

**Recommendation Rec(2005)9  
of the Committee of Ministers to member states  
on the protection of witnesses and collaborators of justice**

**EXPLANATORY REPORT**

**Introduction**

1. The need to strengthen the protection of witnesses and collaborators of justice was raised in the context of the fight against terrorism, where the Multidisciplinary Group on International Action Against Terrorism (GMT) identified this activity as one of the six priorities for further counter-terrorism action. It has indeed been recognised that the protection of witnesses and collaborators of justice is an essential part of the fight against terrorism, since there is an increased risk of witnesses being subjected to intimidation which may result in the criminal justice system failing to bring offenders to trial and obtain judgments because witnesses are effectively discouraged from testifying freely and truthfully.

2. The GMT considered that there was growing recognition of the special role of witnesses and, particularly, of collaborators of justice in criminal proceedings and that their evidence is often crucial to securing the conviction of offenders. It is therefore of the utmost importance for states to protect witnesses against such interference by providing them with specific measures of protection that effectively ensure their safety. It also pointed out that in doing so states should be guided, when formulating their internal legislation and reviewing their criminal policy and practice, by the principles appended to Recommendation R(97)13 concerning the intimidation of witnesses and the rights of the defence.

3. However, it should be borne in mind that Recommendation R(97)13 did not contain a comprehensive (procedural and non procedural) set of measures to protect witnesses in terrorist cases. Indeed, it had a very specific scope, paying particular attention to measures to be taken in relation to vulnerable witnesses, especially in cases of crime within the family, and did not cover, for instance, the question of those persons supporting terrorist activities without participating in the commission of criminal offences who might decide to collaborate with the criminal justice system. In addition, it was found out that it was often difficult, in particular in those countries where practical difficulties arise from their own geographical or demographic characteristics, to protect witnesses and collaborators of justice properly and effectively, and that there was therefore a need to strengthen international cooperation in this field, especially as far as relocation is concerned.

4. For this reason, the GMT recommended to the Committee of Ministers that it be given the task of examining, in cooperation with the European Committee on Crime Problems (CDPC), the possibility of developing guidelines and, if necessary, a convention to strengthen the protection of witnesses and collaborators of justice (or “pentiti”), including through improved international cooperation in this area, taking due account of Recommendation No. R(97)13. The development of a comprehensive scheme for protecting witnesses and collaborators of justice, which would apply to organised crime and other related criminal activities as well, could also be considered.

5. At its 111th session at Ministerial Level (Strasbourg, November 2002), the Committee of Ministers endorsed the proposals made by the GMT. Accordingly at its 828th meeting (Strasbourg, 13 February 2003), the Committee of Ministers at Deputies’ level, following the request by the CDPC, adopted specific terms of reference for a Committee of Experts on the Protection of Witnesses and *Pentiti* in relation to acts of terrorism (PC-PW).

6. Pursuant to the specific terms of reference provided by the Committee of Ministers, the PC-PW was instructed to study the means for strengthening the protection of witnesses and *pentiti* in relation to acts of terrorism, including those at international level, and to make proposals as to the feasibility of preparing an appropriate instrument, bearing in mind the links with other related criminal activities.

7. The PC-PW held three meetings (April, July and September 2003) and adopted a final report on the basis of replies to a questionnaire addressed to member and observer states, analyses of these replies prepared by the scientific experts and contributions provided by the representatives of the International Criminal Tribunal for the former Yugoslavia and Europol on the possible elaboration of appropriate international instruments.

8. The conclusion of this final report was that it would be technically feasible and advisable to establish an international legal framework for international cooperation in matters related to the protection of witnesses and collaborators of justice, which should be based on a combination of binding and non-binding instruments. The core of this framework should be a conventional instrument, which could take the form of a new independent convention or of an additional instrument to existing conventions. In particular, it should aim at facilitating international cooperation and at setting common criteria to preserve an acceptable balance between the protection measures and the human rights and fundamental freedoms of all the parties involved (witnesses/collaborators of justice, defendants, victims). The conventional instrument would be completed by elements of "soft law".

9. At their 25th Conference, the European Ministers of Justice welcomed these conclusions, which were subsequently endorsed by the Committee of Experts on Terrorism (CODEXTER) at its first meeting (27-30 October 2003). The CODEXTER advocated the preparation of international instruments on witness protection, emphasising that the adoption of such instruments would enhance the efficiency of the fight against terrorism. The Committee of Ministers took note of these conclusions at its 864th meeting at Deputies' level on 4 December 2003.

10. At its plenary meeting in March 2004, the CDPC approved revised draft specific terms of reference for a new Committee of Experts on Protection of Witnesses and Collaborators of Justice (PC-PW) and submitted them to the Committee of Ministers, which adopted them at its 884th meeting at Deputies' level on 19 May 2004.

11. Pursuant to its new specific terms of reference, the PC-PW was called upon to prepare a draft legal framework for international cooperation in matters related to the protection of witnesses and collaborators of justice, including in relation to acts of terrorism, on the basis of the conclusions of its final report.

12. The Committee was called upon, in particular, to:

- identify issues that should be addressed by means of international non-binding legal instruments and, where appropriate, elaborate draft texts; and
- identify issues that should be addressed by means of international binding legal instruments and, following the approval of an interim report by the CDPC recognising the need for such instruments, elaborate draft texts.

13. In accordance with its specific terms of reference, the PC-PW started its work in October 2004 and completed it in February 2005, having held three plenary meetings during this period. The list of experts who attended these meetings is set out in Appendix II to this report.

14. At its last meeting, the Committee adopted the draft recommendation and took note of the draft explanatory memorandum relating thereto, which were transmitted to the CDPC for its approval. The draft recommendation was approved by the CDPC in March 2005 and adopted by the Committee of Ministers of the Council of Europe on 20 April 2005.

