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CRIMINAL PROCEDURAL MEASURES TO PROTECT VICTIMS OF DOMESTIC VIOLENCE

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Abstract

Protecting the victims of crimes is an objective of the judicial bodies to avoid the risk of revictimization, thus exercising their obligation to defend the fundamental rights of the person (the right to life, the right to health and physical and mental integrity, the protection of dignity, private life, the right to free expression etc.), as protected by a series of national and international normative acts.

The criminal procedural measures for the protection of victims of the crime of domestic violence can belong to various criminal legal or criminal procedural institutions: general protective measures, regulated in art. 113 of Criminal Procedure Code related to art. 125-130 of Criminal Procedure Code, preventive measures, accessory and complementary punishments and administrative protective measures ordered on the basis of Law 682/2002 on the protection of witnesses.

The development of Romanian legislation to complete the spectrum of available instruments, protective measures imposed by international legislation or inspired by the legislation of other states or from the recommendations presented by international experts, is necessary and would follow the trend on a European scale to harmonize the practices of physical and psychological protection of victims.

Thus, the capacity of the judicial bodies to obtain the willingness of the victims to cooperate with the judicial bodies will be enhanced, the risks of exposure to any danger by participating in the trial being minimized, and they will be encouraged to adopt a sincere, unhindered attitude during the hearings.

Key words: *protection of crime victims; domestic violence; procedural protection measures; administrative protection measures.*

INTRODUCTION

The concept of “domestic violence”, for which the expression “family violence” is also used, has known numerous definitions in the sociological, criminological, psychological etc. literature.

In the doctrine, several characteristics of this phenomenon so present in society were revealed, namely:

- the presence of coercive, abusive and violent behavior, manifested physically or verbally;
- the subjects are members of the same family group, intimate partners, children, parents or other relatives;
- permanent access to the victim;
- the goal of imposing the will and control over the family members persists permanently;
- cyclic character;
- causes physical, psychological suffering or material damage. [1]

The expression “domestic violence” was defined in art. 3 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul in 2011 (Ratified by Romania through Law 30/2016), as representing “all acts of physical, sexual, psychological or economic violence, which occur in the family or in the domestic unit or between former or current spouses or partners, regardless of whether the aggressor shares or has shared the same residence with the victim.”

In the European *acquis* there are provisions regarding the obligations of the member states of the European Union to ensure a minimum standard of protection for victims of crimes, making special reference to victims of domestic violence.

A legal instrument adopted for this purpose is Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220/JHA of the Council, in which emphasized the seriousness of the phenomenon of violence within close relationships and its potential to cause systematic physical and mental trauma, with profoundly severe repercussions on the victim.

It has been stressed that women are disproportionately affected by this type of violence, and their situation may be worse if they are dependent on the perpetrator economically, socially or in terms of the right of residence. Consequently, the need for measures to protect victims of domestic violence in certain cases was emphasized.

Directive 2012/29/EU provided in art. 18 that the member states have the obligation to adopt some protection measures for the victims and their family members so that they are not subjected to further aggressions or threats to cooperate with the judicial bodies or to reprisals from the accused or other persons acting in his interest.

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The protective measures must also aim at removing the risk of secondary victimization, as well as protecting the dignity of the victims during their hearing.

Through the same directive, it was emphasized that victims of crime should benefit in an appropriate manner from state support for their recovery and have sufficient access to justice.

In the specialized literature, it has been shown that the expression “secondary victimization” refers to “the complex and long-lasting consequences of a crime resulting from the negative attitude, of criminalizing the victim, not providing support, even condemning and alienating the victim.” [2]

According to the reason presented at point 9 of the above-mentioned directive, in all contacts that victims of domestic violence have with a competent authority in criminal proceedings and with any service that comes into contact with them, the personal situation should be taken into account and the urgent needs of the victim, “the age, gender, possible disability and maturity of the victims of crime, while fully respecting their physical, mental and moral integrity.”

