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**ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER
FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE
HIGH COMMISSIONER AND THE SECRETARY-GENERAL**

Right to the truth

Report of the Office of the High Commissioner for Human Rights*

Summary

This report is presented to the Human Rights Council pursuant to Council resolution 9/11. It contains a study on best practices for the effective implementation of the right to truth, in particular practices relating to archives and records concerning gross violations of human rights, and programmes on the protection of witnesses and other persons involved in trials connected with such violations.

* Late submission.

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I. INTRODUCTION

1. In its resolution 9/11, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights to prepare a comprehensive study, to be presented to the Council at its twelfth session, on best practices for the effective implementation of the right to the truth, including, in particular, practices relating to archives and records concerning gross violations of human rights, and programmes for the protection of witnesses and other persons involved in trials connected with such violations.
2. The implementation of the right to the truth can only be effectively achieved when victims of human rights violations are able to assert their rights and can start the process of dealing with their past. The protection of archives and records concerning gross human rights violations, and the protection of witnesses and other persons involved in trials related to such violations are mutually reinforcing elements that are essential to ensuring the effective implementation of the right to the truth.
3. This report contains a study, carried out by the Office of the High Commissioner for Human Rights (OHCHR) on the two topics as identified in paragraph 9 of resolution 9/11. The first part of the report covers the practices relating to archives and records concerning gross violations of human rights. The second part of the report deals with programmes for the protection of witnesses and other persons involved in trials connected with such violations.

II. PRACTICES FOR THE EFFECTIVE IMPLEMENTATION OF THE RIGHT TO THE TRUTH, INCLUDING PRACTICES RELATING TO ARCHIVES AND RECORDS CONCERNING GROSS VIOLATIONS OF HUMAN RIGHTS

A. Background

4. When a period characterized by widespread or systematic human rights abuses comes to an end, people who suffered under the old regime find themselves able to assert their rights and to begin dealing with their past. As they exercise their newly freed voices, they are likely to make four types of demands of the transitional State, namely demands for truth, justice, reparations and institutional reforms to prevent a recurrence of violence. Each of these demands relies on the availability of archives.
5. The recognition that archives and archivists play a central role in undergirding human rights has grown over the last decade. A key event was the adoption in 1997 by the Commission on Human Rights of the Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1, annex II). Pursuant to Commission resolution 2004/72, the Principles were updated in 2005 (E/CN.4/2005/102/Add.1). The Principles emphasize that a person has a right to know the truth about what happened to him/her and that society as a whole has both a right to know and a responsibility to remember. As part of the measures a State must undertake to protect the right to know, the Principles require the State to “ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law” (*ibid.*, principle 5).

6. A national archives system is designed to serve its State structure, and when that structure changes, the archives system must be reformed. A strong national archival system is essential in a democracy to ensure that records important to exercising human rights are preserved. The system must include institutions that preserve governmental records and institutions that preserve non-governmental records and personal papers. All of these requirements need to be addressed during the post-conflict period. Strengthening the archival sector should be an important reform goal for a democratizing Government. At the same time the archives system is being renewed, transitional justice mechanisms are eager to gain access to a wide variety of records for their work.

7. Transitional justice initiatives themselves create records. When a transitional justice institution completes its project, it will have assembled a large volume of records. The records of a transitional justice institution are a concentrated, rich source of information for the history of the country and its people and must be preserved and made available to future users. OHCHR is preparing a tool on archives of human rights violations as part of its transitional justice tools series. This tool will be available in 2010.

8. The following discussion focuses on the records and archives that are the most important to transitional justice processes, in particular for the exercise of the right to the truth, but it is important to remember that a much broader variety of records support the assertion and protection of human rights. In particular, this study will focus on: strategies for the strengthening and the reform of archival institutions; suggestions for using archives in transitional justice efforts; and considerations for preserving the records of transitional justice institutions.

B. Strengthening archives

1. Varieties of archives

9. Records important to the exercise of human rights are found in the custody of Governments, international intergovernmental bodies and private sector entities. Individuals, too, possess documents that they need to protect their own rights; some of these may also be helpful in asserting the rights of others.

10. Most of the key records for human rights purposes are governmental. This means that strengthening and building capacity in the national archives system is a vital step in a transition process. It also means that governmental access policies are a crucial issue, and new access laws need to be enacted by the legislature following the change of regime.

11. Like Governments, institutions in the private sector own their records, control access to them, and decide what to do with their archives. Records of non-governmental organizations (NGOs) are the property of those organizations, which either maintain their archives themselves, or find a trusted custodian to whom to transfer the records when they are no longer needed for the organization's current work. Businesses, too, need to establish archival procedures, particularly if their work directly impacts human rights.