### General considerations

15. The purpose of a new Recommendation to member states on protection of Witnesses and Collaborators of Justice should be to enhance the compatibility of national criminal justice systems in relation to this matter. In this respect, it was agreed that Recommendation No. R(97)13 of the Committee of Ministers concerning the intimidation of witnesses and the rights of the defence should represent the point of departure of its work, with a view to the revision and updating of the text, and that the revision should be aimed at extending its scope on the basis of the additional experience and information acquired since its adoption. Moreover, the objective of the Recommendation would be to specifically provide guidance on those more specific aspects which were not sufficiently developed in the 1997 Recommendation because of a lack of experience or because of the different focus of that instrument.

16. The Committee reaffirmed the standpoint that the evidence provided by witnesses in relation to certain types of crime, where the prosecution of illegal acts is particularly difficult, is crucial for the conviction of offenders. Such types of crime include offences committed by organised crime groups, particularly by terrorist groups. Although the Recommendation would focus on witnesses involved in this kind of offence, it should not exclude other kinds of serious offence.

17. The protection of witnesses and collaborators of justice giving evidence in terrorism-related cases, in particular, is crucial in order to achieve successful results in the fight against terrorism and terrorist organisations, as was recalled in Resolution No.1 on Combating International Terrorism approved at the 24th Conference of European Ministers of Justice in Moscow. Witness protection is especially important in the fight against organised crime and terrorism because the closed nature of criminal and terrorist groups makes it very difficult to use traditional investigative methods successfully. Testimonies obtained from witnesses may provide useful information about entire criminal groups. However, such criminal groups are equally capable, by intimidating, harming or bribing the witnesses, of obstructing investigations and justice.

18. The Committee has also given particular consideration to the evolving case-law of the European Court of Human Rights in the drafting of the Recommendation, because it sets precise limits to the restriction of the defence's rights. In the context of entitlement to a fair and public trial, the Convention guarantees, above all, that court proceedings shall be public to protect litigants against the secret administration of justice. Article 6<sup>1</sup> secures for everyone the right to have a charge against him/her brought before a court. However, both the Court's and the European Commission on Human

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<sup>1</sup> Article 6 of the Convention reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Rights's conclusions in the cases of Golder<sup>2</sup> and Deweer<sup>3</sup> were that this right is not absolute and is, therefore, subject to implied limitations. The media and the public may thus be excluded from all or part of the trial when the interests of justice so require, for example in order to ensure the protection of witnesses. In this particular respect, Article 6, paragraph 3.d is particularly relevant when devising witness protection measures. It entitles the accused, *inter alia*, to examine or have examined witnesses against him/her, to obtain the attendance of witnesses on his/her behalf, and to examine or have examined witnesses on his/her behalf under the same conditions as witnesses against him/her.

## **Commentary on the principles contained in the Recommendation**

### **I. Definitions**

19. The Recommendation contains a set of definitions which are designed for the purposes of the text and do not necessarily correspond to any legal or doctrinal definitions.

20. The definition of "witness", as formulated by the Recommendation, was built upon the autonomous concept of witness under Article 6 of the European Convention on Human Rights (see the judgments of the European Court of Human Rights in the *Kostovski* and *Isgrò* cases, Appendix I). This definition includes any person who possesses relevant information to criminal proceedings about which he/she has given and/or is able to give testimony. It is, therefore, the function of the witness which matters, rather than his/her status or the form of the testimony – which could differ according to the national system. The expression "relevant information" is intended in the sense of "pertinent for the procedure", without any preliminary consideration of the importance of the information. The element of importance should be connected to the evaluation of the protection needs, but not to the qualification of witness. Moreover, in order to avoid overlapping in the definitions, it was agreed that persons falling within the scope of the definition of "collaborators of justice" would not be covered by the definition of witness.

21. As to the inclusion of informants in the scope of the definition of witness, it was considered that their role was different to that of witnesses and/or collaborators of justice since they provided information which was useful for the initiation of an investigation or for the prevention of crimes, but usually did not enter the proceedings. In spite of this, it was considered that in particular the fight against terrorism might benefit from the extension of some form of protection to informants and that under particular circumstances where there were specific threats, member states could, where appropriate, also consider the application of this Recommendation to informants by making sure, for instance, that the identification details of informants are not disclosed at any stage of the procedure. However, in case the information given by the informant enters the proceedings, the informant may become a witness/collaborator of justice. On the other hand, the scope of this Recommendation is not intended to cover other actors, such as judges, prosecutors, police officers, experts and interpreters who, in the exercise of their ordinary functions, may obtain relevant information and may therefore be exposed to intimidation.

22. "Collaborators of justice" is used in the Recommendation in a precise sense: these persons have knowledge of the structures and activities of criminal organisations, their links with other local or foreign criminal groups, and are accused or convicted of having taken part in offences connected with organised crime or other serious crimes. The qualification of "collaborator of justice" would also apply to those people who had committed a crime but whose cooperation concerned other crimes.

23. "Intimidation" of witnesses may be carried out in a number of ways, but its purpose is the same: to unduly interfere with the willingness of a person to give testimony freely, or to react against a

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<sup>2</sup> Judgment of 21 February 1975, Series A, No. 18.

<sup>3</sup> Judgment of 27 February 1980, Series A, No. 35.

given testimony. The threat must be “real” and “perceived” at the same time and not imaginary or unreasonable under the circumstances. The notion of intimidation has been defined in a flexible manner by the Recommendation; it may be exerted directly on the witness/collaborator of justice, but also indirectly, for instance, on people close to him or her. Intimidation may take different forms, depending on the circumstances and the crimes involved. In particular, it may take the form of an act which is in itself an offence, virtual intimidation owing to the circumstances, indirect intimidation (of third parties, usually relatives), or again of explicit direct threats. Environmental intimidation can be created by the intrinsic intimidation power of a group, that is intimidation can be the result of the mere fact of belonging to a group. The propensity towards intimidation increases with the seriousness of the offence and its “efficiency” is enhanced if carried out by organised crime or terrorist groups, or where the offender is in a position to exercise power or influence over the witness.

