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## Committee on Legal Affairs and Human Rights

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

## Memorandum

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*- The system for protection of witnesses appearing before the International Criminal Tribunal for the former Yugoslavia -*

### I. Introduction

1. On 2 June 2008 the Committee on Legal Affairs and Human Rights appointed me as Rapporteur for the preparation of a report on "The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans" (Doc. 11522).

2. In the context of this assignment I visited The Hague on 8 and 9 April 2009, where I had discussions with officials of the International Criminal Tribunal for the former Yugoslavia (referred to hereafter as "the ICTY" or "the Tribunal").

3. 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[1] might involve with regard to the efficiency of the international protection system for witnesses appearing before it. Later, I will be visiting the Balkans in order to study national witness protection systems.

4. The ICTY judges base their rulings mainly on oral testimony, which is thus an essential element in the proper performance of the Tribunal's duties. It is therefore vital for witnesses and victims to be able to testify in safety. By their testimony, witnesses make an essential contribution to justice and reconciliation in the region, since their testimony not only forms the basis of the Tribunal's judgments but also reveals to those who live in the region and to the international community the truth about the crimes committed.

* Document declassified by the Committee on 26 April 2010.
[1] On 7 July 2009 the United Nations Security Council decided to extend the terms of office of the permanent and ad litem judges of the ICTY until 31 December 2010 (or until completion of the cases to which they were or will be assigned if sooner). See http://www.un.org/News/Press/docs/2009/sc9697.doc.htm

5. The witnesses who testify before the ICTY may be victims or survivors, "well-placed" (or "insider") witnesses (i.e. persons who have held high office in the government, the army and the police), perpetrators of crimes (pleading guilty in whole or in part to the offences with which they are charged and agreeing to testify for the Prosecution), or expert witnesses (in special fields, such as, for example, military doctrine or the law applicable in the former Yugoslavia).

## II. Description of the system for protecting witnesses appearing before the ICTY

6. The Statute of the ICTY incorporates the duty to protect victims and witnesses testifying before the Tribunal. Article 22 of the Statute states that "*The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."* Moreover, the Tribunal's Rules of procedure and evidence include several relevant provisions, in particular in Rules 69 (Protection of Victims and Witnesses) and 75 (Measures for the Protection of Victims and Witnesses). These Rules provide, *inter alia*, that "*in exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal"* and that "*a Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused*".

7. There are measures to protect witnesses before, during and after the proceedings.

8. A special section – the Victims and Witnesses Section – has been set up at the ICTY to assist witnesses coming to The Hague to give evidence. This section, answerable to the Registrar of the Tribunal, is independent and provides logistical and psychological support for witnesses, whether called by the Prosecution, the Defence or the Chambers of the Tribunal.

9. The request to set up witness protection may come from the judge, the Chamber, the party calling the witness, the witness himself or the Victims and Witnesses Section.

10. The protection measures are, *inter alia*, suppressing the protected witness's name and any information that would make it possible to identify him or her from the Tribunal's published reports, not making public registrations from which the victim or witness could be identified, the possibility of testifying by way of a voice and image modification system, assignment of a pseudonym or organising sessions in camera.

11. It is estimated that about 65% of the witnesses testifying before the ICTY are unprotected. Thus protected witnesses are very much in the minority.

## III. The limits of the witness protection system measures

12. With a view to guaranteeing the rights of the defence, all those present in court know the witness's identity (even when protection measures have been put in place to keep his identity secret). 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[2]. However, those present in court are required by the applicable provisions of the Statute and the Rules and by Chamber decisions to abide by protection measures granted.

13. 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 euros.

[2] See Rule 66 of the Rules of procedure and evidence of the Tribunal.

14. This is no mere academic point. The ICTY has already had to consider many cases of contempt involving allegations of disclosure of information about protected witnesses or subjecting them to pressure. In his address to the United Nations Security Council on 12 December 2008 Serge Brammertz, the ICTY Prosecutor, expressed his concern about the pressure put upon witnesses, in particular their intimidation. He therefore urged “states in which witnesses reside to continue assisting the … Tribunal", emphasising that it is "important to create a climate that is conducive for witnesses to testify and provide the necessary guarantees to witnesses who decide to speak before the Tribunal".

15. By way of examples, on 24 July 2009 the Trial Chamber found Mr Vojisla Seselj guilty of contempt of the Tribunal for publishing information in a recent book that made it possible to identify three witnesses for the prosecution who had appeared before the Tribunal.

16. On 17 December 2008 Astrit Haraqija (formerly Kosovo Minister for Culture, Youth and Sport) and Bajruch Morina were found guilty of contempt of the Tribunal for knowingly and willfully interfering with the administration of justice by putting pressure on a protected witness in the trial of Ramush Haradinaj, the former Albanian military commander in Kosovo[3]. They were respectively sentenced to five and three months' imprisonment. The trial of Ramush Haradinaj was impeded by very substantial pressure on witnesses (some people on the witness list were killed) and several of them gave up testifying.