2. Managing permanently valuable records in an archive

12. A national archival system may be concentrated in a single institution or may encompass many different archives, governmental and non-governmental, each with separate responsibilities. Some Governments transfer all permanently valuable governmental records to a single archive, while others maintain separate archives in certain ministries and in the courts. No matter what the number of institutions is, however, the goal should be a national archival system with the following characteristics:

- (a) At the national level:
 - (i) Authority in one or more institutions to select, preserve and make available the records of the Government at all levels;
 - (ii) Authority in one or more institutions to accept donations of non-governmental records and personal papers to ensure that the totality of the nation's history is preserved, not just the history of the Government and its officials;
 - (iii) A framework of laws covering the Government records, including an archives law, an access law or freedom of information act, and a privacy or data protection law. The archives law should affirm that it is the responsibility of the State to preserve the records of Government;
- (b) At the individual archive level:
 - (i) Clear responsibility placed in the archive for appraising the institution's records for disposal or for transfer to the archive, for arranging and describing the records, and for providing access and reference services;
 - (ii) Strategy for preserving records of all physical types and the necessary capacity and technical ability to do so;
 - (iii) Adequate resources to carry out the assigned functions, adequate staff with an appropriate pay scale, and the responsibility for control of budgets and staff;
 - (iv) Physical facilities that are secure and adequate to protect the types of records stored there; appropriate equipment to preserve the records and make them available for research use;
 - (v) A professional training programme for staff members throughout their careers, the adherence to a professional code of ethics, the participation in international professional developments and the adoption of international standard practices for archival work.

13. Maintaining all the Government's records in a national archive has three important benefits. First, it helps ensure consistency in applying restrictions and access rules to archival records. Democracy is best served by a public, clear, consistent application of access policy. Second, by placing sensitive bodies of records there, the national archives build over time a body of precedent in the handling of these records. Such capacity-building in the national archives

staff enables them to gain confidence in their ability to handle difficult access problems, and as each succeeding body of precedent is deposited, the staff's expertise increases. Finally, it is less expensive to manage a single national archive than to operate several institutions.

14. Some experts suggested taking sensitive records out of the country for at least temporary preservation in a secure repository. The usual arguments are that the external institutions have the experience, resources and technical expertise to help with preservation, organization, database development, electronic scanning and electronic access. Except in extreme cases, this course of action is inappropriate in a post-conflict period. Rather than strengthening the capacity of archival institutions inside the country, it enhances the holdings of an institution outside. Even an offer to leave a copy or copies of the electronic version in the country provides very little assistance to the development of an archival system sufficient to handle the ongoing needs of the nation.

15. Taking original records out of the country is an entirely separate issue from depositing a secure copy of records in an external location. Archivists strongly recommend duplicating sensitive materials and storing the duplicate copy in secondary storage, whether in a different location in the same country or in another country. For electronic records and audio-visual records, the institution providing the secondary storage should take responsibility for the preservation of the items entrusted to its care. Electronic records need to be refreshed, periodically recopied, and moved to new electronic platforms as technology advances.

C. Using records in transitional justice processes

16. While archival institutions are being reformed and archival processes are under way, the needs of transitional justice institutions for archives are likely to become most crucial. All transitional justice processes require documents; indeed, the use of records is a cross-cutting issue for these institutions.

17. While some records may be useful for several transitional justice processes, in most cases the records required for a vetting programme are different from those required for a restitution process and both are different from those required for prosecutions, truth commissions, or court monitoring programmes.

18. The first step in using records for a transitional justice process is to understand how the repressive State worked. Then there is a need to understand three aspects about each entity whose records it is planned to use: its structure, the functions it performed, and the records created as it carried out its functions. This is true whether the records are of a Government department, or an opposition group, or a paramilitary body. Understanding the structure and functions helps to judge the probable authenticity and reliability of documents that may be used as evidence. If the records of the organization concerned are already in an archive, the archival description of the records may provide the basic information about the structure and functions of the entity.

Prosecution and the right to justice

19. The demand for justice under the rule of law is met through prosecutions (with associated witness protection programmes) and protected through trial monitoring initiatives. Prosecutions

may be in international tribunals or domestic courts or “hybrid” courts that have both national and international elements. Prosecutions focus on individual perpetrators, while trial monitoring focuses on the institutional structures in the legal system. Both use records extensively.

20. Investigations and prosecutions use whatever documentary materials are pertinent to the matter being investigated: records of Government (especially records of the military and the police and security services, overt or covert); records of non-governmental and international organizations; records of churches and businesses, banks, schools, hospitals and morgues; copies of radio and television broadcasts; records of Government-owned media. They use all physical types of records: paper, electronic, photographic, mapping and satellite imagery and databases.