24. The notion of “anonymity” adopted for the purpose of this Recommendation concerns witnesses whose identifying particulars are not generally divulged to the adverse party or to the public in general. As a consequence, the witness is not “anonymous”, if the concealment concerns only some selected particulars, for example, his current address or profession, but not his identity.

25. The notion of “people close to witnesses and collaborators of justice” needs to be interpreted widely. The aim of any witness protection programme is to prevent a witness and/or his/her family and persons closely related to him/her from being threatened or becoming endangered. It is therefore important that the protection measures may also be applied to those persons who steadily cohabit with the witness, and it is equally important that, under specific circumstances, they can be also applied to those who are exposed to serious, present and concrete danger because of the relationship they maintain with those persons. In other words, in the absence of steady cohabitation, the fact that a relationship is based on kinship, affinity or marriage should not affect the application of measures, and the qualification of “close person” should be evaluated in each case.

## **II. General principles (Paragraphs 1-9)**

26. To give testimony, if so required by the criminal justice system, is, and has been for a long time, a civic duty for everyone, unless the person is privileged. Compliance with such a legal obligation by witnesses should in principle be unconditional. In the context of certain types of criminality, for example organised crime and terrorism, the risk run by witnesses of exposing themselves to retaliation by the offender or his/her associates cannot be ignored. Criminal justice must therefore be sensitive to the specific needs of these persons whose evidence is often essential to uncover the truth. The duty to give testimony implies a corresponding duty on the state to provide measures which will foster the safety of witnesses and collaborators of justice.

27. Witnesses may be influenced by the psychological pressure derived from face-to-face confrontation with the defendant in the court room. Therefore, appropriate procedural measures should provide for alternative methods of giving evidence, which are respectful both of the rights of the defence and of the need to spare witnesses any unnecessary strain or distress when testifying. Trials should be organised in such a way as to avoid, as far as possible, unnecessary confrontation, inappropriate influences on the search for the truth, and, in particular, on witnesses' willingness to give evidence.

28. Witnesses may be intimidated either by acts which take the form of behaviour which may not be in itself illegal (repetitive telephone calls or stalking, for example) or acts which are themselves illegal, for example violence, coercion or threats. The act of intimidating witnesses may be made a specific criminal offence in order to deter people from committing those acts which are not already addressed by criminal law under other offences. However, in some member states witnesses are

already provided with significant protection without intimidation having been made a separate criminal offence.

29. Criminal justice personnel should be competent and sensitive in handling the examination of witnesses, both in ordinary cases, and particularly in the case of vulnerable and intimidated witnesses. Where intimidated witnesses are afraid of the possible consequences of giving evidence, examination techniques should take this into account. For this reason, criminal justice personnel dealing with vulnerable witnesses should have adequate training and guidelines to deal with cases involving vulnerable witnesses or, more generally, with cases where witnesses might require protection measures or programmes, in order to effectively favour the implementation of these measures and programmes, including in cases involving international cooperation.

30. The implementation of a measure whose primary aim is to protect witnesses and collaborators of justice requires confidentiality. For this reason, efforts should be made to ensure that effective measures are in place to prevent any attempts to trace witnesses and collaborators of justice, in particular by criminal organisations, including terrorist organisations. It is in this respect that all the stages of the procedure related to the adoption, implementation, modification and revocation of protection measures or programmes should be kept confidential outside the authority responsible for the protection of the witness/collaborator of justice. Exceptions to this principle should be limited to what is strictly necessary according to the different cases and circumstances, including, for example, the judicial authorities imposing procedural protection measures. This fundamental principle also has important implications with respect to the organisation and independence of protection authorities, and on international cooperation.

31. In order to further stress the importance of the principle of confidentiality, the Committee agreed to include in the text a recognition of the possibility of making punishable as a criminal offence the unauthorised disclosure of information related to the adoption, implementation, modification and revocation of protection measures or programmes.

### **III. Protection measures and programmes**

#### *A. Scope of application of the Recommendation (Paragraphs 10-11)*

32. The PC-PW considered that the Recommendation should aim at the adoption of protection measures and programmes as a means to combat all “serious offences”. The Committee held an exchange of views on the possibility and the need to refer to the precise definition of “serious offences” already adopted in other international instruments, such as the United Nations Convention on Transnational Organised Crime. Article 2 (b) of this Convention provides for a definition whereby ““Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”. In this respect, it was agreed that such a definition could be taken into account as an example, but that for the purposes of the Recommendation it was more appropriate to leave member states a margin of discretion in setting thresholds for qualifying the gravity of the crimes.

33. It was, however, decided to add to the term “serious offences” a non-exhaustive reference to those crimes that should certainly be included in this category, such as organised crime offences, terrorist-related offences and violations of international humanitarian law.

34. In respect to this last category of crimes, the Committee discussed the alternative possibility of making reference to the crimes covered by the jurisdiction of the International Criminal Court, or by the Rome Statute. While recognising that these offences could be considered among the most serious, and that any legislation would include these offences among those for which witnesses and

collaborators of justices could be entitled to protection, some delegations expressed doubts as to the appropriateness of an explicit reference to the jurisdiction of the ICC, or to the Rome Statute, in the text of the Recommendation. Similar concerns were expressed with regard to the possible listing of these offences.

35. When analysing the possible specificities of acts of terrorism with respect to witness protection, the former PC-PW had concluded that no specific features would justify terrorist crimes being dealt in a different manner to other forms of serious offences.

36. This reflection was based on previous findings: in the summary report of its 3rd meeting (Strasbourg, 15-16 October 2001), the Reflection Group on Developments in International Cooperation in Criminal Matters (PC-S-NS) took the view that terrorism was a form of crime. Cooperation against terrorism must be part of the cooperation against all forms of crime; as much as responses to other forms of crime, it must live up to existing standards.

