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The Federal Witness Protection Program Revisited and Compared: Reshaping an Old Weapon to Meet New Challenges in the Global Crime Fighting Effort

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THE FEDERAL WITNESS PROTECTION PROGRAM REVISITED AND
COMPARED: RESHAPING AN OLD WEAPON TO MEET NEW CHALLENGES IN
THE GLOBAL CRIME FIGHTING EFFORT

*Raneta Lawson Mack**

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See, the hardest thing for me was leaving the life. I still love the life. And we were treated like movie stars with muscle. We had it all, just for the asking. We ran everything. We paid off cops. We paid off lawyers. We paid off judges. Everybody had their hands out. Everything was for the taking. And now it's all over. And that's the hardest part. Today, everything is different. There's no action. I have to wait around like everyone else. Can't even get decent food. Right after I got here, I ordered some spaghetti with marinara sauce and I got egg noodles and ketchup. I'm an average nobody. I get to live the rest of my life like a schnook.

- Henry Hill, as portrayed by Ray Liotta in the movie
“Goodfellas” (WARNER BROS.1990)¹

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I. INTRODUCTION

In May 2013, the Department of Justice (DOJ), Office of the Inspector General (OIG) issued an Audit Report on the handling of known or suspected terrorists in the Federal Witness Security Program.² In the *Public Summary* of the Audit Report ("Audit Report"), the OIG disclosed a number of troubling concerns with the Witness Protection Program ("WPP"), particularly concerning national security.³ The Audit Report cautioned that the identified deficiencies "required immediate remedy" and should be "promptly and sufficiently addressed" by the DOJ leadership.⁴ While acknowledging the WPP remains a critical prosecutorial tool in the fight against global terrorism, the Audit Report concluded that permitting known or suspected terrorists to enter the program created and/or exacerbated national security vulnerabilities.⁵ For example, after admitting known

¹ GOODFELLAS (Warner Bros. 1990) (based, in part, upon the real life of mobster, Henry Hill, Jr. Hill was associated with the Lucchese crime family for 25 years until he turned FBI informant and joined the Federal Witness Protection program. He was later expelled from the program after committing numerous crimes. Dennis McLellan, *Henry Hill Dies; Mob Informant was Subject of Goodfellas*, L.A. Times, June 14, 2012, <http://www.latimes.com/news/obituaries/la-me-henry-hill-20120614,0,5859205.story>. Hill's comments epitomize the profound psychological impact of transitioning from a life of crime to the relative obscurity required by daily life in the witness protection program.).

² Audits of the Witness Protection Program are released in summary fashion "due to statutory restrictions and concerns about national security and the safety of Program participants...." The Federal Witness Security Program or WITSEC is the official name of what has become commonly known as the Witness Protection Program or WPP. U.S. Dept. of Justice, Office of the Inspector General, Audit Division, Rep. 13-23, 1 *Interim Report on the Department of Justice's Handling of Known or Suspected Terrorists Admitted into the Federal Witness Security Program, Public Summary* (2013), available at <http://www.justice.gov/oig/reports/2013/a1323.pdf>.

³ Although originally established in 1971 as a means to protect organized crime informants, over the past 40 years, the WPP has evolved to include informants who provide evidence on other serious offenses such as drug trafficking, gang activity and terrorism. *Id.* at 2.

⁴ *Id.* at 1.

⁵ The Audit Report explained that known or suspected terrorists are admitted into the WPP because they have "cooperated in major terrorism investigations and prosecutions that ... [are] integral to [the Department's] primary counterterrorism mission, including the 1993 World Trade Center bombing, the East Africa Embassy bombings, the "Blind Sheik" prosecutions, the Alfred P. Murrah Federal Building attack in Oklahoma City,

or suspected terrorists into the WPP, the DOJ on several occasions failed to report the new government provided identities of the protected witnesses to the Terrorist Screening Center so as to facilitate continued monitoring of their activities, particularly any efforts to fly on commercial aircraft.⁶ In addition to this critical lapse in information sharing, the Audit Report revealed that “[i]n July 2012, the United States Marshals Service (USMS) was unable to locate two former [WPP] participants identified as known or suspected terrorists, and that through its investigative efforts it has concluded that one individual was [outside of the United States] and the other individual was *believed to be* residing outside of the United States.”⁷ The inconsistent tracking methods also resulted in the DOJ being unable to definitively account for how many known or suspected terrorists were actually in the WPP.⁸

Despite these procedural deficiencies and the potential compromise of national security interests, Armando Bonilla, a Senior Counsel in the Office of the Deputy Attorney General “defended the use of the program for terrorism cases, saying that it had been key in securing cooperation from witnesses necessary for successful prosecutions, that no ‘terrorism-linked witness ever has committed a single act of terrorism after entering the program’ and that an F.B.I. review of

the New York City subway suicide-bomb plot, and the plot to bomb John F. Kennedy International Airport.” As a direct result of this cooperation, known or suspected terrorists face the same possibility of retaliation for testifying as government witnesses as other non-terrorist witnesses. *Id.* at 2–3.

⁶ The Terrorist Screening Center (managed by the FBI) is a “one-stop shopping” agency database containing the names of those known or reasonably suspected of being involved in terrorist activity. See <http://www.fbi.gov/about-us/nsb/tsc>. It is possible that even with new identities, known or suspected terrorists in the WPP would have been prohibited from flying or subjected to lengthier screening procedures before boarding an aircraft. Thus, cooperation with the government and acceptance into the WPP does not serve to completely remove the suspicion of terrorist activity. *Id.* at 3.

⁷ The two missing witnesses were tracked and both were determined to be living outside of the United States (apparently having voluntarily left the WPP). However, “it was not clear when or for how long the Marshals Service lost track of them.” Jake Tappen, *U.S. Lost Track of Two with Known or Suspected Terrorist Ties*, CNN, May 16, 2013. <http://www.cnn.com/2013/05/16/politics/witness-protection-missing/index.html>. *Id.* at 4 (emphasis added).

⁸ Audit Report, *supra* note 2, at 4.

participants revealed none who posed a threat to national security.”⁹ In addition, the DOJ’s response to the Audit Report (attached as Appendix 1 to the Audit Report) explained that corrective action on many of the deficiencies has already been implemented. These actions included enhanced information sharing and “formal protocols that provide for greater oversight of the evaluation and screening of [WPP] applications, as well as for enhanced monitoring of known or suspected terrorists admitted to the program.”¹⁰

The Audit Report provides a glimpse into the evolution of the modern day WPP, which now includes more known or suspected terrorist witnesses “as the government has devoted more resources to the prosecution of terrorism cases....”¹¹ More than 20 years ago, I published a law review article addressing a variety of issues and concerns with the WPP.¹² In that article, I discussed the origins of the WPP¹³ and the implementation difficulties that emerged from its initial lack of structure (e.g., problems with child custody arrangements,¹⁴ harm to innocent third parties¹⁵ and debt collection issues¹⁶). The

⁹ Charlie Savage, *Justice Dept. Lost Track of Terrorists, Report Says*, N.Y. Times, May 17, 2013, p. A12.

¹⁰ Audit Report, *supra* note 2, at 13.

¹¹ *Id.* at 10.

¹² Raneta J. Lawson, *Lying, Cheating and Stealing at Government Expense: Striking a Balance between the Public Interest and the Interests of the Public in the Witness Protection Program*, 24 Ariz. St. L.J. 1429 (1992).

¹³ The WPP was developed as a result of the Justice Department’s overriding interest in dismantling organized crime by securing critical testimony from those inside the organizational structure. “The prospect of obtaining more convictions through the WPP seemed a logical way to undermine the Mafia even though [RICO], which allowed divestiture of assets, compelled production of records, and [provided] injunctive relief, has a far greater potential to affect organized crime. *Id.* at footnote 21 (quoting Fred Graham, *The Alias Program* 47 (1977)). *Id.* at 1433–35.

¹⁴ The main issue that would eventually be addressed by case law and legislative reform concerned “whether severing the relationship between the non-relocated parent and his or her children upon relocation [violated] any rights of that non-relocated parent.” *Id.* at 1438–42.

¹⁵ “Because of the program’s relatively rapid expansion and the lax acceptance policies, more relocated witnesses were infiltrated across many areas of the country, thus increasing the likelihood that ... relocated witnesses, some of whom [had] ‘disgustingly lengthy’ criminal records, would reestablish themselves in their previous ‘occupations’ ... often to the detriment of innocent third parties.” *Id.* at 1442–45.

article also analyzed the WPP's legislative evolution designed to resolve its structural and procedural challenges,¹⁷ and offered some recommendations to address lingering concerns with the program.¹⁸ The primary focus of that article, as the title suggests, was evaluating whether the WPP program struck an appropriate balance between protecting witnesses from retaliatory harm and protecting the public from the potential harm threatened by relocating criminals. The article concluded that while statutory reform demonstrated measurable progress toward a balanced approach to witness protection and public safety, more time was necessary to determine the impact of the new legislation.

It has now been more than twenty years since the publication of that article and nearly 30 years since the WPP Reform Act of 1984 was enacted. As discussed earlier, during that time the government has shifted its prosecutorial focus and resources to the fight against global terrorism. At the same time, other countries and international tribunals, using the WPP as a model, have developed their own versions of witness protection programs. Given these circumstances, the topic now seems ripe for a review of the current status of the WPP in the US on its own merit and as compared to other programs around the world. The goal of this article is not to revisit the same analytical territory as the first article (although some review will be necessary), but to update and expand upon that initial research. One major question to be considered in this article is whether the current iteration of the WPP in the United States is sustainable given ever-increasing levels and varieties of criminality on national and international levels.

¹⁶ “Although the government attempted to maintain a tight harness on the amount of debt created and/or evaded by relocated witnesses, the government acknowledged early on that the unpaid debt syndrome [was] their greatest problem and conceded that they [had] been unable to solve it. *Id.* at 1445–46 (*quoting* Fred Graham, *The Alias Program* 122 (1977)).

¹⁷ *Id.* at 1449–54; *see* 18 U.S.C. §§ 3521–3528.

¹⁸ One recommendation proposed establishing relocation and protection agreements with witnesses that would provide lump sum payments from the government. Witnesses would then be released from government responsibility and required to make their own protection arrangements. Other alternatives proposed reestablishing safe house facilities throughout the country and further limiting the government's discretion through stricter standards for the selection of witnesses entering the program. *Id.* at 1455–58.

That is, while the United States was first to formalize the notion of a government protecting witnesses who provide valuable testimony in the crime fighting effort, has the WPP in the United States kept pace with the changing dynamics in global crime? Now that a number of other countries and international tribunals have adopted formal or informal witness protection programs modeled after the US program (but incorporating components unique to their own law enforcement missions), does the US model still represent the WPP paradigm? Or, can the collective global experience with WPPs be synthesized into a set of "best practices" that might help to inform and possibly further reshape the WPP in the United States?

To analyze these questions, Part I of this article begins with a brief historical overview of the WPP's origins and its early implementation process. Part II explores the changes to the WPP that resulted from the Reform Act of 1984 and discusses continuing challenges to the WPP as documented by periodic audits of the program. Part III provides a comparative perspective, examining other countries' and international tribunals' approaches to protecting witnesses who provide testimony in criminal cases to determine if a consistent set of best practice standards has evolved from the various implementations of WPPs. Finally, the conclusion considers whether the WPP in the United States is adapting to the changing landscape of criminality and whether standards and practices from the global experience with WPPs might provide further guidance to the United States as it confronts the challenges and threats presented by global terrorism.

