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The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

Nearly two decades have elapsed since the start of the conflicts in the former Yugoslavia, which were marked by gross violations of international humanitarian law, including crimes against humanity and genocide. The International Criminal Tribunal for the former Yugoslavia (ICTY) has been able to bring justice to thousands of people by sentencing some of the worst criminals for the atrocities committed during the wars. The mandate of the ICTY is due to expire imminently and national courts of the countries concerned are continuing this fundamental work of justice.

The testimonies of witnesses have been indispensible to the ICTY and the national courts. By providing their testimonies, witnesses make an essential contribution to justice and reconciliation in the region, since their testimonies not only form the basis of courts' judgments but also reveal the truth about the crimes committed to those who live in the region and to the international community. Witnesses who stand up for the truth are owed reliable and durable support and protection.

Significant progress has been made in the region in implementing protection and support structures for witnesses who provide their testimonies before national courts. Nevertheless, there is a need for serious improvement in this regard as, due to threats, intimidation and even murder, potential witnesses decide not to testify before national courts of the countries concerned, as they fear for their lives and that of their families. Moreover, many witnesses have not been given the protection and support they deserve, which deters others from coming forward.

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A. Draft resolution[2]

1. Nearly two decades have elapsed since the start of the conflicts in the former Yugoslavia, which were marked by gross violations of international humanitarian law, including crimes against humanity and genocide. The United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) to bring to justice those who have committed serious violations of international humanitarian law in the former Yugoslavia since 1991.

2. The Parliamentary Assembly is aware that the ICTY's mandate will soon expire and welcomes the fact that the majority of war crime cases are now being tried in the national courts of the countries concerned.

3. While recalling its Resolution 1564 (2007) on the prosecution of offences falling within the jurisdiction of the ICTY, the Assembly underlines the urgency of protecting witnesses, since testimonies – and with them a part of the truth – are lost forever when witnesses are no longer alive. Witnesses who stand up for truth and justice are owed reliable and durable protection. Without the protection and support that witnesses need to be able to testify, justice and reconciliation cannot be achieved.

4. The Assembly is appalled to note that, in the region of the former Yugoslavia, several witnesses have been killed and numerous others have been intimidated, threatened or have had their identity revealed by people determined to obstruct the course of justice and conceal the truth. The Assembly regrets that, due to these threats, many witnesses finally decide not to testify because they fear for their lives or those of their families.

5. For many witnesses, testifying is a daunting experience, which implies reliving traumatic events. The Assembly is concerned that many witnesses do not testify because they do not receive adequate support from the authorities. It is also aware that many potential witnesses still believe that they will be perceived as traitors if they testify in war crime cases.

6. The Assembly furthermore underlines the specific difficulties encountered by so-called "insider witnesses", especially those who have served in the armed forces or the police, and stresses the need to guarantee that the witness protection teams are truly impartial and have no vested interest whatsoever in the trials.

7. The Assembly believes that witnesses have the right to be physically protected so that they can deliver their testimonies safely and free from fear. Furthermore, it considers that witnesses should be given support – including legal and psychological support – before, during and after the trial. While acknowledging the work undertaken by certain NGOs in this respect, the Assembly regrets that witness support is often neglected in the countries concerned and urges the relevant authorities to provide witness support either through state programmes or in collaboration with qualified staff working for NGOs.

8. At the international level, while acknowledging the important and pioneering work of the ICTY in developing procedural measures and precedents for witness protection in war crime cases and the essential role of the ICTY's Victims and Witnesses Section, the Assembly is disturbed to note that the Rules of Procedure and Evidence of the ICTY foresee – with a view to guaranteeing the rights of the defence – that the Prosecutor has a duty to disclose the identity of an anonymous witness to the parties 30 days prior to the trial.

9. The Assembly considers that it cannot be seen to be in the interest of justice for the identity of all anonymous witnesses to be systematically revealed to the defence. In cases where revealing the identity of a witness puts that person at a disproportionately high risk, the Assembly considers that the ICTY might envisage the use of a "special advocate", independent of both the prosecution and the defence, in compliance with the case law of the European Court of Human Rights.

10. Also, as already stated in Resolution 1564 (2007), the Assembly is convinced that "[c]onsidering that ICTY's long-term (and moral) commitment towards its own witnesses, a residual mechanism, with a view to continuing to maintain witness protection after its mandate ends, should also be established". It considers that once the mandate has expired, it would be more economical and efficient to hand over the residual mechanism to the International Criminal Court.

11. At the national level, the Assembly recognises that the countries concerned have brought in legislation and regulations on witness protection and acknowledges that many witnesses have been protected in the region as a result of these measures.

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2. Draft resolution adopted unanimously by the committee on 21 June 2010.

12. However, the Assembly is concerned to note that, in practice, the level of witness protection varies greatly across the region as well as within the countries concerned and that – no doubt for financial reasons – witness support and protection programmes seem to be used less than the safety of witnesses requires. Too often, the capacities of the existing systems remain limited and suffer from lack of trust on the part of the population, of a proper legal framework, of adequate funding, facilities and technical equipment, as well as from a lack of co-ordination and co-operation between the relevant actors.

13. The Assembly is pleased to note that increased co-operation between the states concerned has enabled witnesses to continue to be protected as they travel from one state to another and that the use of video-link technology has allowed witnesses to testify without having to travel to the country trying the case and therefore putting themselves in danger.

14. The Assembly welcomes the contribution of the international community in providing funding and training on witness protection in the countries concerned. It particularly acknowledges the important role of the Organization for Security and Cooperation in Europe (OSCE) in the region, in particular its monitoring activity in war crime trials and as regards the training and awareness raising on witness protection in national courts. It encourages the OSCE to pursue this important task.

15. The Assembly further acknowledges the work of the United Nations Development Programme in Croatia in establishing witness support programmes which provide support and advice for witnesses in four pilot courts. It welcomes the fact that the Croatian authorities have taken over responsibility for these programmes. It regrets, however, that these kinds of programmes have not yet been institutionalised in the majority of courts in the region and encourages the authorities of the countries concerned to extend these programmes to all courts trying serious crimes.

16. The Assembly therefore calls on:

16.1. the competent authorities in the states and territories concerned to:

16.1.1. fully implement Committee of Ministers Recommendations R(97)13 on intimidation of witnesses and rights of the defence and Rec(2005)9 on the protection of witnesses and collaborators of justice;

16.1.2. if necessary, modify their national legislation, in order that in extreme cases the identity of witnesses may be kept secret, even from the defence, according to the case law of the European Court of Human Rights;

16.1.3. increase the resources allocated to witness protection programmes, adequately equip the courts with the necessary facilities and technical equipment and establish an autonomous authority, separate from the police or those investigating the crimes, to oversee the programmes and allocate funds;

16.1.4. take steps to ensure that all judges, prosecutors, police officers and any other agents that come into contact with witnesses in serious crime cases are fully trained in witness protection and measures that are available to them to protect witnesses;

16.1.5. encourage the judiciary and prosecutors to investigate speedily and effectively all allegations of witness intimidation and threats and ensure that those people who put witnesses in danger are sanctioned;

16.1.6. make efforts to ensure that witnesses know what protection and support measures are available to them, before, during and after the trial;

16.1.7. provide funding for and establish witness support programmes, using those that have been set up by the United Nations Development Programme in Croatia as a model, in all courts dealing with witnesses in serious crimes;

16.1.8. ensure that witness support measures are available from the beginning of the investigation, for instance by setting up support sections employing social workers and psychologists, in particular in the offices of the specialised prosecutors;

16.1.9. define the regulations and criteria with respect to the role that of NGOs or social welfare centres with regard to witnesses, and ensure adequate funding to perpetuate their service and expertise, and monitor their work to ensure that the service provided is consistent with these regulations and criteria;

16.1.10. continue and improve co-operation with one another in the prosecution of war crime cases;

16.2. the authorities of Bosnia and Herzegovina to:

16.2.1. implement without delay the proposals made in the National Strategy for War crimes cases;

16.2.2. enact legislation to enable the State Agency for Investigations and Protection to provide witness protection programmes in all courts across the country and ensure that this Agency has adequate resources, both financial and human, to support witnesses during the investigation phase as well as during the trial and post-trial phase;

16.2.3. ensure the harmonisation of case law, consider setting up a supreme court or grant the powers of a supreme court to an existing jurisdiction so as to guarantee legal certainty by harmonising the interpretation of the law;

16.3. the authorities of Croatia to:

16.3.1. in circumstances where witnesses may be at risk, use one of the four principal courts which were granted special jurisdiction to hear war crime cases or cases of organised crime;

16.3.2. extend the witness support programmes established by the United Nations Development Programme to all courts dealing with serious crime in Croatia;

16.4. the authorities of Montenegro to thoroughly investigate all cases of intimidation, threats and attacks against witnesses and to protect them before, during and after they deliver their testimony in serious crime cases;

16.5. the authorities of Serbia to:

16.5.1. create and implement a procedure to organise the operation of the Witness Protection Unit, allocate adequate resources for its proper functioning and adapt legislation so that all courts dealing with serious crimes outside the War Crimes Chamber can benefit from this unit;

16.5.2. consider the transfer of responsibility for the Witness Protection Unit to the Ministry of Justice, in order to avoid any conflict of interest between the members of this unit and the witnesses they are supposed to protect;

16.6. the authorities in Kosovo[3] to:

16.6.1. seriously tackle problems encountered by witnesses, given the acute difficulties they are faced with, which have resulted in several of them being killed;

16.6.2. enact legislation that provides for the protection of witnesses that testify in war crimes and serious crime cases, during the investigation proceedings, the judgment and after the trial, including the creation and functioning of witness protection and support units, and implement it fully;

16.7. the European Union to continue to make effective witness protection an essential criterion for the setting up of a partnership with the countries concerned, as well as to provide more manpower to EULEX's Witness Protection Unit;

16.8. all member states to:

16.8.1. accept and organise the relocation of endangered witnesses on their territories, especially those from Kosovo;

16.8.2. consider financing witness protection plans and adequate training for staff in charge of carrying through this task, as well as consider the possibility of bearing part of the living costs of witnesses relocated in their country;

16.9. the international community to continue to provide funding, expertise and training in witness protection and witness support in the region;

16.10. the ICTY to:

16.10.1. consider amending the Rules of Procedure and Evidence, so that, in extreme cases, the identity of a witness can remain anonymous even to the defence, in line with case law of the European Court of Human Rights;

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3. All references to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

16.10.2. set up a residual mechanism with a view to maintaining witness protection after its mandate ends, for example by handing over this mission to the International Criminal Court.

B. Draft recommendation[4]

1. Referring to its Resolution ... on the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, the Parliamentary Assembly fully shares the Committee of Ministers' position, expressed in its Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice, according to which "the scope and the effective and rapid implementation of international co-operation in matters related to the protection of witnesses and collaborators of justice, including with relevant international jurisdictions, should be improved".