37. Although in some systems security measures can be applied to witnesses involved in investigating criminal cases concerning all grades of offences (including, therefore, terrorism-related crimes), the Report on Witness Protection (Best Practice Survey), adopted by the Group of specialists on criminal law and criminological aspects of organised crime (PC-S-CO) at its 3rd plenary meeting (15-17 February 1999), properly highlighted witness protection as especially important in the fight against organised crime and terrorism. According to that report, this could be explained by the closed character of the criminal and terrorist groups, which makes it very difficult to use traditional investigative methods successfully.

38. Moreover, perpetrators of terrorism-related crimes are generally members of a wider group, and giving testimony against such individuals is like speaking against the whole group they belong to. Threats and retaliation can therefore come from the whole group and a larger number of people than the accused against whom the witness/collaborator of justice will give evidence. There is no difference between organised crime and terrorist organisations in this respect.

39. Similarly, there is no doubt that terrorism-related offences can be deemed as serious offences. In most systems, crimes of "terrorist association" or related to terrorist organisations receive heavy sentences, as they are perceived as serious crimes. As a consequence, most member states also extend their system of protection measures to terrorism-related crimes.

40. Nevertheless, the former PC-PW, as well as this Committee, concluded that it may be necessary to recommend that terrorism-related crimes always be included in the offences for which specific witness protection measures or programmes are available, and recognised the need to ensure that protection measures for witnesses and collaborators of justice involved in terrorism-related crimes are adopted in all countries and are the subject, where appropriate, of international agreements facilitating international cooperation.

#### *B. Entitlement to protection measures and programmes (Paragraphs 12-15)*

41. Apart from the obvious principle of the involvement of the person to be protected (as a victim, witness, co-perpetrator, accomplice or aider and abetter) in the investigation and/or in the case, the Committee identified the following criteria entitling a witness/collaborator of justice to receive protection measures: the relevance of the contribution, the seriousness of the intimidation and the willingness and suitability of the person to be subject to protection measures. The seriousness of the crime does not appear in this list of criteria, as it represents an implicit prerequisite which is evaluated at a stage previous to the one envisaged in this context.

42. A testimony related to a serious offence can be particularly relevant if it is credible (genuine and spontaneous) and is the crucial evidence available in order to prosecute a specific serious offence or, for instance, to dismantle a terrorist organisation and detect the proceeds derived from the perpetration of crimes. A relevant testimony could also be the one necessary to corroborate other evidence in order to successfully prosecute a specific serious offence, or to challenge other evidence favourable to the accused.

43. Protection measures and programmes should only be adopted when there are concrete, objective indications (different from personal and subjective concerns) that the testimony will subject the witness/collaborator of justice or people close to him/her to serious retaliation and harm. The more the information is relevant, the more these measures should make sure that the witness/collaborator of justice and the people related to him/her are not subject to any threat, intimidation, retaliation or harm aimed at preventing him/her from giving testimony and that this person is not thereafter harmed on account of his/her testimony.

44. The witness/collaborator of justice should voluntarily accept protection measures or programmes. The principle also implies that the protection measures can also be revoked at the specific request of the witness/collaborator of justice. The voluntary entry of witnesses implies the informed consent of the witness/collaborator of justice to the rules of security he/she has to respect and the extent of the limitations for him/her that follow from the adoption of protection measures.

45. Willingness is important because the witness/collaborator of justice must not only comply with but also voluntarily support all the means taken to ensure his/her safety and prevent danger to him/herself, as well as to the overall programme, where this is the case, which also has the responsibility to safely protect other witnesses, past and future. These means will include voluntary restrictions on his/her right to publish witness-protection related matters or speak about them with other persons or the media.

46. The suitability criterion, finally, refers to the psychological, social and medical condition of the person to be protected and aims at taking into account the aptitude of particular categories of people in terms of reliability and controllability for protection purposes.

47. These criteria should also be applied to people related to the witness/collaborator of justice to make them eligible for protection measures.

48. The adoption and implementation of protection measures and, especially, programmes implies a considerable amount of human and economic resources. The decision to adopt them should subsequently be subject to the respect of the principles of subsidiarity and proportionality.

49. According to the principle of subsidiarity, protection measures can only be adopted when the testimony meets the above-mentioned criteria, and there is no other evidence available that can be deemed sufficient to establish a case related to a serious offence. The evidence to be given by the witness must therefore be crucial, decisive or critical to the case. In other words, the law enforcement agencies could not reasonably take the matter before the courts without the evidence of the witness.

50. The principle of proportionality entails the evaluation and the comparison of the relevance of the seriousness of the intimidation and the nature of the protection measures to be taken. As will be explained in greater detail later, since the adoption some protection measures implies a restriction on the freedom and the privacy of the protected person, the principles of subsidiarity and proportionality might help identify the boundaries of these restrictions.

51. As to the principle of equality of treatment, the PC-PW agreed that it was appropriate to include a reference to the need to recognise the principle that persons subject to the same kind of intimidation should be entitled to similar protection. However, such a principle should not be intended to limit the need to carefully evaluate the particular characteristics of each case and the individual needs of the person(s) to be protected, nor to compromise the operational discretion of the authorities deciding upon the adoption of protection measures and programmes.

*C. Procedural protection measures (Paragraphs 16-17)*

52. When protection measures affect the procedural rights of the parties, it becomes necessary to strike an appropriate balance between the different interests at stake, including the general interest in the prevention of crime, the specific needs of the witnesses/collaborators of justice, those of the victims, and the fundamental right to a fair trial. This should be done through the adoption of appropriate procedural rules.

53. The point of departure is that all evidence in criminal cases must normally be produced at a public hearing, in the presence of the accused and with a view to adversarial argument. Any exception to this principle is limited since it would infringe on the right to a fair trial. As a general rule, paragraphs 1 and 3(d) of Article 6 of the European Convention of Human Rights require that the counterpart be given an adequate and proper opportunity to challenge and question a witness against him/her, either when this witness gives testimony or at a later stage.