II. A BRIEF HISTORICAL OVERVIEW

"The Witness Protection Program, under the auspices of Title V of the Organized Crime Control Act of 1970, was originally formulated to insure witness testimony in organized crime proceedings and provide for the health, safety and welfare of witnesses and their families both during and after those proceedings."¹⁹ In an effort to gain

¹⁹ The duty to protect those who come forward with information about criminal conduct is rooted in the establishment of a national government charged with the responsibility to protect the rights of its citizens and to protect them from violence should they choose to assist the government's prosecutorial efforts. *In re Quarles and Butler*, 158 U.S. 532, 536 (1895) (explaining that the right of a citizen informing of a violation of the law to be protected against lawless violence arises out of the nature and

a prosecutorial toehold into the world of organized crime, the government established a program to relocate and change the identities of persons who could provide testimony in criminal cases against members of organized crime families.²⁰ According to Gerald Shur, who founded the WPP in the 1960s, “we had to find a way to make a mid-level gangster vulnerable, and then we had to offer him a way out. That’s what I explained in my memo. But there was another piece to the puzzle. We had to be able to offer a gangster protection. We had to prove we could keep a mobster alive if he testified for us. We had to create some kind of protection program. But how?”²¹

Eventually, Shur settled on a solution: protection through anonymity because “[t]he best way to keep a witness safe was by moving him away from the danger area, moving him to a place where no one knew who he was ... then ... [giving him] a new identity so [he] couldn’t be followed.”²² Shur’s solution was ultimately adopted by the President’s Commission on Law Enforcement and the Administration of Justice. The Commission recommended the federal government “should establish residential facilities for the protection of witnesses desiring such assistance.... After trial, the witness should be permitted to remain at the facility so long as he needs to be protected. The federal government also should establish regular procedures to help federal and local witnesses who fear organized crime reprisal to find jobs and places to live in other parts of the country, and to preserve their anonymity from organized crime groups.”²³

Because the initial implementation of the WPP lacked specific procedural guidelines, “the scope of the protection obligation was simply resolved on a case-by-case basis.”²⁴ Most witnesses were provi-

essential character of the national government and is secured by the Constitution). Lawson, *supra* note 12, at 1429–30.

²⁰ The threat of retaliation for breaking “omerta” (the Mafia’s code of silence) was believed to be so severe that witnesses and their family members would not be safe in the aftermath of such damning testimony. Lawson, *supra* note 12 at 1429–30.

²¹ PETE EARLEY & GERALD SHUR, WITSEC: INSIDE THE FEDERAL WITNESS PROTECTION PROGRAM 33 (2002).

²² *Id.* at 69.

²³ *Id.* at 71.

²⁴ LAWSON, *supra* note 12, at 1436. Indeed, the original WPP had but two simple rules: witnesses had to undergo a legal name change and they had to keep their new identities

ded with changed identities, new locations, subsistence payments and assistance with obtaining employment. However, despite the government's best efforts, during these early days, stories abounded of witnesses returning to their criminal ways after entering the WPP, which brought home the stark realization that "[s]omeone innocent was going to get hurt someday because of these witnesses."²⁵

Over time, the courts further outlined the government's duty of protection by concluding that the Attorney General has "wide latitude in determining the participants in the WPP" and that there is no notice or hearing requirement before or after termination because witnesses are not deprived of any liberty or property interest envisioned by the Due Process Clause.²⁶ While the case law "solidified the government's complete control and discretion with respect to the [WPP]," it did not clarify the government's obligations to non-relocated parents, debt collectors and others who suffered harm at the hands of relocated witnesses.²⁷ The Witness Security Reform Act of 1984 ("Reform Act") was enacted, in part, to address those serious and persistent substantive issues. With this statutory imprimatur, the Attorney General now had the legal authority to "provide for the care and protection of witnesses in whatever manner [was] deemed most useful under the special circumstances of each case" and to reduce the likelihood of harm to innocent third parties as it carried out that mission.²⁸

III. THE WITNESS SECURITY REFORM ACT OF 1984 – 18 U.S.C. §§ 3521–28

The first major statutory overhaul to the WPP occurred in 1984 with the enactment of 18 U.S.C. §§ 3521–28. "In response to the major criticisms of the WPP, the Reform Act established an overall basic structure for the [WPP] while simultaneously allowing the Attorney General broader discretion in some significant areas."²⁹ Among other

and locations secret from relatives and friends from the past. EARLEY, *supra* note 21, at 77.

²⁵ EARLEY, *supra* note 21, at 114.

²⁶ *Garcia v. United States*, 666 F. 2d 960 (5th Cir. 1982), *cert. denied*, 459 U.S. 832 (1982).

²⁷ LAWSON, *supra* note 12, at 1438.

²⁸ EARLEY, *supra* note 21, at 92.

²⁹ LAWSON, *supra* note 12, at 1449.

things, these statutes set forth the Attorney General's discretionary authority to provide for the relocation and protection of witnesses if a crime of violence is likely to be committed against the witness and/or his family as a result of the witness' testimony.³⁰ To further emphasize the breadth of the government's discretion, the statute expressly releases the Attorney General from civil liability for "any decision to provide or not to provide protection [to witnesses]"³¹ and authorizes the Attorney General to take actions to protect and relocate witnesses for as long as "in the judgment of the Attorney General, the danger to that person exists."³²

Subsection (c) of 18 U.S.C. § 3521 requires the Attorney General to perform a suitability analysis on any potential witnesses, which may include an assessment of the criminal history of the witness and a requirement that the witness undergo psychological evaluation.³³ Overall, the Attorney General shall consider:

[T]he person's criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for protecting the person, the relative importance of the person's testimony, results of psychological examinations, whether providing such protection will substantially infringe upon the relationship between a child who would be relocated in connection with such protection and that child's parent who would not be so relocated, and such other factors as the Attorney General considers appropriate.³⁴

³⁰ The Witness Security Reform Act of 1984, 18 U.S.C. § 3521(a). Family members or other persons closely associated with the witness may also be relocated and protected.

³¹ *Id.* § 3521(a)(3).

³² *Id.* § 3521(b)(1).

³³ *Id.* § 3521(c). The psychological evaluation is performed on any witness and all adult members of the witness' household who will be protected; To the extent possible, the testing is designed to "determine if the individuals may present a danger to their relocation communities." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-21.330 (1997).

³⁴ 18 U.S.C. § 3521(c). The Attorney General is not permitted to provide protection to any witness when the need for that witness' testimony is outweighed by the risk of danger to the public. *Id.* § 3521(c).

The statute also requires that a memorandum of understanding ("MOU") shall be executed between the government and protected witnesses.³⁵ The terms of the MOU are extensive and mandate, among other things, that witnesses provide testimony, refrain from criminal conduct, take steps to maintain their security, and comply with all legal obligations, including those associated with civil judgments and child custody and visitation.³⁶ Like most other aspects of the WPP, termination from the program is at the discretion of the Attorney General and such proceedings may be instituted if there is a substantial breach of the provisions of the MOU, including submitting false statements related to child custody and visitation.³⁷ Witnesses subject to termination are entitled to receive notice and the reasons for termination; however the decision to terminate will not be subject to judicial review.³⁸

Probationers and parolees may also be placed in the WPP.³⁹ They must execute an MOU before entering the program, and, while in the WPP, they are subject to supervision by the United States Parole Commission.⁴⁰ Probationers and parolees must comply with all the requirements of the MOU and they remain obligated to pay any monetary fines or damages owed to their victims.⁴¹ A violation of the MOU can result in termination from the WPP as well as revocation of probation or parole status.⁴²

To address longstanding concerns with the avoidance of debt obligations by protected witnesses, the statute includes a special section on civil judgments.⁴³ If a civil judgment is entered against a protected witness, she must make reasonable efforts to comply with

³⁵ *Id.* § 3521(d). A separate MOU must be executed by each person being protected is eighteen years of age or older. *Id.* § 3521(d)(2).

³⁶ The Witness Security Reform Act of 1984, 18 U.S.C. § 3521(d)(1). The MOU also sets forth the protection that the Attorney has determined is necessary for the witness and his family as well as procedures to be implemented for resolving grievances regarding the administration of the program. *Id.* § 3521(d)(1).

³⁷ *Id.* § 3521(f).

³⁸ *Id.* § 3521(f).

³⁹ 18 U.S.C. § 3522 (1984).

⁴⁰ *Id.* § 3522(c).

⁴¹ *Id.* § 3522(d).

⁴² *Id.* § 3522(b).

⁴³ 18 U.S.C. § 3523 (1984).

the judgment. If the Attorney General determines that such efforts are not being made, then “after considering the danger to the person and upon the request of the person holding the judgment [the Attorney General may] disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment.”⁴⁴ Such disclosure is only for purposes of allowing the plaintiff to collect on the judgment and further disclosure not associated with this purpose is prohibited.⁴⁵

If the Attorney General declines a request to disclose the identity of the protected witness to a person holding a valid judgment against her, then, upon petition to the court, a guardian may be appointed to act in the interests of the judgment holder.⁴⁶ “Upon appointment, the guardian shall have the power to perform any act with respect to the judgment which the [judgment holder] could perform, including the initiation of judicial enforcement actions in any Federal or State court or the assignment of such enforcement actions to a third party under applicable Federal or State law.”⁴⁷ Finally, no officer or employee of the DOJ can in any way impede the efforts of the guardian to enforce the judgment.⁴⁸

Child custody and visitation arrangements are also provided for in the statute. The primary focus of these provisions is protecting the security of relocated witnesses while also maintaining the best interests of children of relocated parents. For example, to highlight the seriousness of maintaining family relationships, if it is determined that a potential witness would not be able to comply with a custody or visitation order while under protection, then the Attorney General may decline to offer protection unless the witness seeks to modify the

⁴⁴ *Id.* § 3523(a).

⁴⁵ *Id.* § 3523(a). This section further provides that “[a]ny such disclosure or nondisclosure by the Attorney General shall not subject the United States and its officers or employees to any civil liability.” *Id.* § 3523(a).

⁴⁶ *Id.* § 3523(b)(3). “The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties....” *Id.* § 3523(b)(3)(B).

⁴⁷ *Id.* § 3523(b)(5). Further, “[a]ny good faith disclosure made by the guardian in the performance of his or her duties under this subsection shall not create any civil liability against the United States or any of its officers or employees.” *Id.* § 3523(b)(5).

⁴⁸ 18 U.S.C. § 3523(b)(7) (1984).

current custody or visitation order.⁴⁹ Upon relocation, the non-relocated parent is notified that his rights “to visitation or custody, or both, under the court order shall not be infringed by the relocation of the child and the Department of Justice responsibility with respect thereto.”⁵⁰ If the protected person violates any custody or visitation order, then the non-relocated parent may bring an action against the protected witness/parent. If the court finds that there is a violation, then the protected witness may be held in contempt and given a maximum of sixty days, in the discretion of the Attorney General, to comply with the court order.⁵¹ A failure to comply may result in the witness’ identity and location being revealed to the other parent, as well as termination of any financial assistance provided by the WPP.⁵²

Finally, to address the potential harm to innocent third parties, the statute establishes a victims compensation fund, which allows the Attorney General to “pay restitution to, or in the case of death, compensation for the death of any victim of a crime that causes or threatens death or serious bodily injury and that is committed by any person during a period in which that person is provided protection under [the WPP].”⁵³

⁴⁹ 18 U.S.C. § 3524(b) (2012).