21. When determining whether an international crime has been committed requires establishing the existence of a policy or pattern of systematic violations, understanding the flow of information to or from the leaders, whether they are army generals, presidents, or leaders of rebel groups, is crucial. This requires a serious analysis of the records of the highest levels of the institution; the registers of documents sent and received can be especially useful, as are reports from subordinate units to headquarters.

22. Prosecutors may obtain records from NGOs, international organizations and church groups who were present in the region when the crimes occurred. Pertinent records created by these institutions may include, for example, regular reports back to the entity’s headquarters, interviews with persons they are assisting, and correspondence with the local authorities as the organizations struggle to get permission to bring in or ship out goods, aid workers, or refugees. Because many aid organizations have substantial experience in working in countries in crisis, their records providing an on-the-scene neutral point of view on events may have special probative value.

Truth-seeking and the right to know

23. Research on the fate of missing persons can include searching through records, interviewing people, exhuming burial sites and conducting DNA tests. NGOs often support or lead the demand to know the fate of the disappeared, and some transitional Governments establish a special body to resolve cases of disappearance. Just as individuals search for information on themselves or others, the wider public seeks an answer to what happened within the society as a whole. During the last quarter of the twentieth century, one of the most popular vehicles for seeking societal truths has been the truth commission. The updated Set of Principles declares that “[a]ll persons shall be entitled to know whether their name appears in State archives” (ibid., principle 17 (b)).

24. Truth commissions are not bound by the formal rules of evidence required by a prosecution, and so they use a broader range of records than any other transitional justice institution. Records of Government (especially military, police, security services, civil registries, land records, courts and prosecutor records), records of NGOs, radio and television broadcasts, records of international organizations and personal papers have all been used by a truth commission. Most truth commissions take extensive oral testimonies whose records can help substantiate, expand upon or disprove allegations of human rights violations.

25. Many truth commissions have had difficulty obtaining military records; a few have been able to use declassified documents obtained from other countries that shed light on military activities. A commission may obtain security-classified documents from the Government, but have difficulty getting them declassified for publication in the commission's report.

D. Preserving the records of transitional justice institutions

26. The records of a transitional justice institution must be managed competently while the institution is active. Then, when the institution completes its work, its records need to be appraised and the portion judged to be permanently valuable should be transferred directly to an archive.

27. Transitional justice institutions may be international or national. The national institutions may be a special part of an existing institution (court, prosecutor) or wholly new ad hoc bodies (vetting committees, truth commissions, reparation panels). Most of them will be Government institutions, with the exception of court monitoring projects and some truth commissions, such as the truth commission sponsored by the Catholic Church in Guatemala.

28. It is important to distinguish between national records and records of ad hoc international bodies. While there are obvious local interests in both types of records, the responsibility for preserving the records of, for example, a national truth commission is clearly national, while the responsibility for preserving the records of a body established under the United Nations is clearly the responsibility of the United Nations. In this regard, it is worth mentioning the work of the Advisory Committee on the Archives of the United Nations ad hoc Tribunals for the former Yugoslavia and Rwanda, which was commissioned to draft a study on the future of the archives of both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The study included an independent analysis on how best to ensure future accessibility to the archives, protect their security and preservation, as well as assess possible locations. A final decision regarding the archives of both ad hoc tribunals will be taken by the Security Council.

29. The records of the national courts that prosecute post-conflict cases should be considered part of the records of the larger justice sector, including the records of the prosecutors and investigators, the prisons and detention centres, and the police. These are records that belong in the Government's archives system, even if the court was a temporary one set up to hear special cases, or the prosecutor was appointed only to undertake post-conflict prosecutions.

30. The records of the unique transitional bodies - vetting panels, reparations commissions, truth commissions - are not part of the regular records system of the Government, yet they create vital records for the nation and its history. These bodies, hearing testimonies, may develop statistical profiles, write reports, adjudicate, grant compensation, and create an entire range of modern archival materials. The records they create are administrative and investigative, case files and reports, published and unpublished, paper and electronic and audio-visual, databases and radio broadcasts.

31. Of the 20 truth commissions whose work was completed by 2005, the records of 3 commissions are in the custody of the United Nations archives, 3 are controlled by the country's national archives, 11 are in various locations, governmental and non-governmental,

and in 3 countries the location of the records is not known.¹ At a minimum, the records should remain within the national archival system. If, for further Government action, a portion of the records is needed by a successor body (for example, the records of a compensation commission are needed by the Government's treasury to pay claims), those records should be copied and a copy provided to the successor body. The original records should not be divided. Only by keeping the records together in an archive can the Government ensure that an accurate picture of what the body learned and did will be available for future uses.

