada, see also: Bell, S. *Cold Terror: How Canada Nurtures and Exports Terrorism Around the World, 2nd Edition*. (Toronto: Wiley, 2006).

taken. For instance, most witness protection programs have a requirement that a serious risk to the witness be established before protection services are offered. Risk assessment can be useful for allocating limited protection resources, but that presupposes that a reliable method exists to assess the nature of that risk.

A threat assessment is a set of investigative and operational activities designed to identify, assess, and manage persons who may pose a threat of violence to identifiable targets. One can distinguish among three major functions of a threat assessment: the identification of a potential perpetrator, the assessment of the risk of violence posed by a given perpetrator at a given time, and the management of both the subject and the threat that he or she poses to a given target.⁹⁰ There are situations, such as when there has been a failed attempt on the life of a witness, where the evaluation is relatively straightforward. However, risk assessment is not always that simple. In fact, assessing a threat is by no means a simple or exact process.

While a group that makes or poses a threat may be identified, not all potential aggressors are, or can be, identified. Assessment of the risk may be based on information whose validity and reliability is questionable. Management of the aggressors or potential aggressors may be difficult if they are individually unknown, cannot be located, or are operating in another country. The predictive capacity of threat assessment models is not absolute. The secretive nature of the groups involved, contextual vagaries, and the often ambiguous and unconfirmed nature of the intelligence gathered by security agencies make it extremely difficult to arrive at reliable conclusions.

In theory, the risk assessment is based on a number of factors: the potential vulnerability of the witness (age, gender, physical and mental condition); the proximity of the witness to the offender; the nature of the crime or crimes that were committed; the characteristics of the accused, including his/her criminal history, whether or not he/she has access to weapons, whether he/she is known to belong to a terrorist or criminal organization; whether his/her alleged accomplices are still at large; evidence of past attempts at intimidating witnesses or justice officials;

⁹⁰ Fein, R., Vossekuil, B. & Holden, G. *Threat Assessment: An Approach to Prevent Targeted Violence*. (Washington (D.C.): National Institute of Justice, 1995, p. 3).

and the presence and nature of any direct threat that might have been made by the suspect or his/her known associates.⁹¹ In many instances, the nature of the potential risk is subject to change and too complex to be readily assessed by such a simple method.⁹²

If the potential exists for a witness to be threatened or harmed, then there is a level of risk. The challenge is in identifying, analyzing, validating, evaluating, and quantifying the risk(s). Risk is contextual, dynamic, and exists along a continuum of probability.⁹³ Assessments should therefore be conducted periodically and their results should be shared with the witnesses so that they have a realistic understanding of the dangers they potentially face, without invalidating their feelings of fear and anxiety.⁹⁴

It appears that current methods for assessing threats to witness are not particularly effective when the threat comes from a terrorist group. Organized criminal groups and terrorist groups use violence and the threat of violence differently as a strategy to achieve their goals. While both may use violence to send a message, make a statement, or instill fear, they do so in different ways. Also complicating the assessment of threats made by terrorist groups is the nature of the agency assessing the threat. Police agencies are traditionally oriented towards a focus on crime and criminals. Their efforts are not typically focused on collecting intelligence on political groups and their progressive radicalization. National intelligence agencies may have a greater capacity and expertise to assess threats made by terrorist groups against witnesses and potential informants. Police, when attempting to conduct an assessment of a threat posed by a terrorist group, can find themselves lacking some vital information, and thus draw incomplete or inaccurate conclusions.

5.2 Basic Witness Protection Measures

Each year, only a few witnesses are offered the opportunity to participate in a formal witness protection program. Of these, some decide not to

⁹¹ Fyfe, N. and McKay, H. "Police Protection of Intimidated Witnesses: A Study of the Strathclyde Police Witness Protection Programme". Fyfe, N. *Protecting Intimidated Witnesses*.

⁹² Dedel, K. *Witness Protection*, p. 21.

⁹³ Borum, R., Fein, R. A., Vossekuil, B., and J. Berglund, J. "Threat Assessment: Defining an Approach for Evaluating Risk of Targeted Violence". *Behavioral Sciences and the Law*, 1999, 17, 323-337.

⁹⁴ Council of Europe. *Protecting Witnesses of Serious Crime*. Dedel, K. *Witness Protection*, p. 20

accept the protection. In fact, the overwhelming majority of witnesses who are intimidated do not participate in a witness protection program, choosing to remain under the responsibility of local police services. Many of them decide to move and relocate somewhere not very far from where they used to live, sometimes because they think that this is the only effective way to protect themselves and their family.⁹⁵ They may also change jobs, move their children to another school, stop frequenting certain places (places of worship, restaurants, etc.), and change their mode of transportation (e.g. avoid public transportation, drive different routes, etc.). Many of them rely temporarily on friends and relatives to help them and provide temporary accommodation, even though they may hesitate to ask for that kind of assistance for fear of compromising someone else's safety.

The police can take a number of basic measures to protect witnesses against intimidation. They can minimize the information given over the radio identifying the witnesses; perform house-to-house calls on neighbours; interview witnesses in safe places, where they will not be recognized; enquire from witnesses whether they feel intimidated or whether they have been threatened; engage in surveillance of the witness at crucial times; escort the witness to work, court, etc; lend a personal alarm device; assist with emergency relocation; increase police patrols in the area where the witness lives; or even offer 24-hour police protection. For the police, this is often a question of resources and cost and they should be provided with clear guidelines on the provision of such protection to witnesses, including witnesses for the defence.

When witness protection resources become an issue, the private sector can and already does provide varying levels of witness protection. Alternate models of providing protection services can include specially trained private providers working with the police. Knowing that the police are often unable to protect them, many witnesses and collaborators of justice in Canada contract privately for their personal security. Some report that advantages of private protection include a customer service orientation featuring round-the-clock, immediate access to a known and trusted contact, flexible "on-demand" services, and a clear articulation and agreement of services to be provided.

⁹⁵ Fyfe, N. *Protecting Intimidated Witnesses*, p. 104.

The police also resort in some cases to protective custody, even if the method is not one that will necessarily encourage witnesses to collaborate with the authorities. Many countries have provisions in their laws to permit the detention of a material witness (someone who has unique information about a crime). In the USA, there is a federal statute on material witnesses⁹⁶ and there are statutes in most individual states as well. The material witness statute permits the detention of any person who may have information pertaining to a criminal investigation for the purpose of testifying before a grand jury or during a criminal proceeding. Under the federal statute, it is possible to obtain a warrant for the arrest of a material witness if: (1) the testimony of the individual is material, and (2) it is impracticable to secure the person's presence by subpoena. Some witnesses can be detained for their own protection. There is, however, a clear possibility of abuse of the provisions concerning the detention of material witnesses, in particular those who are being detained as a form of "investigative detention" while the investigation is ongoing.⁹⁷ Most experts in witness protection would probably argue that compelling material witnesses to testify (by arresting and/or detaining them) is among the least effective measures for obtaining useful evidence from a threatened witness. Since there is no proof that compelling witnesses to testify is effective (e.g., via arrest, investigative hearings), it should really only be used as a last resort.⁹⁸

Protective measures can also be taken at the level of the courts. Some witnesses may be unable to testify freely if they are required to testify in open court in the usual manner. In these circumstances, according to the International Defence Attorneys' Association, "the interests of justice may require that steps be taken to limit public access to the testimony or identity of the witness, and to give the witness some protection from the accused in the courtroom."⁹⁹ The court may restrict public access to the witness's identity or testimony through a number of measures, including having a witness testify under a pseudonym; expunging names and identifying information from the Court's public records; or having all members of the public, including members of the media, excluded from the courtroom during the testimony of a witness. The use of screens, closed-circuit television and video links are the main methods by which a witness, while testifying, can be protected from the accused.

⁹⁶ 18 U.S.C. s 3144 (2000).

⁹⁷ Studnicki, S. M. and J.P. Apol. "Witness Detention and Intimidation: The History and Future of Material Witness Law". *St. John's Law Review*, 2002, No. 76, pp. 483-533, p. 520.

⁹⁸ Dedel, K. *Witness Protection*, p. 32.