54. The Recommendation provides for certain examples of the kind of procedural measures that countries may consider, in accordance with their domestic law.

55. The recording of statements made by witnesses during the preliminary phase of the procedure may effectively discourage potentially harmful actions against the witness, for example by the affected group of organised criminals. It is therefore suggested that, while taking into account the principle of free assessment of evidence by courts, procedural law should admit statements given during the preliminary phase of the procedure as evidence in court, particularly where the witness has died or disappeared or there is another circumstance which prevents the witness from giving evidence in court, in particular if his/her appearance in court may result in a great and actual danger to his/her or a third party's life. In such cases, the right of the parties to participate in the examination and interrogate and/or cross-examine the witness, and to discuss the contents of the statement during the proceedings should be guaranteed. In this latter case, in particular, some concerns for the rights of the counterpart would be motivated whereas that statement would be used as conclusive evidence, which was not implied by the drafting proposed.

56. In general, procedural laws should allow the disclosure of information enabling the identification of a witness at the latest possible stage of the procedure, and select the details to be released. Limiting access to the trial, for example by excluding or restricting the media and/or the public from all or part of the trial, may also be considered. It should, however, be recalled that the constitutional principles of a number of countries do not allow such restrictions and the European Convention on Human Rights also provides for the right to a public trial, while recognising that "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" (Article 6, paragraph 1, of the European Convention on Human Rights).

57. The use of devices to prevent the physical identification of witnesses and collaborators of justice, such as using screens or curtains, disguising the face of the witness or distorting his/her voice,

could be envisaged in those cases where the protected witness needs to be present in court. In other cases, effective protection may require that the counterparts' simultaneous attendance at the court hearings be avoided, either by removing the defendant from the courtroom or allowing the witness to give evidence from a different location to that where the defendant is situated. In these cases, video-conferencing or other audiovisual techniques may be used to enable the parties to follow the proceedings.

58. The use of all these measures should not be disproportionate and should be granted by the court, taking into account the rights of the defence. These measures may also be admissible for countries experiencing constitutional or other difficulties in introducing measures permitting anonymous testimonies in the strict sense.

#### *D. Anonymity (Paragraphs 18-21)*

59. The Recommendation also addresses the question of anonymity, aiming particularly at providing rules which could ensure that anonymity is consistent with domestic law and with European Human Rights Law, and following the same approach already adopted in Recommendation (97)13. The purpose of the provisions on anonymity in the Recommendation is not to allow the use of anonymity where it is not permitted by domestic law, but to provide guidance on the use of this measure where it is allowed and appropriate.

60. The starting point for this approach is the consideration that allowing a witness to give evidence anonymously always entails a risk, due to the fact that the defence cannot verify the genuineness, accuracy and sincerity of the statements, the main risks being the following:

- the anonymous witness might be considered unreliable for subjective reasons associated with his/her personal history, for instance former mental disorders or simply former episodes of habitual lying, which could not be brought to light without the defence knowing his/her identity and verifying his/her personal history;
- the anonymous witness might have had an undisclosed relationship or some form of contact or indirect connection with the counterpart in the past which should be made known and taken into consideration in order to verify whether it might be the source of a prejudiced attitude towards the defendant;
- the anonymous witness could be plotting against the counterpart.

61. Extensive case-law from the European Court of Human Rights relates to the handicaps to the counterpart when the witness is kept away from the trial, especially when "anonymity" becomes part of the protection.

62. In the *Lüdi* case<sup>4</sup>, a local court convicted the accused on the basis of statements made by two anonymous witnesses but the use of this procedure involved such limitations on the rights of the defence that the defendant could not be said to have received a fair trial: "the accused could have put written questions to the anonymous witnesses, had he so requested at the trial. These possibilities cannot, however, replace the right to examine directly prosecution witnesses before the trial court. In particular, the nature and scope of the questions that could be put in either of these ways were, in the circumstances of the case, considerably restricted by reason of the decision to preserve the anonymity [of those two witnesses]. Being unaware of their identity, the defence was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility".

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<sup>4</sup> *Lüdi v. Switzerland*, judgment of 15 June 1992, Application no. 12433/86, Series A, No. 238;

63. In the *Kostovski*<sup>5</sup> case, the Court ruled (paragraph 42) that "if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such situations are obvious."

64. In the *Doorson*<sup>6</sup> case, the Court reviewed and confirmed certain principles of its earlier decisions, noting that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. The subsequent use of their statements by the trial court found that a conviction was, however, capable of raising issues under the Convention. Nevertheless, as was already implicit in the *Kostovski* judgment, such use was not necessarily incompatible with the Convention. The Court particularly acknowledged that Article 6 did not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, the life, liberty or security of a person might be at stake, as might interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other substantive provisions of the Convention, which imply that contracting states should organise their criminal proceedings in such a way that those interests were not unjustifiably prejudiced. Against this background, the principles of a fair trial also require that, in appropriate cases, the interests of the defence should be balanced against those of the witnesses or victims called upon to testify.

65. The Amsterdam court decided in this case not to disclose the identity of anonymous witnesses to the defence, having considered the need to obtain evidence from them while, at the same time, protecting them against the possibility of reprisals by the applicant. In the circumstances, there had been sufficient reason for maintaining their anonymity. This decision of the court presented the defence with difficulties which criminal proceedings should not normally involve. Nevertheless, no violation of the Convention was found, as it was established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities. The following procedures were undertaken: the anonymous witnesses were questioned at the investigation stage (on appeal) in the presence of the counsel for the defence by an investigating judge who was aware of their identity, although the defence was not. The investigating judge had noted circumstances on the basis of which the trial court was able to draw conclusions as to the reliability of their evidence. The counsel was not only present but had also been put in a position to ask the witnesses whatever questions he considered to be in the interest of the defence except in so far as they might lead to the disclosure of their identity, and these questions had all been answered. The European Court of Human Rights noted that the anonymous witnesses had identified the defendant from a photograph which he himself acknowledged to be of himself; moreover, the anonymous witnesses had given descriptions of his appearance and dress.

