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Kosovo Chronicle 3 – Inadequate witness protection program in Kosovo

by CRDP

Priština, May 2013

Witness protection poses a significant challenge in Kosovo, where the impunity of powerful perpetrators of politically or ethnically motivated crimes has not been effectively confronted.

Therefore, unwillingness to protect witnesses of war and organized crimes in post conflict Kosovo and the permanent threats they are faced with, poses a real threat to stability of the country and democratization of society in a longer term.

Victim and witness cooperation is essential to ensure fair and successful prosecutions, yet often in post-conflict situations, individuals do not want to cooperate out of fear. Providing witness protection is therefore both an expedient for law enforcement as well as a fundamental legal obligation. While the need to investigate and prosecute serious crimes will arise at an early stage, it can take years to enact legislation to establish effective mechanisms to protect witnesses, including building the capacity and ensuring the integrity of those who implement these mechanisms.¹

Inadequate witness protection remains a major impediment to justice, especially for organized and war crimes in Kosovo. As cases of witness intimidation and harassment are widespread, many witnesses were and are unwilling to testify, fearing for their lives. Kosovo adopted a witness protection law which went into force on September 1, 2012. Yet, due to the high costs, this law is difficult to be implemented; additionally judges and prosecutors often fail to use existing protective measures available in courtrooms. Regulation 2001/20 of the United Nations Mission in Kosovo (UNMIK) on the Protection of Injured Parties and Witnesses in Criminal Proceedings², grants trial panels the power to implement a series of protective measures. In most serious cases, witnesses are able to testify anonymously. However, for witnesses in the most sensitive cases relocation outside Kosovo is the only effective means of protection. But, even this measure proves to be complex to maintain after the mysterious suicide of the so-called 'Witness X' in Germany in 2011- a witness that was under protection of EULEX.³ Foreign governments so far, have been reluctant to accept Kosovo witnesses at risk.

The witness protection in Kosovo as the Council of Europe has noted in its own report in 2010, is yet insufficient and its implementation even harder. Although the Government of Kosovo and its institutions are committed to develop the mechanisms to guarantee the protection of witnesses, it failed to fulfill such commitments. Experts say that it will take a number of years to create a strong witness protection program, including a training of the police and other technical staff.⁴

The UN Human Rights Chief, Navi Pillay in her recent visit to Kosovo has emphasized that her Office regards witness and victim protection as an essential component of efforts to monitor, investigate and prosecute human rights violations and other crimes.

"The whole capacity of a country to render justice to the victims and end impunity regarding past and current abuses could come into question if the justice system is unable to secure convictions because of failures in the production of witness evidence."⁵

Background

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 ICTY⁶ has been able to

¹ <http://www.inprol.org/files/CR07008.pdf>

² <http://www.legislationline.org/documents/id/3889>

³ European Union Rule of Law Mission in Kosovo

⁴ http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf

⁵ <http://www.ohchr.org/EN/NewsEvents/Pages/WitnessProtectionInKosovo.aspx>

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.⁷

Significant progress has been made in the region of the Balkans, 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 safety and that of their families. Moreover, many witnesses have not been given the protection and support they deserve, which deters others from coming forward.⁸

The testimonies of witnesses have been indispensable 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 to those who live in the region and the international community the truth about the crimes committed. Witnesses who stand up for the truth are owed reliable and durable support and protection.⁹

Kosovo has often been criticized by international organizations and local groups for failing to protect witnesses' security effectively. The new Law, and more specifically the Article 19 urges Kosovo institutions and its government together with other organizations, to cooperate and provide support for Witness Protection Directorate.¹⁰ In addition, government authorities, organizations and other institutions are obliged to offer secure and confidential support in the manner required from the Directorate. Subsequently, the budget allocated by the government is not sufficient and this creates further obstacles to an efficient implementation of witness protection package.

Crime is notably high in Kosovo; not so much petty crime, but corruption and organized crime. The causal relationship between lack of witness protection and crime is obvious: without witnesses there are no convictions and without convictions there is no crime deterrence. Where witness protection increases, impunity declines and crime drops because existing criminals go to jail and new ones are forced to think twice before asking for a bribe. Hence, one would expect Kosovo to write laws that better protect witnesses, make it easier for people to testify, and facilitate prosecutors' use of witness testimonies.¹¹

In June 2010, the Special Rapporteur Mr Jean-Charles GARDETTO submitted his report to the Committee on Legal Affairs and Human Rights emphasizing that in war crimes trials processed by the ICTY on Kosovo conflict, the witness-protection program although in place, proved to be largely ineffective. Moreover, where 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. The same report stresses that: "the trial of Ramush Haradinaj, the former leader of the Kosovo Liberation Army illustrates this. Haradinaj was indicted by the ICTY for crimes committed during the war in Kosovo but was subsequently acquitted. In its judgment, the Tribunal highlighted the difficulties that it had in obtaining evidence from the one hundred (100) prosecution witnesses. Thirty-four (34) witnesses were granted protection measures and eighteen (18) witnesses had to be issued with summonses. A number of witnesses who were going to give evidence at the trial were murdered.¹² Similarly, a prosecution witness was murdered and an anonymous witness was seriously injured in a market in Xërxë/Zerze on October 10, 2005 after having agreed to testify in a war crimes trial. The full name and details of the anonymous witnesses 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.¹³