⁹⁹ International Criminal Defence Attorneys Association. *Protection of Witnesses*. Position Paper presented during the United Nations Preparatory Conference on ICC Rules of Procedure and Evidence, 26 July - 13 August 1999, July 15, 1999, p. 3.

The Supreme Court of Canada has recognized that limitations on public access to the identity or testimony of a witness can assist the administration of justice in a number of ways, including:

- maximizing the chances that witnesses will testify because they will not be fearful of the consequences of publicity;
- protecting vulnerable witnesses (e.g., child witnesses, police informants, and victims of offences allegedly committed by organized groups);
- encouraging the reporting of sexual offences; and,
- protecting national security.¹⁰⁰

The use of practical measures such as videoconferencing, teleconferencing, voice and face distortion, and other similar techniques is encouraged.¹⁰¹

Allowing witnesses to conceal their address or occupation may also assist in their protection. In France, for example, some witnesses (those who can contribute an important element of evidence and were not involved in the offence) can be allowed to testify without having to reveal their address. They are allowed to give the address of the police instead of their own.¹⁰²

Some protection measures are also necessary when a witness is being detained. Witnesses who are incarcerated can be particularly vulnerable. Their protection poses some distinct challenges to the authorities.¹⁰³ In a review of current practices with respect to “jailhouse witnesses”, a report prepared for the Los Angeles County District Attorney’s Office refers to a number of challenges that can be encountered in trying to ensure the safety of incarcerated witnesses and prevent their intimidation by criminal elements.¹⁰⁴ Some of the most frequent ones come from the presence in the institution of other inmates who want to prevent them from testifying or who may themselves intimidate or harm the witnesses. Co-mingling

¹⁰⁰ C.B.C. v. Dagenais 94 C.C.C. (3d) 289 (S.C.C.), 1994, at 320-321.

¹⁰¹ ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*, p. 10. Also, Nijboer, J. “Children and Young Persons in the Criminal Justice System: The Council of Europe Recommendation on Witness Protection and Rights of the Defence”, *Criminal Law Forum*, 1999, No. 10, pp. 443-465.

¹⁰² Laborde, J. *État de droit et crime organisé*. Lameyre, X. and M. Cardoso, “La délation en droit pénal français, une pratique qui ne dit pas son nom”, p. 150.

¹⁰³ Boisvert, Anne-Marie. *La protection des collaborateurs de la justice*, p. 16.

¹⁰⁴ Cooley, S. *Jailhouse Witness Protection Task Force: Final Report*. (Los Angeles: District Attorney’s Office, August 2004).

of protected witnesses with the general population inmate is generally inadvisable. Co-mingling of protected witnesses with other inmates cannot only during incarceration but also during their transportation to court or in the court lockups. This can of course create opportunities for violence, threats, and intimidation. Witness-safety issues around communication with the outside world (telephone, letters) and visits must be examined carefully. Weaknesses in information management systems, either at the institution or at the court level, can significantly add to the risks faced by the protected witness. Dangerous mistakes can also occur because of poor communication between prison authorities and professionals from other agencies who share a responsibility for the protection of the witnesses.¹⁰⁵

Intimidation of protected witnesses who are detained can be very hard to detect, particularly when it occurs indirectly. There is often a need to take measures to protect the families of custodial witnesses.¹⁰⁶ In some instances, the corruption or the intimidation of prison personnel can introduce a huge element of risk for the witnesses who are being detained. It is therefore often necessary to limit the circle of individual staff members who have access to the protected inmates and to information about them. In some instances, detained witnesses may be transferred to another province/state or country for their protection, provided that the necessary agreements exist between the jurisdictions.

In some jurisdictions, correctional authorities have established a special "witness protection unit" with special security measures and better quality of accommodation for inmates. It is also possible to have alternative housing and transportation options for endangered witnesses. No matter where these protected witnesses are being held, it is usually necessary to limit their mobility within the institution and to minimize contact between them and other inmates. However, having a separate detention facility for protected witnesses may not always be practical, although it greatly simplifies a number of protection issues. Furthermore, having a separate facility does not address all issues relating to the witnesses' temporary detention near or at the court facilities where they are expected to testify. Wherever the witnesses are being detained there are some challenges relating to their transportation to and from the place where the hearings/trials are conducted.

¹⁰⁵ Cooley, S. *Jailhouse Witness Protection Task Force*.

¹⁰⁶ Parliamentary Joint Committee on the National Crime Authority. *Witness Protection*. (Canberra: Australian Government Publishing Service, 1998, p. xii).

It is often recognized that, because protected witnesses must serve their sentence under harsher circumstances than would otherwise be the case, their situation should receive special consideration at the time of making parole or release decisions.¹⁰⁷ Sometimes, special arrangements concerning their supervision on probation or parole must be made. Protected witnesses serving a prison sentence must be given clear assurance as to the arrangements proposed for their protection upon release.¹⁰⁸

All of the practical measures mentioned so far require that the professionals from law enforcement, court services, sheriff's office or detention facilities who become involved with the witness be made aware of the risks faced by witnesses and be properly trained to deal with the risks involved. Sufficient training is very seldom offered in Canada. Within the R.C.M.P., training is offered to the witness protection coordinators who also have access to a handbook on witness protection. The R.C.M.P. also has a national program on human sources development and human sources handling. However, there are no nationally recognized training program or standards for witness protection.

5.3 Procedural Measures

In addition to the measures mentioned above, other procedural measures have been considered and sometimes introduced in national legislation and practices in order to protect witnesses. These measures must ensure an appropriate balance between the need to protect the safety of witnesses and the obligation to safeguard the defendants' right to a fair trial.

One of these measures revolves around procedural means of recognizing pre-trial statements. In most European countries, pre-trial statements given by witnesses and collaborators of justice are recognized as valid evidence in court, provided that the parties have the opportunity to participate in the examination of witnesses.¹⁰⁹ A report by a Council of Europe Group of Experts suggests that one may assume that, in a system where pre-trial statements of witnesses or testimonies of anonymous witnesses are generally regarded as valid evidence during proceedings, these procedures can provide effective protection of witnesses. The need

107 Parliamentary Joint Committee on the National Crime authority, 1988, *Witness Protection*, p. xv.

108 Parliamentary Joint Committee on the National Crime Authority, 1988, *Witness Protection*, p. xv

109 Piancete, N. "Analytical Report", p. 22.

for actual witness protection, it was argued, was probably lower under those circumstances, than when these procedures do not exist in the justice system.¹¹⁰

Another promising procedural approach to witness protection consists of better managing the disclosure process and the risks that it represents to witnesses and potential witnesses.¹¹¹ Defense lawyers have a right to obtain witness statements at the time of disclosure, but these statements can eventually be used against witnesses and increase their vulnerability. For example, Kim Bolan, a journalist who followed the Air India trial very closely, reported that photocopies of statements by some Sikh witnesses were made and circulated in the Sikh community and family members and friends of the witnesses were approached about the statements: "Some were given copies of confidential disclosure material to keep"¹¹².

However, disclosure may be more of a problem in some cases than in others. For instance, a survey in the United Kingdom of crime witnesses found on high-crime estates facing non-life-threatening forms of intimidation found no evidence to support the commonly held view that disclosure is the cause of "low-level" witness intimidation.¹¹³ In none of the cases in which in-depth interviews were conducted was the timing of the intimidation linked to the disclosure of case material to the defense.

Another form of procedural protection for witnesses is sometimes available in other countries, even if quite controversial. "In light of growing concerns over witness intimidation and national security, courts and legislatures throughout the world have recently been called upon to curtail the right of confrontation by withholding the true identities of prosecution witnesses from the accused, permitting them to testify anonymously and prohibiting cross-examination that could reveal their true identity."¹¹⁴ In some countries, it is possible to use statements of anonymous witnesses as evidence in court although, generally speaking, convictions may not be based on anonymous testimonies alone. This is usually limited to cases where there is reason to believe that the witness would be seriously endangered.

110 Council of Europe. *Combating Organised Crime*, p. 22.

111 For instance, the ICTY considers delaying the disclosure of witness identity prior to trial as a measure that can be taken by the court to achieve the appropriate level of protection for a particular witness.

112 Bolan, K. *Loss of Faith*, p. 242

113 Maynard, W. *Witness Intimidation: Strategies for Prevention*.

114 Lusty, D. "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials". *The Sydney Law Review*, 2002, No. 24, pp. 361-426, p. 362.