In Romanian legislation, the concept of domestic violence was defined in art. 3 of Law 217/2003 for the prevention and combating of domestic violence, republished, in the sense that it represents “any inaction or intentional action of physical, sexual, psychological, economic, social, spiritual or cyber violence, which occurs in the family or domestic environment or between spouses or ex-spouses, as well as between current or former partners, regardless of whether the aggressor lives or has lived with the victim.” [3]

This definition is likely to cover all the plans and forms in which the abusive behavior of the person can be manifested within close relationships and overlaps only in part with the area of criminal behavior criminalized in the Criminal Code at art. 199 under the name of “family violence”, the content of which is more limited.

The criminal acts qualified as “family violence” are, in essence, aggravated forms of the following crimes: murder (art. 188 of the Criminal Code), qualified murder (art. 189 of the Criminal Code), hitting or other violence (art. 193 of Criminal Code), bodily harm (art. 194 of the Criminal Code) or hitting or bodily harm that caused death (art. 195 of the Criminal Code), in the sense that the higher punishment limit will be increased by quarter if the act is committed by the perpetrator against a family member.

The social values protected by the criminalization of these crimes are the life of the person, respectively the physical integrity or the health of the family member and the social relations that develop around these values, but also the social relations regarding good coexistence within the family.

The material object of these crimes is the body of the injured person who is a family member.

From the perspective of the crime of domestic violence prev. of art. 199 of the Criminal Code, the victim will only be the passive subject of that crime, i.e. the person who suffered a physical, material or moral injury through the criminal act. In the criminal process, this person will acquire the status of an injured person, and if this person will constitute a civil party to obtain material compensation or the prosecutor will exercise the civil action in his interest (in the case of minors), he will have the status of a civil party. If the victim of the crime does not want to participate in the criminal trial as an injured person, he may be heard in the criminal trial as a witness.

Participating in the criminal process by filing a criminal complaint, making statements in the criminal process or participating in other judicial activities (including collaboration with the judicial bodies to obtain evidence in the criminal process, according to art. 148 of the Criminal Procedure Code) may generate risks to the life, health, physical and mental integrity of the victim of domestic violence, but also to other people close to her as a result of the aggressor's desire for revenge and/or his attempt to intimidate the victim in order to discourage her from providing information that could contribute to his criminal liability for committing one or more crimes from those provided for in art. 199 of Criminal Code.

Protecting the victims of crimes is an objective of the judicial bodies to avoid the risk of revictimization, thus exercising their obligation to defend the fundamental rights of the person (the right to life, the right to health and physical and mental integrity, the protection of dignity, private life, the right to free expression, etc.), as protected by a series of national and international normative acts, including the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution of Romania [4].

In order to achieve these goals, the Romanian legislator instituted a series of mechanisms for the protection of victims of crimes, this paper focusing on those measures that can be ordered in a criminal trial with the object of crimes of domestic violence.

The measures for the protection of victims of crimes can have as their objective, in addition to protecting victims of crimes or other people close to them against threats to their physical and mental safety, ensuring the smooth running of the criminal process, by creating conditions for obtaining honest statements on the part of the injured persons, without them fearing that they will be the victims of a revenge by the accused person or an attempt to intimidate by aggressive methods, so that they do not cooperate with the judicial bodies and the truth about the facts that happened is found out.

The ability of a person to testify freely and truthfully in a criminal trial or to cooperate with the investigative bodies, without fear of suffering retaliation, may have important repercussions in the resolution of a criminal case through

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fruition of honest information that can lead to finding out the truth. Conversely, giving statements can be a source of great anxiety for many people, and the quality of their testimonial evidence can be seriously affected if they perceive a danger to themselves or other close people, such as imminent retaliation by the defendants.

The bodies competent to apply protective measures must take into account the particular situation that requires the establishment of such measures: the type of crime investigated, the person who needs protection, the nature of the relationships with the defendants, the level of stress or fear, the degree of danger to physical psychological safety, the specific needs of the person. Particularly relevant in this sense is the recommendation in point 58 of Directive 2012/29/EU according to which the states of anguish and fear of victims related to the carrying of legal proceedings should be an essential factor in the decision-making process regarding taking protective measures.

I. CRIMINAL PROCEDURAL MEASURES FOR THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE

The criminal procedural measures for the protection of victims of the crime of family violence can belong to various criminal substantive or procedural institutions: general protective measures, regulated in art. 113 of Criminal Procedure Code related to art. 125-130 of Criminal Procedure Code, obligations established by the court on the occasion of postponing the application of the penalty, preventive measures, accessory and complementary punishments and administrative protective measures ordered on the basis of Law 682/2002 on the protection of witnesses.