2. The Assembly, while underlining the urgency of protecting witnesses effectively, stresses the need to ensure full implementation of Committee of Ministers Recommendations R(97)13 on intimidation of witnesses and rights of the defence and Rec(2005)9 on the protection of witnesses and collaborators of justice.

3. The Assembly therefore calls upon the Committee of Ministers to:

3.1. instruct its relevant committees to prepare an evaluation report on the level of implementation of Recommendations Rec(2005)9 and R(97)13, to be submitted to the Parliamentary Assembly;

3.2. instruct the European Committee on Crime Problems (CDPC) to undertake a feasibility study on whether the protection and support of witnesses could be the subject of a future Council of Europe convention.

4. Draft recommendation adopted unanimously by the committee on 21 June 2010.

C. Explanatory memorandum by Mr Gardetto, rapporteur

1. Introduction

1. On 31 January 2008, members of the Parliamentary Assembly submitted a motion for a resolution on the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans (Doc. 11522). The Committee on Legal Affairs and Human Rights appointed its rapporteur on 2 June 2008.

2. It may be useful to describe the different stages in the preparation of this report. On 8 and 9 April 2009, the rapporteur visited The Hague where he had discussions with officials from the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "the Tribunal"). The purpose of this visit was to understand the issues that the ICTY has to deal with in the concluding phase of its work, as well as the difficulties that the imminent closure of the Tribunal might entail with regard to the efficiency of the international protection system for witnesses appearing before it.

3. Subsequently, in the spring of 2010, the rapporteur visited Zagreb (Croatia), Belgrade (Serbia), Sarajevo (Bosnia and Herzegovina) and Pristina (Kosovo) to broaden his understanding of the situation.[5] He spoke to numerous government members and officials, members of parliament and of the judiciary, representatives of the field missions of the ICTY, the European Union and the Organization for Security and Cooperation in Europe (OSCE), as well as representatives of non-governmental organisations.

4. These different stages are evidence of the care with which this report has been prepared.

5. Back in 2007, the Assembly produced a report on the prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia.[6] The report assessed, among other things, national jurisdictions and their capacity for trying war crimes. In this context, it looked at witness protection and support and explained how witnesses were not being adequately protected in trials taking place in national jurisdictions, partly due to gaps in legislation but also due to procedural difficulties. In Resolution 1564 (2007), the Assembly called upon national governments to "improve the protection of witnesses at national level and co-ordination at regional level and clarify the legal safeguards".

6. In this report, the Assembly also underlined that "so far only a tiny proportion of those responsible for war crimes have been brought to justice. No matter how long and painful the reconciliation process may be, more efforts are still required". The time has come for the national courts of the states concerned to take over from the Tribunal and prosecute those responsible for war crimes who have not yet been brought to justice. This work has already begun at national level where the national courts face a very large number of war crime cases.[7] In this context, the protection of witnesses – the key actors in the prosecution of war crime cases – is a highly acute matter.

7. Due to the time that has elapsed since the events occurred, material elements for prosecution have generally disappeared in war crime cases regarding the Balkans war at the end of the 1990s. Witnesses are therefore essential in order to find out the truth and prosecute the criminals. They are a key element in the work of justice, and such work is essential to avoid impunity, reinstate trust in the region and contribute to the reconciliation process in the Balkans.

8. Given the fact that due to numerous threats, potential witnesses might finally decide not to testify before the national courts of the states concerned, the present report assesses the current witness protection and witness support systems in place in the countries that have to deal with the highest number of cases or in which this issue is especially acute, namely Bosnia and Herzegovina, Croatia, Montenegro, Serbia and Kosovo, and compares these systems to the standards that have been set by the ICTY.

9. The material collated by the rapporteur on his visits to the region has been of great value, both qualitatively and quantitatively. The rapporteur found that the systems currently in place do not always provide adequate protection to the witnesses involved in prosecutions of war crimes (and of organised crime) in national courts. The consequences range from the identity of protected witnesses being revealed in Croatia, witnesses being threatened and intimidated in Bosnia and Herzegovina, witnesses who are on the point of testifying being assassinated in Kosovo, etc.

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5. The visits took place on 2-3 February, 4-5 February, 9-10 March and 15-16 April 2010 respectively.
6. Assembly Doc. 11281.
7. In this respect, the rapporteur refers the reader to the report on the obligation of member states of the Council of Europe to co-operate in prosecution of war crimes, presented by the Committee on Legal Affairs and Human Rights (rapporteur: Mr Dorić, Croatia, ALDE, Doc 12454).

10. Improving the protection of witnesses at national level and co-ordination at regional level are crucial elements for the success of the work of justice and the effective implementation of the law. At the same time, witnesses need to be given support, as appropriate, before, during and after the trial to ensure that they feel comfortable delivering their testimonies. Indeed, fear is not always based on a physical threat, many witnesses are victims or survivors of atrocities – retelling their tale is often a psychologically traumatic process that requires support. Similarly, the rapporteur was informed by many of his interlocutors that there was a general fear of being perceived as a traitor, especially among those who have served in the armed forces or the police.

2. Defining the terms

2.1. Witness protection

11. A witness is any person who possesses information relevant to criminal proceedings about which he or she has given and/or is able to give testimony (irrespective of his or her status and of the direct or indirect, oral or written form of the testimony, in accordance with the national law).[8]

12. Although the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or "the Convention") does not mention the protection of witnesses specifically, the European Court of Human Rights ("the Court") has started to build a body of case law on witness protection in relation to several articles of the Convention: the obligation of the state to protect life (Article 2); the obligation of the state to protect the right not to be subjected to inhuman or degrading treatment when giving evidence (Article 3); and the right to respect for private and family life (Article 8). The Court has always balanced these rights against the right of the defendant to a fair trial (Article 6).[9]

13. The Council of Europe has been active in promoting standards on witness protection across its member states. There have been a number of recommendations of the Committee of Ministers dealing with the issue. Specifically: Recommendation R(97)13 concerning intimidation of witnesses and rights of defence**,** which, *inter alia*, recognised the need to protect witnesses prior to, during and after the trial; and Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice*,* which urged member states to improve protection afforded to witnesses. The latter recommended the types of measures that should be available and called for increased international co-operation in the field of witness protection.

14. Many states have adopted witness protection programmes in some form or another, but they vary greatly in the level of protection they afford to witnesses. Some schemes are limited to being enshrined into law but are little more than a paper exercise, not backed by financial resources or practical measures to effectively protect the witness, whereas other programmes greatly assist the authorities in combating organised crime.[10]

15. The types of measures that can be used are wide-ranging: starting from pre-trial measures such as placing a witness in a safe house or obtaining an injunction against the accused to prevent him or her from intimidating the witness, to protection during the trial which includes such measures as removing the defendant from the courtroom while a witness gives evidence and using video-conferencing technology. The threat to a witness might be so severe that the use of anonymous testimonies may be necessary. This can be done by giving a witness a pseudonym or using voice-distortion technology.[11] More extreme (and costly) protection measures include changing the identity of the witness following the trial and relocating him or her to another country.

16. Witness protection measures should be grounded in binding legislation as they can cause serious disruption to the life of the witness and may affect the defendant's right to a fair trial.[12] In its good practice study, the United Nations Office on Drugs and Crime recommends that an autonomous authority, separate from the police or those investigating the crimes, be established to oversee witness protection programmes

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8. Definition contained in the Committee of Ministers Recommendation R (97) 13 on intimidation of witnesses and rights of the defence.

9. See, for example, *Doorson v. The Netherlands*, judgment of 26 March 1996, paragraph 70, Reports 1996-II; *Van Mechelen and Others v. The Netherlands*, judgment of 23 April 1997, paragraph 58, Reports 1997-III; *Jasper v. the United Kingdom* (Grand Chamber), Application No. 27052/95, paragraphs 51-53, Reports 2000-II; *S.N. v. Sweden*, Application No. 34209/06, paragraph 47, Reports 2002-V.

10. See Vega-Gonzalez P. and Ferstman C., *Ending threats and reprisals against victims of torture and related international crimes*: A call to action, Redress, London, 2009.

11. The use of anonymous witnesses always has to be balanced against the defendant's right to a fair trial.

and that the necessary funds be allocated to it. This is essential to guarantee proper scrutiny of the system and co-ordination of all the different programmes that may need to be implemented, including perhaps the allocation of new housing and psychological support for the witness.

17. For witness protection measures to function properly, allegations of witness intimidation have to be properly investigated. Measures also need to be in place to punish those people who put protected witnesses at risk. The ICTY has brought legal proceedings against a number of people for revealing the names of protected witnesses and placing them in danger. In contrast to this approach, the rapporteur was given many examples across the region of the former Yugoslavia where the authorities have refrained from punishing those who had publicly (for example, via their own websites!) disclosed names of protected witnesses.

2.2. Witness support

18. A discussion on witness protection is incomplete without reference to witness support. Providing a witness statement to the police or a court is often traumatic for a victim or witness. It involves having to recall and relive experiences which in the majority of cases are harrowing and painful. For many witnesses, providing a testimony at court is their first experience of the criminal justice system. This is often a daunting process, especially for those witnesses who feel threatened or are frightened of the consequences of providing a testimony. Victims and witnesses in war crime cases are particularly vulnerable due to the nature of the crimes involved.

19. The rapporteur considers that victims and witnesses need some form of support before, during and after providing testimonies. If this type of support is not provided then the risk is that witnesses will not come forward, will provide incomplete or inadequate testimonies or that secondary victimisation[13] occurs.

20. The type of support needed will always depend on the individual and the vulnerability of the witness, but support programmes should be seen as an essential service and part of the proper administration of justice. States should provide services for the support of witnesses and encourage and facilitate the work of non-governmental organisations in assisting witnesses[14] before, during and after the trial.[15]

21. Through the investigation process and before trial, law enforcement officers must question witnesses sensitively; witnesses must be provided with information on their rights and what protective and support measures are available to them. They must also be provided with psychosocial support, including therapy and counselling, where it is needed. This can be delivered either through state programmes or by specialised staff from NGOs.

22. It is important that some support be provided to witnesses when they go to court to deliver their testimonies. At the very least, a member of staff should be there to help the witnesses and explain where they need to go. There should also be staff to provide psychological support during breaks in the trial.

23. Court facilities also need to be fit for purpose. Where possible there should be separate entrances to the court for witnesses and a separate room where they can go to wait to be called into trial. It is also imperative that witnesses feel comfortable while giving their testimony. The trial chamber should be set up in such a way that the witness is not made to feel intimidated by the accused.[16]

24. In general, the rapporteur found that support for witnesses in the region is often neglected post-testimony. Yet this is precisely where the risk of secondary victimisation is most prevalent and witnesses are often left feeling (re)exploited, which can have the effect of discouraging other potential witnesses.

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12. For a more in depth account, see *Good practice for the protection of witnesses in criminal proceedings involving organized crime*, UNODC, Vienna, 2008, and *Protecting witnesses of serious crime – Training manual for law enforcement and judiciary*, Council of Europe Publishing, Strasbourg, 2006, p. 30.