In many European countries, in exceptional circumstances and in accordance with European Human Rights law, anonymity of persons who provide evidence in criminal proceedings may be granted, in order to prevent their identification. Resulting decisions have been controversial, involving fundamental issues for criminal justice. In many civil law countries, the decision to grant the status of anonymous witness rests with the “judge of instruction”, who must ascertain the risk to the witness as well as the identity, credibility, and reliability of the witness.¹¹⁵ This is done in an interview from which the accused, his/her attorney, and the public prosecutor can be excluded. When excluded, the latter may follow the interview through an audio-link with a voice transformer (or other secure means) and the defense must have an opportunity to ask questions (whether through the audio-link or by putting the questions before the investigation judge before the interview).¹¹⁶ It is also often possible to grant partial anonymity to witnesses at risk. The defendant is given an opportunity to question the witnesses directly, but the witnesses do not have to state their name and address (only the trial judge is informed of their identity). Some disguise preventing the accused from recognizing the witness - a measure primarily used to protect the identity of undercover police officers - is sometimes used to protect witnesses.

The European Court of Human Rights has often agreed to the legality of the use of anonymous informants during preliminary investigations, but it has also emphasized that the use of the information thus obtained at the trial presents a problem with respect to fairness.¹¹⁷ Even when permitted by law, the procedure for granting partial or full anonymity to a witness tends to be rarely used because of how, in practice, it can limit the admissibility of various elements of their testimony.¹¹⁸ In some cases, if the examination of a witness in the presence of a defendant poses imminent danger to the health of the witness, then he/she can be heard in the absence of the defendant, in order to prevent both direct verbal or physical threats to the witness as well as more subtle intimidation by the defendant, such as ominous looks or gestures.¹¹⁹

115 For an examination of the rich body of case law from which is emerging some important principles of international human rights law on witness anonymity: Lusty, D. “Anonymous Accusers: 363.

116 Council of Europe. *Combating Organised Crime*, p. 19.

117 Council of Europe. *Terrorism: Special Investigation Techniques*. p. 31.

118 Council of Europe. *Combating Organised Crime*, p. 20.

119 Council of Europe. *Combating Organised Crime*, p. 20.

Anonymous testimonies raise obvious issues about the rights of the defendants to a fair trial. The European Court on Human Rights has set some limits on the use of anonymous testimony¹²⁰. The judge must know the identity of the witness and have heard under oath the testimony and determined that it is credible, and must have considered the reasons for the request of anonymity; the interests of the defense must be weighed against those of the witnesses and the defendants and their counsel must have an opportunity to ask questions of the witness; a condemnation cannot be based on the strength of the testimony of that witness alone.¹²¹ The admissibility of such anonymous testimony depends, according to the European Court on Human Rights, on the circumstances of the case and three principles that emerge from case-law.^{122 123} Is anonymity justified by compelling reasons? Have the resulting limitations on the effective exercise of the rights of the defense been adequately compensated for? Was the conviction exclusively or substantially based on such an anonymous testimony? Special rules on anonymity have been legislated in Belgium, France, Germany, the Netherlands, Moldova, and Finland.¹²⁴ In some of this legislation (e.g. Moldova), the testimony of an anonymous witness must be corroborated to be considered valid.

As mentioned previously, witness anonymity during criminal proceedings is very controversial. There are significant issues surrounding the legitimacy and legality of the use of such measures¹²⁵ and, in the word of one vocal critic of this approach: "Arguments in favour of witness anonymity are based on the contention that prejudice to the accused can be minimized and that which remains can be justified through a purported 'balancing' of competing interests in the administration of justice. The problem with this approach, despite its superficial appeal, is that it is unfairly balanced against the accused from the very outset".¹²⁶

120 European Court on Human Rights, *Visser vs. The Netherlands*, 14 February, 2002

121 Lameyre, X. and M. Cardoso, "La délation en droit pénal français, une pratique qui ne dit pas son nom", p. 152.

122 Council of Europe. *Terrorism: Special Investigation Techniques*, p. 31

123 The European Court of Human Rights, through its judgments, has played an important role by "establishing legal limits within which the battle against organized crime in Europe must be waged", in particular with respect to the use of undercover agents and anonymous witnesses. (Fijnaut, C. and L. Paoli (eds.) *Organized Crime in Europe -Concepts, Patterns and Control Policies in the European Union and Beyond*. (Dordrecht: Springer, 2004, p. 628).

124 Piancete, N. "Analytical Report", p. 19.

125 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Case*. Spencer, J. and M. Spencer. *Witness Protection and the Integrity of the Criminal Trial*. Paper presented at the Conference on Modern Criminal Investigation, Organized Crime and Human Rights, Durban, South Africa, December 3 - 7, 2001.

126 Lusty, D. "Anonymous Accusers, p. 423

The International Criminal Defence Attorneys' Association, in its submission to the United Nations Preparatory Conference on the International Criminal Court Rules of Procedure and Evidence, stated that: "complete witness anonymity is only appropriate in instances where the individual is an informant who aided in the discovery of admissible evidence, but is not testifying against the accused in the proceeding".¹²⁷

6.0 Witness Protection Programs

Witness protection programs offer a way to safeguard the investigation, the criminal trial, and the security of the witnesses. Their main objective is to safeguard the lives and personal security of witnesses and collaborators of justice, and people close to them. The programs include procedures for the physical protection of witnesses and collaborators of justice such as, to the extent necessary and feasible, relocating and re-documenting them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the new identity and whereabouts of such persons. Even if it is not uncommon for a witness to be rewarded for cooperation with law enforcement authorities (financially, by charge reduction as a result of plea bargaining, or leniency at the time of sentencing), witness protection programs are not some kind of reward for the witness for cooperating with the authorities.¹²⁸

The Council of Europe recently published a review of witness protection programs in 27 European countries based on a questionnaire sent to Member States.¹²⁹ That review revealed that the rules governing the protection of witnesses and others who participate in criminal proceedings are fairly recent, except in a few countries like Belgium and Italy, which pioneered the use of these measures.¹³⁰ However, at this time most European countries have legislation that offers the possibility of protective measures for victims, witnesses, and collaborators of justice. Across Europe, there are attempts to harmonize various aspects of

¹²⁷ International Criminal Defence Attorneys Association. *Protection of Witnesses*, p. 2.

¹²⁸ Although it is not hard to understand how it may be necessary for the authorities to provide an incentive for cooperation, this must be done cautiously. The presence of certain incentives can in fact compromise the value of the testimony or its credibility.

¹²⁹ Council of Europe. *Terrorism: Protection of Witnesses and Collaborators of Justice*.

¹³⁰ Piacente, N. "Analytical Report", p. 11.

witness protection programs as part of larger efforts to improve internal cooperation in criminal matters.¹³¹

Existing protection programs do not differ widely in terms of the kind of protection they offer, although there are some differences among them in terms of eligibility criteria, the administrative process, and the modalities of the programs. There are also some significant differences in terms of who is responsible for their operation. In many countries, witness protection is largely seen as a police function¹³², whereas in others the judiciary and various government departments play a key role. In Canada, the national witness protection program is seen primarily as a police program.

Protection in existing programs tends to be extended to witnesses only in cases involving the most serious crimes, and not necessarily always in cases involving the most serious threats. This is because the logic behind such programs, given their cost and the need to establish priorities, is based primarily on the desire to facilitate the cooperation of the witness and not on the premise that the State has an obligation to protect all witnesses or that witnesses have a right to be protected.

6.1 Characteristics of Programs

Programs styled after the US witness protection program have been developed throughout Europe and in various other parts of the world. Most have a legislative basis¹³³, but a few, like the one in the United Kingdom do not. In the absence of a legislative basis, these are treated as a police activity.

In Canada, there are varying approaches to the protection of witnesses in criminal trials. The most sophisticated is the federal witness protection program, which is operated by the Royal Canadian Mounted Police, and which accepts witnesses from various municipal and provincial police

131 Council of Europe. *Terrorism: Protection of Witnesses and Collaborators of Justice*. Dandurand, Y., Colombo, G., and N. Passas. Measures and mechanisms to strengthen International Cooperation among Prosecution Services, Working Paper IV. In *Report of the Second Summit of Attorneys General, Prosecutors General and Chief Prosecutors*, Doha, Qatar, November 14-16, 2005.

