

***SUBJECT: WITNESS PROTECTION IN CRIMINAL PROCEEDINGS,
PAST EXPERIENCE AND IDENTIFIED PROBLEMS***

Ladies and gentlemen, esteemed colleagues, distinguished representatives of the United Nations

Let me greet you all on my behalf and on behalf of Bosnia and Herzegovina, the State I am coming from and I wish you successful participation in this conference.

Bosnia and Herzegovina is the country situated in the centre of the Western Balkans, with 51129 km². According to the Census from 1991 its population figure was 4.37 million.

However, due to the tragic war that happened in BiH in the period from 1992-1995, great suffering and displacement of the population there is are no exact up-to-date population figures for BiH as there has been no census after the war.

The State of Bosnia and Herzegovina comprises two entities: the Federation of BiH and Republika Srpska as well as the Brčko District.

This information is very important for an adequate analysis of the problems related to witness protection in criminal proceedings.

In the period between 2002 and 2003 a significant reform of the criminal justice system was conducted and some laws stipulated a legal framework for protection of witnesses were enacted at the State level such as:

- Criminal Code of BiH
- Criminal Procedure Code of BiH
- Law on Protection of Witnesses under Threat and Vulnerable Witnesses
- Law on Programmes of Witness Protection in BiH

The Criminal Procedure Code defines a manner of interviewing and examining a protected witness during trials and it stipulates duties of all the participants in the proceedings to ensure protection of his/her identity and security.

The Criminal Code provides for culpability for disclosure of identity of protected witnesses by any party in the proceedings including third parties. Article 240 of the Criminal Code of BiH stipulates the following:

- „Whoever without authorisation discloses, delivers or takes another action with an aim of revealing data on the identity or information which can lead to the discovery of the identity of a person who has given or is

about to give evidence before the institutions of Bosnia and Herzegovina, and which must not be disclosed according to the law or has been declared a secret data by a decision of the Court of Bosnia and Herzegovina or by an authorised person” shall commit a criminal offence for which a 3 to 8- year imprisonment sentence may be pronounced. A fine may also be imposed as an accessory punishment.

The legal sanctions are more severe if the criminal offence is committed by authorised persons or if the perpetrators refuse to identify a source of information.

THE LAW ON PROTECTION OF WITNESSES UNDER THREAT AND VULNERABLE WITNESSES

The Law was enacted in mid 2003 and it stipulates measures ensuring protection of witnesses under threat and vulnerable witnesses in criminal proceedings conducted in judicial institutions at the State level. Therefore, the Law provides for two categories of witnesses who can be granted protection pursuant to this Law.

A WITNESS UNDER THREAT

- „is a witness whose personal security or the security of his family is endangered through his participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his testimony or a witness who has reasonable grounds to fear that such a danger is likely to result from his testimony.”

A VULNERABLE WITNESS

„is a witness who has been severely physically or mentally traumatized by the events of the offence or otherwise suffers from a serious mental condition rendering him unusually sensitive, and a child or a juvenile“.

Therefore, the purpose of the measures stipulated by this Law is to protect witnesses under threat and vulnerable witnesses in order to protect their identity and other data and information that may indicate witness's identity as well as protection of vulnerable witnesses from their intimidation, confusion and a negative psychological influence.

This Law provides for the measures which ensure psychological, social and professional protection to witnesses under threat and vulnerable witnesses in judicial proceedings.

The Court, Prosecutors and other bodies participating in the criminal proceedings have to inferior a witness under threat and vulnerable witnesses on the measures of protection, assistance and support. The

Prosecutor provides this information in the course of an investigation whereas the Court does it after an Indictment is filed.

The Law recognises two types of the protective measures ensuring protection of the identity of witnesses:

- procedural protective measures
- additional protective measures,

Procedural protective measures allow for the following:

1. Witness hearing at the main trial in a different order from the one stipulated by the BiH Criminal Procedure Code;
2. The court's control over the manner of the examination of witnesses (President of the Panel controls the manner in which a vulnerable witness is examined, particularly to protect the witness from harassment and confusion);
3. The Court may, with the consent of the parties and the defence attorney, hear a vulnerable witness by posing questions directly to the witness on behalf of the parties and the defence attorney;
4. Testimony by using technical means for transferring image and sound (the parties and the defence attorney may ask questions although not in the same room as the witness);
5. Removal of the accused from the courtroom during the testimony (the accused must be enabled to follow the testimony through technical means for transferring image and sound, or the testimony shall be recorded and presented to the accused
6. Reading out the records on testimony given during the investigative phase or their use evidence at the main trial (exceptions from the direct and cross-examination)
7. Limitation of the right of an accused and his defence attorney to inspect files and documentation
(This limitation allows for making a decision on prohibition to disclose some or all of the personal details of a witness or other details would contribute to identifying a witness, and would seriously endanger the witness under threat. The information must be released at the latest when the witness testifies at the main trial);

