

Article 32: Protection of witnesses, experts and victims

1. *Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*
2. *The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*
 - (a) *Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*
 - (b) *Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.*
3. *States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*
4. *The provisions of this article shall also apply to victims insofar as they are witnesses.*

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

I. Overview

The Convention regards the protection of witnesses, experts and victims as an important complement to the criminal law provisions such as the offence of obstruction of justice.

Article 32 includes both mandatory and non-mandatory provisions. As a mandatory provision article 32 (1) requires that each State Party must take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them. Paragraph 2 specifies certain measures that States Parties may envisage in order to provide for the necessary protection of witnesses and experts as required by paragraph 1. While paragraph 2 (a) includes a provision on procedures for the physical protection against intimidation and retaliation, paragraph 2 (b) focuses on evidentiary rules ensuring the safety of witnesses and experts with regard to their testimony.

Protection measures can be classified in two categories: first, the procedures for the physical protection of such persons and evidentiary rules to permit

witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means; secondly, and to the extent necessary and feasible, the State should offer longer-term protection up to and during any trial, as well as the possible subsequent relocation of witnesses and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons.

Paragraph 3 is a non-mandatory provision requiring States Parties to consider implementing cross-border witness protection through relocating victims who may be in danger in other countries.

Paragraph 4 requires States Parties to apply the provisions of article 32 to victims insofar as they are witnesses.

Finally, article 32, paragraph 5, requires States Parties to enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders. This provision is relevant in cases in which a victim is not a witness.

II. Practical challenges and solutions

States Parties should give particular consideration to the following terms:

- Witnesses and experts, relatives and other persons close to them;
- Effective protection from potential retaliation or intimidation;

- Physical protection of such persons, including to the extent necessary and feasible, relocating them and non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
- Evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means;
- Agreements or arrangements with other States for the relocation of witnesses.

II.1. Witnesses and experts, relatives and other persons close to them

States Parties would need to consider that the Convention does not define the term “witness”. Thus, the procedural law of the States Parties would determine which persons are to be regarded as witnesses. However, States Parties should take into consideration that article 32 limits the scope to witnesses who give testimony concerning offences established in accordance with the Convention. However, the article does not restrict the scope of its provisions to specific stages of criminal proceedings.

This being so, States Parties may wish to take into consideration the following three models of implementation:

- First, States Parties may consider implementing the paragraph in a manner according to which only a person that actually gives testimony has to be protected.

Accordingly, their protection measures would only cover those persons who testify either in trial or in court hearings that are part of the investigative process.

However, States Parties may bear in mind that the status of a person may vary during procedures while its endangerment can be constant. Thus, there could be a need to protect a person at any stage of investigations even when it is still uncertain whether the person will actually (need to) testify.

- Second, States Parties may consider a broader implementation having in mind that the rationale of the article, that is, protecting persons who are endangered by intimidation or retaliation because of their willingness to cooperate.

Correspondingly, States Parties may consider including those persons who are willing to give testimony at a later stage of proceedings. States Parties may also consider protecting these persons, at least until it becomes apparent that they will not be called upon to testify.

- Finally, States Parties may consider an even broader implementation to include those who give or identify key evidence, such as incriminating documentation, but do not testify in court.

States Parties should consider taking a broad interpretation of the term “expert”. According to such an interpretation, States Parties may regard including all persons that can provide law enforcement bodies and courts with expertise whether during an investigation or as witnesses in court. They should be afforded the same range of protection measures applied to witnesses. Finally the definition of relatives or people close to the witness should normally mean immediate family but, again, a broad implementation and hence a generous inclusion of persons who are close to

the witness or expert may be preferable. States Parties should bear in mind that quite often the treatment of relatives and friends may be a crucial factor when a witness has to choose between cooperation and intimidation.

II.2. Effective protection

States Parties may consider implementing comprehensive witness protection programmes as the most effective means to ensure the safety of witnesses and experts. In this regard, States Parties should bear in mind that some protection measures (for example, the change of name) may require legislation and informal arrangements. Where programmes exist, States Parties should consider adjusting such programmes to the particular importance of witnesses for the successful prosecution of corruption offences.

States Parties should bear in mind that possible ways of intimidation and retaliation are manifold. Thus, when deciding on admitting a person in a witness protection programme, they may not only focus on physical threat. Rather, they should consider applying a wider scope. States Parties may include several additional aspects for their law enforcement agencies to decide whether to protect a person or not. Such aspects may, inter alia, be the likelihood that the defendants or their associates would carry out the threat as well as the duration of the threat that could persist long after the investigation and trial have come to an end. Moreover, they should take into consideration whether an organized criminal group is

involved, as in such cases the giving of evidence against members with status could lead to significant or continuing forms of retaliation.

As witness protection programmes are expensive and labour-intensive, States Parties may consider providing for a diversified frame of protection measures. States Parties may therefore consider that a full witness protection programme can only be available to a limited number of witnesses and those witnesses have to be central to a successful conviction which is not amenable to other forms of investigative or surveillance techniques, or of presenting evidence. States Parties may bear in mind that the limited access to a comprehensive witness protection programme does not mean leaving other witnesses without any protection. In fact, possible ways of witness protection range from short-term physical security to long-term relocation for a witness and their family. A risk assessment therefore should provide for adequate protective arrangements in any given case. While comprehensive witness protection programmes are particularly intended for long-term protection against retaliation, protection measures in other corruption cases may concentrate on pretrial intimidation and thus would be more properly addressed by other means to physically safeguard the witness than complete witness protection measures.

With regard to the implementation of witness protection in a specific case, States Parties may wish to pay attention to the fact that some States provide for the possibility of a memorandum of understanding or protocol between the State and the witness which regulates the protective measures to be taken. Such memorandum of understanding or protocol may enhance the effectiveness of the

protection and may form a good incentive for cooperation. In any case, such memorandum of understanding or protocol help in providing clarity and in avoiding possible disagreements regarding the scope of protection. UNODC has developed a set of materials regarding witness protection, including a manual on “Good practices for the protection of witnesses in criminal proceedings involving organized crime”, which is available on its website.¹

III. Agreements or arrangements with other States

Depending on its experience on matters relating to witness protection, a State Party may conclude that ad hoc agreements or arrangements with other countries for the relocation of witnesses would be sufficient. However, States Parties may wish to consider that the development of an individual arrangement may take time that is not at its disposal in a continuing criminal proceeding. An approach to deal with this issue may be the development and conclusion of transnational agreements or arrangements which do not only apply for a single case, but serve as a framework for a number of cases that may occur.

States Parties may also consider the development of cooperation agreements or arrangements on a “family of countries” basis as the best way to implement a cross-border witness protection programme. Thus, States Parties would be able to use such States as safe havens that are geographically conterminous or which share common linguistic, economic and cultural characteristics.

¹ <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.

IV. Victims

In a number of cases, not all victims would be called to give evidence and in other cases, those who may be victims may extend beyond those who have been subject to direct loss or damage. In assessing the severity of a case, it is possible that the quantum of damage may be addressed by enabling the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings, and in particular after the decision on guilt and before sentencing. This provision is relevant in cases in which a victim is not or cannot be heard as a witness and hence would not be able to present views and concerns since criminal proceedings are brought against the perpetrator by the State.