13. Secondary victimisation does not happen as a direct result of the criminal act, but through the response of institutions and individuals to the victim. It involves a lack of understanding of the suffering of victims which can leave them feeling both isolated and insecure, losing faith in the help available from their communities and the professional agencies. The experience of secondary victimisation intensifies the immediate consequences of crime by prolonging or aggravating the victim's trauma; attitudes, behaviour, acts or omissions can leave victims feeling alienated from society as a whole; see paragraph 46 of the Explanatory Memorandum to Recommendation Rec(2006)8 on assistance to crime victims, as well as "Statement of principles", *Social Rights of Victims of Crime*, European Forum for Victim Services (1998), p. 2.

14. In Recommendation Rec(2006)8 the Committee of Ministers called upon member states to provide a minimum level of support to victims. This is also applicable to witnesses.

15. The ICTY has recently made recommendations on best practice in witness support. See Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (September 2009), pp. 87-89.

16. See section 4.2 below as regards Croatia.

3. Witness protection and support at the International Criminal Tribunal for the former Yugoslavia

25. Witness testimonies have been fundamental to the functioning of the ICTY. By their testimony, witnesses make an essential contribution to the work of justice, to the fight against impunity, to restoring the confidence of the people in the authorities and thus to reconciliation in the region. Their testimony not only forms the basis of the Tribunal's judgments but also reveals the truth about the crimes committed to those who live in the region and to the international community. The ICTY has done pioneering work in setting standards on witness protection and support. Judges have based their rulings mainly on oral testimony, which is thus an essential element in the proper performance of the Tribunal's duties. It is vital for witnesses and victims to be able to testify in safety.

26. The rapporteur has described extensively in a separate memorandum the system for protection of witnesses appearing before the ICTY. This document has since been declassified by the committee and is available on the Assembly's website.[17] The rapporteur considers the information therein as being an integral part of his report and will not repeat it here (although he will use it to underpin certain recommendations).

27. The rapporteur wishes, however, to underline certain limits of the witness protection measures put into place by the ICTY.

28. During his visits to the region of the former Yugoslavia, the rapporteur was informed that the protection given to witnesses by the ICTY before and after the trial is rather poor. There is only one field presence of the Victims and Witnesses Section (hereafter "the Section"), which is based in Sarajevo and counts on only two members of staff (exclusively working on this issue and supported by personnel based in The Hague who travel to the region regularly) to provide witness protection and support to the whole region. The rapporteur was told that the Section did not liaise with the police forces in the region to ensure that witnesses were protected before going to The Hague to testify.[18] The rapporteur was disturbed to hear about one witness who decided not to testify in one case at the ICTY because he felt that the protection measures he was granted were not strong enough.

29. Furthermore, one NGO told the rapporteur about an incident where a woman – who had testified for rape in the Dragoljub Kunarac trial in The Hague – was seated near defence representatives on her flight home. This panicked the woman and demonstrated poor logistical planning and a disappointing lack of post-trial protection in this case.

30. There is also a wider problem of protecting witnesses who are allowed to testify anonymously. The right to know the identity of a witness testifying against a defendant, like his or her right to cross-examine that witness, are part of the basic rights of the defence,[19] laid down in the Rules of Procedure and Evidence of the ICTY. Thus, all those present in court know the witness's identity (even when protection measures have been put in place to keep his or her identity secret). The Prosecutor has a duty to disclose the identity of an anonymous witness to the parties thirty days prior to the trial. The rapporteur notes that the relevant legislators in all of the countries in the former Yugoslavia have incorporated this provision into their laws.[20]

31. If a party reveals the identity of a protected witness or divulges any information whereby he can be identified, he is liable to prosecution for contempt of the Tribunal and to a sentence of up to seven years' imprisonment and/or a fine of €100 000.

32. As indicated in the rapporteur's memorandum, this is no mere academic point.[21] Regardless of the sanctions pronounced by the ICTY in this regard, the fact that the defence has an automatic right to know the identity of the witness means that it is revealed to the very person from whom the protection measures were designed to protect the witness. This could lead to reprisals at a later date or, indeed, as has been highlighted in the cases mentioned in the memorandum,[22] intimidation of a witness and of his or her family. This can even go as far as the murder of a witness or of a member of his or her family. The rapporteur was told that this

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17. See document AS/Jur (2009) 38: http://assembly.coe.int/CommitteeDocs/2009/20090903_ajdoc38.pdf.
18. The Registrar of the ICTY told the rapporteur that the Section liaises with the local police on a case-by-case basis and with the agreement of the witnesses. In some instances witnesses expressly request that the local police are not informed.
19. See Rule 66 of the Rules of Procedure and Evidence of the Tribunal.
20. On this particular point, the rapporteur would like to quote the Chief Prosecutor of Bosnia and Herzegovina: "I believe it relevant to emphasize that this provision that the information must be released when the witness testifies at the main trial is harmful and counterproductive and its impact is almost retroactive – back to the very first contact with the witness when he/she requests protection." (Document transmitted to the rapporteur by the Chief Prosecutor.)
21. See document AS/Jur (2009) 38: http://assembly.coe.int/CommitteeDocs/2009/20090903_ajdoc38.pdf.
22. Ibid.

provision has caused problems for prosecutors in the countries of the former Yugoslavia, because when witnesses find out that their identity will be revealed to the defence, they subsequently refuse to testify[23] or at the very least they have to be convinced again. Moreover, some witnesses have to go through the traumatic experience of being relocated, which could be avoided if, in extreme cases, the identity of witnesses could be kept anonymous.

33. It cannot be seen to be in the interest of justice for the identity of all anonymous witnesses to be revealed to the defence. Although the rapporteur believes that it is fundamental to ensure the right of the defendant to a fair trial, this must be balanced against the right of the witness to be protected. There have been a number of judgments from the European Court of Human Rights on this issue which have established that concealing the identity of the witness from the defendant, where the witness fears reprisals, is not necessarily a violation of the right of a defendant to a fair trial, as long as the defendant or his or her lawyer has the opportunity to put questions to the witness. The Court emphasised that safeguards must be put in place and that a conviction should never be based solely – or to a decisive extent – on the basis of an anonymous statement.[24]

34. In cases where revealing the identity of the witness puts that person at a disproportionately high risk, the rapporteur suggests that the use of a "special advocate" – independent of both the prosecution and the defence – may be an appropriate safeguard. A "special advocate" could analyse the anonymous evidence, take instructions from the defendant and make representations on behalf of him or her as to the worth of these statements.[25]

35. In the light of the long-term commitment of the ICTY to its own witnesses, the Assembly, in its Resolution 1564 (2007) on the prosecution of offences falling within the jurisdiction of the ICTY, has encouraged the United Nations to set up a residual mechanism "with a view to continuing to maintain witness protection after its mandate ends".

36. Such a mechanism should give the judges the ability to rule on protection measures in the context of procedures after the trials, and on cases of contempt of the Tribunal (in the event of violation of witness protection measures). Such a mechanism should make it possible to perpetuate the principle of regular assessment of the existing threat to protected witnesses. A permanent point of contact with protected witnesses (*inter alia* to answer their questions, to warn them of the release of certain convicted persons or to enable them to report any new threat to them), but also with states which have entered into relocation agreements with the ICTY, should remain operational. Lastly, such a residual mechanism should provide for the possibility of reviewing and reassessing the necessity for maintaining a witness's relocation or, on the other hand, the possibility of terminating it.

37. The United Nations Security Council might contemplate entrusting such a mechanism to the International Criminal Court or creating an independent entity (possibly, in the end, in the form of an entity common to the ICTY and the International Criminal Tribunal for Rwanda). The solution of integrating the residual mechanism into the existing system of the International Criminal Court would probably be less costly and more sustainable.

38. Witnesses have played and continue to play an essential part in the campaign to ensure that war criminals, particularly in the Balkans, do not go unpunished. They are key players in the implementation of the ICTY's mandate. The Tribunal has a long-term moral, indeed even legal, commitment to them. Witnesses must have the right to continuing access to the international protection system under the umbrella of which they testified, even after the ICTY's work is finished. If this right were flouted, it would not be surprising if persons agreeing to testify before international tribunals became increasingly rare.

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23. Reportedly, witnesses who had first accepted to act as prosecution witnesses changed their mind once their identity had been revealed to the defence and declared that they had been forced to act in favour of the prosecution and eventually testified in favour of the defence.

24. *Doorson v. The Netherlands*, Application No. 20524/92, paragraphs 68-71, and *Kostovski v. The Netherlands*, Application No. 11454/85, paragraph 44.

25. In *A and Others v. the United Kingdom*, Application No. 3455/05, paragraphs 212-224, the European Court of Human Rights considered the role of "special advocates" at the Special Immigration Appeals Commission, who are able to make submissions on behalf of the defendant on "closed material" that cannot be revealed to the defendant on the grounds of national security. The Court ruled that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearings by testing the evidence and putting arguments on behalf of the detainee (or defendant) during the closed hearings.

39. The credibility of the United Nations and of international justice as a whole requires that an effective residual protection mechanism for witnesses be set up, and should endure when the mandate of the ICTY ends.

4. Adequacy of witness protection and support programmes in the Balkans

4.1. Bosnia and Herzegovina[26]

40. In Bosnia and Herzegovina, many witnesses in war crime cases reportedly complain that they or their family members have been threatened, offered a bribe or subjected to intimidation.[27] Such witnesses are therefore reluctant to testify.

4.1.1. Legislation

41. Bosnia and Herzegovina has ratified a number of international and European conventions that protect the rights of victims and witnesses, including the right to life, liberty and security, and respect for private and family life. The main domestic provisions relating to witness protection are contained in the Criminal Procedure Code of Bosnia and Herzegovina,[28] the Law on the protection of witnesses in danger or at risk,[29] the Law on the witness protection programme of Bosnia and Herzegovina[30] and the Criminal Code.

42. The Criminal Code provides special measures for the protection of vulnerable witnesses, including the exclusion of the public from the trial. Measures can also be imposed to prevent the suspect or the accused from unduly influencing the witness, by imposing a restraint order or other orders to ensure that they remain in their place of residence. Under the Criminal Code, it is an offence to disclose the identity of a protected witness.

43. The Law on the protection of witnesses in danger or at risk contains provisions enabling witnesses to testify via video-link, the removal of the accused from the courtroom and additional measures to prevent disclosure of the identity of the witness. Similar laws have been adopted at the entity level.

44. The Law on the witness protection programme is only applied at the state level. It provides for witnesses to be placed under a programme, with their consent, to guarantee their safety during the criminal proceedings. It includes measures to change the identity of and to relocate a witness. However, as has been reported to the rapporteur, so far the law has never been applied. It is likely that the cost of using such a measure is one of the reasons for this. It is usually the sender country that has to bear the costs of relocating a witness to another state. The rapporteur feels that for a relatively poor country like Bosnia and Herzegovina, this might not always be possible and is extremely inhibiting.

45. Generally speaking, the provisions contained in these codes and laws, if used properly, could go a long way towards protecting the life, security and privacy of witnesses. However, there are many problems with their implementation both at the state court and at the entity level.