III. PROTECTION OF WITNESSES AND OTHERS CONCERNED IN TRIALS OF GROSS HUMAN RIGHTS VIOLATIONS

A. Background

32. There is a relationship between the efficient investigation and prosecution of perpetrators of gross violations of human rights and a successful witness protection programme. If a country's justice system is unable to secure convictions because of failures in the production of witness evidence, its capacity to deal effectively with past abuses as well as the confidence of its people in the justice system are compromised. Thus, the failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth.

33. Safeguarding the identity of a witness at the early stage of the judicial process enhances the potential for safely obtaining testimony at trial without resorting to a formal witness protection programme. OHCHR considers witness and victim protection an essential component of its efforts to monitor and investigate human rights violations. OHCHR developed practices in this area and as a recognition of its efforts, it was invited by Pre-Trial Chamber I of the International Criminal Court on 24 July 2006 to submit observations on issues concerning the protection of victims, witnesses and the preservation of evidence.² Consideration for witness protection has been integrated in a number of its manuals such as the Manual of Operations of the Special Procedures of the Human Rights Council,³ the Training Manual on Human Rights Monitoring,⁴ and a draft manual on the protection of victims, witnesses, sources and other individuals cooperating with OHCHR that is also being developed.

¹ Trudy Huskamp Peterson, "Truth and the records of truth commissions", *Studien und Quellen* 30, Zurich, 2004, www.trudypeterson.com/downloads/TRUTH.pdf. The three in the United Nations archives are the records of the truth commissions of Burundi, El Salvador and Guatemala.

² See document ICC-02/05-10, Situation in Darfur.

³ At www2.ohchr.org/english/bodies/chr/special/docs/Manual_August_FINAL_2008.doc.

⁴ United Nations publication, Sales No. E.01.XIV.2, 2001.

B. Human rights obligations and the legal framework of witness protection

34. From a human rights perspective, norms relating to the provision of an effective remedy⁵ require effective investigation and punishment of perpetrators and are a strong basis for States to take measures to protect witnesses. The lack of such protection amounts to a violation of victims' rights to an "effective remedy". In addition, the protection of the life, physical and psychological integrity, privacy and reputation of those who agree to testify before courts is more generally required under relevant ICCPR provisions protecting the right to life, prohibiting torture and inhuman or degrading treatment, etc.

35. The protection of witnesses and victims is also an integral part of the fight against impunity. Principle 10 of the updated Set of Principles for the protection and promotion of human rights through action to combat impunity (*ibid.*) states that "effective measures shall be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission". The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law also reaffirm that States should take measures for the protection of victims and witnesses. In particular, States should ensure the safety of witnesses and others from intimidation and retaliation, before, during and after judicial, administrative or other proceedings.⁶

36. Recently, special procedures mechanisms of the Human Rights Council also highlighted the importance of witness protection for the successful investigation and prosecution of gross human rights violations. For instance, the Special Rapporteur on extrajudicial, summary or arbitrary executions noted that without an effective witness protection programme, it is difficult, if not impossible, to achieve prosecution of those responsible for extrajudicial executions (see A/63/313). The Working Group on Enforced or Involuntary Disappearances recommended to the Government of Argentina to adopt a comprehensive protection programme for witnesses and others involved in the investigation of cases of enforced disappearance (see A/HRC/10/9/Add.1).

37. Most recently, the universal periodic review (UPR) mechanism of the Human Rights Council has also addressed the importance of witness protection programmes in various country reports, recommending to countries the adoption of measures to ensure the effective implementation of legislative guarantees and programmes for the protection of witnesses and victims.⁷ Human rights treaty bodies have also duly addressed the importance of witness protection. More than 80 States parties to various human rights treaties have been recommended to develop laws and programmes on witness and victim protection, and ensure appropriate human and financial resources for such programmes, in order to put an end to the climate of fear

⁵ Article 2, International Covenant on Civil and Political Rights (ICCPR).

⁶ General Assembly resolution 60/147, annex, para. 12 (b).

⁷ See A/HRC/8/46 (Sri Lanka); see also A/HRC/8/34 and Corr.1 (Argentina).

that plagues the investigation and prosecution of such cases.⁸ In its recent resolution 63/182 on extrajudicial, summary or arbitrary executions, the General Assembly acknowledged the importance of ensuring the protection of witnesses in the prosecution of those suspected of extrajudicial, summary or arbitrary executions, and urged States to intensify efforts to establish and implement effective witness protection programmes or other measures. In the same resolution, the General Assembly also encouraged OHCHR to develop practical tools designed to encourage and facilitate greater attention to the protection of witnesses.