⁵⁰ *Id.* § 3524(c)(the statute explains the Justice Department’s responsibility as follows: “[t]he Department of Justice will pay all reasonable costs of transportation and security incurred in insuring that visitation can occur at a secure location as designated by the United States Marshals Service, but in no event shall it be obligated to pay such costs for visitation in excess of thirty days a year, or twelve in number a year. Additional visitation may be paid for, in the discretion of the Attorney General, by the Department of Justice in extraordinary circumstances. In the event that the unrelocated parent pays visitation costs, the Department of Justice may, in the discretion of the Attorney General, extend security arrangements associated with such visitation.”).

⁵¹ *Id.* § 3524(d)(5).

⁵² *Id.*

⁵³ *Id.* § 3525(a). Payments from the fund are limited to a maximum of \$50,000 in case of the death of the victim. Additionally, “[n]o payment may be made ... to a victim unless the victim has sought restitution and compensation provided under Federal or State law or by civil action. Such payments may be made only to the extent the victim, or the victim’s estate, has not otherwise received restitution and compensation, including insurance payments, for the crime involved.” *Id.* § 3525(d).

A. Audits of the Witness Protection Program

As discussed earlier, a recent audit of the WPP revealed difficulties with the handling of known or suspected terrorists in the program.⁵⁴ Since the statutory overhaul in 1984, the Department of Justice, Office of the Inspector General (OIG) has periodically audited the WPP to determine whether the program is accomplishing the specific objectives established by the reform legislation. For example, in 2003, the OIG audited the United States Marshals Service (USMS), “one of three Department of Justice components that have prominent roles in the [WPP].”⁵⁵ Because the USMS has primary “hands on” responsibility for relocating, changing identities and protecting witnesses, the audit focused specifically on those criteria. More precisely, the objectives of the audit were to examine: “1) USMS plans and strategies to achieve the [WPP’s] stated security objectives; 2) controls for witness safety; and 3) internal controls for financial activities, including payments to protected witnesses and their families.”⁵⁶ During the ten-year period between 1993–2003, the OIG discovered only one significant security breach by the USMS, which involved the inadvertent relocation of two protected witnesses to the same city. The witnesses later encountered and recognized each other necessitating another relocation for one of the witnesses.⁵⁷

The report also identified concerns with the WPP staffing levels, observing that “[b]etween FY 1995 and FY 2003, [WPP] operations positions declined from 175 to 135, and administrative positions

⁵⁴ See *supra* notes 2–8 and accompanying text.

⁵⁵ U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., EXECUTIVE SUMMARY, UNITED STATES MARSHALS SERVICE ADMINISTRATION OF THE WITNESS SECURITY PROGRAM i (2003) <http://www.justice.gov/oig/reports/USMS/a05usms/final.pdf> [hereinafter “USMS Audit”]. The entire report is 139 pages. However, because it contains confidential information related to participants in the WPP, only an Executive Summary is released to the public. The other two departments that have responsibility for helping to administer the WPP are the Criminal Division’s Office of Enforcement Operation (OEO), which authorizes admission into the WPP, and the Federal Bureau of Prisons (BOP), which maintains custody of incarcerated protected witnesses.

⁵⁶ *Id.*

⁵⁷ *Id.* at ii. The USMS Audit noted that the error could have been prevented by a more thorough review of the backgrounds of the two individuals.

declined from 49 to 38, but the witness population increased from 15,229 to 17,108.”⁵⁸

The timeliness of the USMS’ preliminary reviews of witness suitability for the program was also deemed a critical issue.⁵⁹ The USMS is responsible for the initial evaluation of witnesses for the WPP, which includes explaining the parameters of the program to prospective witnesses and collecting information about those individuals.⁶⁰ Once the information is collected, “the USMS formulates a recommendation, positive or negative, regarding the admission of the candidate to the [WPP] and forwards the recommendation to the Criminal Division OEO.”⁶¹ Typically, when initial requests are made to admit witnesses to the program, the USMS evaluation must be done in a timely fashion so as to prevent any harm that might occur to the witnesses and/or their families during the time between the initial request and admission into the program. The audit found that the USMS took nearly twice the prescribed time to complete the interviews.⁶² Among other things, such delays presented problems for incarcerated witnesses who had been released from prison because “[t]he BOP cannot maintain custody of inmates past their release date and the USMS cannot take released prisoners under protection until OEO grants its approval.”⁶³ These released prisoners were therefore in an administrative “twilight zone,” which could have resulted in harm to them or their families.

The USMS Audit also noted that local WPP inspectors who work closely with witnesses and their families to facilitate their post-relocation assimilation were not necessarily trained in employment counseling. The audit report speculated that the lack of training in such a critical area could lead to delays in witnesses finding suitable

⁵⁸ *Id.* at ii–iii. The OIG Report concluded that “if the staffing level does not keep pace with the workload, the quality of services provided to program participants could decline unacceptably.” *Id.* at iii.

⁵⁹ USMS Audit, *supra* note 55, at iii–iv.

⁶⁰ *Id.* at iii.

⁶¹ *Id.*

⁶² *Id.* at iv. However, the audit did not find “evidence of actual harm resulting from failure to complete preliminary interviews in a timely manner.” *Id.*

⁶³ *Id.* Of course, OEO approval is based upon the USMS’ preliminary review and recommendation.

employment, which, in turn, could result in witnesses remaining on subsistence funding longer than necessary.⁶⁴

A separate October 2008 audit assessed the Federal Bureau of Prisons (BOP) and its discharge of its responsibilities under the WPP.⁶⁵ The audit examined the “physical safety and security of [WPP] inmates, the general security environment within BOP facilities housing [WPP] inmates, and other BOP systems and processes relating to the program for incarcerated witnesses.”⁶⁶ Overall, the audit determined that the BOP was “providing a secure environment for [WPP] inmates” but also noted that other inmates who were possible threats to WPP inmates were not being properly recorded in the system.⁶⁷ Such poor recordkeeping could have resulted in WPP inmates being housed with or near other prisoners who could harm them.

After a thorough review of the services provided by the BOP, the audit made eighteen recommendations to improve safety and security for WPP inmates. Among the recommendations were a requirement that BOP staff handling WPP inmates sign secrecy agreements and the development of a “method to accumulate and analyze data or program activities, including newly designated [WPP] inmates, terminated [WPP] inmates, reasons for termination, and [WPP] inmate injuries.”⁶⁸

⁶⁴ USMS Audit, *supra* note 55, at v. See also Earley & Shur, *supra* note 21, at 88 (at the WPP’s inception, founder Gerald Shur described finding employment for witnesses as the “biggest headache” because “many of them had never worked at legitimate jobs”). Assimilation problems were also identified with respect to foreign born witnesses who required immigration documents before they could engage in certain activities. The report recommended the establishment of an MOU between the USMS and Immigration and Customs Enforcement (ICE) to establish “a procedure that ensures the timely provision of immigration related documents to foreign born protected witnesses and their dependents.” USMS Audit, *supra* note 55, at v.

⁶⁵ U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., AUDIT REPORT 09-01, THE FEDERAL BUREAU OF PRISONS’ WITNESS SECURITY PROGRAM, (Oct. 2008) <http://www.justice.gov/oig/reports/BOP/a0901/final.pdf>. (“The BOP’s role in WPP implementation arises when a witness is admitted to the program upon incarceration or while incarcerated in the BOP. The BOP’s primary responsibility is to provide for the safety of witnesses participating in the program during incarceration.”) *Id.* at i.

⁶⁶ *Id.* at ii.

⁶⁷ *Id.* at iii.

⁶⁸ *Id.* at v.

B. Evolution of the WPP and Further Recommendations for Change

To date, “[m]ore than 8,500 witnesses and 9,900 of their authorized family members have participated in the program since it began in 1971.”⁶⁹ While the focus was almost exclusively on organized crime during the early years, terrorism has now emerged as the next frontier for government crime fighting and prosecution. Just as with organized crime families, infiltrating terrorist organizations often requires recruiting those from within the organization to provide evidence against higher-ranking members in order to secure convictions and eventually dismantle the organization. There is a key difference, however, between members of organized crime families and members of terrorist organizations. Typically, in an organized crime family, there is a known hierarchical structure, loyalty is owed to the family, and criminality is largely focused on conduct designed to enhance the economic well-being of “the family” and to protect its turf. By contrast, terrorist organizations do not necessarily maintain hierarchical structures and the loyalty of individual members is often focused on dogmatic beliefs that, over time, become ingrained and inseparable from the individual. Therefore, separating the individual from the terrorist organization and offering him protection under the WPP may not necessarily remove that person’s impulse to engage in terrorist activity based upon a set of strongly held beliefs.

As a result of this disparity in the nature and character of organized crime and terrorism, and recognizing the unique characteristics of potential witnesses who might emerge from terrorist groups,

In May 2012, OEO, the USMS, the FBI, and the TSC, in consultation with the Department’s National Security Division and the National Joint Terrorism Task Force (NJTTF), finalized and simultaneously implemented formal protocols to provide for specialized handling for former known or suspected terrorists in the [WPP] Program. Recognized in

⁶⁹ U.S. MARSHALS SERV., OFFICE OF PUBLIC AFFAIRS, WITNESS SECURITY FACT SHEET 2013 <http://www.usmarshals.gov/duties/factsheets/witsec-2013.pdf> (according to the fact sheet, “no Witness Security Program participant following program guidelines has been harmed while under the active protection of the U.S. Marshals Service”). Of course, it is important to note the qualifying language of that statement.

the OIG Audit Report as a “significant milestone,” these protocols require the robust and real-time sharing of information between all national security stakeholders. Since that time, the FBI, the TSC, and the NJTTF have had complete access to the OEO and USMS files of each Program participant who is linked to a terrorism crime. Additionally, OEO and the USMS have disclosed to the FBI, the TSC, and the NJTTF the true and new identities and known aliases and other relevant information on *all* identified former known or suspected terrorists admitted into the [WPP] Program.⁷⁰

As the Audit Report makes clear, the recognition of terrorism as the new frontier for aggressive law enforcement efforts has prompted new protocols for the WPP. In turn, an influx of these new types of protected witnesses will likely engender more alterations to WPP standards as the program evolves yet again to meet the challenges of this new crime-fighting agenda. When the WPP was initially developed in the 1970s, there was no model or reference to rely upon in building the program. However, since its inception, other countries and international tribunals have used the WPP in the US as a model for implementing their own WPPs designed to assist crime-fighting efforts within their borders and jurisdictions. The next section will examine some of those WPPs to determine if there is a set of best practices or standards that can now be gleaned from the various global implementations of WPPs. If so, then these standards may now provide a model by which the WPP in the United States can further develop and reform the program to take on the unique demands of fighting global terrorism.