4.1.2. The court system

46. The War Crimes Chamber of the State Court of Bosnia and Herzegovina was established on 9 March 2005 as a joint initiative of the ICTY and the Office of the High Representative.[31] The Chamber's mandate is to try mid- to low-level perpetrators referred to it by the ICTY. It also tries war crime cases that have been initiated locally.

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26. The rapporteur visited Sarajevo on 9 and 10 March 2010. He met with officials from the ICTY, the OSCE, the Office of the High Representative, the Chief Prosecutor of Bosnia and Herzegovina, international judges, the European Union Police Mission and representatives of NGOs.

27. See *Witness Protection and Support in BiH Domestic War Crimes Trials: obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing*, OSCE, Sarajevo, 2010.

28. Official Gazette of Bosnia and Herzegovina, No. 3/03.

29. Ibid.

30. Official Gazette of Bosnia and Herzegovina, No. 29/04.

31. The concept underlying the War Crimes Chamber initiative is that accountability for gross violations of human rights that took place during the conflict ultimately remains the responsibility of the people of Bosnia and Herzegovina. It is essentially a domestic institution operating under national law.

47. Nevertheless, the War Crimes Chamber has a relatively small budget and does not have the resources or time to hear all war crime cases. It therefore only handles the most serious and highly sensitive ones. The domestic courts under the jurisdiction of the entities deal with the remaining cases.

48. The rapporteur wishes to highlight a problem that has been drawn to the Assembly's attention previously and which has an impact on the trial of war crime cases and witness protection in Bosnia and Herzegovina.[32] The judicial authorities of the state operate totally independently of those of the entities. The result is that the Court of Bosnia and Herzegovina does not have the same jurisdiction as a state supreme court would have because the entities have their own supreme courts.[33] The rapporteur believes that legal harmonisation throughout Bosnia and Herzegovina is necessary in order to secure certainty of the law and that the Court of Bosnia and Herzegovina should therefore have the powers and jurisdiction of a supreme court, or alternatively that such a supreme court should be established.[34]

49. The jurisdictions are arranged differently from region to region. In the Federation, the municipal courts try less serious crimes than the cantonal courts. In Republika Srpska, the municipal courts exercise jurisdiction over less serious offences. In the Brčko District, the basic court handles serious offences.

50. When in Bosnia and Herzegovina, the rapporteur had the feeling that the amount of levels and the complexity of the judiciary make it difficult to get a clear picture of the system, both for the general public and for external observers. Moreover, the rapporteur got the impression that the system makes it easy for his interlocutors to pass their responsibilities on to someone else and to pass the buck, which is contrary to the interests of the general public and the proper administration of justice, and makes the reorganisation of the judicial system in Bosnia and Herzegovina necessary.

4.1.3. Witness protection

51. Although witness protection measures are described in detail by law, in practice witness protection is inadequate in Bosnia and Herzegovina. In a recent report,[35] the OSCE found that the authorities had failed to investigate allegations of death threats diligently. In many cases, witnesses have reported that they or their family members have been threatened, offered a bribe or subjected to some form of intimidation.[36]

52. Where witnesses have been found to be in need of protection, there is often a failure to apply any protection measures or to apply them effectively. Witnesses who have been given pseudonyms to conceal their identity, for example, have complained about receiving summonses through the ordinary post. This renders the protection measures ineffective because the local community is able to find out that the person has been asked to testify.

53. Furthermore, during his visit, the rapporteur was told that there have also been many cases of defence counsel violating orders prohibiting the disclosure of witnesses' names. So far, none has been prosecuted in this context.

54. The rapporteur was concerned to learn from a judge at the State Court that the key witnesses in two cases he had been working on had ultimately refused to testify, as they feared reprisals. Inadequate protection has meant that witnesses are increasingly unwilling to collaborate in prosecutions.

55. The rapporteur was pleased to note that, technically, the State Court of Bosnia and Herzegovina is perfectly equipped to protect witnesses during trials. But, unfortunately, the level of protection given to witnesses is often inconsistent. This has significantly affected witnesses who give evidence in more than one trial. In effect, at the first trial they may be granted excellent protection measures, including, for example,

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32. See Explanatory Memorandum, paragraph 89 of Doc. 11281 on the prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY).

33. Cases can only be referred to the Court of Bosnia and Herzegovina from the entity courts if the latter request it. For example, it is unable to effect even a minimum harmonisation of case law. Different criminal codes apply at state and entity level. Certain crimes exist in the criminal code of the Federation but not in the code of the Republika Srpska.

34. The Assembly has previously called on the authorities of Bosnia and Herzegovina to establish a state-level supreme court to enhance the reform of the judiciary in Resolution 1513 (2006) and Resolution 1564 (2007). See also Assembly Resolution 1626 (2008), which inter alia calls upon the authorities to "ensure the uniform application of the Criminal Code of Bosnia and Herzegovina at entity and state level, in particular with respect to war crime cases".

35. *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing*, OSCE, 2010.

36. Despite these practices appearing to be widespread, the OSCE found only three cases where people had been prosecuted and convicted of unlawful influencing.

being assigned a pseudonym. Subsequently, when they are asked to testify in another trial, with another defendant, sometimes based on the same set of facts, they are not necessarily given the same levels of protection. This renders the protection measures implemented in the first case useless.

56. It should be noted that, over the past few years, the State Court has begun to develop rules of procedure governing protection of witnesses. The rapporteur was assured that this should go some way towards ensuring that the system becomes consistent, but there is still a long way to go.

57. The Witness Protection Department of the State Investigations and Protection Agency (SIPA) provides protection to witnesses during proceedings in cases brought before the State Court, but it is not competent to protect witnesses in cases dealt with in the entity jurisdictions. Since its inception (in 2005), it has protected 439 witnesses in 705 trials.

58. Several of his interlocutors complained to the rapporteur that the SIPA Witness Protection Department is underfunded and understaffed.[37] The technical equipment of staff members is reportedly very poor.

59. The rapporteur was concerned to hear that witness protection measures are not really put in place before and after the trial and calls upon the authorities to allocate funds so that SIPA can provide long-term protection to witnesses before, during and after trials.

60. There are more profound problems at the entity level where witnesses are not afforded adequate protection.[38] This is again partly due to insufficient funding and inconsistencies in how protection measures are implemented. The courts were supposed to have developed rules of procedure, but they have not yet done so.

61. One of the main problems is that SIPA only operates at the State Court level. In 2008, a new draft law on the witness protection programme was proposed by the Council of Ministers, which would have enabled SIPA to expand its witness protection programmes to witnesses testifying before the entity courts. Unfortunately, the law was not adopted, due to a vote against it by representatives of the Republika Srpska.

62. The rapporteur was told that there seemed to be a general feeling that this law should not be adopted at federal level as entity competencies should remain within the entities. The rapporteur cannot support this line of reasoning where witnesses' safety is put in peril and he urges the authorities to extend the role of SIPA across all courts, including those in the entities, as soon as possible.

63. With the exception of the cantonal and municipal courts of Sarajevo, the entity courts do not have the same technical facilities as the State Court to implement measures of protection such as video-links or voice/ image distortion.[39] As the courts know that they do not have the necessary resources, they often even fail to assess whether a witness needs any protection in the first place.

64. The rapporteur was concerned to hear that as a result of all of the above, witnesses have stopped requesting the implementation of protective measures. The rapporteur welcomes the efforts made by the OSCE to reverse this phenomenon by producing information leaflets explaining what rights witnesses have and what they can expect in terms of protection measures. He also urges the authorities concerned, and particularly the courts in the entities, to take up the OSCE's recommendations on ways in which the courts can get round having insufficient resources, including, for example, creating a makeshift screen to hide the witness from public view during the testimony or borrowing video-link equipment from the State Court.

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37. It currently has only 22 members of staff whereas 30 are foreseen for its effective functioning.

38. To cite but one example: on his visit to Sarajevo, the rapporteur was told about the treatment received by the sister of a girl from Banja Luka who had been raped and murdered in 1993 by four policemen. The offenders were acquitted in a masquerade trial in 1993 but the case was reopened at the end of the war, at the request of the family. The sister (a Muslim) had been the key witness in the case and complained that staff at the court had treated her very badly, as if she had been convicted of committing a crime. The rapporteur heard that she was insulted during the trial, whereas the accused were welcomed like heroes. The accused were subsequently convicted and sentenced to ten years imprisonment. Despite the circumstances and the severity of the crimes committed, no witness protection measures were put in place at the trial and the names of the witnesses were made public by the media

39. The rapporteur was pleased to note that the European Union has earmarked €4.1 million for witness protection programmes across the Balkans. It is about to put out tenders for companies to bid to provide services, including equipping the ten different cantonal and district courts with the necessary technology to provide protection measures to witnesses.

4.1.4. Witness support

65. Only the State Court has the capacity to provide psychological and social support to witnesses through the Witness and Victim Section.[40]

66. The Witness and Victim Section has the responsibility of providing psychological, organisational and administrative support to both prosecution and defence witnesses in war crime trials. This includes explaining the trial process to the witness. It is staffed by professional psychologists and social workers with expertise in working with traumatised victims of crime. A 24-hour phone service is provided in case of need. It also assists in transport and logistical arrangements for witnesses. However, until the date of the trial the Service only contacts the witness by phone. They do contact the witness a few days after the testimony by way of a follow-up call but no long-term support or counselling is provided to the witness. The War Crimes Chamber is also well equipped to make testifying a less traumatic experience: there is a separate entrance for witnesses, which is manned by SIPA staff, and a separate waiting room.

67. The Witness and Victim Section only gets involved with witnesses once the indictment has been confirmed and after they have already been interviewed by the Prosecutor's Office. Prior to this, no support is offered. The rapporteur was told that this makes it problematic to work with witnesses in war crime cases. It is difficult to find them in the first place and those that are found are afraid of testifying and therefore need some form of support.

68. The rapporteur encourages the setting up of a support section in the Office of the Prosecutor. This should include social workers and psychologists.[41] The National War Crimes Strategy provides for this and it should be implemented as soon as possible. The SIPA should also be strengthened so as to be already active during the investigation phase, as well as during the trial and post-trial phases.

69. At entity level, no government-funded projects carrying out psychological and social witness support exist. Provisions exist within the Law on the protection of witnesses in danger or at risk for measures concerning support for witnesses. It provides that during the investigation phase, the prosecutor, and after preferring of the indictment, the court, shall notify the Social Welfare Centres that a witness is provided with protection and support measures. The welfare institution should ensure that the witness is provided with assistance and psychological support, including the presence of a competent person during the questioning or the hearing. However, it was repeatedly indicated to the rapporteur that there has been no corresponding investment in the centres to help them deliver the level of service that the law provides for. The rapporteur was disturbed to learn that most of the centres are overburdened and do not even know what their legal obligations towards witnesses are.[42]

70. The rapporteur was told that, as a result of this, the level of support offered to witnesses across the country varies greatly, with some prosecutors relying on the services of local and thematic NGOs to provide support. An example of good practice is that of the Tuzla Canton where a memorandum of understanding has been signed between the Tuzla Canton Ministry of Labour and Social Affairs and Vive Žene, a local NGO.[43] Out of Vive Žene's 32 employees, 20 are psychologists, nurses, or psychiatrists. The NGO works well with the Prosecutor's Office. It establishes a first contact with the witnesses, prepares them for trial and provides psychotherapeutic assistance to them before, during and after the trial. The same organisation is also involved in creating an unofficial witness support network in Brčko where good co-operation has recently been established with the Prosecutor's Office, the Ministry of Internal Affairs and an association of victims.