38. Discussion on witness protection within the human rights framework could benefit from the legal frameworks developed by both the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. Both conventions contain provisions requiring or encouraging measures of protection for witnesses giving testimony concerning offences under those treaties. Although the scope of application of those conventions is limited and does not encompass many of the human rights violations that are of concern to this report, it does have the potential to contribute to the subject of the study.

39. Article 24 of the United Nations Convention against Transnational Organized Crime places an obligation on each State party to take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention and, as appropriate, for their relatives and other persons close to them. Article 24 also stresses that protective measures should not prejudice the rights of the defendant, including the right to due process.

40. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the Convention include specific provisions (article 6 and article 5, respectively) that stipulate a series of protective measures for victims of trafficking and smuggling; and have been interpreted and applied in conjunction with the aforementioned provisions of the parent Convention on the protection of victims and witnesses.

⁸ For example, Human Rights Committee: *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, para. 66 (9); *ibid.*, *Sixtieth Session, Supplement No. 40 (A/60/40)*, vol. I, para. 90 (10); *ibid.*, *Sixty-first Session, Supplement No. 40 (A/61/40)*, vol. I, para. 85 (12); Committee on the Elimination of Discrimination against Women: *ibid.*, *Sixty-third Session, Supplement No. 38 (A/63/38)*, para. 225; *ibid.*, *Sixty-first Session, Supplement No. 38 (A/61/38)*, para. 107; *ibid.*, *Sixtieth Session, Supplement No. 38 (A/60/38)*, annex III, para. 5.7; *ibid.*, *Fifty-eighth Session, Supplement No. 38 (A/58/38)*, para. 275; Committee against Torture: *ibid.*, *Sixty-third Session, Supplement No. 44 (A/63/44)*, paras. 32 (10) and 40 (12); *ibid.*, *Sixty-second Session, Supplement No. 44 (A/62/44)*, paras. 33 (4) (c) and (19), and 38 (18) (b); *ibid.*, *Sixty-first Session, Supplement No. 44 (A/61/44)*, para. 29 (28); *ibid.*, *Fifty-ninth Session, Supplement No. 44 (A/59/44)*, para. 78; Committee on the Elimination of Racial Discrimination: *ibid.*, *Sixty-first Session, Supplement No. 18 (A/61/18)*, para. 149.

41. Though both conventions and protocols have contributed to the development of witness protection programmes in many countries,⁹ the specific nature of witness protection should be carefully examined while considering effective investigation and prosecution of gross human rights violations. Firstly, a distinction should be made between the witnesses of organized crime and those testifying in crimes related to gross human rights violations. In the context of prosecutions dealing with organized crime, witnesses are usually “insiders”, but in the case of trials for human rights violations, witnesses are to a large extent the victims or their family members, friends or relatives. Secondly, it is rare to find a link between State authorities and perpetrators of ordinary or organized crimes, even serious ones (e.g. drug trafficking). In human rights prosecutions, on the other hand, the alleged perpetrators are almost inevitably associated with State authorities. There are often State agencies or connected individuals with an interest in opposing prosecution and with the practical power to pervert the course of justice, including through abuse and intimidation of witnesses. As a result, it may become more difficult to prosecute perpetrators of gross human rights violations.

C. Witness protection at international tribunals

42. In the last few years, international criminal tribunals have attempted to address the unique aspects of witness protection in the trials of international crimes and gross human rights violations. With the establishment of ICTY, ICTR and the International Criminal Court, the protection of victims and witnesses became the object of increasing attention by international and national human rights bodies.

43. Rule 34 of the Rules of Procedure and Evidence of ICTY sets up a Victims and Witnesses Section, which was set up under the authority of the Registrar to: (a) recommend protective measures for victims and witnesses; (b) provide counselling and support for them, in particular in cases of rape and sexual assault. Similarly, the Victims and Witness Support Section of the ICTR was established in 1996 pursuant to the Tribunal’s Rules of Procedure and Evidence, under the authority of the Registrar. The practice of both ICTY and ICTR reveals that the concern for the security and safety of individuals and the psychological needs of victims and witnesses have been the overarching concern.

44. The Rome Statute of the International Criminal Court also contains important provisions for the protection of victims and witnesses. Article 68 (1) of the Rome Statute provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The Court is able to protect witnesses only with the effective assistance of the States parties, which requires an effective witness protection programme at the national level. According to its last annual report to the General Assembly in 2008, the Court had concluded 10 agreements with States on the protection and relocation of witnesses, and 2 ad hoc arrangements (A/63/323, para. 68).

