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Final version

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

Parliamentary Assembly

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 merit 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 without fear. Furthermore, it considers that they should be given support – including legal and psychological support – before, during and after the trial. While acknowledging the work undertaken by certain non-governmental organisations (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.

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1. Assembly debate on 26 January 2011 (5th and 6th Sittings) (see Doc. 12440 rev., report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Gardetto). Text adopted by the Assembly on 26 January 2011 (6th Sitting). See also Recommendation 1952 (2011). 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.

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 thirty days prior to the trial.

9. 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 when 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 adopted legislation and regulations on witness protection and acknowledges that many witnesses have been protected in the region as a result of these measures.

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 Co-operation in Europe (OSCE) in the region, in particular its monitoring activity in war crime trials and training and awareness raising with regard to 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 Recommendation No. R (97) 13 on intimidation of witnesses and rights of the defence and Recommendation 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. establish and provide funding for 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, including gender-sensitive witness protection for the victims of war crimes involving sexual violence, 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, where they exist, and in the police units responsible for the investigation of crimes under international law;

16.1.9. define the regulations and criteria concerning the role of NGOs or social welfare centres with regard to witnesses, 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 War Crimes Strategy;

16.2.2. enact legislation to enable the State Investigation and Protection Agency 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 and during the trial and post-trial phase. Similar legislation should be enacted and adequate resources should be made available in order to provide witness protection in criminal proceedings before the courts in all entities;

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, ensuring that it is established according to professional standards, with suitably qualified and trained staff, in order to ensure the impartial operation of the unit, free of political or other interference, 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 and from the Victim and Witness Support 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 Kosovo2 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 other 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 out this task, and 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 the case law of the European Court of Human Rights;

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.