71. The rapporteur welcomes the work of NGOs in assisting the authorities by delivering support services to witnesses. However, he was concerned to hear that there were no guidelines or standards set for NGOs working in this field. As a result of which there is no knowledge about the level of service that NGOs provide and whether it is adequate or not. There is some merit in getting NGOs with expertise to deliver services but there must be strict criteria regarding their role and their work must be monitored regularly to ensure that a

40. Since 2005, the Witness and Victim Section has supported over 3 000 witnesses. The district and cantonal courts in Bosnia and Herzegovina and the basic court of the Brčko district do not have such witness support sections.

41. This was recommended to the rapporteur by several interlocutors when he was in Sarajevo.

42. As stated by the Chief Prosecutor of Bosnia and Herzegovina, "Although we can agree that this type of assistance to a vulnerable witness is both logical and humane, it is not of great benefit to the prosecutor nor the witness, as we are well aware of the fact that the social care institutions in Bosnia and Herzegovina are not able to meet their regular duties and obligations regulated by all other legislation on persons entitled to social care, let alone to provide assistance and support to the witnesses rendered vulnerable and in need of protection due to testimony". (Document handed to the rapporteur by the Chief Prosecutor.)

43. The agreement was signed at the end of 2007.

consistent service is being provided. Furthermore, the rapporteur feels strongly that the authorities must take responsibility for these programmes by establishing them in all areas and providing funding to maintain services and expertise, whether they are delivered through NGOs or through the Social Welfare Centres.

4.1.5. 2008 National War Crimes Strategy

72. The National Council of Ministers adopted the National War Crimes Strategy in December 2008. It sets out an approach on how to better equip the judiciary to investigate, prosecute and adjudicate in war crime cases. Witness protection is among the areas addressed by the Strategy and the measures proposed in it were meant to ensure the "protection, support and same treatment to all victims and witnesses in the proceedings before all courts in Bosnia and Herzegovina".

73. The strategy contains plans to revise legislation and by-laws in the field of witness protection and to clarify the competencies, actions and procedural steps of those participating in witness protection. The SIPA would be additionally staffed and equipped with adequate material and technical resources. Moreover, the entities and Brčko District courts are supposed to adopt by-laws prescribed by the entity witness protection laws. Prosecutors would analyse cases and see where they were linked so that the cases could be grouped in order to prevent witnesses having to give evidence in identical circumstances. Co-ordination should be improved between the courts and the prosecutors' offices so that where a witness would be appearing in more than one case, the same protection measures would be put in place, to prevent the disclosure of the witness's identify in another trial.

74. The National Strategy for War Crimes also recognised that there were many problems with the current system of victim support and promised to improve the quality of these services. It envisaged: creating a network of witness and victim support services and using the witness/victim support offices at the State Court to co-ordinate this service; using the knowledge and capacities of NGOs already working in this field; identifying NGOs able to deliver psychological and social support; improving facilities at courts so that witnesses will be provided with psychological assistance while delivering their testimony and separate waiting rooms would be created in each court to avoid unnecessary contact between the witness and the general public; and employing psychologists in prosecutors' offices.[44]

75. The measures envisioned in the strategy are positive and wide-ranging and could go a long way towards improving the security of witnesses. However, it was reported to the rapporteur that no steps could be taken due to a lack of reliable data on the number of war crime trials still to be conducted. The rapporteur was astonished that – one and a half years after the strategy had been adopted – this data had still not been collated. Enough time has been lost and the rapporteur urges the authorities to implement the strategy, which they themselves adopted, as a matter of priority. This strategy, which includes a wide range of useful measures, should not remain yet another "paper exercise" to please the international community and must be implemented to bring about concrete results.

4.2. Croatia[45]

76. In October 2003, the four largest county courts in Croatia (Osijek, Rijeka, Split and Zagreb) were granted special jurisdiction to hear war crime cases under the Law on the Application of the Statute of the International Criminal Court and the Prosecution of Criminal Acts against the International Law of War and International Humanitarian Law. The judges in these courts have been specially trained in how to deal with war crime cases. Nevertheless, all courts that hear penal cases in Croatia continue to process war crime cases. Municipal courts handle cases where a maximum sentence of ten years can be handed down.[46] According to our interlocutors, the main reason for the continuation of this practice is to enable war crime cases to be heard in the jurisdiction closest to where the crimes were committed, rather than in courts with specialist prosecutors, judges and facilities. Considering the importance of training of prosecutors and judges and of provision of adequate equipment to ensure witness protection and support, the rapporteur urges the Croatian authorities to use one of the four specialised courts in circumstances where witnesses may be at risk.[47]

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44. The OSCE hosted a meeting in December 2009 of representatives of the judiciary, the state and entity level ministries of justice, human rights and social welfare actors, Social Welfare Centres and civil society organisations. The participants deliberated on how to establish psychosocial support services for witnesses at the entity level through using the services of NGOs. The rapporteur hopes that the relevant authorities will take this forward as quickly as possible. See Conclusions and Recommendations, Round table on establishing a psycho-social support system for witnesses and victims in war crime cases in BiH, organised by the OSCE mission to Bosnia and Herzegovina, 3-4 December 2009.

4.2.1. Legislation

77. Legislation relating to witness protection can be said to be adequate in Croatia; the laws largely cover the main areas and meet international standards. The Law on Criminal Procedureis the main piece of domestic legislation that regulates procedural measures for witness protection. It details the list of measures available, starting with precautionary measures, such as prohibiting the accused from leaving his place of residence or making the defendant report to the authorities. Provisions in the law also include procedural measures, for example allowing the witness to testify under a pseudonym, keeping information regarding the witness confidential and limiting the recording of the main hearing.

78. Revealing the identity of protected witnesses, threats, aggravated murder, violation of secrecy of data, obstructing the collection of evidence are all criminal acts under the Criminal Code aimed at protecting witnesses.[48] Witness protection programmes are provided for under the Law on witness protection,[49] which also provides for a Witness Protection Unit and Commission.

79. The Witness Protection Unit is part of the Ministry of the Interior/Police Directorate and is responsible for implementing and organising protection programmes. The Commission consists of five members who are representatives of the Supreme Court (a judge), the Chief State Prosecutor's Office, the administration of prison system or the ministry competent for judicial affairs, the Ministry of the Interior/Police Directorate, and the Head of the Witness Protection Unit.

80. Upon the proposal of the competent state prosecutor or an endangered person, the Chief State Prosecutor may submit a request to the Commission to include the witnesses into the Protection Programme, if his or her testimony is indispensable to the proceedings.

4.2.2. Witness Protection

81. Examples of good practice were highlighted to the rapporteur during his visit to Zagreb. In the Ademi-Norac trial, more than 40% of the witnesses who testified did so via a video-link. One third of these were endangered witnesses living in Croatia. Two thirds resided outside the country and their testimonies were obtained through co-operation with Serbia, Canada, the United States and Norway, where the witnesses were resident. This was clearly an encouraging example of where international co-operation facilitated testimonies being given at a trial.

82. Nevertheless, various interlocutors told the rapporteur that witnesses still do not feel secure testifying in war crime cases. Often the problem is that judges and prosecutors are not aware of the tools available to them to protect witnesses. For example, where video-conferencing facilities exist, they are not being used on a regular basis to help witnesses who are reluctant to give evidence at trial. Part of the problem is that most war crime cases continue to be tried in the county courts or the municipal courts nearest to where the crimes were actually committed rather than in the specialised courts. Major concerns were expressed to the rapporteur about this because neither the judges nor the prosecutors have been trained in the same way as those in the four courts with special jurisdiction to try war crime cases. Moreover, trying cases of this kind in local courts, rather than transferring them to specialised courts, puts witnesses in the local community at greater risk.

83. This predicament was highlighted in the investigation surrounding the Gospić massacre. According to information provided to the rapporteur, the local police force was implicated in crimes committed between 1991 and 1995 against ethnic Serbs. When the case was being investigated, witnesses were asked to go to the local police station to give evidence. Unsurprisingly, Serbian witnesses do not feel safe in these circumstances and consequently are reluctant to give their testimonies.

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45. The rapporteur visited Zagreb on 2 and 3 February 2010 and met with representatives of the State Attorney's Office, the Ministry of the Interior, the Bar Association, the ICTY, the OSCE, the European Union and the United Nations Development Programme (UNDP), and judges of the County Court.
46. There are 104 municipal courts and 21 county courts. County courts are the appellate jurisdictions for these cases as well as first instance jurisdictions for crimes that carry a penalty of more than ten years.
47. The state attorneys at local level should also be aware of the criteria for a transfer request of such cases.
48. Official Gazette Nos. 28/98, 50/00, 129/00, /51/01, 11/03 and 105/04.
49. The Law on witness protection (Official Gazette No. 163/03).

84. The rapporteur urges the Croatian authorities to ensure that war crime cases are dealt with in the four specialised courts. This would ensure that judges and prosecutors coming into contact with witnesses are fully trained regarding the witness protection measures that are available to them. Furthermore, such cases would not be tried near to where the crimes were committed, which would prevent putting witnesses in the local community in additional danger.

85. In some cases, the identities of protected witnesses have been revealed. There are penalties against this, but the rapporteur was advised that no one has ever been prosecuted or convicted for it. The negative consequences of this were illustrated to the rapporteur in the so-called "Garage" and "Sellotape" cases, where Branimir Glavaš, a Croatian parliamentarian, was convicted of war crimes against Serbian civilians in March 2009. During a press conference in 2005, the then Mayor of Osijek, Ante Dapić, read out the names of 19 people who had provided information on the crimes committed – many among them subsequently refused to give any statements as a result of this. Similarly, Glavaš published court documents, witness statements and other court filings on his personal website. Following this, the Zagreb County Court took steps to implement protection measures and ordered that the judicial investigation into the case be kept confidential. Nevertheless, the identities of protected persons become known when accused persons gave their defence statements or questioned the witnesses. Another prosecution witness's identity became public before his witness protection programme had started. Finally, after his conviction, Glavaš disseminated a video in which he violated some witness protection measures. The rapporteur was disturbed to hear that despite these obvious and public breaches of court decisions, no sanctions were imposed on those revealing the identities of the witnesses.

86. The upshot of this is that witnesses do not currently feel secure in coming forward and testifying. The rapporteur considers that improvements in the current system need to be made to ensure that witnesses come forward and testify without having to be forced to do so. The laws must be fully implemented and sanctions have to be imposed on those people who put witnesses in danger.