As for the general measures for the protection of the victim, they can be ordered in cases where such measures can be taken against the threatened or vulnerable witness, or when the measures are necessary for the protection of the victim's private life or dignity.

According to art. 125 of the Romanian Code of Criminal Procedure, the procedural protection measures provided for threatened witnesses can be taken “in case there is a reasonable suspicion that their life, bodily integrity, freedom, property or professional activity” or of other persons could be endangered. Such protection measures can be ordered even in the absence of suspicion that there is a danger to the witness, when he is considered vulnerable due to the trauma suffered as a result of the commission of the crime or the subsequent behavior of the criminal or when the witness is a minor.

In the specialized literature, the opinion was expressed that the notion of “trauma” suffered by the witness refers only to those unfortunate consequences “of a physical (bodily) or mental nature” so that this concept does not include material damages. [5] We do not share the opinion of the authors in the sense that trauma does not include the material damage suffered by the witness as, under

certain conditions, such an event could have a strong emotional impact on a person, like the loss of wealth.

Certain categories of crimes injured persons are considered vulnerable due to special circumstances or the nature of the crime committed against them, including child victims, victims who are dependent on the perpetrator of the crime, victims of violence within close relationships.

Certain protective measures can be taken even if there are no objective reasons to suspect that there is a danger to the life, bodily integrity, freedom, assets or professional activity of the injured person or a family member as a result of the statements provided to judicial bodies.

This presumption meets the needs of victims of crimes and contributes to the smooth carrying of the criminal process by simplifying the procedure for taking protective measures, which can be essential to preserve the sincerity of these persons and, implicitly, the veracity of their statements.

If the injured person or the civil party is in any of the situations mentioned above (the victim is presumed to be vulnerable), the criminal prosecution body informs them about the protective measures that can be taken, what they consist of, and that they can waive them. In case of waiving the protective measures, the statement of the injured person/civil party is recorded in writing and signed by her, being assisted by the legal representative in the cases provided by law.

During the criminal investigation, the prosecutor has the power to institute protective measures, *ex officio* or at the request of the victim of the crime of family violence, issuing a reasoned order, which is kept in a special place to ensure confidentiality.

The protective measures that can be taken by the prosecutor are the following:

- supervising and guarding the victim's home or providing a temporary home.

This measure is aimed at the physical protection of the victim and his family (protection of life, health, bodily integrity and freedom), protection against attempts to influence his statements, protection of property and even professional activity.

- accompanying and ensuring the protection of the victim and/or his family members during the journeys.

In addition to protecting the victim or family members against physical or mental aggression that the defendant or their henchmen could inflict on them, the measure is also useful to ensure the presence of the victim at the headquarters of the judicial body. The persons subject to protection can be accompanied in any type of travel, both in the country and outside it, and it is ensured by the state bodies competent to ensure the protection of persons (police, gendarmes).

- the protection of identity data (name, surname, personal numerical code, etc.) by assigning a pseudonym with which the victim will sign his statements.

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When a person is assigned another name under which he will sign the statement, any hearing of him will take place in such a way that the other participants in the criminal process (except judicial bodies) do not know the true identity of the protected person. Thus, it will be possible to be heard through technical means that allow the person to be located in another room or even to be heard from a distance. The protection measure may be combined with another protection measure, explained below.

- hearing the victim without the victim being present at the place where the judicial body is located, by means of audio-video technical means of transmission, with the voice and image distorted, when the other protective measures are not sufficient.

This measure is ordered with the objective to ensure the anonymity of the victim or the witness and “the impossibility of the suspect/defendant/his relatives to perceive the characteristics of his physiognomy and voice and to recognize him at the moment or to identify him later for the purpose of revenge.” [6]

In order to protect the identity of the person who has been allowed by the competent judicial body to use a pseudonym under which he will give the statement and whose hearing is done by technical means that distort the voice and image, the prosecutor, the judge or the court will reject those questions likely to require answers that may provide clues or reveal the identity of the person benefiting from the protection measures.