IV. A COMPARATIVE PERSPECTIVE

In December 2012, the United Kingdom Ministry of Justice announced the formation of a nationwide witness protection service “to improve coordination between police forces and safeguard those

⁷⁰ Audit Report, *supra* note 2, at 8 (emphasis in original).

who risk their lives giving evidence in court.”⁷¹ The new program, officially named the UK Protected Persons’ Service, is expected to be launched in December 2013, and is designed to “provide a more consistent and enhanced standard of help for witnesses who may need to be moved and given new identities.”⁷²

With the implementation of this new program, the UK joins a plethora of other countries and international tribunals in taking a formalized and coordinated approach to relocating and changing the identities of protected witnesses who provide critical testimony in criminal cases. The WPP in the United States was the first government program of its kind, specifically designed to relocate and change witness identities in order to protect their safety. Since 1970, many countries and international organizations have sought to design similar programs, often using many components of the WPP in the US as basic building blocks and adapting those elements to meet the unique needs of their criminal justice systems.⁷³ This section will focus on a variety of countries and international tribunals as a means to

⁷¹ Owen Bowcott, *UK-Wide Witness Protection Programme to be Launched in 2013*, THE GUARDIAN (Dec. 27, 2012), <http://www.theguardian.com/law/2012/dec/28/ukwide-witness-protection-programme-2013>. There are existing police witness protection programs in the UK, but those suffer from a lack of consistency in the level of services provided to witnesses and a failure to coordinate and share intelligence about witnesses among the various law enforcement agencies. As one alternative to witness protection, legislation in the UK allows witness testimony to be heard anonymously if witnesses fear being targeted as a result of their testimony.

⁷² *Id.*

⁷³ See, e.g., Piotr Bakowski, *Witness Protection Programmes, EU Experiences in the International Context*, Library Briefing, Library of the European Parliament 1 (January 28, 2013) <http://www.europarl.europa.eu/document/activities/cont/201301/20130129ATT59967/20130129ATT59967EN.pdf>. (“There is a growing number of WPPs in the EU Member States. Differences between them have been linked to the variety of legal traditions and experiences with organized crime.”). United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime*, 22–23, United Nations, New York (2008) <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>. [hereinafter “UNODC”] (stating that the growing trend toward reliance on WPPs by inquisitorial systems has almost certainly been driven by “[t]he growing tendency of inquisitorial legal systems to adopt elements once exclusive to adversarial systems – such as the greater value given to oral testimony and lesser weight to pretrial statements [which] has increased the importance of witnesses in criminal proceedings involving serious crimes and, accordingly, the obligation to preserve their evidence.”).

compare the myriad approaches to witness protection.⁷⁴ While there are numerous approaches to witness protection and security – ranging from psychological counseling, increased law enforcement presence, anonymous testimony and temporary protective custody – this comparative analysis will focus primarily on witness protection programs that are designed, at least in part, to permit and facilitate relocations and identity changes for protected witnesses.⁷⁵

The comparative analysis will examine four major features that are typically present in WPPs:

(A) *Qualifications for Witness Protection*. This section will compare the criteria used to measure whether witness protection will be extended to those providing testimony for the government, including an examination of the assessment and risk factors to be balanced and the types of offenses that are most likely to lead to relocating and changing the identities of protected witnesses;

(B) *The Decision Making Process*. This section will compare the allocation of responsibilities among individuals and organizations that administer WPPs. Those who supervise WPPs often dictate its priorities and effectiveness. Too much bureaucracy can produce delays and inefficiency, whereas too little oversight can result in a government program that supports dangerous criminals with little regard for the broader public interest;

(C) *Government Obligations and Witness Responsibilities While in the WPP*. This section will analyze the flow of obligations between the government and witnesses in various WPPs. Once in the program, establishing clear and consistent standards and expectations between

⁷⁴ With the increase in global crime and cross-border humanitarian laws, international tribunals such as the International Criminal Court have endeavored to provide protection for witnesses who may be endangered after providing testimony before the tribunal. However, because these tribunals “have neither their own protection force nor territorial jurisdiction to keep or relocate witnesses,” they have to rely upon governments to cooperate. So far, “[v]ery few countries have signed relevant agreements with these tribunals.” Bakowski, *supra* note 73, at 4.

⁷⁵ Indeed, the United Nations Office on Drugs and Crime has provided a formal definition for the type of WPP that features relocations and identity changes. According to UNODC, such a WPP is a “formally established covert programme subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.” UNODC, *supra* note 73, at 5.

the government and protected witnesses is essential to the crime-fighting effort, the long-term protection of witnesses and their families, and the prevention of harm to the public; and

(D) *Termination from the WPP*. This section compares termination procedures among WPPs. Termination from witness protection is often the result of a failure to abide by program requirements, which may have caused physical or financial harm to innocent persons. At the same time, removing the protective veil of the WPP may directly expose witnesses to the same threat of harm that initially led to placement in the WPP. While strict termination requirements are necessary, they must be balanced against the government's responsibility to protect those who risk their lives to assist in the government's crime fighting agenda.⁷⁶

A. *Qualifications for Witness Protection*

The standards and criteria used to determine which witnesses will be admitted into the program are among the key components of any WPP. These guidelines are usually a function of the unique crime fighting objectives of the particular country or international tribunal establishing them. Consequently, qualifications to participate in WPPs are as varied as the countries and the species of criminal conduct within their borders. Typically, however, to qualify for witness protection in the form of relocation and identity change, witnesses must first be willing and able to provide credible and essential testimony against defendants in serious organized crime or terrorism prosecutions.

In the United States, pursuant to 18 U.S.C. §3521(a)(1) and (2), the Attorney General is responsible for issuing guidelines defining the

⁷⁶ It should be noted here that while many WPP programs begin as policy based initiatives (as in the case of the WPP in the US), those informal standards are often formalized and ultimately incorporated into legislation. Nevertheless, "[t]here are examples of countries with established programmes where witness protection is not based on a law, such as New Zealand. In those countries, witness protection was developed as a regular police function deriving directly from the responsibility of the police to protect the life and safety of people. Policy, coupled with the agreements signed with witnesses admitted to the programme, provide a sufficient and adequate framework for the programme's operations." UNODC, *supra* note 73, at 44. These programs will be considered alongside statutory framework programs in this comparative analysis.

types of cases in which witnesses (and their family members) may obtain witness protection.⁷⁷ According to the United States Attorneys' Manual:

A witness may be considered for acceptance into the [WPP] if they are an *essential witness* in a specific case of the following types:

- A. Any offense defined in Title 18, United States Code, Section 1961(1) (organized crime and racketeering);
- B. Any drug trafficking offense described in Title 21, United States Code;
- C. Any other serious Federal felony for which a witness may provide testimony that may subject the witness to retaliation by violence or threats of violence;
- D. Any State offense that is similar in nature to those set forth above; and
- E. Certain civil and administrative proceedings in which testimony given by a witness may place the safety of that witness in jeopardy.⁷⁸

⁷⁷ Specifically, 18 U.S.C. §3521 provides in pertinent part:

(a) (1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

Those guidelines have been issued and published in Title 9 of the United States Attorneys' Manual. United States Attorneys' Manual, *supra* note 33, at 9-21.100.

⁷⁸ *Id.* (emphasis added). http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/21mcrm.htm. The Manual specifically excludes "informant" from the definition of "witness," noting that "[t]he safety/security of an informant assisting in an investigation is the responsibility of the investigating agency utilizing the informant." *Id.* at Chapter 9-21.110 The Manual does, however, include prisoner witnesses "provided all the other criteria [related to credible testimony and possible harm to the witness] are met." *Id.* at 9-21-130.

Upon determination that a witness meets one or more of the specific case criteria, the government attorney prosecuting the case may submit an application to the Department of Justice, Office of Enforcement Operations (OEO) summarizing the testimony to be provided by the witness and assessing the witness's suitability for the WPP. This risk assessment must include a balancing of the need for prosecution of the cases using the witness's testimony against the potential danger to the community in which the witness and his or her family will be relocated.⁷⁹ Specifically,

Factors which must be evaluated in the risk assessment include, but are not limited to, criminal record, alternatives other than the [WPP] which have been considered, and the possibility of securing the testimony from other sources. If it is determined that the need for the prosecution of the case is outweighed by the danger that the witness or adult family members would pose to the relocation community, the Attorney General is *required to exclude the witness from the [WPP]*.⁸⁰

In addition, because of the long-term expense implications of relocating a witness and his or her family, the government attorney submitting the application must determine "that the witness's testimony is *significant and essential* to the success of the prosecution, as well as *credible and certain in coming*."⁸¹

By comparison, many other countries view witness relocation and identity change as a "last resort" for protecting witnesses whose lives may be endangered by providing testimony.⁸² For example, the Council of Europe Committee of Ministers ("COE Ministers"), in its recommendations to Member States on the protection of witnesses and collaborators of justice, observed:

⁷⁹ *Id.* at 9-21.100.

⁸⁰ *Id.* (emphasis added).

⁸¹ *Id.* (emphasis added).

⁸² Indeed, "[g]iven the financial impact for the state and drastic changes in the life of persons concerned ... such [programs] are reserved for very important cases in which the witness's testimony is crucial to the prosecution and there is no alternative way of ensuring the security of the witness." Bakowski, *supra* note 73, at 2.

Protection programmes implying dramatic changes in the life/privacy of the protected person (such as relocation and change of identity) should be applied to witnesses and collaborators of justice who need protection beyond the duration of the criminal trials where they give testimony. Such programmes, which may last for a limited period or for life, should be adopted only if no other measures are deemed sufficient to protect the witness/collaborators of justice and persons close to them.⁸³

In terms of the crimes and risk factors that might warrant witness protection, the COE Ministers recommended that:

11. No terrorism-related crimes should be excluded from the offences for which specific witness protection measures/programmes are envisaged.
12. The following criteria should, *inter alia*, be taken into consideration when deciding upon the entitlement of a witness/collaborator of justice to protection measures or programmes:
 - involvement of the person to be protected (as a victim, witness, co-perpetrator, accomplice or aider and abettor) in the investigation and/or in the case;
 - relevance of the contribution;
 - seriousness of the intimidation;

⁸³ Council of Europe, Committee of Ministers, *Recommendation Rec(2005)9 of the Committee of Ministers to Member States on the Protection of Witnesses and Collaborators of Justice*, Section 3, paragraph 23 (2005) <https://wcd.coe.int/ViewDoc.jsp?id=849237&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>. [hereinafter “COE Recommendations”]. The Ministers define a witness as any person who possesses relevant testimony in a criminal proceeding while collaborators of justice include “any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organization of any kind, or in offences of organized crime, but who agrees to cooperate with the criminal justice authorities, particularly in giving testimony about a criminal association or organization, or about any offence connected with organized crime or other serious crime.” *Id.* at Section 1, Definitions.