66. The Court found, therefore, that the above procedures were sufficient to have enabled the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements. However, the Court recalled that even when "counterbalancing" procedures were found to compensate sufficiently for the handicaps under which the defence laboured, a conviction should not be based either solely or to a decisive extent on anonymous statements. That was not the case in the *Doorson* judgment, because the Amsterdam court found that the various items of evidence were corroborative of each other.

67. It results from the case-law of the European Convention on Human Rights that the use of statements made by anonymous witnesses is not in all circumstances incompatible with the European

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<sup>5</sup> *Kostovski v. The Netherlands*, judgment of 20 November 1989, Application no. 11454/85, Series A, No. 166;

<sup>6</sup> *Doorson v. The Netherlands*, judgment of 26 March 1996, Application no. 20524/92, Reports 1996-II;

Convention of Human Rights, but it needs corroborative evidence. However, if the anonymity of a witness is maintained, the counterpart will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the European Court of Human Rights has recognized that in such cases paragraphs 1 and 3(d) of Article 6 require that the handicaps under which the counterpart labours be sufficiently counterbalanced by the procedure followed by the judicial authorities.

68. It was then considered that the only solution for striking a balance between the measure of anonymity and the rights of the defence would be the establishment of a verification mechanism capable of providing an effective substitutive form for the counterpart in the search for any suspicious circumstance that might seriously affect the reliability, and so on, of the anonymous witness.

69. Furthermore, the Recommendation assumes that anonymity must be considered an exceptional measure to be taken only when the life or freedom of the person involved or of the persons close to him/her is seriously threatened, the evidence is likely to be significant and the person appears to be credible. In any case, even if anonymity has been granted, in accordance with the current ECHR case-law, no conviction should be based solely or to a decisive extent on the evidence of anonymous witnesses. The consequence, following the argumentation of the ECHR in the *Birutis* case<sup>7</sup>, might be that in a case in which the authorities are fully justified in keeping the witnesses anonymous, there is not sufficient evidence for a criminal conviction.

#### *E. Non-procedural protection measures and programmes (Paragraphs 22-23)*

70. The main objective of witness protection measures and programmes should be to safeguard the life and personal security of witnesses/collaborators of justice, their relatives and other persons close to them. The PC-PW recognised that while safeguarding life and personal security were necessary, they were not sufficient, and well-being and psychological support could be other important aspects to be taken into account when designing, adopting and implementing protection measures and programmes. Witness protection measures and programmes should therefore aim at providing the appropriate physical, psychological, social and financial protection and support.

71. Some measures or programmes are usually implemented in the place of residence of the witness and, where appropriate, the collaborator of justice, and normally last for the duration of the investigation or trial and for a short period of time thereafter. The measures applied in these programmes include *inter alia*:

- protection of the personal data of the witness/collaborator of justice and the people related to witnesses and collaborators of justice;
- change of the telephone numbers and car plates of the witness/collaborator of justice and of the people close to them;
- police patrols in the area around their houses;
- bodyguards and other physical protection;
- electronic control of telephone calls to and from the telephone numbers of the protected persons;
- psychological and financial support.

72. Protection programmes implying more dramatic changes to the life and/or privacy of the protected person (such as relocation and change of personal data) should be applied to witnesses and collaborators of justice who need protection beyond the duration of the criminal trials where they give testimony. They may last for a limited period or for life. Because of their impact on the persons

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<sup>7</sup> *Birutis and Others v. Lithuania*, judgment of 28 March 2002, Applications nos. 47698/99 and 48115/99;

involved, as well as of their cost, such programmes should be adopted only if no other measures are deemed sufficient to protect the witness/collaborator of justice and the persons close to them.

73. When relocation has to be used, every adequate effort should be made to sever any links that the subject may have with his/her former location and to ensure that attempts to identify his/her new location are frustrated. If the witness is reluctant to move out of the area, arrangements may be made for temporary relocation or other alternatives which may take immediate pressure off the witness, people close to him/her and the authorities. Permanent relocation in and around the witness's own area should, however, be avoided, as it does not provide the witness/collaborator of justice and his/her family with the necessary security. When there is no alternative because of the protected person's wishes, he/she should be warned of the dangers of a "local move".

74. Where a witness/collaborator of justice is relocated outside his/her area, the main consideration, other than the security and welfare aspects, must be to identify an area which allows the protection authorities to keep control over the situation. Careful consideration should be given to the destination and the effects of the introduction of the protected person(s) in the new area. When necessary, protected persons should be able to contact the protection authorities rapidly. When necessary to achieve the aim of the relocation, cooperation and mutual exchanges of information should be considered between protection authorities and local law enforcement bodies in the area of relocation of the protected person, while respecting the principle of confidentiality.

#### *F. Legal framework (Paragraphs 24-25)*

75. The adoption of protection programmes requires the informed consent of the person(s) to be protected and an adequate legal framework, including appropriate safeguards for the rights of the witnesses or collaborators of justice according to the national law.

76. The legal framework should indicate the kind of protection measures and programmes that can be adopted, the necessary prerequisites for the adoption of these measures, the procedure to be followed for their adoption, the duration and the conditions for renewal or revocation and/or suspension, as well as the rights and obligations of the persons eligible for or subject to protection. It should also contain information on the consequences for the protected person(s) resulting from the intentional perpetration of an offence.

77. It should therefore normally be possible for the person(s) eligible for protection to be assisted by a lawyer when agreeing to enter a witness protection programme, and in case of revocation and modification of the protection measures, and to challenge the decisions taken in this regard. Providing legal assistance to the witness, or at least recognising his/her right to legal assistance in this context, is also important to help his/her understanding of the legal position and of the practical arrangements that may be proposed by the authorities responsible for protecting him/her.