17. On 15 March 2007 the Appeals Chamber confirmed the judgment finding Josip Jovic guilty of contempt of the Tribunal for divulging the identity and excerpts from the testimony of Stjepan Mesic (the current President of Croatia), who testified as a protected witness in the case concerning Tihomir Blaskic.

18. On 31 January 2000 Milan Vujin (lead counsel for a defendant before the Tribunal) was found guilty of contempt of the Tribunal for telling persons about to give statements to co-counsel what they should or should not say and in effect instructing them to lie; nodding his head to indicate to witnesses during witness interviews when to say yes and when to say no; interfering with witnesses in a manner which dissuaded them from telling the truth; knowingly instructing a witness to make false declarations in a statement to the International Tribunal; and paying a person giving a statement money when pleased with the information provided, but not paying him when he did not answer as instructed. Milan Vujin was struck off the list of assigned counsel.

19. The list of convictions for contempt of the Tribunal for putting pressure on witnesses, revealing the identity of protected witnesses or publishing excerpts from their testimonies is still a long one. For example, Domagoj Margetic published the complete and confidential list of protected witnesses in *Prosecutor v. Tihomir Blaskic* on his internet site.

20. It is obvious that, pursuant to the rights of the defence, disclosure to the defence team, admittedly late but inevitable, of protected witnesses' identity impairs their anonymity and thereby their protection. Once protected witnesses have been identified, the defence team can easily put pressure on them and their families.

## IV. "Witness relocation" agreements

21. The risks to which some witnesses are exposed as a result of testifying at The Hague makes it too dangerous for them to return to their countries of origin.

22. In these cases, in practice a small minority, it is essential to relocate these witnesses and their families in a new country, possibly after a change of identity.

23. The Tribunal has non-judicial victim protection measures available for this purpose, involving the inclusion of the witnesses concerned in a relocation programme managed by the ICTY Registry. These are exceptional measures and must be approved by the Registry of the Tribunal.

[3] On 3 April 2008 the Trial Chamber had acquitted Ramush Haradinaj on all counts, while stressing the great difficulties that it had encountered in obtaining the testimony of many victims.

24. The Tribunal has now entered into witness relocation agreements with 13 states and is currently negotiating with several others. These agreements (confidential documents filed with the Secretary-General of the United Nations) are political commitments and are not legally binding. According to officials of the Tribunal, the present number of relocation agreements falls far short of requirements.

25. In the context of these agreements, the ICTY may call upon states to agree to relocate in their respective territories a witness (and his family if need be) who runs a particular risk.

26. A relocated witness cannot be sent back to a country in the former Yugoslavia without his and the Tribunal's express consent. The Tribunal Registry submits an annual report assessing the level of the threat to the witness and his family. If it considers that the threat level no longer justifies relocation, the relocation programme in the receiving country may be terminated.

## V. A witness protection system completely dependent on cooperation by states

27. Ultimately the system for protection of witnesses testifying before the ICTY is completely dependent on cooperation by certain states. Without relocation agreements the ICTY would be incapable of guaranteeing the long-term protection of witnesses exposed to the greatest threats.

28. Moreover, once such agreements have been entered into with certain countries, the countries concerned decide on a case-by-case basis whether they will agree to relocate a particular witness in their territory. These procedures are lengthy (sometimes lasting as long as a year) and the result is not necessarily positive. If in the end the state consulted refuses to relocate a witness a fresh request must be made to another state, which may take as long. During this period witnesses remain the responsibility of the ICTY Victims and Witnesses Section. It is obvious that the longer the period necessary for relocation (during which protected witnesses are temporarily resident in the Netherlands), the more difficult the adaptation to the new receiving country will be. The states consulted should therefore deal with relocation requests as quickly as possible.

29. The Tribunal is having serious difficulties in relocating witnesses with "blood on their hands" (i.e. those who have been involved in crime). Most of the states which have entered into relocation agreements with the ICTY are reluctant to accept relocation of such witnesses in their territory (some of them have incorporated an express refusal to do so in the agreement).

30. Lastly, it is more and more difficult for the Tribunal to conclude relocation agreements. Indeed, the ICTY is not the only international tribunal that depends on the co-operation of states to protect its witnesses exposed to the greatest threat. Thus, paradoxically, we see a certain amount of competition among various international tribunals which are appealing to states to enter into relocation agreements. Since presumably the ICTY will close in the immediate future, the international community tends to focus its efforts on the International Criminal Court with regard to the possible negotiation of relocation agreements.

31. Lastly, despite a widespread belief in certain states, the lack of a national witness protection programme is never an obstacle to a relocation agreement with the ICTY. Most of the time relocation is implemented by way of existing immigration procedures.

## VI. The necessity for a residual mechanism

32. In the light of the long-term (and moral) 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".

33. 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 residual 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 relocation, or on the other hand the possibility of terminating it.

34. The United Nations Security Council might contemplate assigning the duties of such a residual mechanism to the International Criminal Court or creating an independent residual entity (possibly, in the end, in the form of an entity common to the ICTY and the International Criminal Tribunal for Rwanda).

35. 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 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.

36. 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.