ADDITIONAL MEASURES TO PROVIDE FOR THE ANONYMITY OF A WITNESS:

1. Confidentiality of personal details of a witness (where there is a justified fear that if some or all of the personal details of the witness are released it would seriously endanger the personal security of a witness or his family – this protective measure may not exceed thirty years, following upon the day the decision became final);
2. Testimony behind a screen;
3. Testimony behind a screen utilizing electronic distortion of the voice of the witness or the image of the witness, or both the image and the voice, by using technical means for transferring image and sound.

The protective measures, both procedural and additional, are granted by the Court upon the Prosecutors reasoned motion. In its decision the Court defines the measures to be applied to the witness testifying before the court.

HEARING A PROTECTED WITNESS

In exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony, the Court may conduct a hearing of a protected witness granting him/her the status of the protected witness.

(1) A motion for a witness protection hearing may be made by:

- The Court, *ex officio*
- the Prosecutor; or
- the suspect or the accused
- defence attorney of the suspect/accused

Pursuant to this Law the Court shall, without delay and not later than within 15 days following the day the motion is received, determine whether such a hearing is justified. An appeal against a decision may be filed with the Panel of the Appellate Division of the Court within a deadline of 7 days, which shall consider the appeal without delay and shall deliver its decision no more than 15 days from the day the appeal is received.

A witness protection hearing is conducted by the Panel in accordance with the provisions of the Criminal Procedure Code of Bosnia and Herzegovina.

The record of the witness protection hearing shall not contain information relating to the identity of the protected witness but a pseudonym for the witness, as determined by the Court.

At the main trial of the criminal case, the Court shall have the testimony of the protected witness read out loud from the record of the witness protection hearing. The witness may not be called to give testimony other than the testimony at the witness protection hearing.

The Court shall not base a conviction solely on evidence provided by the protected witness.

In the cases processed by the Prosecutor's Office of BiH, the Department for Witness Protection at the State Agency for Investigation and Protection – SIPA is in charge of executing orders, duties and tasks related to witness protection.

Members of the Department for Witness Protection are responsible for the care of witness protection during their transportation to the Court and for taking them back to their place of residence, as well as for other details related to logistics issues.

Likewise, at the Court of BiH there is a Witness Support Unit that provides psychological help to witnesses and coordinates their stay in the Court building during the testimony.

LAW ON THE WITNESS PROTECTION PROGRAM IN BiH

This law was passed in 2004. The Witness Protection Program means operational and tactical measures and actions taken by employees of the Department for Witness Protection of the State Agency for Investigation and Protection in order to insure efficient protection of life, health and bodily integrity of witnesses during and after the criminal procedure, aimed at making it possible for a witness to testify freely and openly in the criminal procedure before the Court of BiH.

For the purposes of this law a witness shall be a person without whose testimony there would be no prospects in criminal proceedings of investigating the facts or of ascertaining the whereabouts of the suspect, or such would be made much more difficult.

The Law also provides opportunity for a protection of a family of a witness under Article 83(1) of the CC of BiH, as well as other persons that have close relationship with a witness.

Protection of a witness, as well as a member of his family will be provided for with the consent of a witness that they wish to enter a protection program.

The Law prescribes in which manner a witness will embark on the witness protection program, and which kinds of protection and support can be given to a witness.

As protection measures the law prescribes:

1. Physical and technical protection measures;
2. Safe facilities;
3. Relocation within the BiH;
4. Temporary change of identity;
5. Relocation to another state;
6. Protection and support to persons (cooperative witnesses, suspects that have been granted immunity or reached a settlement with the Prosecutor's Office).

As support measures the law prescribes:

1. Legal assistance;
2. Financial help;
3. Social support;
4. Psychological support;
5. Other kinds of professional assistance.

The implementation of protection measures and support to a witness that has embarked on a protection program is done by the State Investigation and Protection Agency, which is an administrative agency within the Ministry of Security of BiH and within it there is a Department for Witness Protection in charge of the implementation of the witness protection program.