132 Fyfe, N. *Protecting Intimidated Witnesses*. Fyfe, N. and J. Sheptycki. "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", p. 333.

133 The United Nations Office on Drugs and crime has developed a *Model Witness Protection Bill* to facilitate the development of legislation at the national level. United Nations Drug Control Programme. *Model Witness Protection Bill 2000*. (Vienna: UNDCP, 2002).

agencies across the country. In this program, witnesses are given entirely new identities and relocated to new homes. Depending on the unique nature of the case at hand, these witnesses may be relocated to another part of the province, a different province, or in some instances, moved to entirely different countries. In Canada, each year, approximately 40 percent of new admissions into the witness protection program are relocated outside of the province of origin.¹³⁴ In the case of relocation to a new country, loosely formalized arrangements exist with cooperating countries, and amongst country-level witness protection agents, to accept protected witnesses from other parts of the world. For instance, witnesses from the EU may find themselves relocated to Australia, Canada, South Africa, or the United States. In all instances of relocation, in or out of Canada, the originating province or local police authority pays for the costs of the relocation.

Where relocation is used to protect the witness, police witness protection agents accompany the witness and help them get settled for the first few days in their new home. Often, but not always, local police are informed that a protected witness has been placed within their jurisdiction.

Protection measures should be proportional to the seriousness of the risk faced by the individual. In situations where the facts do not warrant a full identity change and relocation, or where it is determined that the individual is not suited to the federal program by virtue of such variables as a substance abuse problem, or long-term immersion in a criminal lifestyle, it may be decided to offer a lower level of protection. In these instances, provinces will provide a local police authority with a modest sum of money, usually in the range of \$500 to \$2,000, and an open plane ticket for delivery to the witness. The witness is told to find their own place to hide until the time of trial, and to provide for their own income. Police will transport the witness back for trial, but will not provide any form of support once the witness has provided their testimony and the trial is concluded. In some instances, police and government will provide some form of minimal support past the time of trial, up until the end of the appeal period for the charge.

The third, and least sophisticated form of protection, is to place the witness in a hotel either in town, or within the region, sometimes with or without police physical protection, and support them until time of trial. Once the witnesses have given their evidence at trial, all support is removed.

¹³⁴ Lacko, G. *The Protection of Witnesses*.

Procedures for admission into a protection program: The initiative to consider placing an individual in a protection program usually comes from the individual or from the police. In countries where that decision does not belong to the police, another procedure is in place to review applications/requests for admission into the program. In such cases, the request for protection must include information on the nature of the investigation, the role of the candidate in the criminal activity, and the danger or threat faced by the individual. Some countries have established central “assessment boards” while others rely on senior prosecutors or various prosecution authorities. In some countries, the prosecution service is hardly, if ever, involved in the decision. Often, the protection service is not represented officially in the decision-making body, but gives information and advice to it. When an individual is accepted, a certain amount of planning is required, which results in some kind of “protection plan” commensurate with the level of threat.

In most countries that have a formal approval process, there are also provisions for a simplified process for authorizing temporary protection measures in urgent circumstances. Issues of cost often come up in relation to decisions concerning these temporary measures.

Most witness protection programs consider the suitability of the witness to “fit” in the program, whether the witness is stable or has significant emotional, psychological and chemical dependency/abuse issues, or whether they will compromise the protection program.

Prior to acceptance into the witness protection program, the police typically conduct a biographical review of the witness to identify and assess both the level of threat to the person, and any encumbrances that may hinder their entry into the program. Often times, an in-depth interview of the witness forms part of that assessment. The interview serves to help determine the suitability of the candidate for entry into the program, assess the likelihood that they will succeed in the program, and identify who else might be at risk of harm should the witness testify. In the case of individuals who are involved in a criminal lifestyle, the interview is also used to debrief the witness on crimes they may have knowledge of or involvement in.

Generally, the suitability of a witness for admission into a protection program is determined on the basis of these factors:

- The seriousness of the offence being tried (must be a serious indictable offence)
- The importance of the evidence the witness has to offer at trial, and that the witness's testimony is credible, significant, and certain in coming
- How essential the witness is to the success of the trial, or if the evidence can be presented by other means or other witnesses
- Availability and suitability of options other than full protection
- Whether the witness has agreed, in writing, to testify at trial
- Whether there is a direct, overt or significant potential threat to the life and safety of the witness, or their family if the witness testifies
- The level of risk that this threat may materialize or be carried out
- Whether the management and protection of the witness is beyond the normal scope of local police ability/capacity
- Whether there is a substantial likelihood of conviction if this witness testifies.¹³⁵

Witnesses must voluntarily agree to enter the program. The voluntary aspect is important because protected witnesses must play an active role in ensuring their own safety and preventing harm to themselves and persons close to them.¹³⁶ This does not mean that the individual is completely free; in fact, the candidate may already be in detention. One barrier to entry into the program relates to child custody and access for the non-custodial parent. In the situation of a single parent attempting entry into the program, written permission from the other parent must first be obtained. Police report instances where a parent has multiple children from different partners. These instances pose significant challenges for all involved.

Relatives that may join the protected witness: The risk for relatives of endangered witnesses can also be high. If family members must also be protected, each individual must freely choose to enter the program and must be suitable for the program. The more relatives are involved, the

¹³⁵ The United States Witness Security Program, administered by the US Marshals Service, uses very similar criteria for admission to their "WITSEC Program", and the European Union has proposed similar admission criteria in their draft European programme for the protection of witnesses in terrorist and transnational organized crime cases.

¹³⁶ Council of Europe. *Combating Organised Crime*, p. 26.

more difficult it is to make them comply with the code of conduct and the conditions of the program.¹³⁷

Foreign nationals: The protection and relocation of foreign nationals can offer some special challenges¹³⁸, but in the case of terrorism and transnational crime, the role of these foreign witnesses and informants is often crucial. In at least one country, Italy, since July 2005, foreigners who cooperate with the police and prosecutors to prevent terrorist organizations from committing crimes may be eligible for special residential status.¹³⁹

Protection agreements: In the Canadian federal program, witnesses sign a formal contract with the government. Each contract is individually negotiated and articulates what the government will do by way of support and protection of the witness in return for the witness testifying at trial. An agreement should specify the obligation of the protection service to protect the individual and his/her relatives, as well as the duration of the protection measures. The duration of the protection measures may depend upon risks as evaluated by the protection service. The agreement should also outline the obligation of the witness to keep secret their former identity, old address, role in criminal proceedings, etc.; refrain from activities that would increase the risk against them; cooperate fully in the criminal proceedings; try to find employment quickly; and make arrangements for outstanding accounts, contracts and financial obligations. The agreement should explain clearly the conditions under which the protection will be ended.

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

- Committing a crime
- Refusing to give evidence in court
- Failing to satisfy legal or just debts
- Behaving in a manner that may compromise his/her security and/or the integrity of the program

¹³⁷ Council of Europe. *Combating Organised Crime*, p. 27.

¹³⁸ Abdel-Monem, T. "Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?", *The American Criminal Law Review*, 2003, Vol. 40 (3), pp. 1235-1269.

¹³⁹ Piancete, N. "Analytical Report".

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

In addition, protection may be terminated if it is determined that the threat no longer exists.¹⁴⁰

Measures can be taken to prevent a protected witness from getting involved in crime while under protection: (a) relocation to areas not affected by criminal organizations that might recruit the witness; (b) if in prison, relocation to special detention facilities where other collaborators are held; (c) assistance with job search; temporary support measures; change of personal data; special attention to the grievances of the witness and his/her family; and (d) strict surveillance and control of the witness, family members and associates.¹⁴¹

The protection agreement must be drafted in language that the individual can read and understand.¹⁴² Ideally, the agreement should be discussed with the witnesses and it should be possible for them to elect to retain the services of legal counsel.