- willingness and suitability to being subject to protection measures or programmes.⁸⁴

The United Nations Convention Against Transnational Organized Crime provides that state parties “should take appropriate measures to protect witnesses in criminal proceedings related to crimes covered by the Convention and its Protocols.”⁸⁵ Those crimes include:

- (a) Participation in an organized criminal group;
- (b) Money-laundering;
- (c) Corruption in the public sector;
- (d) Obstruction of justice;
- (e) Trafficking in persons;
- (f) Illicit manufacturing of and trafficking in firearms, their parts and components and ammunition;
- (g) Smuggling of migrants;
- (h) Other serious crimes as defined in the Convention, encompassing the elements of transnationality and involvement of an organized criminal group.⁸⁶

Examining witness selection practices across multiple international jurisdictions, the United Nations Office on Drugs and Crime (“UNODC”) noted that typical factors to be considered in the assessment of suitability for participation in the WPP include: the level of threat to the person’s life; the witness’s personality and psychological fitness; the danger that witnesses with criminal backgrounds may pose to the public if relocated under a new identity; the critical value of the witness’s trial testimony for the prosecution and the impossibility of gaining such knowledge elsewhere; and the importance of the case in dismantling criminal organizations.⁸⁷ The UNODC recommends

⁸⁴ The COE Recommendations stipulate that before protection is offered there should also be some consideration as to whether the witness testimony evidence could be gleaned from other sources. *Id.* at Section 3, Paragraphs 10–13.

⁸⁵ UNODC, *supra* note 73, at 23.

⁸⁶ *Id.*

⁸⁷ The UNODC cautions that “[w]itnesses must be under serious threat to be admitted to a [WPP],” and that threat “must be against the witnesses’ life ... and not ... to his or her well-being or property.” *Id.* at 61.

that when assessing the risk factors, the severity of threats should not be speculative or taken at face value. Instead, the seriousness of the threat against a witness must be measured by considering such factors as: “(a) [t]he origin of the threat (group or person); (b) [t]he patterns of violence; (c) [t]he level of organization and culture of the threatening group (for example, street gang, Mafia-type group, terrorist cell); [and] (d) [t]he group’s capacity, knowledge and available means to carry out threats.”⁸⁸

Eligibility requirements for WPPs in a variety of other countries focus on the same basic factors that assess the seriousness of the offense being prosecuted, the need for the testimony and the risk of harm to the witness. For example, Italy, with its long history of Mafia violence, provides protection for witnesses “to drugs, mafia or murder offenses, and all offenses where the sentence is between five and 25 years.”⁸⁹ Informants in cases involving mafia, terrorism and drug trafficking offense may also receive protection.⁹⁰ Italy’s WPP, which marked its 20th anniversary in 2012, is “considered [that country’s] single most important window into the secretive world of organized crime.”⁹¹ However, despite the fact that the program is still relatively young, it is already expanding its eligibility requirements. More specifically, “changing immigration patterns and the spread of international terrorism have led authorities to open the program to eastern Europeans, North Africans and several other nationalities....”⁹²

Canada’s WPP statute does not set forth a list of crimes that might warrant extending protection to cooperating witnesses. Instead, Canada adopts a factor based approach to admissibility into its WPP that includes consideration of “the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness

⁸⁸ *Id.* at 62.

⁸⁹ YVON DANDURAND & KRISTIN FARR, A REVIEW OF SELECTED WITNESS PROTECTION PROGRAMS 32 (2010), *available at* http://publications.gc.ca/collections/collection_2011/sp-ps/PS4-96-2010-eng.pdf.

⁹⁰ Eligibility for Italy’s WPP also requires witnesses to reveal all information in 180 days. *Id.* at 32.

⁹¹ Victor L. Simpson, *Italy’s Secret Anti-Mob Weapon: Witness Protection*, AP: THE BIG STORY, (Oct. 14, 2012, 6:59 AM), <http://bigstory.ap.org/article/italys-secret-anti-mob-weapon-witness-protection>.

⁹² Italy’s WPP is believed to be the second largest behind the WPP in the United States and costs more than \$100 million dollars a year to implement. *Id.*

in the matter.”⁹³ The Canadian statute expressly provides for reciprocal arrangements with foreign jurisdictions to enable witnesses involved in proceedings in those jurisdictions to be admitted into Canada’s WPP.⁹⁴ The extraterritorial effect of Canada’s WPP statute also extends to witnesses participating in international criminal courts or tribunals.⁹⁵

On the European Union front, in 2007, the EU Commission assessed the feasibility of legislation applicable to all of its member states in the area of witness protection.⁹⁶ The impact assessment ultimately concluded that, while the protection of witnesses was considered a priority initiative, overarching legislation was not currently feasible in the EU for several reasons.⁹⁷ Specifically, the Commission opined that:

The substantial differences that exist between the penal laws of the Member States make the cooperation between them, in the fight against often highly sophisticated criminal groups, less effective. Cross-border co-operation in witness protection is particularly hampered with countries

⁹³ Witness Protection Program Act, S.C. 1996, c. 15(7)(c) (Can.), *available at* <http://laws-lois.justice.gc.ca/eng/acts/W-11.2/page-2.html#h-4>. Other factors to be considered include: “(e) the likelihood of the witness being able to adjust to the Program, having regard to the witness’s maturity, judgment and other personal characteristics and the family relationships of the witness; (f) the cost of maintaining the witness in the Program; (g) alternate methods of protecting the witness without admitting the witness to the Program....” *Id.* § 15(7)(e)–(g).

⁹⁴ *Id.* § 14(2).

⁹⁵ Specifically, “[t]he Minister may enter into an arrangement with an international criminal court or tribunal to enable a witness who is involved in activities of that court or tribunal to be admitted to the Program, but no such person may be admitted to Canada pursuant to any such arrangement without the consent of the Minister of Citizenship and Immigration, nor admitted to the Program without the consent of the Minister.” *Id.* § 14(3).

⁹⁶ See generally COMMISSION OF THE EUROPEAN COMMUNITIES, COMMISSION WORKING DOCUMENT ON THE FEASIBILITY OF EU LEGISLATION IN THE AREA OF PROTECTION OF WITNESSES AND COLLABORATORS WITH JUSTICE (2007), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0693:FIN:EN:PDF>.

⁹⁷ While acknowledging that the primary responsibility for witness protection rested at the national level, the Commission nevertheless concluded that “[a]ction at the EU-level would have added value in fighting organized crime by enhancing cross-border cooperation through encouraging witnesses to testify in return for protection.” *Id.* at 6.

that do not have legislation and/or administrative structure on witnesses and protection programmes, even if within their borders they carry out such activities for their own citizens. Increasingly countries where practical difficulties arise from their own geographical (small territory) or demographic characteristics (densely populated) and countries that are highly affected by criminal organisations need to relocate protected persons to other countries.⁹⁸

While the outlook for a binding agreement among the EU Member States was not particularly positive due to these differences, the assessment noted that “[f]actual trends in criminality, i.e. the increase of activity in number and scale of cross-border organised criminal and terrorist groups, has led states to strengthen their cooperation.”⁹⁹ Thus, “[t]he recognition of the increased need for co-operation in fighting cross-border organised criminals via witnesses that need protection and the implementation efforts for developing witness protection systems required by the UN Conventions might lead to changes in attitude at political and at operational level.”¹⁰⁰

The failure to establish an EU wide WPP policy has not prevented Member States whose interests are uniquely aligned from developing cooperative agreements in the area of witness protection. For example, the Baltic States of Lithuania, Latvia and Estonia have executed an Agreement on Cooperation and Protection of Victims and Witnesses.¹⁰¹ The Agreement provides that requests for protection must be in writing and should contain, among other things:

- 4) the legal status of the person under the criminal case or other important information;

⁹⁸ *Id.* at 6.

⁹⁹ *Id.* at 8.

¹⁰⁰ The European Commission concluded that any further consideration of legislation should be put on hold until further research and analysis could be conducted. *Id.* at 9.

¹⁰¹ See generally *Agreement Between the Government of the Republic of Latvia, the Government of the Republic of Estonia and the Government of the Republic of Lithuania on Co-operation in Protection of Witnesses and Victims*, LIKUMI (2000), <http://likumi.lv/doc.php?id=8209>.

- 5) [a] short description of the criminal case, in relation to which the request is being submitted, as well as causes and motives, on the basis of which the person should be moved to another State; [and]
- (6) information explaining the seriousness of the existing threats, whether there are actual threats to the life, health, property or legitimate interests of the persons, whether such threats have been expressed or whether there are sufficient grounds to believe that the person is endangered.¹⁰²

Once the appropriate requests and documentation are provided, the parties agree to cooperate “by temporarily or permanently moving the Persons under protection to the territory of the receiving Party without disclosing the identity of the endangered persons and, if necessary, by providing [guards] or supervision over the place of their stay.”¹⁰³

Careful analysis of the various standards for admission into WPPs reveals striking similarities in the types of the crimes that might lead to witness protection as well as the balancing factors used to assess threats against potential witnesses and risks to the public. Two key differences among those programs and the WPP in the US might nevertheless help lead the way to future reform efforts in the United States. First, the notable emphasis on cross-border and international cooperation among most countries and international tribunals developing and implementing WPPs is a striking recognition that global crime is the new order of the day, and thus crime fighting efforts must necessarily be broader in scope. By comparison, the WPP in the US appears limited by its express terms to protecting witnesses for the Federal and State governments.¹⁰⁴ While the Attorney General has very broad discretion when implementing the WPP in the US, nothing in the statute suggests any wide-ranging authority to extend the reach of the WPP to protect witnesses abroad. As the United States ramps up its

¹⁰² *Id.* at art. 3, §§ 4–6.

¹⁰³ *Id.* at art. 2, § 7. The parties also agree to exchange scientific and technical information and to establish “joint groups of experts for solving of more complicated issues of protection of Persons under protection and developing procedural norms, taking into account the legislation of the Parties...” *Id.* art. 2, §§ 8–9.

¹⁰⁴ *See* Witness Security Reform Act of 1984 18 U.S.C. § 3521(a).

fight against the global terrorist threat, an essential corollary to that expansion might be extending the protective reach of the WPP through legislation that facilitates the negotiation of reciprocal agreements with foreign countries and international tribunals, a step our neighbor to the North has already taken.¹⁰⁵

The second difference relates to the specific crimes that may warrant witness protection. Many countries have elevated the crime of human trafficking to the level of a “serious offense” that requires WPPs to safeguard witnesses who assist in the dismantling of organizations that perpetuate this particularly brutal form of criminality. The United States has acknowledged that it is “a source, transit, and destination country for men, women, and children—both U.S. citizens and foreign nationals—subjected to forced labor, debt bondage, involuntary servitude, and sex trafficking.”¹⁰⁶ While the U.S. government does offer some level of protection to victims of human trafficking, it has admitted that the “[f]ederal funding streams and grants for victim services [remain] inadequately structured for providing comprehensive care options for all types of trafficking victims, resulting in disparate treatment of victims, including turning some away.”¹⁰⁷ Including human trafficking as a specific crime in the list of offenses for which a cooperating witness might receive protection under the WPP will certainly not be a cure-all for the lack of resources devoted to victim/witness protection in this area. But, it will provide yet another tool to incentivize witness cooperation and to further infiltrate the multifaceted trafficking rings that endanger the lives of adults and children, and often provide seed money for terrorist organizations.¹⁰⁸

B. The Decision Making Process

In the United States, three different government organizations are involved in the decision to admit witnesses to the WPP: (1) the U.S.

¹⁰⁵ WITNESS PROTECTION PROGRAM ACT, *supra* note 93.

¹⁰⁶ U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 2013 - COUNTRY NARRATIVES: T-Z AND SPECIAL CASE 381 (2013), *available at* <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.

¹⁰⁷ *Id.* at 384.