Direct witness intimidations

Nicholas Schmidle in his report at large published in the New Yorker, a piece called 'BRING UP THE BODIES', wrote: 'The prosecution of Fatmir Limaj—a former KLA leader and a close confidant of Prime Minister Thaci—had unraveled in similar fashion. According to an internal ICTY document from 2004, Limaj's relatives and associates launched a campaign of "serious intimidation of and interference with potential witnesses." Two men showed up at the house of one witness and warned him not to testify adding, "If you make the mistake of going there, you will be dead." Someone called the wife of a second witness and threatened, "You will be liquidated." A third witness withdrew after a relative after he overheard a group of men at a café in Pristina saying of any people who testified against Limaj, "We will burn them, their families, and their houses." A fourth witness refused to meet an ICTY investigator explaining that he "did not want to die."¹⁴ On

⁶ *International Tribunal for Former Yugoslavia*

⁷ http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf

⁸ *Ibid*

⁹ *Ibid*

¹⁰ http://www.md-ks.org/repository/docs/law_on_witness_protection.pdf

¹¹ <http://www.balkanicaucaso.org/eng/Regions-and-countries/Kosovo/Kosovo-fights-crime-repression-not-crime-129883>

¹² *The Committee on Legal Affairs and Human Rights in June 2010, the Rapporteur: Mr Jean-Charles GARDETTO (pg 25)*

¹³ OSCE LSMS (2006), "Review of the Criminal Justice System in Kosovo", pp.14-15, Henley, W (2007) *Witness Protection Still "Big Problem in Kosovo (Institute for War and Peace Reporting).*

www.iwpr.net/?p=tri&s=f&o=335202&pc_state=henh. (taken from http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf)

¹⁴ http://www.newyorker.com/reporting/2013/05/06/130506fa_fact_schmidle?currentPage=3

November 30, 2005, the tribunal acquitted Limaj, though the judges observed that a “context of fear, in particular with respect to witnesses living in Kosovo, was very perceptible throughout the trial.” (A relative of one of Limaj’s indicted deputies was convicted of contempt, because he “knowingly interfered with” a witness.)¹⁵

Concerns were further raised after the mysterious suicide of Agim Zogaj, the so-called ‘Witness X’ in the trial of former Kosovo Liberation Army commander Fatmir Limaj and nine more ex-KLA fighters accused of war crimes against Serbs and Albanians at the Klecka detention centre in 1999. Zogaj was the main witness in the ‘Klecka’ case until he was found dead in September 2011 in Duisburg, Germany.¹⁶ In afterwards of this event, the Office of the High Commissioner for Human Rights delivered a press briefing emphasizing its concerns over the inadequate witness protection program in Kosovo. “We are concerned that a key witness in a war crime case in Kosovo was found dead in a park in Germany. “...only an effective and well-resourced witness and victim protection system in Kosovo will help render justice to the victims and end impunity regarding past violations”.¹⁷

The new code of criminal procedure

The new criminal code procedure approved by the Kosovo Parliament makes it even more difficult for witnesses to give evidence.¹⁸

As already elaborated above protecting witnesses to/of criminal acts from threats or intimidation has been and remains, one of the greatest challenges for the judicial authorities in Kosovo. Despite domestic law with available procedures for protecting witnesses (such as anonymous and distance testimony, non-public hearings, physically separating the defendant from the witness), few witnesses are willing to provide court testimony. Incidents of witness intimidation were reported regularly.¹⁹

The new code of criminal procedure, contains rules that say the following: (a) if a witness who gave an incriminating statement to the police or the prosecutor before a trial changes his version while testifying in court, the prosecutor cannot challenge what the witness says (by quoting his pre-trial statement), but can only ask him whether his memory is correct; (b) if the same witness dies before having testified in court, his pre-trial statement cannot be used as evidence, or is given only very limited value.²⁰

The old rules were different, and similar to those of most jurisdictions. The prosecutor could forcefully challenge a witness who changed his testimony by quoting his pre-trial statement in front of the judges, with the witness risking incrimination for perjury. Previously, if the witness died before the trial, his pre-trial statement could be used as evidence.²¹

Recommendations

The authorities in Kosovo should seriously tackle problems encountered by witnesses, given the acute difficulties they are faced with, which have resulted in several of them being killed and dozens intimidated and threatened.

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.²²

As recognized by Kosovo officials themselves, without the international community, Kosovo would not be in a position to ensure any kind of protection for endangered witnesses.²³ A lack of local and international specialized police with expertise in protecting witnesses was evident so far.

Kosovo government, Civil Society Organizations and EULEX, should consider different modalities such as making a joint agreement with the states, but those non-neighboring ones (Albania, Macedonia and Montenegro), where large Albanian population lives, and explore the ability to relocate witnesses outside the Balkans. Apparently, such measures are useless as long as the witness is physically in Kosovo, where everybody knows everybody else.

Finally, local and international authorities must raise public awareness of the moral and legal duty of residents of Kosovo to provide witness testimony and bring criminals to justice.²⁴

¹⁵ http://www.newyorker.com/reporting/2013/05/06/130506fa_fact_schmidle?currentPage=3

¹⁶ <http://www.balkaninsight.com/en/article/witness-protection-in-kosovo-strengthened>

¹⁷ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11455&LangID=E>

¹⁸ <http://www.balcanicaucaso.org/eng/Regions-and-countries/Kosovo/Kosovo-fights-crime-repression-not-crime-129883>

¹⁹ <http://www.osce.org/kosovo/23307>

²⁰ <http://www.balcanicaucaso.org/eng/Regions-and-countries/Kosovo/Kosovo-fights-crime-repression-not-crime-129883>

²¹ <http://www.balcanicaucaso.org/eng/Regions-and-countries/Kosovo/Kosovo-fights-crime-repression-not-crime-129883>

²² http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf

²³ http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf

²⁴ <http://www.osce.org/kosovo/23307>