4.2.3. Witness support

87. Participation in criminal trials is mandatory for witnesses who have been issued with a summons. Once a witness has been summoned to attend a trial, normally only limited support is offered to them. Financial assistance is given towards the costs of travelling to court. However, witnesses have to request this during the trial and are required to hand their receipts to the judge who subsequently makes a decision on whether the witness is entitled to receive compensation for his or her expenses.

88. The rapporteur was informed that, beyond this, the courts do not always provide witnesses with the support they need. Witnesses often arrive at court and are expected to find their own way to the right courtroom and wait in the main area until called to give evidence. In Croatian courts, there are a limited number of reserved rooms where witnesses can be separated from the general public and the defendants.

89. Other concerns were expressed by those the rapporteur met on his visit about court facilities not being fit for purpose. In particular, the layout of the courtrooms is not conducive to the witness providing his or her testimony without fear of intimidation. For example, in the Ademi-Norac case, the defendant was seated in close proximity to the witnesses who had to testify, with no barrier between them and the defendant. This happened despite the fact that the case was heard at the Zagreb County Court, which has special jurisdiction to hear war crimes and is one of the courts with better facilities.

90. There is not yet a developed system throughout all the courts that offers witnesses psychological and social support or provides them with information on the court proceedings, or about NGOs that can help them.[50] Witness support only really exists within social networks, which can provide only limited legal or psychological support. There is a significant lack of investment by the authorities in these programmes and those that do exist tend to be run by volunteers or NGOs. As in the case of Bosnia and Herzegovina, the rapporteur is concerned about the lack of consistency of the services provided by NGOs.

91. On the other hand, the rapporteur was encouraged to note that there have been some attempts to improve the system. In 2005, a Department for Support to Witnesses and other Participants in War Crimes Trials was established within the Ministry of Justice. It is responsible for ensuring legal and physical protection, as well as psychological assistance for witnesses in war crime trials in and outside Croatia. It also helps the prosecution process by finding witnesses and organising their travel to a particular court. Unfortunately, there are only three members of staff within the department,[51] which means that they are unable to provide any comprehensive assistance to witnesses who testify across the country.

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50. See UNDP document, "Assistance in the Development of a witness and victim support system in Croatia".

92. In 2007, the United Nations Development Programme (UNDP) conducted a survey on witness support in Croatia. It found that the vast majority of witnesses were not offered any contact with organisations that could provide them with practical or psychological support and most witnesses felt threatened. As a result of the findings in the survey, the UNDP established a pilot project whereby witness/victim support offices were set up in four county courts (Osijek, Vukovar, Zadar and Zagreb). Two members of staff were employed in each court and then trained to provide support for witnesses during the court proceedings. The UNDP also invested in the courts' infrastructure by creating work stations for the witness/victim support offices and separate waiting rooms for witnesses and victims.

93. In the framework of the programme, NGOs, volunteers, judges, prosecutors, police co-ordinators, patrol officers and criminal investigators were trained on witness/victim's rights. NGOs that provided psychological, legal and other types of assistance were assessed and networks created. The rapporteur believes that this is an excellent example of good practice and should serve as an inspiration for the other countries in the region. It is particularly encouraging to see that the responsibility for the programme was taken on by the Ministry of Justice in November 2009.

94. The UNDP has called for the programme to be rolled out in three more courts in the near future; however, the Ministry of Justice made it clear to the rapporteur that no funding could be made available for this in 2010. The rapporteur strongly urges the authorities in Croatia to allocate the necessary financial resources so that these programmes can be put into place in all courts in Croatia that come into contact with witnesses in cases involving serious crimes. In particular, they should be established without delay in Rijeka and Split, in view of the fact that they have jurisdiction to hear war crime cases.

4.3. Montenegro

95. Montenegro declared its independence from Serbia and Montenegro in 2006. As Serbia and Montenegro had a federal system, separate laws on witness protection have been in place since 2003.

4.3.1. Legislation

96. The laws governing witness protection in Montenegro are: the 2003 Criminal Code, the 2003 Criminal Procedure Code, the 2004 Law on Witness Protection Programme, the 2005 Police Act and the 2005 National Security Agency Act.

97. The Criminal Procedure Code provides that witnesses are not required to answer questions when they fear for their safety, until appropriate protection measures are put in place.[52] It also provides, among other things, for protection measures to be implemented to conceal the identity of the witness during the trial by the use of a pseudonym and questioning with the assistance of voice-distortion technology.[53]

98. The Law on Witness Protection Programme enables protection for witnesses in cases of crimes "against the constitutional order and security of the Republic of Montenegro, crimes against humanity and other values protected by international law, crimes which are committed in an organised manner, and crimes carrying a legally prescribed punishment of ten or more years of imprisonment."[54]

99. Protection programmes are available to witnesses or someone close to them (such as the spouse or other relative). A witness can be placed on a protection programme at his or her request or on the initiative of the state prosecutor, a judge, the director of a prison or the Director of the Criminal Police. Measures prescribed in the law include: the physical protection of the person and his or her property, change of identity and relocation.

4.3.2. In practice

100. The measures prescribed in the witness protection laws in Montenegro, if employed properly, would provide adequate protection to witnesses in war crime cases. In practice, not many war crime cases are being tried in comparison to other states. However, in other types of cases tried, it would appear that witnesses were not always provided with adequate protection.

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51. Ibid.
52. Article 108.
53. Article 109.
54. Article 5.

101. The rapporteur was informed about the case of a former police officer, Slobodan Pejović, who is a witness in a war crimes case that is currently being tried in Montenegro. In 1992, the force that Mr Pejović was part of deported Bosnian Muslim refugees from Montenegro and delivered them to the Serbian army in Bosnia. Mr Pejović has spoken out against the decision and claims that he refused to take part in the crimes. Subsequently, he has been attacked on a number of occasions when he believes that his life was threatened. He alleges that in September 2009 his car was riddled with bullets and in December 2009 it was smashed up. Nine members of the local police force have now been indicted and Mr Pejović is to give evidence at the trial later this year.

102. According to information provided to the rapporteur, the local police force has been reluctant to implement any protection measures for Mr Pejović, despite the seriousness and level of the threats against him. Some measures have been implemented recently, but only after 70 NGOs complained to the authorities about the treatment he was receiving. The difficulty in this case seems to be that Mr Pejović is requesting protection from the very force he is testifying against. The rapporteur calls upon the authorities in Montenegro to investigate thoroughly all the attacks against Mr Pejović and to protect him before, during and after he delivers his testimony in this case.

103. The case of Mr Pejović shows the seriousness of the shortcomings in the witness protection system in Montenegro, at least when it comes to the effective implementation of the existing relevant legislation.

104. A Witness Protection Unit was established in the Ministry of Internal Affairs in 2006. It is responsible for the application of protection programmes. A Development Strategy was adopted in 2007. The OSCE Mission in Montenegro has provided training to three members of staff there. The OSCE plans to host a seminar in 2010 to expose the Witness Protection Unit to the practices of other units in the region. The amenities of the courts in Montenegro also need to be upgraded for them to have the technical facilities to allow witnesses to testify safely and in good conditions.

4.4. Serbia[55]

105. The Republic of Serbia has potentially one of the most difficult tasks in prosecuting war criminals in the former Yugoslavia, partly due to the size of its population, but especially due to the number of conflicts that the Yugoslav People's Army (JNA) and paramilitaries were involved in.

106. The War Crimes Chamber was created in 2003 and is part of the Belgrade District Court. It is composed of nine judges (three sections consisting of three members) and is responsible for all future war crime trials in Serbia. Reportedly, only the War Crimes Chamber and the Organised Crime Chamber seem to be adequately technically equipped to ensure witness protection and support.

107. The post of special prosecutor for war crimes was established with the aim of seeking out and prosecuting perpetrators of such crimes. It has a special detention unit and a special war crimes investigation service within the Ministry of Internal Affairs. There is also a special prosecutor for organised crime, who has similar functions to those of the special prosecutor for war crimes.

4.4.1. Legislation

108. The legislative framework concerning witness protection (which barely existed beforehand) has been considerably improved over the last few years.

109. The Criminal Procedure Code of 2006 is the principle source of witness protection provisions in Serbia. Articles 109.a to109.dj give a framework based on the Rules of the ICTY. Article 117 of the Code, stipulates under which conditions the court can place a witness under a protection programme: where the witness or someone close to him would be exposed to serious danger to life, health, physical integrity and property, in criminal proceedings for an offence punishable by at least four years' imprisonment. Protection measures include: exclusion of the public from the trial or altering, expunging from records or a ban on the publication of the identity of the witness, withholding data on the witness, questioning of the witness under a pseudonym, and concealing the appearance of the witness; testifying in different locations and using voice- distortion technology. Article 110 governs the treatment of particularly vulnerable witnesses. This relates both to witnesses in court proceedings and during the police investigation.

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55. The rapporteur visited Belgrade on 4 and 5 February 2010. He met with representatives of the European Union, ICTY and OSCE, government ministers, the Public Prosecutor, the Special Prosecutor for War Crimes and other officials.

110. The Law on the organisation and jurisdiction of governmental authorities in war crimes proceedings (2003)[56] provides for testimonies to be delivered by video-link. It also stipulates that where cases are transferred from the ICTY, the protection measures that have already been put in place remain.

111. The Police Act (2005)[57] provides that the police should undertake appropriate measures to protect the lives of victims/witnesses that have given information.

112. The Law on the protection programme for participants in criminal proceedings (2005)[58] governs non-procedural protection and provides for a protection programme for witnesses in organised crime and war crime cases. The Protection Unit is based in the Ministry of Internal Affairs. Protection measures include: physical protection of persons and property; relocation to a new home or to another prison if the person is incarcerated; concealing the identity of a witness; and a total change of identity.

4.4.2. Witness Protection

113. It was explained to the rapporteur that in the present system it is the judge who takes the decision as to whether a witness is at such risk that it requires placing him or her on a witness protection programme. All information on the witness must be kept in a sealed envelope and only the Chamber of Judges knows the identity of the witness. However, thirty days prior to the trial, the defence counsel is notified about the identity of any anonymous or protected witnesses. The accused is forbidden from revealing the identity of a witness given to his defence counsel. The rapporteur believes that this system has similar flaws to those discussed above with reference to the ICTY.

114. Sanctions exist to deter people from revealing the identity of witnesses (which is considered as a breach of professional secrecy), but they have not been used yet. It has been known for protected witnesses to reveal their own identity.

115. A Witness Protection Unit (WPU) was established in 2006 in the War Crimes Chamber (outside any formal legal framework) and is operated by the Ministry of Internal Affairs. The rapporteur was informed that the Unit has been very active and has placed more witnesses on its programmes than the rest of the Balkans put together. Many measures are available to judges, including the use of video-links and the pre-recording of testimony. Testimonies by way of video-link have been particularly useful in getting witnesses to testify from outside the jurisdiction.