¹⁰⁸ See, e.g., Nathan Vardi, *Al-Qaeda's New Business Model: Cocaine and Human Trafficking*, FORBES, (Dec. 18, 2009, 5:05 PM), <http://www.forbes.com/2009/12/18/al-qaeda-cocaine-business-beltway-al-qaeda.html>.

Attorney General's Office (or a delegate), (2) the OEO Senior Associate Director, and (3) the U.S. Marshal's Service.¹⁰⁹ The decision making process contemplates several stages during which threats to witnesses and risks of harm to the public are measured. Upon receipt of an application for witness protection from a government attorney, the OEO arranges with the United States Marshals Service to conduct a preliminary interview with the witness.¹¹⁰ This interview is "designed to provide the witness with an overview of Program guidelines and the services that the witness can – and cannot – expect to receive. It will also ensure that all parties involved are aware of the issues which need to be resolved prior to Program authorization and relocation."¹¹¹ Next, the witness and all adult members of his/her family must undergo psychological testing and evaluation to determine the likelihood that they will represent a threat to the communities in which they will be relocated.¹¹² A separate polygraph examination is required of witnesses who will be incarcerated prior to being relocated in the WPP. The polygraph is used to determine whether the "candidate intends to harm or disclose other protected witnesses or disclose information obtained from such witnesses."¹¹³

¹⁰⁹ In situations when the risk to the witness is imminent, "emergency Program protection may be authorized by OEO and provided by the USMS before completion of the written risk assessment and [before] all parties have entered into a Memorandum of Understanding. However, before this emergency protection can occur, the USMS must first conduct a preliminary interview ... to ensure that there are no obstacles to temporary relocation. The assessment and Memorandum of Understanding must be completed as soon as practicable following the authorization for emergency protection." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-21.220 (1984), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/21mcrn.htm#9-21.220.

¹¹⁰ "Because of the need for this preliminary interview, it will be necessary for OEO to receive the application for the witness's participation in the Program as soon as it is clear that the individual (1) is an essential witness, (2) is endangered, and (3) will need to enter the Program." *Id.* at 9-21.300.

¹¹¹ United States Attorneys' Manual, *supra* note 33 at 9-21.100.

¹¹² *Id.* at 9-21.330.

¹¹³ "Authorization for the Program may be rescinded or denied if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or disclose information obtained from such witnesses." *Id.* at 9-21.340.

The results of the interview, psychological testing and polygraph (if necessary) are compiled and analyzed by the USMS to formulate a “recommendation, positive or negative, regarding admission of the candidate to the [WPP]....”¹¹⁴ That recommendation is then forwarded to the OEO for the final decision. This multi-level decision making process, in which the USMS gathers all of the requisite information to make a recommendation to the OEO, is the result of a grand compromise between the DOJ and the USMS. Early in the WPP’s development, the USMS moved to obtain absolute power and control over witness selection because “they were stuck dealing with the riff-raff after the prosecutors had closed their briefcases and gone home.”¹¹⁵ The resulting compromise did not grant the USMS complete control, but, instead allowed the agency to conduct preliminary interviews and make formal written recommendations to the OEO, which Gerald Shur and his successors came to value and rely heavily upon.¹¹⁶

While the WPP in the US contemplates that applications for witness protection will come primarily from government prosecutors, the UNODC recognizes that applications for inclusion in WPPs might originate from a number of sources, including prospective witnesses, police personnel, prosecutors and judges.¹¹⁷ In most WPPs, decision making authority is vested in an agency outside of the WPP, whether it is a single official (such as the Minister of Justice or the Attorney General) or a multidisciplinary body (representatives of prosecutor offices, courts or police officials).¹¹⁸ For example, “[i]n Australia, a Witness Protection Coordinator applies to a Witness Protection Committee for the placement of a witness in the NWPP [National Witness Protection Program]. This committee is comprised of the Deputy Commissioner of National Security, as well as two senior AFP [Australian Federal Police] officers. Together, these make recommendations to the AFP

¹¹⁴ USMS Audit, *supra* note 55, at iii.

¹¹⁵ Earley & Shur, *supra* note 21, at 219.

¹¹⁶ *Id.* at 221.

¹¹⁷ For example, in South Africa witnesses may apply directly to the relevant authority and the application must be forwarded to the director of the program for consideration. In Slovakia, if the witness requires protection during the trial, the presiding judge may make the request. UNODC, *supra* note 73, at 59.

¹¹⁸ *Id.* at 60.

Commissioner on the entry and exit of witnesses in the program.”¹¹⁹ By contrast, “Irish Witness Protection program appears to be almost entirely administered by the Garda [the police force].”¹²⁰ However, the police officials who are involved in the investigation of crimes are prohibited from any involvement in the discussions and decisions related to a witness’ eligibility for protection. That measure is meant to preserve the independence and consistency of decision making with respect to the operation of the program.”¹²¹

Because decision making authorities and processes vary across jurisdictions, the UNODC cautions that rather than seeking a uniform model,

[c]areful consideration should be given to how the witness protection authority exercises its discretionary powers and which measures it can apply. In most cases, decisions are not subject to any kind of external review because, for security and confidentiality reasons, no other authority has access to the information available to the witness protection authority.¹²²

Further, in its recommendations to decision making authorities on how to best weigh the threat and risk factors when selecting a witness for the program, the UNODC explains that, while threats to witness safety are key, this factor must be balanced against equally important competing concerns that could make the witness a poor risk for relocation. Such concerns include: “the character of the witness and his or her ability to maintain secrecy,” the “likelihood of relapse into criminal activity and the associated risk to persons in the witness’s new and unsuspecting social environment,” and the “witness’s willingness to abide by the strict limitations imposed by the [program] on his or her personal life.”¹²³ Each of these factors is critical to long-term success in the WPP.

¹¹⁹ Dandurand, *supra* note 89, at 40.

¹²⁰ *Id.* at 39.

¹²¹ *Id.* at 40.

¹²² UNODC, *supra* note 73, at 60.

¹²³ In conducting the assessment, the UNODC recommends that a distinction be made between “threat” and “risk.” A “threat assessment looks at whether the life of the

The COE Committee of Ministers advocates for organizational separation in the decision making process so 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.”¹²⁴ The COE also contemplates international cooperation so as to “facilitate the examination of protected witnesses and collaborators of justice and to allow protection programmes to be implemented across borders.”¹²⁵

Despite the variety of personnel involved in decision making processes, one study examining an array of WPPs concluded that “the criteria considered for program admission seems to be fairly standard.”¹²⁶ That is, nearly all of the programs studied used similar factors to determine witness suitability for admission to the WPP. Those factors include:

the seriousness of the offence(s) involved; the importance of the evidence the witness can offer and whether the witness can be expected to offer a credible and significant testimony; whether the witness is essential to a successful investigation and prosecution and is committed to testifying; the level of risk the witness is facing and whether there is a direct and significant threat to the life and safety of the witness, or persons close to him/her; and, the availability and suitability of options other than full protection.”¹²⁷

As the foregoing discussion illustrates, the key to effective decision making is ensuring that the process reflects a balanced and objective consideration of the factors. Decision making personnel might vary, but the assessment should not. In the United States, a recent audit of the USMS revealed low staffing levels and a corresponding inability to conduct preliminary interviews in a timely

witness is in serious danger,” while a “risk assessment examines the chances of the threat materializing and assesses how it can be mitigated.” *Id.* at 62–63.

¹²⁴ COE Recommendations, *supra* note 83, at Section 3, Paragraph 28.

¹²⁵ *Id.* at Paragraph 30.

¹²⁶ Dandurand, *supra* note 89, at 41.

¹²⁷ *Id.*

manner.¹²⁸ Going forward, the U.S. government's fight against global terrorism will likely yield an increasing number of prospective witnesses whose previous involvement in terrorist activities warrants stricter pre-screening prior to entry into the program and more extensive post-relocation monitoring to detect and prevent further acts of terrorism. Thus, in addition to remediating the staffing level deficiencies, this new reality might warrant a reallocation of the decision making responsibilities in the current WPP to include the involvement of more agencies and personnel with specialization in terrorism detection and prevention. Admittedly, there is already extensive information sharing among all of the national security stakeholders when a known or suspected terrorist is considered for or admitted to the WPP.¹²⁹ Perhaps it is time to further incorporate the expertise of these stakeholders into the screening and substantive decision-making process.¹³⁰

C. Obligations While in Witness Protection

Once it has been determined that a witness and his or her family members are suitable candidates for witness protection, every adult will be required to execute a Memorandum of Understanding (MOU). The MOU guarantees that the "USMS is obligated to satisfy each commitment documented, as long as the witness remains in good standing in the Program, and the USMS will not be required to provide amenities or services not included in the document."¹³¹ Pursuant to 18 U.S.C. §3521(d):

(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including—

¹²⁸ See *supra* notes 55–64.

¹²⁹ These stakeholders include the FBI, the TSC, the DOJ National Security Division and the National Joint Terrorism Task Force (NJTTF). Audit Report, *supra* note 2, at 9.

¹³⁰ A current protocol requires the OEO to "consult with the Department's National Security Division prior to admitting a terrorism-linked witness into the Program." This is most definitely a step in the right direction. *Id.* at 13.

¹³¹ United States Attorneys Manual, *supra* note 33, at 9-21.500.

- (A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings;
- (B) the agreement of the person not to commit any crime;
- (C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter;
- (D) the agreement of the person to comply with legal obligations and civil judgments against that person;
- (E) the agreement of the person to cooperate with all reasonable requests of officers and employees of the Government who are providing protection under this chapter;
- (F) the agreement of the person to designate another person to act as agent for the service of process;
- (G) the agreement of the person to make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation;
- (H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title; and
- (I) the agreement of the person to regularly inform the appropriate program official of the activities and current address of such person.¹³²

The USMS is responsible for fulfilling the government's obligations under the MOU as long as the witness remains in compliance with the requirements of the MOU. The USMS also has an obligation to:

- (1) assist the witness in obtaining one reasonable job opportunity;
- (2) provide assistance in finding housing;
- (3) provide identity documents for witnesses and family members whose names are changed for security purposes;

¹³² The MOU must also include "procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General." 18 U.S.C. § 3521(d).

and (4) arrange for witnesses and family members who are severely troubled to receive counseling and advice by psychologists, psychiatrists, or social workers, when the need has been substantiated.¹³³

Because witnesses are often relocated to areas in which they have no previous connections or previous background, and because they often cannot continue their previous line of work (assuming it was legitimate) in order to prevent detection, the USMS is authorized to provide subsistence funding for a six-month period (unless witnesses are able to support themselves). This funding is intended to assist witnesses in regaining a level of financial stability under their new identities while they seek to become self-sufficient.¹³⁴ Witnesses are expected to aggressively seek employment and failure to do so "or rejection of an employment opportunity will be grounds for discontinuation of subsistence payments, and the processing of the witness for public assistance."¹³⁵

The most troublesome aspects of the MOU for many witnesses are the requirements that they refrain from engaging in further criminal conduct and sever any and all connections with family members and friends who are not part of the WPP. As might be expected, witnesses being admitted into the WPP often have criminal backgrounds themselves, so perhaps it is not surprising that some witnesses are ill-suited to the relatively mundane post-relocation lifestyle. Consider the story of Brenda Paz, a middle-school dropout who became a member of the notorious MS-13 street gang, one of the most violent in the US. After an arrest for auto theft, Brenda agreed to provide first-hand information on the history, structure and operations of the MS-13 gang in exchange for leniency.¹³⁶ She was admitted to the WPP, relocated to another state and given a new identity. Despite

¹³³ United States Attorneys' Manual, Criminal Resource Manual, *supra* note 33, 705, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00705.htm

¹³⁴ The funding time limitation can be extended when witnesses have difficulty finding employment to become self-sufficient. However, the payments cannot be made indefinitely and if the witness is deemed unemployable then "he or she will be assisted in obtaining public assistance." *Id.* at 706.