Duration: The duration of one's participation in the program is in large part determined by the length of the investigation and the criminal proceedings. On average, the minimum length of the witness participation in a protection program is two years.¹⁴³ The average duration was two to five years in the three programs reviewed in the best practices document prepared for the Council of Europe¹⁴⁴. "The general principle is that a protected witness should be enabled to live a normal life as much as possible and as soon as possible".¹⁴⁵ After that, the witness protection agency will let participants leave the program and take care of themselves completely again, the moment this can be done safely.

¹⁴⁰ ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*.

¹⁴¹ Piacete, N. "Analytical Report", p. 37.

¹⁴² Council of Europe. *Combating Organised Crime*, p. 30-31.

¹⁴³ Heijden, T. van der. *Witness Protection Programmes Compared*, a paper presented at the Second World Conference on the Investigation of Crime: Modern Criminal Investigation, Organized Crime and Human Rights, Durban (S.A.), Dec. 3-7, 2001.

¹⁴⁴ Council of Europe. *Combating Organised Crime*.

¹⁴⁵ Council of Europe. *Combating Organised Crime*, p. 39.

Protection of identity: It is often necessary to take measures that are in conflict with privacy and access-to-information regulations in order to prevent people from locating the protected witnesses. Essentially, these measures will circumvent the usual measures in place to provide transparency, reliability, and continuity of information about individuals.¹⁴⁶ Many countries are hesitant to provide witnesses with a new identity and use this kind of measure sparingly. In some countries, a change of identity may deprive the individuals of their constitutional right to vote or to run for public office. Problems may also occur also in relation to family law (divorce, child custody) and the law of succession. Some observers refer to the “unintended victims” of witness relocation: communities that may suffer from the threat represented by the relocated criminals; people and organizations unable to recover unpaid debts from witnesses and their dependants; parents and relatives unable to access children taken into protection with a relocated partner.¹⁴⁷

Termination: Protected witness can typically withdraw from a protection program voluntarily or their participation may be terminated by the agency. Typically, an involuntary termination occurs when the protected individual commits a new offence or is otherwise not in compliance with the protection agreement, including for having compromised his/her new identity. Proper notification of a decision to terminate the protection must be communicated to the individual in question and he or she should be provided with an opportunity to challenge or appeal the decision. Legal representation should ideally be available in such circumstances, but this is not always the case.

Appeals and complaints: Theoretically, the rights of protected witnesses to challenge or appeal decisions made by the witness protection agency that affect them are not limited and can include internal appeals and reviews, civil action, judicial review of decisions, and complaints to mechanisms of civilian oversight of the police. In practice, protected witnesses are rarely in a good position to affirm these rights.

6.2 Interagency Collaboration

Interagency competition and conflicts frequently create difficulties with the use of informants and the operation of witness protection programs.¹⁴⁸

¹⁴⁶ Boisvert, A-M. *La protection des collaborateurs de la justice*, p. 12.

¹⁴⁷ Fyfe, N. and J. Sheptycki. “International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases”, p. 322.

¹⁴⁸ Norris, C. and C. Dunnigham. “Subterranean Blues”.

Inter-agency cooperation is essential to the success of prosecutions based on the testimony of protected witnesses.¹⁴⁹ Cooperation is required in identifying cases of intimidation. Cooperation is crucial in cases involving witness relocation. It is essential to have efficient, prompt, and secure communication among the agencies involved and safety precautions within each agency to protect the confidentiality of the information that must be exchanged. Careful attention must therefore be given to mechanisms that foster effective inter-agency cooperation. This is as true at the inter-jurisdictional level (within a country) as it is at the international level.

Several protection measures (e.g. identity protection) require the collaboration of several agencies throughout the government, often at different levels of government. Mechanisms are required to help mobilize these various agencies and ensure that they collaborate towards the common justice objective. All those involved must share the objective of victim protection.¹⁵⁰ In Canada, federal-provincial cooperation is often required in creating a new identity for a protected witness (health insurance, vital statistics, and driver's licenses are the responsibility of the provincial governments, while social insurance numbers, criminal records, and passports fall within the responsibilities of federal government departments). In her review of the Québec system, Anne-Marie Boisvert recommended new federal-provincial discussions for greater collaboration between the two levels of government, particularly about federal detention and changes of identity.¹⁵¹

The flow of information among the various agencies involved tends to be problematic. The police and intelligence agencies are notoriously reluctant to share information about their own informants. Intelligence agencies may not necessarily entrust the police with the protection of agency informants.

¹⁴⁹ Brouwer, G.E.. *Review of the Victoria Police Witness Protection Program*; Dedel, K. *Witness Protection*, p. 33. Fyfe, N. *Protecting Intimidated Witnesses*, p. 67; Greer, S. "Where the Grass is Greener? Supergrasses in Comparative Perspective", in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp.123-140, p. 136). Maynard, W. *Witness Intimidation: Strategies for Prevention*.

¹⁵⁰ Boisvert, A.-M. *La protection des collaborateurs de la justice*, p. 12.

¹⁵¹ Boisvert, A.-M. *La protection des collaborateurs de la justice*, p. 17.

6.3 Management of Witness Protection Programs

At the federal level, the law gives the responsibility of managing the federal witness protection program to the Commissioner of the R.C.M.P. At the provincial level, the situation varies. In Ontario, the Ministry of the Attorney General has a special team of police officers seconded from police forces or retired police officers. The province of Quebec operates its own program. In British Columbia, since 2003, Police Services, the R.C.M.P. and the municipal police departments of the province have established an Integrated Witness Protection Unit in order to provide a consistent approach to witness protection based on highly trained resources in witness management and a process and a system designed to reduce both the risk to the police department and the protected witnesses. The unit includes a few officers from municipal police departments and operates under R.C.M.P. policies as part of the Source Witness Protection Unit.

In the US, at the federal level, it is the Office of Enforcement Administration, at the Department of Justice, that makes the decision concerning entry into the witness protection program, in consultation with the US Marshals' Service. The latter evaluates the risks and ensures the protection of witnesses. There is a growing consensus internationally that it is preferable for witness protection to be kept separate from the agency conducting the investigation or prosecution. Following her review of the witness protection system in the province of Québec, Marie-Anne Boisvert also recommended the creation of a bureau within the Ministry of the Attorney General.¹⁵²

A Council of Europe study of best practices in witness protection concluded that it is important to separate witness protection agencies from investigative and prosecutorial units, with respect to personnel and organization. This is necessary in order to ensure the objectivity of witness protection measures and protect the rights of witnesses. The independent agency is responsible for admission into the protection program, protective measures, as well as continued support. Since the investigative agency is usually most knowledgeable about the criminal background of the applicant, the nature of the investigation, and the crime involved, it often assists the protection service in the assessment of the threat to the applicant and their immediate relatives".¹⁵³

¹⁵² She also suggested the broad terms of the mandate of the proposed bureau. Boisvert, A.-M. *La protection des collaborateurs de la justice: éléments de mise à jour de la politique québécoise*, p. 21.

¹⁵³ Council of Europe. *Combating Organised Crime*, p. 38.

A review of existing programs in Europe identified three main necessary characteristics of agencies charged with implementing witness protection: (1) they must cooperate very closely with law enforcement agencies, presumably on the basis of well defined protocols; (2) the agency (or the part of the law enforcement agency) responsible for witness protection should operate independently of the other elements of the organization to protect the confidentiality of the measures taken to protect a witness; (3) the staff dealing with the implementation of the protective measures should not be involved either in the investigation or in the preparation of the case where the witness is to give evidence.¹⁵⁴

The ISIC-OPCO- Europol Working Group recommended that specialized witness protection units be established with adequate administrative, operational, budgetary, and informational technology autonomy.¹⁵⁵ The group of experts emphasized that such units should not be involved in the investigation or in the preparation of the cases where the witness/ collaborator of justice is to give evidence.¹⁵⁶

In our view, serious consideration should be given to creating a national and autonomous witness protection program in Canada and providing it with adequate resources. A program that would be kept separate from normal police functions would offer greater protection to witnesses and would hopefully be more credible than the current program in the eyes of witnesses and potential witnesses. The establishment of such a program would require addressing a number of practical, logistical and communication issues, as well as the collaboration and participation of the provinces, the R.C.M.P. and other Canadian police forces.