78. The implementation of a protection programme could be ruled by different means. In many member states, the witness protection authorities usually make use of a memorandum of understanding or (less frequently) of a contract when they have to implement protection measures.

79. The memorandum of understanding can be deemed a sort of code of conduct, from which no right for the protected person derives, and which in fact describes what the protected person should or should not do in order to continue to receive protection. The content of this code of conduct is usually discussed with the persons to be protected. At this stage, the witness/collaborator of justice and the other persons eligible for protection should be entitled to make representations and it would be advisable that they be assisted by a lawyer, if they so wish (also in order to ensure better informed

consent to the duties and limitations contemplated by the memorandum). The same considerations may apply in the case of the revocation and modification of the protection measures.

80. However, if a contract is signed, the person concerned should be entitled to ask questions or make representations before a relevant authority, if he/she thinks his/her own rights have been jeopardised, while respecting the principle of confidentiality.

81. Where appropriate, protection measures could be adopted on an urgent and provisional basis before a protection programme is formally adopted. These measures could include immediate relocation to a different place, economic subsidies, physical protection, protection of the identity of the protected person(s), and, for those in custody and/or serving a sentence in jail, immediate relocation to special detention facilities with special security measures.

#### *G. The role of collaborators of justice (Paragraphs 26-27)*

82. The testimony of collaborators of justice is, in many cases, crucial for obtaining evidence concerning offences committed by organisations, especially with regard to organised crime and terrorist offences. It is recognised that collaborators of justice may become eligible for certain protection measures in view of the collaboration. In the case of collaborators of justice serving a prison sentence, this may also include the adoption of special penitentiary regimes. However, since the purpose of the Recommendation is limited to the aspects related to the protection of collaborators of justice, issues such as the use of measures aimed at encouraging individuals to co-operate with justice where people have committed crimes would only be relevant to the extent that such measures have a protective aim and that no stand would be taken as to the desirability of such encouraging measures.

83. Moreover, it should be recalled that protection measures which may encourage people to collaborate with justice should necessarily take into account the principle of safeguarding the rights and expectations of victims, and that a balance between these two principles should be struck. In particular, it should be ensured that victims can claim compensation for injuries or damages suffered as the result of a criminal offence perpetrated by criminals who then co-operate with justice. In this sense, Article 2 of the 1983 European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116) already contemplated a duty on states to compensate victims of violent crimes (terrorism-related crimes can be included in this category), when compensation is not fully available from other sources and even if the offender cannot be prosecuted or punished.

84. In the case of collaborators of justice, protection should also be aimed at preserving his/her credibility and public security. Both would be jeopardised if the collaborator of justice committed further crimes while under protection. Moreover, the perpetration of a crime by a protected person might cause the real name and current whereabouts of the protected person to be revealed and undermine his/her security.

85. Specific measures aiming at preventing collaborators of justice from committing crimes while under protection and therefore, even involuntarily, jeopardising the case in court, should be considered, such as for example:

- relocation to areas not affected by criminal organisations that might recruit the collaborator of justice (if in prison, relocation to special detention facilities where other collaborators of justice are held);
- adoption of temporary financial support measures for the collaborator of justice and his/her immediate family members and associates;
- assistance with job searches;

- change of personal data;
- strict surveillance and control of the collaborator of justice and his/her immediate family members and associates, although taking into consideration the limitations that such a measure would imply for the freedom and privacy of the protected persons.

86. In this context, special attention should be given to the grievances of the collaborator of justice and his/her family. Periodical contacts should take place to ensure that they have no grievances with regard to their protection and that no medical or psychological problems have gone undetected;

87. The intentional perpetration of an offence by a collaborator of justice under protection should, according to the relevant circumstances, imply the revocation of protection measures.

#### *H. The organisation of witness protection authorities (Paragraph 28)*

88. The PC-PW discussed at length the drafting of the provisions aiming, on the one hand, at guaranteeing the necessary autonomy to witness protection organisations and, on the other hand, at ensuring an adequate level of cooperation between witness protection organisations and law enforcement agencies. The Committee noted that different national systems provide for different degrees of independence of witness protection units. One of the findings of the former PC-PW was that the authorities responsible for witness protection within enforcement agencies should operate independently of other elements of the organisation. This principle, however, could give rise to concerns of constitutional compatibility with respect to the principle of hierarchical subordination.

89. It was therefore considered appropriate to recall as a standpoint the respect of the fundamental principles of administrative organisation of each state, and then the need for the operational autonomy of staff dealing with the implementation of protection measures, and for organisational separation between this function and the investigation or preparation of the case where the witness/collaborator of justice is to give evidence.

90. This will preserve the confidentiality of the operations related to the protection of witnesses, contribute to effectively stop any criminal effort to trace the protected persons, avoid any undue interference in the statements and testimony the witness/collaborator of justice are to give before the investigators, the prosecutor or the judges. Moreover, as law enforcement agencies often deal with suspects or defendants, this will prevent any information about the protected persons being involuntarily disseminated to the latter.

91. However, an adequate level of contact with law enforcement agencies should be assured in order to successfully adopt and implement protection measures and programmes. For instance, when the threat assessment is carried out by the protection authorities, this should be made in close cooperation with the investigators.

#### **IV. International cooperation (Paragraphs 29-32)**

92. Given the transnational dimension of several forms of serious offences, including organised crime and terrorism-related offences, the protection of witnesses and collaborators of justice and people close to them can sometimes only be effectively ensured outside national borders. More and more frequently, countries where practical difficulties arise from their own geographical or demographic characteristics and countries that are highly affected by criminal organisations need to relocate protected persons to other countries, and have all the other protective measures implemented in those countries. International criminal courts, such as the International Criminal Court or the International Criminal Tribunal for the former Yugoslavia, also need to rely on international agreements with countries for the protection of witnesses, collaborators of justice and people close to

them. Moreover, member States are often facing practical difficulties arising from relocation requests when particular procedures need to be implemented by both the requesting and the requested state.