¹³⁵ *Id.* at 707.

¹³⁶ UNODC, *supra* note 73, at 63.

warnings not to contact any of her old gang associates, Brenda did just that and was coaxed into returning to her old way of life with the promise of forgiveness for her testimony against the gang. Unfortunately, “[w]ithin days she was dead” and her “body was found in a river with a rope around her neck, 16 stab wounds to the chest and arms and three deep cuts across the neck.”¹³⁷

The geographical and social isolation that led Brenda to contact her former gang associates despite the strong likelihood that her life would be endangered demonstrate the profound psychological impact that the WPP constraints can have on individuals who are unaccustomed to a structured, law-abiding existence. While psychological testing and evaluation can provide some insight into witness suitability prior to entering the WPP, the assessments cannot account for the severe isolation and corresponding emotional trauma that can result from being completely removed from one’s former life. Indeed, “in the United States mental distress has resulted in an above average suicide rate for protected witnesses which means, ironically, that the greatest danger to the safety of protected witnesses may be themselves.”¹³⁸

As discussed earlier, the MOU also requires witnesses to follow strict guidelines with respect to child custody, visitation and debt repayment or risk having their identities revealed to relevant parties.¹³⁹ These measures are designed to ensure long term accountability to third parties despite participation in the WPP.

By comparison, an examination of MOUs in a variety of WPPs by the UNODC reveals that these agreements typically include:

- (a) A declaration by the witness that his or her admission to the protection programme is entirely voluntary and that any assistance must not be construed as a reward for testifying;¹⁴⁰
- (b) The scope and character of the protection and assistance to be provided;

¹³⁷ *Id.*

¹³⁸ Dandurand, *supra* note 89, at 46.

¹³⁹ See *supra* notes 43–52, and accompanying text.

¹⁴⁰ A feature that is likely implicit or explicit in the actual MOU agreements in the United States, but that is not made explicit in the statutory language.

- (c) A list of measures that could be taken by the protection unit to ensure the physical security of the witness;
- (d) The obligations of the witness under the programme and possible sanctions for violations, including removal from the programme;
- (e) The conditions governing the programme's termination.¹⁴¹

Essentially, the MOU "establishes and informs programme participants about the good security practices they must abide by for the duration of the protection programme."¹⁴² While recognizing the need for subsistence payments to assist relocated witnesses and their families to establish new lives, the UNODC cautions that "the financial benefits granted by a witness protection programme are not meant to maintain a criminal's standard of living if his or her lifestyle was financed by illegal activities."¹⁴³

The UNODC acknowledges the harsh reality imposed by the dictates of MOUs and concedes that, in some cases, "[w]itnesses cannot be separated from their family members forever."¹⁴⁴ To address this issue and reduce the likelihood that witnesses will compromise the integrity of the program by trying to connect with their pasts, witness protection programs have adapted to meet the needs of protected families by "extending protection to the witness' family members, cohabitants and other persons close to him or her."¹⁴⁵ However, because WPP resources are usually very limited, other measures can also be taken to attempt to preserve familial and friendship bonds without compromising the security of the WPP. For example, reunions at locations far away from where the witness has been relocated might be arranged.¹⁴⁶

¹⁴¹ UNODC, *supra* note 73, at 65.

¹⁴² *Id.* at 68.

¹⁴³ *Id.* at 69. The attractiveness of subsistence payments may depend upon the country in which the witness is relocated. In some countries, "inclusion in the national welfare system works as an incentive for witnesses to become financially independent as soon as possible. But in developing economies, social security benefits (a regular salary, medical care, education etc.) may be attractive." *Id.* at 70.

¹⁴⁴ *Id.* at 70.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

With respect to ensuring that witnesses maintain their debt obligations, the UNODC recommends special provisions designed to protect creditors and others in the event that witnesses fail to cooperate.¹⁴⁷ For example, some countries resolve this issue by allowing WPP administrators to reveal the location of the delinquent witness' property to creditors and/or by permitting the sale or disposal of the property on the witness' behalf. A more direct means of addressing the issue while maintaining operational security involves WPP administrators loaning funds to witnesses to facilitate the repayment of financial obligations. However, such funds must be repaid to the WPP over time.¹⁴⁸

Canada's WPP statute includes a broad MOU-like provision entitled, "Deemed Terms of Protection Agreement," which provides that:

- A protection agreement is deemed to include an obligation-
- (a) on the part of the Commissioner, to take such reasonable steps as are necessary to provide the protection referred to in the agreement to the protectee; and
 - (b) on the part of the protectee,
 - (i) to give the information or evidence or participate as required in relation to the inquiry, investigation or prosecution to which the protection provided under the agreement relates,
 - (ii) to meet all financial obligations incurred by the protectee at law that are not by the terms of the agreement payable by the Commissioner,
 - (iii) to meet all legal obligations incurred by the protectee, including any obligations regarding the custody and maintenance of children,
 - (iv) to refrain from activities that constitute an offence against an Act of Parliament or that might compromise the security of the protectee, another protectee or the Program, and

¹⁴⁷ *Id.* at 73.

¹⁴⁸ *Id.*

(v) to accept and give effect to reasonable requests and directions made by the Commissioner in relation to the protection provided to the protectee and the obligations of the protectee.¹⁴⁹

By contrast, in the State of Victoria (Australia), the MOU requirements are very specific, detailing mandatory and optional provisions:

Memorandum of understanding

5. Memorandum of understanding

(1A) For the purposes of section 3B(2)(c), a memorandum of understanding between the Chief Commissioner of Police and a witness *must*-

(a) set out the basis on which the witness is included in the Victorian witness protection program and details of the protection and assistance that are to be provided; and

(b) contain a provision to the effect that protection and assistance under the program may be terminated if the witness breaches a term of the memorandum of understanding.

(2) A memorandum of understanding *may contain* provisions relating to-

(a) any outstanding legal obligations of the witness and how they are to be dealt with; and

(b) any legal obligations that the witness may or may not enter into; and

(c) the surrender and issue of passports; and

(d) the issue of any documents relating to the new identity of the witness; and

(e) the prohibition of the witness from engaging in specified activities; and

(f) marriage, family maintenance, taxation, welfare or other social or domestic obligations or relationships; and

¹⁴⁹ Canadian Statute, *supra* note 93, § 8.

- (g) any other obligations of the witness; and ...
 - (i) if a new identity is to be extended to any members of the family of the witness, provisions relating to paragraphs (a) to (g) in relation to each member of the family to the extent that such provisions are necessary; and
 - (j) any other matter for which it may be necessary or convenient to make provision.
- (3) A memorandum of understanding *must contain* a statement advising the witness of his or her right to complain to the IBAC [Independent Broad-based Anti-corruption Commission] about the conduct of the Chief Commissioner of Police or another member of the police force in relation to the matters dealt with in the memorandum.
- (4) A memorandum of understanding must be signed-
- (a) by the witness; or
 - (b) if the witness is under the age of 18, by a parent or guardian of the witness; or
 - (c) if the witness otherwise lacks legal capacity to sign, by a guardian or other legal personal representative of the witness.
- (5) If-
- (a) a parent or guardian of a witness has signed a memorandum of understanding because the witness was under the age of 18; and
 - (b) the memorandum is still operating after the witness turns 18-
- the Chief Commissioner of Police may require the witness to sign the memorandum.¹⁵⁰

Despite the specificity and contract-like provisions of MOUs, generally speaking, these documents are not considered binding contracts. As such, a breach of the MOU provisions does not permit

¹⁵⁰ State of Victoria, Victorian Consolidated Acts, Witness Protection Act 1991 – SECT 5, http://www.austlii.edu.au/au/legis/vic/consol_act/wpa1991248/s5.html.

judicial review in most jurisdictions. While MOUs vary in the level of necessary detail, the focus on clear expectations and responsibilities seems to be a universal trend. However, because of the stressful and often time-sensitive circumstances that give rise to MOUs, there is concern in some countries with the inherent disparity in bargaining power between the parties executing MOUs. This has led to at least one proposal that potential witnesses be provided access to legal counsel during the negotiation of MOU terms.¹⁵¹ Proposals of this type are unlikely to become a prevailing trend given the absolute need for secrecy and confidentiality in WPPs, the broad discretion granted to governmental entities to shape the parameters of MOUs, and, in many cases, the lack of judicial review and oversight in the event of a breach. In addition, notwithstanding the government's significant bargaining power, potential witnesses are not entirely without means to redress potential violations of the MOU because most statutes require some form of private dispute resolution, usually at the agency level, to maintain the confidentiality of the WPP.

D. Termination from the Witness Protection Program

When witnesses initially apply to the WPP, the threats against their lives are very high and most witnesses are quite amenable to the substantial restrictions imposed by MOUs. But, as time wears on, "some [witnesses] gain a sense of confidence and refuse to resign themselves to imposed restrictions and, within a few years, most decide to leave the [program] or are removed."¹⁵² In fact, the two most common ways of terminating participation in the WPP are through removing the witness from the program (typically for violating provi-

¹⁵¹ Dandurand, *supra* note 89, at 66–67. Specifically, in Canada, "the [Standing Committee on Public Safety and National Security] which reviewed the witness protection program recommended that: (...) the Witness Protection Program Act be amended so that potential candidates are automatically offered the aid of legal counsel with an appropriate security clearance during the negotiation of the candidate's admission to the Witness Protection Program and the signing of the protection contract. The fees of such counsel should be paid by the independent Office responsible for witness protection at the Department of Justice." *Id.*

¹⁵² UNODC, *supra* note 73, at 64.

sions of the MOU) or the witness elects to voluntarily withdraw.¹⁵³ Pursuant to 18 U.S.C. §3521 (f):

The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter, including information with respect to the nature and circumstances concerning child custody and visitation. Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.¹⁵⁴

Courts have consistently upheld the Attorney General's discretion with respect to terminating witnesses from the WPP. For example, in *Boyd v. T'Kach*, the U.S. Court of Appeals for the Tenth Circuit concluded:

¹⁵³ In addition, some programs may have a natural termination point or may be terminated when the threat to the witness is deemed to no longer exist. For example:

In Europe, the minimum duration of the protection is generally determined by the length of trial proceedings, on average between three and five years ... [o]ther programs reserve the right to decide when to terminate protection. In South Africa, protection is provided for only as long as the perceived threat is deemed to exist, and then for a following six-week phasing out period, after which protection is terminated. Similar clauses exist in Australia, Jamaica, and the Philippines where the relevant authority has the right to decide when the circumstances which gave rise for the need for protection have ceased.

Dandurand, *supra* note 89, at 47.

¹⁵⁴ Witness Security Reform Act of 1984 18 U.S.C. § 3521(f).