The persons who have the status of “family members” and who can benefit from the protection measures mentioned above are those indicated in art. 177 of the Criminal Code, i.e. the ascendants and descendants, brothers and sisters, their children, as well as the persons who have become such relatives through adoption (family relations are also preserved in relation to natural relatives), the spouse, but also persons living in cohabitation or who have established relationships similar to those of parents and children, if they live together.

In addition to these protective measures, the injured person also has the possibility to request to be informed if the defendant will be detained, under preventive arrest or house arrest, or if he will be sentenced to a custodial sentence (prison or detention for life), regarding his release or escape (art. 111 par. 5 of Criminal Procedure Code). Such a provision is intended to put the injured person on guard, who can take the necessary precautions if he considers that the release of the defendant would represent a danger of any kind to him or to another person.

As a result of the changes brought by Law no. 217/2023, starting from 01.01.2024, at art. 111 par. 6 of Criminal Procedure Code an additional measure of protection of the injured person will be provided, i.e. hearing him via videoconference or other technical means of communication at the place where he is temporarily accommodated on the basis of a protective measure.

Also from 01.01.2024, as an effect of the above-mentioned law, the Criminal Procedure Code will provide for additional scenarios in which protective

measures can be taken both for the benefit of the injured person, the civil party, and the threatened or vulnerable witness, respectively when the release or escape of the perpetrator of the crime may represent a danger to their private life or dignity or may cause them damage of any nature, regardless of its extent.

The same protective measures shown above can be ordered during the trial phase, an additional protective measure that can be ordered at this procedural moment being the non-publicity of the court hearing during the hearing of the victim, having in consideration that the general rule is the publicity of the criminal process.

In the preliminary chamber phase, the body competent to rule on protective measures (taking, maintaining, and revoking) is the preliminary chamber judge, and in the trial phase the court before which the case is pending.

During the criminal investigation, the prosecutor has the obligation to verify, at reasonable time intervals, whether the reasons that determined the taking of protective measures exist, and otherwise order, by means of a reasoned ordinance, their termination.

After the file has been registered with the court, within 15 days, the judge of the preliminary chamber must check whether or not the maintenance of the protective measures is still required, by ordering their maintenance or termination.

The court will check before the start of the judicial investigation, as well as before each hearing of a person who benefits from a protection measure, if the conditions that determined their taking still exist and will issue a reasoned decision in the sense of maintaining or terminating the measures of protection.

If the court decides to postpone the application of the penalty against the defendant according to art. 83 of the Criminal Code, it can impose on the defendant the obligation not to communicate with the victim or her family members or to approach these persons during the 2-year supervision period (art. 85 par. 2 letter e of Criminal Procedure Code). In the case of bad faith non-compliance with this obligation by the defendant, the postponement of the application of the penalty will be revoked and its application and execution will be ordered.

In order to protect the victim of crime of family violence, the judicial bodies can impose certain obligations on the defendant when taking or during preventive measures, namely that of judicial control, judicial control on bail and house arrest.

The judicial body competent to rule on the preventive measure of judicial control or judicial control on bail (the prosecutor, the judge of the preliminary chamber or the court, as the case may be) will be able to impose on the defendant the obligation not to return to the family home, not to approach the injured person or their family members and not to communicate with them directly or indirectly, in any way (art. 215 par. 2 letter d of Criminal Procedure Code). In the content of the act ordering the taking of these preventive measures, the obligations that the

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defendant must comply with are expressly provided and his attention is drawn to the fact that, in case of bad faith violation of the obligations imposed on him, the measure preventive measures of judicial control or judicial control on bail can be replaced by the measure of house arrest or preventive arrest.

A similar prohibition is imposed on the defendant when the measure of house arrest is ordered, the defendant having the obligation established by law not to communicate with the injured person or his family members, or with witnesses (art. 221 par. 2 letter b of Criminal Procedure Code).

If the defendant violates in bad faith the obligations related to the measure of house arrest, including that of not communicating with the injured person, the measure of house arrest may be replaced by preventive arrest.

Protection measures for victims or other close persons can also be ordered by means of accessory and complementary punishments consisting in the prohibition of certain rights, which aim to complement the coercive, re-educational and exemplary functions of the main punishment.