6.4 Costs of Programs

Witness protection is expensive. The costs are made up for the most part by the following: the protection service (especially staff salaries), removals and temporary residences, economic subsistence, housing, and medical costs.¹⁵⁷ The study of best practices conducted on behalf of the Council of Europe examined the cost of programs in three countries. In one, the costs were between 80,000 and 160,000 US\$ per year (occasionally as much as \$250,000). In another country, the average witness with a family

¹⁵⁴ Piancete, N. "Analytical Report", pp. 46-49.

¹⁵⁵ ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*, p. 7.

¹⁵⁶ ISISC-OPCO-EUROPOL. *Harmonisation of Witness Protection Legislation*, p. 8.

¹⁵⁷ Heijden, T. van der. *Witness Protection Programmes Compared*.

of three people cost 80,000 US\$. The costs fell mainly in the following categories: the protection services – salary of staff; removals and temporary residences; economic subsistence; housing; medial costs; legal assistance. The same study concluded that: “Although witness protection is not cheap, the costs are reasonable compared to labour-intensive investigative measures such as infiltration or long-term surveillance. The strong impression is that witness protection is more effective and efficient than those other methods, especially in the case of organized crime”.¹⁵⁸

Factors that influence the costs of witness protection programs include: whether the witness has a family that also needs protection, the length of time the witness spends in temporary accommodation, the witness’ standard of living, the changing nature of the threat against the witness, and the entitlement of the witness to financial assistance.¹⁵⁹

The high costs of protection measures explain in part why the use of available measures is most limited to serious crimes and strategically important cases. It is not always sufficient to fund these protection programs out of regular police budgets. Such a practice may lead to poor decisions about whether or not to protect certain individuals or whether or not to proceed with certain investigations. Speaking on behalf of the Canadian Association of Police Chiefs (CAPC), Superintendent Schumaker of the Winnipeg Police Service complained that the current national witness protection program is “simply unaffordable”, particularly for smaller police services. “The message from the CAPC”, he added, “is that we need a restructured, more inclusive witness protection program with federal funding, from which all police agencies in this country, big or small can draw”.¹⁶⁰ A clear government commitment is therefore required, with an allocation of adequate resources.¹⁶¹

6.5 Accountability

There are many seemingly intractable accountability issues associated with the use of informants and witness protection programs.¹⁶² Because

¹⁵⁸ Council of Europe. *Combating Organised Crime*, p. 41.

¹⁵⁹ Fyfe, N. and McKay, H. “Police Protection of Intimidated Witnesses”, p. 287.

¹⁶⁰ Schumaker, G.B., Appearing on behalf of the Canadian Association of Police Chiefs, Testimony before the House of Commons Standing Committee on Public Safety and National Security, May 8, 2007, p. 2.

¹⁶¹ Boisvert, A.-M. *La protection des collaborateurs de la justice*, p.12.

¹⁶² Fyfe, N. *Protecting Intimidated Witnesses*, p. 65. South, N. “Informers, Agents and Accountability”, in Billingsley, R., Nemitz, T. and P. Bean (Eds.). *Informers: Policing, Policy, Practice*. (Portland: Willan Publishing, 2001, pp. 67-80).

of the secrecy that must surround these activities, there is very little room left for proper accountability or oversight mechanisms. Even the financial accountability of the police-based programs tends to be problematic as it is hard to obtain information on the cost of the programs, the amount spent on particular cases, and the compensation offered to informants and witnesses. Countries vary in terms of the measures that they have in place to hold to account those responsible for these programs. In some countries, including Canada, an annual report must be submitted to Parliament (or another public authority). Several countries require their programs to publish a report on their activities.¹⁶³ However, none of these arrangements is particularly satisfying from the point of view of accountability.

Witnesses and informants who are very vulnerable, particularly those who are up against terrorist organizations, are typically not in a position to negotiate the terms of their cooperation with the authorities. The authorities may or may not always honour these terms and when they do not, there is very little recourse available to the witnesses. There is even less recourse available to witnesses who are denied protection when the police are not able or prepared to proceed with a given case or when they decide that they no longer need a particular witness. As many of the decisions concerning witness protection and the use of informants are still left to the discretion of the police or the prosecutors, it is important to balance these discretionary decision making powers with adequate protection for the rights of the witnesses and informants.

Regular police oversight mechanisms seem to be insufficient for dealing with some of the complex accountability issues that arise out of various witness protection practices or the use of informants and agents.¹⁶⁴ Police complaint mechanisms are available to witnesses and some of them have used these mechanisms. However, in practice, because these witnesses are still dependent on the police for their protection, the mechanisms do not offer a satisfactory and practical redress mechanism for them. Furthermore, witnesses who have entered a protection program usually have limited means of complaining about how they are treated without jeopardizing their new identity or exposing themselves to more danger.

¹⁶³ Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*, p. 33.

¹⁶⁴ In his testimony before the House of Commons Standing Committee on Public Safety and National Security the Chair of the Commission for Public Complaints Against the Royal Canadian Mounted Police, Mr. Paul Kennedy, noted the limitations of the current complaint process for protected witnesses, and the statutory obstacles to the Commission's access to the relevant information, Tuesday, May 29, 2007.

6.6 Effectiveness of Programs

Ineffective protection measures can affect the outcome of prosecutions and trials, and affect public confidence in the efficacy and fairness of the courts.¹⁶⁵ There is very little research on the effectiveness of these programs, and the evidence relating to the cost effectiveness of these programs is very weak. However, anecdotal evidence of their success in obtaining convictions in cases where protected witnesses are used is generally positive.¹⁶⁶

The three national programs reviewed in the Council of Europe survey of best practices¹⁶⁷ were apparently very effective: not a single participant or relative of protected witnesses has become the victim of an attack by the source of the threat. According to the study: "The effectiveness is underlined by the fact that there have been attacks, some of them fatal, on relatives not participating in a protection programme and on witnesses who chose to leave the programme at a moment when the responsible protection agency did not consider the situation safe".¹⁶⁸ In all three cases, serious attempts by criminals to trace protected witnesses were documented. In some instances, it became necessary to relocate the participants and their relatives a second time. Exact figures on the number of convictions gained on the basis of statements made by protected witnesses were not available in any of the countries studied. As the study cautioned, "successes in the combating of organized crime should not be attributed to witness protection measures alone but to the combination of a witness protection programme and a system of regulations concerning the collaboration of co-defendants with the justice authorities".¹⁶⁹

In the rare cases where it was possible to interview protected witnesses after their relocation, they usually indicated that, without protection measures, they would not have agreed to or have been able to testify.¹⁷⁰ Then again, witnesses seldom regard giving evidence as a positive or satisfying experience.

165 Brouwer, G.E. *Review of the Victoria Police Witness Protection Program*, p. 3.
166 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*, p. 27.
167 Council of Europe. *Combating Organised Crime*, p. 40.
168 Council of Europe. *Combating Organised Crime*, p. 40.
169 Council of Europe. *Combating Organised Crime*, p. 41.
170 Parliamentary Joint Committee on the National Crime Authority. *Witness Protection*, p. 18.

Satisfaction of participants in a protection program is rarely measured systematically. A rare exception to this is the survey of 300 witness security program participants in the US by the Office of the Inspector General, which apparently revealed that the great majority of respondents agreed that adequate measures had been taken to ensure their protection.¹⁷¹

Fyfe and McKay conducted an evaluation of the Strathclyde Police witness protection program, including interviews with 14 protected witnesses. It is the only police force in the U.K. to have a formal witness protection program.¹⁷² The witnesses complained of mental distress and there was evidence that their experience had seriously affected their mental health.¹⁷³ In terms of witness intimidation, it was unclear what signals relocation sends to intimidators. Witness relocation “may reinforce the problem of intimidation by demonstrating the power of intimidators to ‘purify’ communities of those viewed as ‘grasses’ because of their cooperation with the criminal justice system.”¹⁷⁴

The few attempts made to assess the effectiveness of existing witness protection programs have assessed the outcomes of the programs mainly in terms of the physical security of witness (whether or not they were injured or attacked while in the program) and their participation in the legal process (including whether their participation led to a conviction of the accused). However, as Fyfe and Sheptycki¹⁷⁵ convincingly argued, evaluations of witness protection programs should look not only at conviction data and witness safety/satisfaction data but also at other aspects of the programs and their potential impact, intended or unintended.