116. Problems with the functioning of the WPU were brought to the attention of the rapporteur. Firstly, there is no protocol on how the unit should operate, which could potentially lead to inconsistencies. Secondly, the WPU is financially under-resourced. There is a lack of equipment, which means that despite measures being provided for in law, they are not always available in practice. For example, not enough police officers are available to provide support to witnesses who need round-the-clock protection.

117. A further concern expressed to the rapporteur by several of his interlocutors was that the Witness Protection Unit fell under the responsibly of the Ministry of Internal Affairs, which is also responsible for the police service. This presents a difficulty when the unit is trying to protect witnesses “with blood on their hands” or those witnesses who are wanted in connection with other crimes. Indeed, witness protection programmes do not work so well, because of a potential conflict of interests, when the police have to protect witnesses that they are trying to have prosecuted. Complications have reportedly also been encountered when “insider” witnesses attempt to testify, for example witnesses who are part of the police. Such witnesses are reluctant to come forward and testify against their colleagues, especially where any protection that they may be awarded would come from those that they are attempting to testify against. There have been calls for the Unit to be transferred over to the Ministry of Justice so that the unit is independent of the police force. Furthermore, a lack of co-ordination and co-operation between the WPU, the prosecutor’s offices and the courts was pinpointed.

118. It was also reported to the rapporteur that inappropriate behaviour by members of the WPU towards witnesses has sometimes resulted in the witnesses either changing their testimony or simply deciding not to testify at all. Even more worrying, the rapporteur was told by the Special Prosecutor for War Crimes, that members of this unit were believed to have made public extracts of witness testimonies. However, they could

56. Official Gazette of the Republika Srpska, Nos. 67/03, 135/04 and 61/05.
57. Official Gazette of the Republika Srpska, No. 101/05.
58. Official Gazette of the Republika Srpska, No. 85/05.

not be prosecuted due to lack of evidence. Considering that the WPU actually supports the work of the prosecutor, the prosecutor would like to have a certain authority over the unit to be able to avoid such problems.

119. Finally, several members of the WPU are reportedly former members of the "red berets" (unit which is said to have committed war crimes). The rapporteur underlines that recruitment of WPU members should comply with a strict procedure and strict criteria, in order to waive any doubts about possible previous involvement of its members in war crimes or serious crimes. Therefore, the WPU should not include members of former units that participated in the war.

120. For all these reasons the rapporteur supports calls for the WPU either to be transferred over to or to be co-ordinated by the Ministry of Justice, with a view to the office of the prosecutor being structurally in charge of ensuring witness support from the beginning of the investigation phase.

121. Only the War Crimes Chamber has a WPU and there is no legal basis for establishing units outside the Chamber. However, the rapporteur feels that the Chamber for Organised Crime and other courts that may deal with cases of organised crime or trafficking also need to be able to protect witnesses who may be put in danger by testifying. A protocol on how the WPU operates also appears indispensable.

122. Although not a war crime case, the case of Zoran Vuk Vukojevic is illustrative of where witness protection programmes are needed and where witnesses need to have confidence in the system. The rapporteur was told that Mr Vukojevic had worked for one of the biggest criminal gangs in Serbia, the "Zemunski klan", and was a witness in the case of the murder of the Serbian Prime Minister, Zoran Djindjic, who was assassinated in 2003. Mr Vukojevic was a collaborator of justice and had been placed on a witness protection programme. However, of his own free will, he left the programme, only to be found murdered in his car shortly afterwards, on 3 March 2006.

123. If adopted, the new Law on Criminal Proceedings will alter the way crimes are investigated in Serbia. Investigative judges will cease to exist and the prosecutor will take over the investigative functions (therefore being in touch with witnesses from the very beginning of the investigation phase). As such, it may become imperative to also have a witness protection unit within the Ministry of Justice, attached to the prosecutor. Currently, there is ongoing debate in Serbia about this possibility, which the rapporteur supports (see also the section on Bosnia and Herzegovina).

124. During his visit to Serbia, the rapporteur got the feeling that there is a certain political will to improve the witness protection system and that some efforts have already been undertaken to that end. However, the capacities of the system remain very limited and it suffers from a lack of trust on the part of the witnesses, an inadequate legal framework, absence of adequate funding, a lack of technical equipment, as well as from a lack of co-ordination and co-operation between the relevant actors.

4.4.3. Witness support

125. The rapporteur regrets that no comprehensive and efficient system of witness support has been established in Serbia. A Victim and Witness Support Unit was established in the War Crimes Chamber in June 2006. It consists of two members of staff who had no prior related work experience when they were employed. They have now been trained and work closely with the Humanitarian Law Centre. They make travel and accommodation arrangements for witnesses and look after them in the court building. Nevertheless, they currently do not have the capacity or financial resources to provide psychological support to witnesses.[59] No such system has been rolled out in any other court that deals with victims or witnesses of serious crimes.

126. Again, as discussed in previous sections of this report, the rapporteur welcomes the work of NGOs in this field, but firmly believes that the Serbian authorities should take responsibility for witness support by setting up and providing funding for programmes in all courts that have dealings with witnesses of serious crimes.

4.5. Kosovo[60]

127. There is no Witness Protection Law in Kosovo. However, a draft law aimed at protecting witnesses is currently undergoing review by the competent ministries. All five district courts in Kosovo have jurisdiction to hear war crime cases.[61] Regulation 2001/20 of the United Nations Interim Administration Mission in Kosovo

59. Information taken from *Serbia: Burying the Past: Impunity for enforced disappearances and abductions in Kosovo*, Amnesty International, London, 2009.

(UNMIK) on the Protection of Injured Parties and Witnesses in Criminal Proceedings, grants trial panels the power to implement a series of protective measures.[62] In the most serious cases, witnesses are able to testify anonymously.[63] However, it was made clear to the rapporteur that these measures are useless as long as the witness is physically in Kosovo, where everybody knows everybody else. Most witnesses are immediately recognised by the defence when they deliver their testimony, despite all the anonymity measures.

128. A witness protection unit was first established by UNMIK.[64] However, an OSCE report assessed that this structure suffered from three main deficiencies: lack of sufficient funds; lack of a comprehensive witness protection law and lack of local and international specialised police with expertise in protecting witnesses.[65] In the meantime, EULEX has also set up a witness protection unit and the rapporteur was reassured to see that the unit seems to work very professionally, although it suffers from a chronic lack of staff.

129. There are many limitations to the protection arrangements currently available, not least because Kosovo has a population of less than two million with very tight-knit communities. Witnesses are often perceived as betraying their community when they give evidence, which inhibits possible witnesses from coming forward. Furthermore, many people do not believe that they have a moral or legal duty to testify as a witness in criminal cases.[66]

130. Moreover, when a witness does come forward, there is a real threat of retaliation. This may not necessarily put them in direct danger, losing their job for example, but there are also examples of key witnesses being murdered. Some witnesses who had testified against, *inter alia*, Daut Haradinaj before the courts in Kosovo, have been murdered.[67] Concerns have been raised about possible parallel interests between those who sought to interfere with the trial of Daut Haradinaj and those who might seek to interrupt the prosecution against Ramush Haradinaj before the ICTY.[68] The trial of Ramush Haradinaj, the former leader of the Kosovo Liberation Army, well illustrates how pressure can be brought to bear on witnesses. Mr Haradinaj was indicted by the ICTY for crimes committed during the war in Kosovo but was subsequently acquitted. In its judgment of 3 April 2008, the Tribunal highlighted the difficulties that it had had in obtaining evidence from the prosecution witnesses. Thirty-four of them were granted protection measures and 18 had to be issued with summonses. On 21 July 2010, the Appeals Chamber of the ICTY partially quashed the acquittals and ordered a partial re-trial of the case, particularly in the context of the serious witness intimidation that formed the context of the trial.[69]

131. Similarly, a prosecution witness was murdered and an anonymous witness was seriously injured in a market in Xërxë/Zerze on 10 October 2005, after having agreed to testify in a war crime trial. The full name and details of the anonymous witness were published in a local newspaper. As a result of this, at the trial in December 2005, the surviving witness was no longer able to testify anonymously.[70]

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60. The rapporteur visited Pristina on 15 and 16 April 2010. He met, in particular, with the Minister of Justice, representatives of EULEX and the OSCE.
61. NB: currently, international (EULEX) judges have exclusive competency in war crime cases.
62. Including: omitting information that could be used to identify the witness; non-disclosure of records; testifying behind a screen; using voice-distortion techniques; assigning a pseudonym; hearings closed to the public; and the possibility for the jurisdiction to temporarily order the accused to be removed from the courtroom. In 2007, the five district courts were upgraded and equipped with some of the technology that they need to implement practical protection measures for witnesses. This included voice-alteration technology, closed-circuit television equipment (enabling witnesses to testify from other rooms in the court) and video-conferencing technology. The latter measure allows witnesses to testify from other locations both inside and outside of Kosovo. However, apparently, only one of those courts is really adequately equipped.
63. Article 157 (3) of the Provisional Criminal Procedure Code of Kosovo provides that "[t]he court shall not find the accused guilty solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused".
64. UNMIK DOJ Circular No. 2003/5.
65. See *Witness Security and Protection in Kosovo: Assessment and Recommendations*, OSCE, November 2007, p. 9. During his visit to Kosovo, the rapporteur was told by various sources that UNMIK's WPU has not always worked professionally enough, nor has it always respected the anonymity of the witnesses (which it allegedly sometimes jeopardised on purpose).
66. Ibid., p. 8.
67. ICTY Court Records database – transcript of the hearing of 24 May 2005 in the case of the Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj – provisional release hearing of Ramush Haradinaj, see pp. 76, 77, 78 and 79, http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/IT-04-84/TRS2539R0000131909.doc.
68. Ibid, pp. 75 and 76.
69. See ICTY press release, AC/MOW/1358e, The Hague, 21 July 2010.
70. *Review of the Criminal Justice System in Kosovo, The protection of witnesses in the criminal justice system, The administration of justice in minor offences courts, Juveniles in criminal proceedings (2006), OSCE Mission in Kosovo,*, Henley, W. Witness Protection Still Big Problem in Kosovo, Institute for War and Peace Reporting, 2007.

132. As noted by the OSCE, in Kosovo, all too frequently, witnesses who initially make statements to the police later change their testimony or become unwilling to testify at trial, because they fear reprisals. Incidents of witness intimidation and injury occur often enough to justify this reluctance on the part of witnesses.[71] Witnesses who testify anonymously or under a protection programme also fear that their identities will be disclosed. Indeed, local newspapers have frequently revealed the identities of protected witnesses.[72] Threats and assaults on witnesses often go unpunished.

133. The difficulty with witness relocation programmes has already been discussed elsewhere in this document. However, the rapporteur wishes to draw attention to the fact that this is a particularly acute problem in Kosovo, where witnesses have been killed.

134. Relocating witnesses safely inside Kosovo is nearly impossible due to its size. The only real protection measure for endangered witnesses (and their relatives) is relocation outside Kosovo. However, several factors (for example, the traditionally large size of Kosovo families, their lack of knowledge of English, the non-recognition of Kosovo's independence by a number of states, etc.) have as a consequence that not many countries accept relocation candidates from Kosovo. Similarly, the rapporteur was told that some governments are reluctant to accept witnesses from Kosovo due to wider issues concerning their migration and political asylum policies.