In the case of penalties applied to natural persons, accessory penalties are executed during the execution of the main penalty or are in force even when the convicted person avoids execution, while the complementary penalty enters into force after the execution of the main penalty or its consideration as executed (as a result of the expiration of the statute of limitations for the execution of the sentence or the pardon) or from the date of the definitive stay of the sentence of imprisonment, the execution of which was suspended under supervision.

The complementary penalty of the prohibition of certain rights is applied for a minimum period of one year and a maximum of 5 years.

In accordance with art. 66 para. 1 lit. n and o of the Criminal Code, the court may prohibit the convicted person, as an accessory and complementary punishment, the right to communicate with the victim of the crime or with her family members or to get close to them, as well as the right to approached the home, workplace, school or other places where the victim carries out his social activities, under the conditions established by the court through the sentencing decision.

The non-compliance by the convicted person, with intention, of these complementary or accessory punishments constitutes the crime of non-execution of criminal sanctions, provided. of art. 288 para. 1 of the Criminal Code and is punished with imprisonment from 3 months to 2 years or with a fine, if the act does not constitute a more serious crime.

II. ADMINISTRATIVE MEASURES FOR THE PROTECTION OF CRIME VICTIMS

In addition to the procedural protection measures regulated in the Code of Criminal Procedure, there is the possibility of ordering some administrative protection and assistance measures for the victims of crimes, by introducing them into a protection program, regulated by Law no. 682/2002 on witness protection.

Family members or other close people can also be included in the protection program. According to the special law, the notion of "family member" includes the spouse, parents and children, while the expression "close persons" refers to those persons with whom the victim is linked by strong emotional ties.

These persons may be entered into the witness protection program if their life, bodily integrity or freedom is threatened as a result of the information, data and/or statements provided or which they have agreed to provide to judicial bodies.

We observe, thus, that administrative protection measures are taken under more restrictive conditions compared to the procedural measures provided for in the Code of Criminal Procedure, which also provide for other hypotheses that justify the taking of protective measures: when there is a reasonable suspicion or fear that the goods or the activity professional status of the witness or a family member may be jeopardized.

Moreover, from the economy of the text of Law no. 682/2002 on the protection of witnesses results that the threat to life, health, bodily integrity or freedom must be concrete or, at least, very likely, for the introduction of the persons concerned by the danger in the protection program.

Another difference between the two categories of protective measures concerns the persons who can benefit from the respective measures, in the sense that, in order to benefit from protection under the special law, these persons must have the capacity of a witness, not an injured person, and protective measures are available if the data, information, statements given by a person are related to the most serious crimes such as genocide, war crimes, terrorism, murder, crimes related to drug trafficking, human trafficking, money laundering, etc., as well as any other crime punishable by a prison sentence, the special maximum of which is at least 10 years, which may be the case for some of the crimes provided for in art. 199 of Criminal Code, such as murder or sexual assaults.

If the persons indicated above provided data, information or made statements in relation to facts other than those indicated in Law 682/2002 on the protection of witnesses, they and family members or other close persons, as the case may be, will only be able to benefit from the procedural mechanisms of protection, regulated in the Romanian Criminal Procedure Code.

The measure of introduction into the witness protection program is ordered by the prosecutor, the preliminary chamber judge or the court, as the case may be, upon the proposal of the criminal investigation bodies, during the criminal investigation phase, or by the prosecutor in the preliminary chamber procedure or during the trial phase.

The body that will establish the protection scheme as a result of the introduction of people into the witness protection program is the National Office for Witness Protection, which operates within the Ministry of Internal Affairs and under the General Inspectorate of the Romanian Police.

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Regarding the content of the protection program, it is composed of one or more of the range of measures provided for in art. 12 of Law 682/2002 on witness protection:

- a) protection of the identity data of the protected witness;
- b) the protection of his statement;
- c) listening to the protected witness by the judicial bodies, under an identity other than the real one or through special ways of distorting the image and voice. This measure has an equivalent among procedural protection measures.
- d) the protection of the witness in detention, preventive arrest or in the execution of a custodial sentence, in collaboration with the bodies that administer the places of detention;
- e) increased security measures at home, as well as protecting the movement of the witness to and from the judicial bodies, which also corresponds to the procedural protection measures.
- f) change of domicile;
- g) change of identity;
- h) change of appearance.