⁹ See United Nations Office on Drugs and Crime (UNODC), *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, 2008.

D. Elements of witness protection programmes

45. A witness protection programme is a formal system, designed to provide a full range of physical protection and psychosocial support to programme participants, be they witnesses or associated persons. Currently, both national and international witness protection programmes are utilized for witnesses who can give vital evidence regarding the most serious of crimes when that evidence is not available elsewhere. Protection may be granted not just to witnesses who collaborate but also to the victims who become witnesses, and could be extended to family members or persons close to the witness.

46. Several States have enacted witness protection legislation, while many others have informal physical security systems. For example, in Argentina, a new witness protection draft bill¹⁰ is currently under consideration in Congress, in an attempt to address the gaps of the previous witness protection laws and to counter the continuous threats received by human rights defenders and many of the victims and witnesses in trials against former military and police officers.

47. It is important to understand that witness protection programmes are just one part of an overarching group of actions used to ensure the safety and well-being of witnesses. This requires identification and consideration of options, a carefully thought-out strategy and the design of a programme to meet the individual circumstances of the witness and associated persons.

48. Admission to a witness protection programme traditionally involves assessment, physical protection, relocation, change of identity or measures of disguising identity and ownership, resettlement, integration into a community, and a pathway out of the programme once trial is completed and/or the threat has diminished. Protective measures include arrangements to facilitate the appearance of witnesses before the courts, arrangements to provide them with psychosocial support, special protection measures where appropriate when they are testifying, and protection to ensure the safety of witnesses outside the court. National witness protection programmes are designed to provide a much higher level of physical security than the protective measures. Many national systems have developed witness protection programmes to cater for “at-risk witnesses” in investigations and prosecutions. Witness protection programmes may vary from one tribunal/court to another depending on the framework of the court or tribunal. However, they have many common elements.

49. A formal legal framework that provides witness protection and ensures the well-being of the witness is required. Experiences indicate that the lack of a legal basis and clear roles and responsibilities, both for participants and programme hosts, led to considerable problems, litigation, and sometimes loss of life. While considering the legal framework, some key aspects should be taken into consideration. Witness protection programmes should carefully consider the safety and physical and psychological well-being of the witness. The threat and risk assessment process will determine what level of protection should be provided to ensure the safety of the

¹⁰ Programa nacional de protección de personas en situación de peligro en procesos penales, N° de Expediente 6526-D-2008, Trámite Parlamentario, 168 (20/11/2008).

participant. This may involve physical protection, relocation, measures of disguising identity and ownership, change of identity and pathways, i.e. self-supporting protection measures. In addition, the programme operators will have a duty to ensure that the witness testimony is not affected or tainted by involvement in the programme. In cases of international relocation, information on the witness must be available to the accepting State for necessary assessment, which will be subject to international and/or national laws and policies. Moreover, a witness protection programme should ensure the protection of the confidentiality of the programme and its integrity.

50. Participants in a witness protection programme are likely to have witnessed horrific events and can suffer trauma as a result. Programmes should be designed to deliver medical, psychological and community support to the participants until they are capable of finding their own way. In cases of relocation, starting a new life in a new location may bring with it a range of legal challenges. This highlights the need for access to legal support for participants. Emergencies do arise despite best planning. Thus, arrangements for emergency response are essential. Arrangements for data protection must also form part of the structure of the programme. It is important to develop criteria for eligibility to participate. These criteria, while flexible, must also be objective and transparent to assist in the process of determining who is eligible for the programme.

51. As stated above, the efficient management of programmes to protect at-risk witnesses requires dedicated witness units to negotiate mutual cooperation agreements, secure attendance of witnesses, provide psychosocial support, and to facilitate other measures for witness protection. Witness protection programmes should also be able to act independently from courts. The prevailing wisdom is that such authority must be disconnected from individual prosecutors, investigators or defence counsel, in order to carry out their assessments in an objective way. Regarding the separation of the function of support for witnesses, the Council of Europe recommends that:

staff dealing with the implementation of protection measures should be afforded operational autonomy and should not be involved either in the investigation or in the preparation of the case where the witness/collaborator of justice is to give evidence. Therefore, these functions should be separated organizationally. However, an appropriate level of cooperation/contact with or between law-enforcement agencies should be ensured in order to successfully adopt and implement protection measures and programmes.¹¹

52. For the participant, a witness protection programme imposes a stringent regime that must be complied with. The regimes may involve severance from relatives, community, associates and all other aspects of former life; non-contact with any person, organization or institution known prior to entering the programme; loss of control over most aspects of life, in the initial stages at least; a strict contract setting out permissible behaviours; telephone calls and visits only when arranged by the programme on terms established by the programme; living where told by the programme; change of lifestyle; and selling off of assets, perhaps at “fire sale” prices. Failure to

¹¹ Council of Europe, Recommendation Rec(2005) 9 of the Committee of Ministers to member States on protection of witnesses and collaborators of justice, 20 April 2005.

comply with these conditions can result in warnings and expulsion from the programme. Participants can exit programmes voluntarily, but they are then totally responsible for their own security, and have to complete their obligations to testify. Criminal activity while in the programme can result in expulsion. All these measures should be applied in conformity with international human rights standards.