93. The further development of international cooperation has therefore become an issue which requires urgent attention.

94. Although some international instruments have already provided guidelines on this issue, improvements can be provided by adopting international binding instruments, on a bilateral and/or multilateral level. States should therefore be encouraged to proceed in this direction.

95. This may include, in particular, the development of specific forms of cooperation such as those mentioned in the Recommendation. For instance, it should be recommended that States facilitate and improve the use of modern means of telecommunication such as video-links, while safeguarding the rights of the parties, to allow live examination of protected witnesses or collaborators of justice or when the appearance of the protected person in court in the requesting state or before international criminal courts is otherwise impossible, difficult or costly. At the same time, it would be important to improve the security of these means, for example by arranging videoconferences in such a way that the country where the person is relocated is not disclosed.

96. While acknowledging the existing differences in national law, basic principles governing the conditions for international relocation of protected persons should be identified with the aim to establish a model agreement for those member States who are willing to relocate protected persons abroad.

97. Moreover, it is important to recall that some contact networks are already in place, and provide for the possibility of exchanging experiences and for practical assistance in international cooperation, including through the diffusion of model agreements and guidelines. In this sense, countries having already experiences with international cooperation on witness protection and countries without prior experience in this field should be encouraged to make the best use of the existing networks of national experts, such as the Europol network of experts on witness protection<sup>8</sup>. Moreover, it would be advisable that the national competent authorities for international relocation are represented in this network.

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<sup>8</sup> The Europol network of experts on witness protection consists, at present, of the Heads of Specialised Units on witness protection/national contact points from all of the 25 European Union member states, plus 6 non-member states of the European Union, 8 international organisations active in this field, and overseas observers from Australia, Canada, New Zealand, South Africa and the U.S.A.

## Appendix I

*List of relevant cases brought before the European Court of Human Rights (chronological order of Court judgments):*

- *Delcourt v. Belgium*, judgment of 17 January 1970, Application no. 2689/65, Series A, No. 11;
- *Golder v. The United Kingdom*, judgment of 21 February 1975, Application no. 4451/70, Series A, No. 18;
- *Sunday Times v. The United Kingdom*, judgment of 26 April 1979, Application no. 6538/74, Series A, No. 30;
- *Deweere v. Belgium* case, judgment of 27 February 1980, Application no. 6903/75, Series A, No. 35;
- *Le Compte, van Leuven and de Meyere v. Belgium*, judgment of 23 June 1981, Application no. 6878/75 and 7238/75, Series A, No. 43;
- *Adolf v. Austria*, judgment of 26 March 1982, Application no. 8269/78, Series A, No. 49;
- *Axen v. Germany*, judgment of 08 December 1983, Application no. 8273/78, Series A, No. 72;
- *Campbell and Fell v. The United Kingdom*, judgment of 28 June 1984, Application no. 7819/77 and 7878/77, Series A, No. 80;
- *De Cubber v. Belgium*, judgment of 26 October 1984, Application no. 9186/80, Series A, No. 86;
- *Unterpertinger v. Austria*, judgment of 24 November 1986, Application no. 9120/80, Series A, No. 110;
- *Monnell and Morris v. The United Kingdom*, judgment of 2 March 1987, Application no. 9562/81 and 9818/82, Series A, No. 115;
- *H. v. Belgium*, judgment of 30 November 1987, Application no. 8950/80, Series A, No. 127-B;
- *Belilos v. Switzerland*, judgment of 29 April 1988, Application no. 10328/83, Series A, No. 132;
- *Ekbatani v. Sweden*, judgment of 26 May 1988, Application no. 10563/83, Series A, No. 134;
- *Kostovski v. The Netherlands*, judgment of 20 November 1989, Application no. 11454/85, Series A, No. 166;
- *Windisch v. Austria*, judgment of 27 September 1990, Application no. 12489/86, Series A, No. 186;
- *Delta v. France*, judgment of 19 December 1990, Application no. 11444/85, Series A, No. 186-A;
- *Isgrò v. Italy*, judgment of 19 February 1991, Application no. 11339/85, Series A, No. 194;
- *Asch v. Austria*, judgment of 26 April 1991, Application no. 12398/88, Series A, No. 203;
- *Vidal v. Belgium*, judgment of 22 April 1992, Application no. 12351/86, Series A, No. 235-B;

- *Lüdi v. Switzerland*, judgment of 15 June 1992, Application no. 12433/86, Series A, No. 238;
- *Artner v. Austria*, judgment of 28 August 1992, Application no. 13161/87, Series A, no. 242-A;
- *Saïdi v. France*, judgment of 20 September 1993, Application no. 14647/89, Series A no. 261-C;
- *Doorson v. The Netherlands*, judgment of 26 March 1996, Application no. 20524/92, Reports 1996-II;
- *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, Application no. 19874/92, Reports 1996-III;
- *Van Mechelen and others v. the Netherlands*, judgment of 23 April 1997, Application no. 21363/93, 21364/93, 21427/93, 22056/93, Reports 1997-III;
- *García Ruiz v. Spain*, judgment of 21 January 1999, Application no. 30544/96, Reports 1999-I;
- *A.M. v. Italy*, judgment of 14 December 1999, Application no. 37019/97, Reports 1999-IX;
- *Lucà v. Italy*, judgment of 27 February 2001, Application no. 33354/96, Reports 2001-II;
- *Solakov v. the Former Yugoslav Republic of Macedonia*, judgment of 31 October 2001, Application no. 47023/99, Reports 2001-X;
- *Visser v. the Netherlands*, judgment of 14 February 2002, Application no. 26668/95;
- *Birutis and Others v. Lithuania*, judgment of 28 March 2002, Applications nos. 47698/99 and 48115/99.