Having reviewed existing data, Fyfe and Sheptycki concluded that, in spite of claims that are frequently made about the cost-effectiveness of witness protection programs or, more generally, the use of criminal

171 United States Department of Justice, Office of the Inspector General. *United States Marshals Service – Administration of the Witness Security Program. Executive Summary*. (Washington: Office of the Inspector General, U.S. Department of Justice, 2005).

172 Fyfe, N. and McKay, H. “Police Protection of Intimidated Witnesses”, p. 292.

173 Fyfe, N. and McKay, H. “Police Protection of Intimidated Witnesses”, p. 296

174 Fyfe, N. and McKay, H. “Police Protection of Intimidated Witnesses”, p. 298.

175 Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Cases*, p. 28.

informants in criminal investigations and prosecutions, the evidence is far from conclusive. Expediency, they added, should not be confused with cost-effectiveness, particularly where some of the many negative effects of the use of criminal informants are weighed against the benefits of some current practices.¹⁷⁶

7. International Cooperation for Witness Protection

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

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

Because of the dynamic nature of transnational crime and terrorism, countries must constantly refine and perfect their strategies. The different modalities and tools of cooperation are meant to be complementary and, as cooperative relationships are being built, they can lead to integrated approaches to cooperation and to strategic approaches to the investigation and prosecution of crimes across international borders. More proactive, intelligence-led approaches are required to detect and disrupt criminal and terrorist conspiracies, dismantle terrorist networks, and apprehend and punish criminals.¹⁷⁷ Intelligence-led approaches, however, must depend on reliable information from informants and witnesses and, to a large extent, on the effective communication and analysis of that information both within a country and across borders.

¹⁷⁶ Fyfe, N. and J. Sheptycki. *Facilitating Witness Co-operation in Organised Crime Case*, p. 29.

¹⁷⁷ See, for example, Council of Europe. "Crime Analysis", in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*. (Strasbourg, Council of Europe Publishing, 2005, pp. 105-144).

That sharing of information, of course, introduces a whole new set of challenges for the protection of these sources of information.

The importance of operational cooperation across borders among law enforcement agencies investigating and prosecuting crimes with a transnational dimension must be acknowledged, and it is now specified in a number of international instruments¹⁷⁸. The development of joint operational activities offers one of the most promising new forms of international cooperation against terrorism and organized crime. Nevertheless, several outstanding issues remain in making that kind of cooperation fully functional on a broader scale. Practical problems in the organization of joint investigations include the lack of common standards and accepted practices, the actual supervision of the investigation, the prevention of intelligence leaks, and the absence of mechanisms for quickly solving these problems.¹⁷⁹

To ensure greater international cooperation in offering effective witness protection at home or across borders, law enforcement and prosecution agencies often need to develop arrangements with other jurisdictions for the safe examination of witnesses at risk of intimidation or retaliation.

Developing a capacity to protect witnesses and even relocate them across borders must often be considered. Article 24 (para. 3) of the UN Convention against Transnational Organized Crime and article 32 (para. 3) of the UN Convention against Corruption require States Parties to consider entering into agreements or arrangements with other States for the relocation of witnesses.

Proactive law enforcement strategies and complex investigations frequently involve resorting to special investigative techniques.¹⁸⁰ In fact, the relevance and effectiveness of techniques such as electronic surveillance, undercover operations, the use of agents and informants, and controlled deliveries can probably not be overemphasized. These techniques are especially useful in monitoring/documenting the activities

¹⁷⁸ Article 19, of the *United Nations Convention against Transnational Organized Crime* requires States Parties to consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. See also similar language in article 49 of the *UN Convention against Corruption*.

¹⁷⁹ See Schalken, T. and M. Pronk. "On Joint Investigation Teams, Europol and Supervision of their Joint Actions", *European Journal of Crime, Criminal Law and Criminal Justice*, 2002, Vol. 10/1, 70-82.

¹⁸⁰ See: Council of Europe. *Terrorism: Special Investigation Techniques*. (Strasbourg: Council of Europe Publishing, 2005).

of sophisticated criminal groups because of the inherent difficulties and dangers involved in gaining access to information and gathering evidence and intelligence on their operations.

When a case requires international cooperation, differences in the law regulating the use of these investigation techniques or the use of collaborators of justice can hinder the efforts of the prosecution. Major efforts have been devoted to the implementation of the United Nations Convention against Transnational Organized Crime and other international cooperation initiatives to identify these obstacles and remedy the situation. These efforts are also relevant to the prevention of terrorist acts, and their use by law enforcement and intelligence agencies within the framework of their ongoing cooperation has drawn some close attention.^{181 182}

With a few regional exceptions, international cooperation in the field of covert investigations tends to take place in a juridical vacuum. Member States increasingly seek to provide a legal basis for judicial cooperation in criminal matters involving officers acting under cover or false identity¹⁸³ or with agents and informants. The International Bar Association's Task Force on International Terrorism has recognized the importance of law enforcement cooperation and recommended that States develop a multilateral convention on cooperation among law enforcement and intelligence agencies setting forth the means, methods, and limitations of such cooperation, including the protection of fundamental human rights.¹⁸⁴

181 The European Court of Human Rights has endorsed the use of such techniques in the fight against terrorism (*Klass and Others v. Germany*) and, within the Council of Europe, a draft Recommendation of the Committee of Ministers to Member States that seeks to promote the use of special investigative techniques in relation to serious crime, including terrorism, is being drafted. See: De Koster, P. "Part 1 – Analytical Report", in Council of Europe, *Terrorism: Special Investigation Techniques*, in particular, Chapter 5: *Special Investigation Techniques in the Framework of International Co-operation*, pp. 35-38. (Strasbourg, Council of Europe Publishing, April 2005, pp. 7-43)

182 A survey of best practices as they relate to the interception of communications and intrusive surveillance led to the observation that "Although, in principle, the increasing co-operation between law-enforcement and national security services can be fruitful in the combating of criminal organizations, extra precautions should be taken to prevent the potential illegitimate gathering of evidence by security services", Council of Europe. "Interception of Communication and Intrusive Surveillance", in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, (Strasbourg: Council of Europe Publishing, 2004, pp. 77-104, p. 102).

183 For instance, the matter is dealt with in the new European Union's new convention on mutual legal assistance.

184 International Bar Association. *International Terrorism: Legal Challenges and Responses*. A Report of the International Bar Association's Task Force on International Terrorism. (London: I.B.A., 2003, p. 140).

In Europe a major effort has been made to develop European legal instruments to set common criteria for the design and implementation of a set of effective legal and practical protection measures and assistance programs for different categories of witnesses, victims and collaborators of justice. The objective is to develop them while preserving an acceptable balance between the protection measures and the human rights and fundamental freedoms of all parties involved. There is no legally binding European legal instrument that specifically and comprehensively deals with witness protection.¹⁸⁵ However, a number of significant Recommendations of the Committee of Ministers of the Council of Europe have been adopted to deal specifically with witness protection and the rights of witnesses¹⁸⁶.

The following measures have been found to support international collaboration in witness protection:

- Cooperation in evaluating the threat against a witness or victim.
- Prompt communication of information concerning potential threats and risks.
- Mutual assistance in relocating witnesses and ensuring their ongoing protection.¹⁸⁷
- Protection of witnesses who are returning to a foreign country in order to testify, and collaboration in the safe repatriation of these witnesses.
- Use of modern means of telecommunications to facilitate simultaneous examination of protected witnesses while safeguarding the rights of the defence.
- Establishing regular communication channels between witness protection program managers.

185 For a summary of the various European legal instruments developed, see: Council of Europe. *Protecting Witnesses of Serious Crimes – Training Manual for Law Enforcement and Judiciary*. (Strasbourg: Council of Europe Publishing, 2006, pp. 38-48). See also: Council of Europe. *The Fight Against Terrorism – Council of Europe Standards*. (Strasbourg: Council of Europe Publishing, 2004). Council of Europe. Committee of Experts on the Protection of Witnesses and Collaborators of Justice (Specific Terms of Reference of the PC-PW), 1st Meeting, Strasbourg, 12-14 October 2004.

186 For example: Council of Europe (2005). Committee of Ministers Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Strasbourg: Council of Europe. See also: Council of Europe (2005b). Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice. Explanatory Report. Strasbourg: Council of Europe.