53. The experience of the Witness and Victims Section (WVS) of the Special Court for Sierra Leone showed that both the pre-testimony and the testimonial phases are crucial to developing confidence and a good relationship between the witnesses and the WVS staff. It also revealed the importance of providing clear and consistent instructions to witnesses on what they will receive, and of assisting witnesses in gaining familiarity with the courtroom and confidence about their testimony and during the testimony period, particularly when witnesses have to travel from their place of origin to the court. In those cases, best practices should recognize the impact that the testimony has on the witness's family, and must provide family members with financial support and communication between the witness and his/her family must be ensured throughout their stay in the court.¹²

54. The ultimate goal of a programme should be a safe and secure exit from it. The programme should have mechanisms that will inform the programme operators when a witness's obligations to testify have been exhausted and will provide periodic threat and risk assessments, not only to determine if the level of protection is adequate, but also when or if the threat no longer exists. These mechanisms should also be designed to determine when or if formal protection can be replaced by self-protection behaviours. Further, more pathways for participants' integration into communities should be designed to make them self-sufficient and able to exist unsupported once the level of risk has diminished to a level where self-protection only is necessary.

E. Relocation for witness protection

55. International relocation is the last resort of a witness protection programme. In such a case, international cooperation and formal agreements between the requesting State or organization and the proposed accepting State need to be concluded. This agreement should set out the obligations of both parties under the agreement, the procedures to be adopted, etc. The requirements of the requesting organization must be consistent with local laws in the host country. The assistance of local officials may also be necessary to address security, health assistance, emergencies and arrangements such as immigration.

56. Relocation of participants can be an extremely traumatic event. In *The Prosecutor v. German Katanga and Mathieu Chui*, the Appeal Chamber of the International Criminal Court emphasized that:

relocation is a serious measure ... that can have a "dramatic impact" and "serious effect" upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and resettling that person into a new environment. It

¹² Special Court for Sierra Leone, *Best-Practice Recommendations for the Protection & Support of Witnesses*, May 2008.

may well have long-term consequences for the individual who is relocated - including potentially placing an individual at increased risk with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that relocation should be only provisional. Where relocation occurs, it is likely to involve careful and possibly long-term planning for the safety and well-being of the witness concerned.¹³

57. The ultimate goals of the relocation programme are best achieved when the witness is effectively resettled and integrated into a new community. Ideally, the programme design will ensure that the integration process starts as early as possible. In this respect, the possible requirements are economic support, retraining, language training, entry into the workforce and social support that will assist in establishing new networks of friends and acquaintances.

58. Change of identity or measures of disguising identity and ownership might be a necessary measure to protect the individuals once they are relocated. If relocation is necessary to ensure the safety of a witness, then it is more than likely that a total change of identity will also be necessary to prevent the new location of the witness being traced. However, the implementation of these measures must start simultaneously with the relocation; otherwise the trail of records left behind may lead to tracing the witness.

59. Another challenging issue is the relocation of witnesses “with blood on their hands” or “dirty witnesses”. The legislation of many countries prevents them from giving sanctuary to individuals who have committed acts that can be characterized as war crimes, or requires these individuals to be brought to justice.

F. Special protection measures for child witnesses, rape victims and others

60. Child witnesses and victims of gender-based crimes require especially sensitive treatment due to the particular trauma and alienation that they may have suffered.¹⁴ Child victims of or a witness to a sexual assault may receive such special treatment and care before, during and after the trial (see E/CN.4/Sub.2/2004/11). In 2005, the Economic and Social Council further adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, and invited States to draw, where appropriate, on the Guidelines in the development of legislation, procedures, policies and practices for children who are victims of crime or witnesses in criminal proceedings.¹⁵

61. The Special Rapporteur on violence against women, its causes and consequences encouraged national institutions to ensure that the specific needs of victims of rape and other forms of sexual violence are fully addressed, including specific provisions for a victim and

¹³ ICC-01/04-01/07 OA7, 26 November 2008, para. 66.