135. The EULEX WPU negotiates ad hoc relocation agreements through informal networks[73] and covers relocation costs (for the relocation itself and for the living costs of relocated persons). However, due to lack of staff, a number of cases cannot be currently investigated because the EULEX WPU would not have the means to protect the witnesses. The rapporteur believes that this is a serious obstacle in the administration of justice that could be remedied by allocating more manpower to the WPU.

136. Like the ICTY, EULEX's mission is of limited duration. The European Union will have to foresee a residual mechanism with a view to continuing to maintain the protection of those witnesses taken care of by EULEX after its mandate ends.

137. Witness support programmes are extremely limited in Kosovo. There is currently no system in place to give support to witnesses in the five courts that deal with war crime cases. There is also a problem of a lack of adequate equipment and facilities, such as separate entrances for witnesses or secluded waiting rooms where witnesses can feel safe while they are waiting to give their evidence at trial.

138. As stated by several of the rapporteur's interlocutors, potential witnesses lack confidence in the protection they could benefit from and therefore refuse to testify. As already underlined in this report, it is of the utmost importance that conditions are created in which witnesses feel safe to testify. Many potential witnesses in Kosovo claim to be perceived as traitors if they testify. The rapporteur encourages member states to facilitate the relocation of endangered witnesses from Kosovo, in particular by accepting to host them on their territory.

139. As recognised by several Kosovo officials, without the international community Kosovo would not be in a position to ensure any kind of protection for endangered witnesses (the Kosovo police does not have the necessary capacities). Furthermore, the authorities recognise openly that in certain highly sensitive alleged war crime cases it will be impossible to find judges, prosecutors and lawyers from Kosovo willing to deal with cases concerning these defendants.

5. Regional and international co-operation

140. Due to the nature of the conflicts in the states of the former Yugoslavia, as well as to the small size of those countries, regional and international co-operation on witness protection is imperative.

141. The rapporteur was encouraged to note that there have been significant improvements when it comes to co-operation on witness protection between the different countries in the region. He was pleased to hear that good co-operation exists between the Serbian and Croatian Ministries of Justice and in general between

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www.iwpr.net/?p=tri&s=f&o=335202&apc_state=henh.

71. *Review of the Criminal Justice System in Kosovo*, ibid. p. 15.

72. The 2007 OSCE report underlines the "irresponsible behaviour of some local newspapers that have in a number of cases revealed the identity of 'anonymous' witnesses".

73. Since it does not have the capacity to formally sign such agreements.

the prosecutors' offices in Bosnia and Herzegovina, Croatia, Montenegro and Serbia. This sort of co-operation is particularly important where a witness has to be protected when travelling from one state to another to give evidence, as well as in cases where video-link testimony can be used to collect testimonies.

142. All Council of Europe member states discussed in this report have signed and ratified the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182), which, among other things, provides for co-operation on witness protection and assistance by the use of video-conferencing technology to enable a witness from one contracting state to testify in a criminal case of another.

143. There are a number of bilateral agreements, for example the District Court in Belgrade and the Court of Bosnia and Herzegovina signed a Memorandum of Understanding in 2007 on Co-operation in Support for Witnesses for their Participation in Criminal Proceedings. Bosnia and Herzegovina and Serbia are also part of the multilateral Police Cooperation Convention for Southeast Europe, Article 10 of which provides for co-operation in the area of witness protection programmes. There are no specific agreements between Serbia and Croatia, but there are agreements between the two countries on mutual assistance in criminal matters.[74]

144. A problem that was repeatedly mentioned to the rapporteur during his visits to the region was that of witness relocation agreements. For these relocation programmes to be effective, international co-operation is very necessary. This is especially the case for the countries discussed in this report as – given their small size – relocation internally will not necessarily provide adequate protection. There have been a number of bilateral agreements made with states in other regions of Europe to relocate witnesses.[75] However, most agreements stipulate that the state requesting assistance should bear the costs of relocation and supporting the witness in his or her host country. The rapporteur feels that this is a particularly onerous requirement falling on the states in the region. Nevertheless, relocation agreements are concluded on the basis of the principle of reciprocity. To help the countries concerned to face the costs of ensuring witness protection – and considering that the good administration of justice is a universal interest as well as a shared responsibility – the rapporteur calls upon Council of Europe member states to financially support their efforts by, for example, considering financing witness protection equipment and adequate training. The host countries should also consider bearing part of the living costs of relocated witnesses.

145. The rapporteur would also like to highlight here the role that the international community has already played in improving witness protection in the region, by providing funding to re-equip courts and train the judiciary staff and other actors in witness protection.[76]

6. Conclusion

146. Over the past few years, all the states discussed in this report have adopted regulations designed to protect witnesses who provide invaluable testimonies in war crime cases. Furthermore, significant investment has been made into programmes by various actors of the international community.

147. The rapporteur believes that these are important steps forward, not just for the prosecution of war crime cases but also to protect witnesses in organised crimes, trafficking and any other cases where witnesses face a real or presumed threat to their safety.

148. Nevertheless, following his visits to the region, the rapporteur feels that there are significant differences in the level of witness protection in the states concerned and that none of those states provide a complete system of witness protection. The consequences of this have been felt most seriously in Kosovo, where witnesses have been murdered. In Bosnia and Herzegovina, witnesses are regularly threatened and intimidated. In Croatia and Serbia, the identities of certain witnesses have been revealed. Although seemingly less serious, the consequences are nonetheless far-reaching as witnesses are reluctant to come forward and provide their invaluable testimonies, without which the courts are unable to administer justice and play their part in the reconciliation process in the Balkans.

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74. Croatia signed a bilateral agreement with the then Federal Republic of Yugoslavia on Legal Assistance in Criminal and Civil Matters in 1998. It also signed an agreement with Bosnia and Herzegovina on Legal Assistance in Civil and Criminal Matters in 1996.

75. In this respect, one has to underline that Kosovo – not being recognised as a state by a number of countries – faces a particular difficulty.

76. In particular, one has to acknowledge the key role played by the OSCE in the region, not least in its work on monitoring war crime trials but also in organising regular meetings, under the Palić Process, of prosecutors and judges from Bosnia and Herzegovina, Croatia, Montenegro and Serbia to discuss, among other things, access to and protection of witnesses.

149. Similarly, witness support programmes are not satisfactory in any of the states discussed and are barely existent in most. At present, the protection services provided are sporadic and do not provide satisfactory support to the witnesses that testify in war crime cases. There is a real danger that those witnesses that do come forward will experience secondary victimisation as a result of this or that they will simply stop coming forward at all.

150. In Bosnia and Herzegovina, the State Court regularly employs witness protection measures. However, improvements are needed and measures should be implemented consistently. In the entity courts, the protection afforded to witnesses is sporadic. The National War Crimes Strategy needs to be implemented and courts at the entity level should develop rules of procedure for witness protection. Further investment in the State Investigation and Protection Agency should be made to ensure that witnesses testifying in war crime cases in the courts at entity level can be placed in protection programmes where necessary.

151. The law provides for support services to be delivered by the Social Welfare Centres, but this has not been matched by the allocation of the necessary financial resources to these services outside of the State Court, where support is limited. Given that the majority of war crime cases are heard at the entity level, it is important that adequate funding and training is given to provide witnesses with effective support. NGOs are providing support in some areas, but the authorities should ensure that this support is consistent and is provided to witnesses in all courts.

152. Satisfactory legislation to protect witnesses exists in Croatia. However, war crime cases are being tried in courts where judicial staff have not been trained in witness protection. The rapporteur believes that war crime cases – in which witnesses are at risk – should be transferred to the courts with special jurisdiction to try them, where judges and prosecutors have the training and facilities to implement protection measures. At the same time, training should be given to judges and prosecutors in all courts so that protection measures can be employed in other cases where witnesses' safety is put at risk when they decide to testify.

153. Witness support services have improved in Croatia thanks to the programme established in four courts by the UNDP. These services should be extended to all courts dealing with cases of war crimes, organised crime and trafficking. In particular, services need to be developed in the county courts in Rijeka and Split, which have special jurisdiction to hear war crimes.[77]

154. In Serbia, all war crime cases are heard in the War Crimes Chamber, where protection measures are available and a Witness Protection Unit is in operation. However, the WPU needs more financial resources and its remit needs to be expanded so that it can protect witnesses in other types of cases, especially those relating to organised crime. The WPU also needs to be overseen by a body that is independent of the police force to ensure that "insider" witnesses are also protected and feel secure.

155. In Serbia, support services are apparently only provided by the Humanitarian Law Centre in the framework of the War Crimes Chamber. Services should be extended to other courts. In Kosovo and Montenegro, witness support barely exists.

156. The regulations governing witness support in Kosovo should be radically amended and funding should be given to agencies involved with protecting witnesses, as well as for the training of their staff. As has been described above, witnesses are not being adequately protected, which is particularly serious in a place where witnesses are already reluctant to co-operate with investigations into war crime cases.

157. In all the states mentioned in this report, these laws have only been enacted recently and the real benefits will not be felt until police investigating war crimes, prosecutors, judges and state officials are trained in the protection measures they can provide to witnesses. The rapporteur strongly believes that the governments must take responsibility and ownership of these programmes. He calls on the authorities in the region to put into place financial measures to ensure that all courts have adequate resources to protect witnesses, as well as to meet the needs of staff and technology.

158. Co-operation between states has been effective in enabling witnesses to testify via video-links from other states in war crime cases. This significantly reduces the risk of harm to witnesses who would otherwise have to travel to a state they have fled from. However, further international co-operation is crucial for witness relocation. European states should consider accepting to host witnesses from the Balkans, and especially Kosovo, in the framework of relocation programmes.

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77. The county courts in Zagreb and Osijek, which also have special jurisdiction to hear war crimes, were equipped as part of the UNDP programme.

159. Furthermore, the rapporteur believes that witness support programmes need to be extended and made operational in all courts in the region that receive witnesses giving evidence in serious criminal cases. All such programmes should at least be established and overseen by the authorities. It is all very well to use NGOs to provide services, but states must not discharge their own duty towards witnesses onto these NGOs. The authorities must ensure that where NGOs are engaged to provide witness support services and receive the appropriate funds to do so, these services meet minimum standards and are consistently delivered to all witnesses that require their services.

160. The countries of the former Yugoslavia must be conscious of the fact that the international community is watching developments on how they conduct war crime trials. Indeed, in the same way that the ICTY has served as a model for subsequent war crime tribunals and special courts, the countries concerned could be taken as a model for peace and reconciliation. One should bear in mind that there is a certain urgency in this respect since testimonies – and with them a part of the truth – are lost forever when witnesses are no longer alive. Witnesses who stand up for truth and justice are owed reliable and durable protection.[78] Without the protection and support that witnesses need to be able to testify, justice and reconciliation cannot be achieved.

78. See document AS/Jur (2009) 38.