The assistance measures that can be provided, as appropriate, within the support scheme are:

- a) reinsertion into another social environment;
- b) professional retraining;
- c) changing or securing the job;
- d) securing an income until finding a job.

This type of assistance has a complementary character to the measures for the protection of threatened persons and aims to create the possibility for them to integrate socially when the cooperation of witnesses, in the sense of the special law, with the judicial bodies generates such a substantial danger for some persons, that they can no longer return to the places they frequented and even have to relocate to avoid being found by potential aggressors.

In the situation where the person eligible to be included in the protection program is in a state of danger, which requires immediate protection measures, the police unit or, as the case may be, the body that administers the place of detention can take the protection measures provided for in Art. 12 par. 2 of Law no. 682/2002 on a provisional basis, for a determined period, until the imminent danger disappears or until the person in question is included in the protection program.

Termination of the protection program according to the special law is ordered by the prosecutor by ordinance or by the court by a conclusion, depending on the procedural phase of the criminal case in connection with which the protected person gave the statement.

III. THE NEED TO COMPLETE THE NATIONAL LEGISLATIVE FRAMEWORK

ON THE PROTECTION OF CRIME VICTIMS

The Romanian legislation is quite comprehensive in terms of measures to protect the participants in the process and, in particular, the victims of the crime, but it can be enriched so that there are the most effective prerequisites for achieving the goal pursued by their disposition.

In order to reduce the victim's feeling of fear towards the defendant, in order to avoid a face-to-face confrontation with the accused, we believe that the possibility of removing the defendant from the courtroom during the hearing of the protected person should be provided for, under the condition that the defendant is represented by a lawyer who to address the questions they consider useful for the exercise of the right to defence.

As is also provided in the legislation of Great Britain, we believe that the legislation of the protection measure consisting in the hearing of the protected person by placing him in a room next to the one where the court session is held, the dividing wall being represented by a two-way mirror, is required, which would allow people in the courtroom to see the person being interviewed, but not the other way around. The advantages of such a protective measure are multiple:

- visual contact between the interviewed person and the defendant/defendants will be avoided, at the same time reducing the stress she might feel as a result of seeing the defendant;

- you can observe the reactions of the person being heard and perceive his non-verbal language;

- the risk that the defendant will try, verbally or through gestures, to intimidate the person formulating the statement, in order to determine him not to testify against him or other persons, will be removed.

Taking an example from Spanish legislation but also the prescriptions of Directive 2012/29/EU, a measure that the legislator should institute as soon as possible is the allocation of special waiting areas, with security, for people who benefit from protection and who are going to participate at the court hearing. Moreover, routes should be established in the premises of the courts, so that the persons in need of protection do not meet the defendants or the rest of the public throughout their stay in the court premises.

In this way, contact between victims and defendants or other persons who could intimidate or threaten those persons will be avoided before the case in which they participate is called. Cases are often not called at the scheduled times due to extended court sessions, so waiting times for court proceedings can be quite long, while public interactions in the common waiting rooms are not closely monitored by the gendarmes who provides security in court premises.

CONCLUSIONS

Protective measures in the criminal process are essential both for protecting the fundamental rights of the person subject to a risk of revictimization,

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but also for ensuring the normal conduct of criminal proceedings against defendants investigated for acts of domestic violence.

This type of measures must be vehemently effective and, at the same time, as flexible as possible, depending on the specifics of the situation and the needs of the person concerned.

The development of Romanian legislation to complete the spectrum of available instruments, at least in the sense of adopting our recommendations above, protective measures imposed by international legislation or inspired by the legislation of other states or from the recommendations presented by international experts, is necessary and would follow the trend at scale European effort to harmonize physical and psychological protection practices for victims.

Thus, the capacity of the judicial bodies to obtain the willingness of the victims to cooperate with the judicial bodies will be enhanced, the risks of exposure to any danger by participating in the trial being minimized, and they will be encouraged to adopt a sincere, unhindered attitude during the hearings.

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