¹⁴ See Guidelines for Action on Children in the Criminal Justice System, Economic and Social Council resolution 1997/30, annex.

¹⁵ Resolution 2005/20.

witness unit with necessary expertise in trauma related to sexual violence (see E/CN.4/2002/83/Add.2 and E/CN.4/2005/72/Add.3). The Special Rapporteur on trafficking in persons, especially women and children, urged States to put in place national mechanisms that will help to identify victims and provide protection and assistance to them, ensuring that “the practice of assistance to victims tied to their cooperation as a witness in the prosecution of traffickers does not undermine the safety and rights of victims” (A/HRC/10/16, para. 39). In this regard, a trial chamber of the International Criminal Court observed that there are particular needs to be taken into account for child and elderly victims, victims with disabilities, and victims of sexual and gender violence when they are participating in the proceedings.¹⁶

G. Witness protection in conflict and post-conflict situations

62. In principle, the responsibility for the protection of witnesses lies with the officials of the State where the witness resides. This does not work in war-torn countries when criminal justice systems break down or are unable to respond. Official agencies entrusted with justice issues may function improperly or not at all, leaving the threatened witness isolated and the investigator with few options to provide for witness security. In such situations, the relocation of witnesses may be required as the last resort of protection.

63. Although witness protection programmes are in place in some countries, only a handful have entered into placement agreements with international courts or institutions. Some countries have opted for placing people within their refugee relocation arrangements, or funding the relocation of a witness to a third country, without taking on the actual relocation within their own witness protection programmes. ICTR reported difficulties securing cooperation from States in this regard and, as of 2002, was not able to conclude any agreements with States, having recourse instead to ad hoc arrangements. In many cases in which international relocation was warranted, ICTR obtained the assistance of the United Nations High Commissioner for Refugees.

64. Inter-State cooperation and assistance are normally based on the principle of reciprocity. Countries that are willing to accept relocated witnesses from other countries expect to have their own vulnerable witnesses accepted in other countries. Various countries with witness protection programmes contemplate such a possibility. For instance, the Witness Protection Act of Canada allows the Solicitor General to enter into reciprocal agreements with foreign Governments to admit foreign nationals into the witness protection programme.¹⁷

IV. CONCLUSIONS

65. The issues of archives of human rights violations and the issue of witness protection are complementary. With regard to archives, it should be noted that access to records is the

¹⁶ Document No. ICC-01/04-01/06-1119, decision of 18 January 2008, para. 127.

¹⁷ Witness Protection Act of Canada, Chapter 15, subsection 14 (2).

key to combating impunity, to vetting officials, to discovering truth, and to providing reparations. Archivists can advise policymakers on the importance and characteristics of good access laws.

66. The records of a transitional justice institution must be managed while the institution is active and secured in an archive when the institution completes its work. The records of a truth commission, with a few exceptions, are national records of the Government, as are records of vetting panels and reparation bodies; they need to be preserved in national archives. Records of temporary courts are either governmental or United Nations property and need to be preserved in the respective archives.

67. With regard to witness protection, the overarching objective is also to combat impunity. In this regard, there is a need to develop common standards and promote best practices that would serve as guidelines to States in protecting witnesses and others concerned with providing cooperation in trials for gross human rights violations.

68. At the same time, while the international tribunals have made strong efforts to design human rights-based witness protection programmes, there is a need to strengthen the effective provision by the international community of financial, technical and political support necessary to develop programmes at the national level. This requires relevant human rights bodies to encourage, facilitate and support States in developing independent, trustworthy and strong witness protection mechanisms at national level.

69. A system of witness protection programme may be considered which, though independent from State mechanisms, would be universally trusted. Such a system could be funded by the State, but not closely controlled by the machinery of State organs. In particular, witness protection mechanisms in such circumstances should not be associated with State agencies such as the police, security agencies and the military. In many cases, these agencies had political and ideological allegiances to the accused implicated in the proceedings, and the capacity to influence the prosecution.

70. Witness protection programmes should also be designed to protect individuals who are cooperating with other accountability mechanisms, include those of a quasi- and non-judicial nature, such as human rights commissions and truth and reconciliation commissions.

71. In recent years, international and regional intergovernmental organizations, such as the United Nations Office on Drugs and Crime, the Council of Europe, the European Police Office-Europol and the European Commission, have carried out significant work in the area of inter-State agreements on relocation of witnesses involved in transnational organized crimes. Similarly, in order to strengthen international cooperation in witness protection in human rights trials, States with established witness protection programmes should be encouraged to formalize agreements between them, and set a framework for the relocation of witnesses to their territories, if required.

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