When it comes to a process of witness protection in Bosnia and Herzegovina, one has to bear in mind the fact that in Bosnia and Herzegovina a large number of war crimes cases are being processed in Bosnia and Herzegovina and that it is at trials for war crimes where a majority of protected witness in the BiH judiciary appears.

Likewise, a number of cases was referred from the Hague Tribunal to the Prosecutor's Office of BiH in accordance with the 11bis Rule of the Hague

Tribunal and obligations have also been undertaken to implement measures that witnesses previously had in the Hague Tribunal.

STATISTICAL DATA

Between 2005 and 2007 the Department for Witness Protection afforded protection and support measures to 259 witnesses in total.

From the statistical point of view, 22 witnesses were afforded protection measures in 2005, 82 witnesses were afforded protection measures in 2006, whereas 155 witnesses were afforded protection measures in 2007, which points to the trend for increasing a number of protected witness from year to year.

Current analyses have shown that a large percentage of as many as 90% of witnesses that testify along with protection measures are witnesses in war crimes cases. Unlike Bosnia and Herzegovina, statistical data available to us show that in neighbouring countries the situation is inverse, so that around 90% of witnessed that testify along with protection measures are witnesses in the cases of organised crime, and only around 10% of them in the cases of organized crime.

Statistical data show that in the Prosecutor's Office of BiH in the Department for War Crimes as many as 20% of witnesses have testified along with protection measures.

Likewise, last year the Court of BiH, at the proposal of the defence, granted protection measures for 7 defence witnesses, who were given support while testifying at the Court of BiH.

Statistical data show that out of a total number of witnesses who were testifying along with protection measures in 2007, there were 2/3 of male witnesses and 1/3 of female witnesses who testified along with protection measures.

WITNESS SUPPORT UNIT OF THE COURT OF BIH

This Department provides administrative, organisational and psychological assistance to witnesses in order to facilitate the experience of testifying and process of testifying in as painless way as possible, and without consequences for mental health.

Personnel of the Witness Support Unit assesses mental capacities of each witness, as well as emotional reactions that may occur, and pursuant to that, gives support to each witness.

Previous experience of this Unit's personnel while working with witnesses has shown that women are more sensitive and need more specific and intensive support during testimony.

During testimony women were showing sorrow more through crying and tremor, whereas men were showing more anger, cynicism and irritation.

PROFESSIONAL CHALLENGES IN THE FIELD OF WITNESS PROTECTION IN THE FUTURE

In the previous work on the cases where persons that testify along with protection measures appear as witnesses, the experience pointed to certain difficulties which agencies for their implementation come across and which have to be removed in the future.

One of the greatest challenges in the implementation of witness protection measures and a witness protection program is lack of financial resources and permanent sources of financing for very complex witness protection programs that relate to the change of identity and relocation of protected witnesses that are in the protection program.

Likewise, the difficulty that has to be intensively dealt with and removed is an inadequate material and technical quality of equipment needed for good quality execution of duties and tasks related to witness protection.

This problem is not so noticeable in the cases processed by the Prosecutor's Office and the Court of BiH, like in the cases that are processed at the local level, where courts do not have needed level of good quality equipment for organising testimony along with protection measures, often because there are cases that court buildings do not have special hallways for bringing protected witness in, neither do they have needed good quality technical level of equipment for testifying with the protection of the witness's image and voice.

Due to the fact that Bosnia and Herzegovina is a comparatively small country according to the area of its territory, this fact makes it impossible that the relocation of protected witnesses that are in the program is done within the country.

Likewise, one of the disadvantages are insufficient legal regulations and especially bylaws, which have to clearly define competences and actions of all subjects and institutions that participate in the implementation of provisions from positive legal regulations of BiH.

One difficulty related to the very witnesses is a case that some witnesses testify in several court proceedings within BiH, as well in the processes that are in progress in BiH and the Hague Tribunal.

Also there is a certain number of cases in which procedural protection measures were granted to witnesses that have testified upon the proposal of the defence.

Esteemed colleagues, we are all aware that good quality processing of extremely complex cases, such as war crimes, is not possible without good quality implementation of the witness protection scheme.

Therefore, I do hope that in the future and by exchanging experience at the national and international level we shall achieve as good quality legislation as possible and with that we shall achieve better and more efficient implementation of witness protection measures in court proceedings.

Thank you for your attention.