187 International cooperation in this area, as noted by a best practice survey conducted by the Council of Europe, "is highly important, since many Member States are too small to guarantee safety for witnesses at risk who are relocated within their borders" (p. 15). Council of Europe (2004). "Witness Protection", in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 15-42.

- Providing technical assistance and encouraging the exchange of trainers and training programs for victim protection officials.
- Developing cost-sharing agreements for joint victim protection initiatives.
- Developing agreements and protocols for the exchange of witnesses who are prisoners.

The cost of protecting a foreign witness abroad is usually borne by the authorities of the sending country. Cooperation among national protection services at the international level is considered to be quite good. Nevertheless, there are still very few countries that have entered into international (bilateral or multilateral) agreements for the protection of witnesses and collaborators of justice. In Canada, the Solicitor General of Canada may enter into a reciprocal agreement with another State to admit foreign nationals into the witness protection program.¹⁸⁸ In Europe, a European Liaison Network under the aegis of Europol has existed since 2000 to facilitate cooperation in witness protection. Non-European countries, such as Canada, Australia, New Zealand, South Africa, and the USA have also joined the initiative.¹⁸⁹

Europol has developed two documents: "Basic principles of European Union police co-operation in the field of witness protection", and "Common Criteria for taking a witness into a Protection Programme". It also offers training annually on "witness protection" and the "handling of informants".

Small states often face some special difficulties in offering effective protection to witnesses. Member States of the Caribbean Community, for example, have established a "Regional Justice Protection Agreement" (CARICOM, 1999) outlining the need to prevent any interference in the administration of justice by the intimidation or elimination of witnesses, jurors, judicial and legal officers, and law enforcement personnel and their associates. The agreement also provides for the establishment of a regional centre to administer the cooperation program.

International cooperation in witness protection is clearly improving. In recent years, however, a major shadow has been cast over some international cooperation initiatives in relation to the prevention of

¹⁸⁸ *Witness Protection Program Act* (S.C. 1996, c. 15, s. 14 (2)). See: Lacko, G. *The Protection of Witnesses*. (Ottawa: The International Cooperation Group - Department of Justice Canada, 2004).

¹⁸⁹ Di Legami, R. "Witness Protection - Europol". Presented at the 10th Annual Conference of the International Association of Prosecutors, Copenhagen, August 2005, p. 2.

terrorism, when suspects and informants were subjected to “extraordinary rendition” or became “ghost detainees”, as they were secretly held and interrogated by the United States or its allies in undisclosed locations, outside the protection of domestic or international law¹⁹⁰.

8. Conclusions

The fight against terrorism cannot be carried out effectively without the assistance of informants and collaborators of justice. These collaborators are typically under significant pressure not to collaborate with the authorities and they are aware of the personal danger and harm that may result from their collaboration. Even if the research on witness protection measures and programs, their operation, costs, and impact is still quite limited, most countries are coming to the realization that existing measures are not only problematic, but also quite insufficient.

The need to better protect the rights of witnesses and collaborators of justice is one that is too easily neglected. The very nature of the problem of witness protection makes it quite resistant to public scrutiny and research. Researchers, journalists, and others who may have an interest in the question face special difficulties in gaining access to the relevant information. In some cases, their enquiries may even constitute an additional risk for the vulnerable witnesses or collaborators of justice. There is still far too little systematic and critical research on the practical and ethical issues that surface in relation to current witness protection practices. What is particularly lacking is evaluative research on the efficacy of these measures.¹⁹¹ Independent research in the related areas of witness intimidation, the use of criminal informants, plea-bargaining, and accomplice testimony is also lacking.

We have emphasized the particular situation of vulnerable groups and communities that can become subject to community-wide intimidation and the importance of addressing that kind of intimidation to prevent terrorism. We have argued in favour of designing some broader strategies

¹⁹⁰ Parry, J.T. “The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees”, *Melbourne Journal of International Law*, 2005, Vol. 6, pp. 517-533. Also: Marty, D. *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States - Draft report – Part II* (Explanatory memorandum). (Strasbourg: Council of Europe, Committee on Legal Affairs and Human Rights, 7 June 2006). Council of Europe. Parliamentary Assembly *Resolution 1433 (2005) Lawfulness of detentions by the United States in Guantánamo Bay*.

¹⁹¹ Fyfe, N. and J. Sheptycki. “International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases”, p. 321.

to protect whole communities against intimidation and retaliation by terrorist organizations and their sympathizers. Perhaps we should have placed even more emphasis on the need to respond to all incidents of intimidation and violence, whether specific or community-wide, to take them seriously and to vigorously prosecute them whenever possible. The communities that are targeted, intimidated and exploited by terrorist groups must feel safe to cooperate with authorities. Members of these communities must believe that they will not be left on their own should they muster the courage to inform the authorities. Above all, we must ensure that our counter-terrorism practices do not render these communities even more vulnerable to intimidation and coercion by radical or terrorist groups.

The issue of community intimidation, itself often related to various forms of discrimination, must be approached from a broader perspective. It should be of grave concern to all Canadians to know that some of their communities can at times be terrified and become incapable of acting for their own protection against radicalized elements that intimidate and coerce them.

With respect to the use of informants, we have acknowledged that their role in fighting terrorism is as problematic as it is essential. Practices relating to the recruitment and use of informants by the police and by security agencies are not only poorly documented, they are also largely unregulated and unmonitored. Given the increased reliance on human intelligence in the prevention of terrorism and the many issues that exist with respect to current practices, it would seem that the time has come for the adoption of a clear regulatory framework for the use of informants and agents and the development of an independent oversight function to monitor compliance.

We would also argue that whether or not Canada eventually decides to create a separate agency to manage witness protection programs across the country, there is an urgent need to elaborate and perhaps also legislate some clear national guidelines concerning the protection of witnesses and collaborators of justice. The role, responsibilities and obligations of the police in that area need to be clearly defined. It is time to address the need for an effective complaint and redress mechanism for protected witnesses who are endangered or whose rights are abused as a result of poor witness protection practices.

We have also emphasized the need to address, in the face of growing transnational terrorism threats, the intimidation that occurs across borders and the resulting need for international cooperation in that area. Finally, we have suggested that effective means must be developed to make the agencies involved in witness protection more accountable for their decisions and practices. There is an urgent need to provide some effective independent oversight of their operations. The credibility of existing witness protection measures in Canada is often very low, particularly in the minds of individuals and groups whose collaboration will continue to be essential for preventing terrorism. This is particularly alarming, because that poor credibility eventually affects the very ability of the authorities to convince informants and witnesses to take the risk of coming forward and offering their collaboration.

Yvon Dandurand

Yvon Dandurand is a criminologist at the University of the Fraser Valley, Abbotsford, British Columbia, where he is currently the Associate Vice-President of Research and Graduate Studies. Dandurand is also a senior associate of the International Centre for Criminal Law Reform and Criminal Justice Policy, a research institute based in Vancouver and affiliated with the United Nations Crime Prevention and Criminal Justice Program.

Dandurand's long career of teaching, research and policy development in the fields of crime prevention and criminal justice has allowed him to specialize in comparative research. He has been involved in numerous criminal justice reform projects in Canada and abroad, including several projects and studies in the area of policing and crime prevention. A lot of his work has focussed on the issue of victim and witness assistance and protection; in particular, the challenges of offering effective protection to witnesses and victims of crime, victims of human trafficking and other transnational organized crime, as well as victims and witnesses of crime against humanity.

In recent years, he has been involved in several United Nations projects to facilitate the implementation of the *UN Convention against Transnational Organized Crime*, the *UN Protocol on Trafficking in Persons Especially Women and Children*, the *UN Declaration on Justice for Victims of Crime and Abuse of Power*, and the twelve global instruments against terrorism. All of these instruments include important international dispositions for the protection of witnesses and victims of crime. He has served on various United Nations Experts Groups and he has produced numerous legislative guides, manuals and other resources to facilitate the implementation of these important international instruments. He is frequently called upon to provide advice to policy makers in various countries and to assist them in planning complex criminal justice reforms. His comparative analyses often focus on identifying and disseminating good practices for implementing international conventions through legislation, training and other programs that are consistent with human rights and the rule of law.