Whether a witness will be protected under the witness protection program is entirely within the Attorney General's discretion. See *Abbott v. Petrovsky*, 717 F.2d 1191, 1193 (8th Cir. 1983). "One cannot receive protection simply on demand." *Garcia v. United States*, 666 F.2d 960, 962 (5th Cir. 1982). Most significantly, §3521(f) of the Witness Relocation and Protection Act provides that "the decision of the Attorney General to terminate such protection shall not be subject to judicial review." Because the district court lacks jurisdiction to review the decision to remove Boyd from the Program, and lacks authority to require his placement in the Program, it is clear that it lacked any jurisdiction or authority to grant Boyd's motion for injunctive relief seeking either his continuation in, or his return to, the Program.¹⁵⁵

Witnesses are frequently terminated from the WPP because they have embarked upon or resumed criminal activities in direct violation of the MOU. Perhaps not surprisingly, transition from a life of crime into an existence with strict behavioral guidelines while living hundreds or thousands of miles away from family and friends causes some witnesses to relapse into their former lifestyles. One of the most infamous examples of this unfortunate tendency is Sammy "The Bull" Gravano. After a lengthy association with mob boss John Gotti, Gravano was arrested and agreed to testify against Gotti. Upon completion of a prison sentence for his own criminal conduct, Gravano was released and entered the WPP in the United States. However, his life without crime did not last long, and within five years of entering the program, Gravano was arrested for drug trafficking and is imprisoned once again.¹⁵⁶

Terminating a witness for engaging in further criminal activity may seem like an obvious consequence for violating a key requirement of the MOU. Yet, despite the strong language regarding termination in MOUs, many witnesses remain in the program notwithstanding their

¹⁵⁵ *Boyd v. T'Kach*, 26 Fed. Appx. 792, 794 (10th Cir. 2001). Boyd was placed in the WPP while incarcerated, and was subsequently removed for violating program guidelines and prison rules.

¹⁵⁶ UNODC, *supra* note 73, at 75.

violations of the express terms of the agreement.¹⁵⁷ This may be due, in part, to the difficulties associated with terminating witnesses under the program as well as a reluctance on the part of the government to “go public” about aspects of the program should protected witnesses choose to initiate public proceedings.

For example, Canada’s WPP statute provides that witnesses may be terminated if there is “a deliberate and material contravention of the obligations of the protectee under the protection agreement.”¹⁵⁸ Further, when there is a violation of the protection agreement, the “Commissioner shall before terminating the protection provided to a protectee, take reasonable steps to notify the protectee and allow the protectee to make representations concerning the matter.”¹⁵⁹ While this language seems straightforward, practical application has revealed numerous difficulties associated with actually terminating witnesses. A case in point: In Canada, the police were repeatedly unable to terminate a protection agreement with a witness known as “166.”¹⁶⁰ Initially, the police attempted to force “166” out of the program for malfeasance and disregard of the rules, but the witness fought back in court, ultimately succeeding in having the termination rulings overturned after a multi-million dollar battle.¹⁶¹ The “crux of the problem in [the] case [was] how the threat to a witness [could] be measured, and how that decision should be reached. Among other things, Victoria Police argued that the need for protection had ceased, meanwhile “166” claimed that risk remained because criminal associates saw his cooperation with police as an unforgivable betrayal of the gangland code of silence.”¹⁶²

The European Union Draft program for the protection of witnesses recommends termination from WPPs for a variety of reasons, including committing crimes, failing to pay debts and compromising

¹⁵⁷ Even when criminal proceedings are instituted against WPP participants, such witnesses are rarely summarily abandoned to the criminal process where their true identities might be revealed. Instead, if possible, efforts are made to continue the protection while the witness is incarcerated. *See* Criminal Resource Manual, *supra* note 133, at 709.

¹⁵⁸ Canadian Statute, *supra* note 93, § 9(b).

¹⁵⁹ *Id.* § 9(2).

¹⁶⁰ Dandurand, *supra* note 89, at 47.

¹⁶¹ *Id.*

¹⁶² *Id.* at 47–48.

the security of the program. The EU proposal also suggests that protection may be terminated if it is determined that the threat to the witness no longer exists.¹⁶³

The UNODC in its survey of WPPs identified four common reasons for terminating witnesses from protection programs: (a) [s]ecurity is compromised by the actions of the witness or his or her inability to honor obligations; (b) [t]he witness violates the rules laid down in the memorandum of understanding; (c) [t]he witness refuses to give evidence in court; and (d) [t]he seriousness of the threat against the witness's life has lessened.¹⁶⁴ Yet, when these circumstances occur and termination is inevitable, some form of ongoing protection must still be provided because the threat to the witness may have diminished but it is not necessarily exhausted.¹⁶⁵ This continued protection obligation is consistent with the realization that "the threat against a protected witness's life never fully disappears. Even after a conviction is secured, a person in custody may still be able to harm the witness. Witnesses may become vulnerable again and may need further assistance after the termination of the programme, as technology develops and makes the techniques and methodologies used obsolete."¹⁶⁶

In some instances, protection is terminated when witnesses voluntarily withdraw from the WPP. In many cases of voluntary withdrawal, "it is clear that program conditions, or else the stress of living away from family and friends is incredibly taxing on protected witnesses and their families. As many reports have confirmed, witnesses will often find that they can no longer make the sacrifice of relocating, giving up their identities and living under such extreme amounts of stress."¹⁶⁷

Interestingly, in some countries, voluntary "withdrawal" takes the form of refusal to enter the program in the first place. For example, the WPP in the Philippines is thought to be rife with political corruption and constrained by inadequate funding. These political and financial burdens often result in excessive delays in processing witnesses, which, in turn, often cause physical and psychological harm to

¹⁶³ *Id.*

¹⁶⁴ UNODC, *supra* note 73, at 73.

¹⁶⁵ *Id.* at 74.

¹⁶⁶ *Id.*

¹⁶⁷ Dandurand, *supra* note 89, at 46.

those witnesses.¹⁶⁸ This failure to protect witnesses has a direct impact on the conviction rates for serious offenses in the Philippines. To correct these deficiencies with the WPP specifically, and with the criminal justice system generally, the Asian Human Rights Commission has called for reform measures including “interim protection mechanisms as well as independent bodies to effectively protect witnesses in highly political cases involving high-ranking government officials.”¹⁶⁹

Across jurisdictions, the WPP termination process is shrouded in a veil of secrecy that protects the government and WPP participants. Witnesses do not want to come forward to reveal their identities and the government may feel a continuing obligation to protect witnesses despite their transgressions (and perhaps a continuing obligation to protect the public from known criminals). The entry of more known or suspected terrorists into the WPP will present special challenges because, according to the Terrorist Screening Center, “there is no ‘former’ known or suspected terrorist designation. The TSC’s Watch listing Guidance provides definitions for ‘known terrorist’ and ‘suspected terrorist’....”¹⁷⁰ Therefore, despite termination or voluntary withdrawal from the WPP, known or suspected terrorist witnesses will likely require continued monitoring, whether by WPP or other national security stakeholders.

E. The Special Status of International Tribunals

International tribunals such as the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are all charged with prosecuting some of the most heinous violations of humanitarian laws. In order to encourage witnesses to come forward to testify, each of the tribunals places a special emphasis on the protection of victims and witnesses. Such protection can take the form of anonymous testimony

¹⁶⁸ Friederike Mayer, *Witness Protection: Remaining Challenge or Unmet Promise?*, 3 OBSERVER: A Journal on threatened Human Rights Defenders in the Philippines 26, 27 (2011), available at http://www.ipon-philippines.info/fileadmin/user_upload/Observers/Observer_Vol.3_Nr.1/Observer_Vol.3_Nr.1_Political-Changes_26.pdf.

¹⁶⁹ *Id.* The Commission also recommended bolstering “the weak support system, particularly the financial support given to witnesses’ families” *Id.*

¹⁷⁰ Audit Report, *supra* note 2, at 16.

and testifying via one-way closed circuit television.¹⁷¹ If a witness's concerns about safety are deemed substantial and well founded, then these tribunals may "arrange for the witness's resettlement within the country of residence or relocation to a third country."¹⁷² To facilitate these extraordinary measures, "[t]he tribunals seek to create a network of countries willing to consider accepting witnesses through the conclusion of framework agreements. The agreements outline the procedure to be followed when relocation is requested and the benefits that the receiving State will offer to the witness. As in inter-State cooperation though, the final decision on whether to accept the witness lies with the receiving State."¹⁷³ Unfortunately, "[v]ery few countries have signed relevant agreements with the tribunals."¹⁷⁴ Nevertheless, the greater emphasis on international cooperation in the relocation of witnesses and the increasing focus on combating global terrorism strongly suggest that the United States and other countries are well advised to enhance their collective cooperation with the efforts of these and other foreign tribunals.

V. CONCLUSION

Witness protection programs originated in the United States as part of a comprehensive effort to undermine seemingly impenetrable organized crime networks. What began as an informal program that suffered from numerous growing pains and procedural glitches has evolved into a "unique and valuable tool in the U.S. government's battle against organized crime, drug trafficking organizations, terrorism and other major criminal enterprises."¹⁷⁵ During the more than 40 years since its inception, the WPP has protected approximately 8,500 witnesses and 9,900 family members.¹⁷⁶ Although there have been terminations from the program for a variety of reasons, the U.S.

¹⁷¹ Kevin F. Mitchell, *Memorandum for the Office of the Prosecutor of the ICTR, Issue: A Comparison between the ICTR and the ICC on the Rights of Victims Who Testify* 18 (2003) available at <http://law.case.edu/war-crimes-research-portal/memoranda/WitnessRights.pdf>.

¹⁷² UNODC, *supra* note 73, at 17.

¹⁷³ *Id.*

¹⁷⁴ Bakowski, *supra* note 73, at 4.

¹⁷⁵ U.S. Marshals Fact Sheet, *supra* note 66.

¹⁷⁶ *Id.*

Marshals Witness Security Fact Sheet proudly boasts that no witness has been harmed while under the active protection of the WPP.¹⁷⁷

Because of the demonstrated effectiveness of the WPP in the US, the program has been exported to other countries and international tribunals and used as a model to institute WPPs abroad. With the implementation of numerous WPPs around the world, the United States can now look to those examples as models to adapt its own WPP to the modern-day prosecutorial focus on infiltrating and dismantling global terrorist networks. As discussed in this article, offering protection to known or suspected terrorists in exchange for valuable testimony will necessitate procedural and substantive changes to the WPP in the US because of the manner in which terrorist networks operate and inculcate those who participate in them. National security stakeholders, who specialize in detecting and preventing terrorism, must be involved in the decision making process when screening known or suspected terrorists for participation in the WPP. There must also be timely and continuous exchanges of information to track and monitor these witnesses before, during and after their participation in the WPP. But, perhaps most importantly, because terrorism is a crime that does not recognize borders, the United States must endeavor to expand the reach of its WPP by engaging in “[i]nternational cooperation initiatives with respect to the identification and use of informants and witnesses, the sharing of intelligence and evidence, and the protection of witnesses.”¹⁷⁸ These changes will go a long way toward reshaping a reliable and effective weapon to confront current and emerging forms of criminality.

¹⁷⁷ *Id.*

¹⁷⁸ Dandurand, *supra* note 89, at 57.