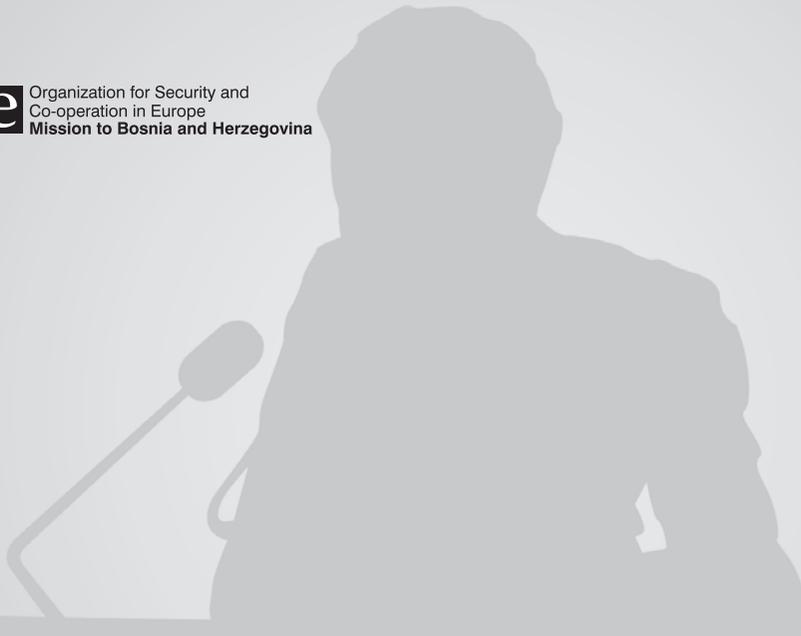




Organization for Security and
Co-operation in Europe
Mission to Bosnia and Herzegovina



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

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Table of contents

I. INTRODUCTION	7
II. SCOPE OF REPORT AND MONITORING METHODOLOGY	8
III. RIGHTS OF VICTIMS AND WITNESSES IN CRIMINAL PROCEEDINGS.....	9
IV. SHORTFALLS IN THE PROTECTION OF THE SECURITY OF VICTIMS AND WITNESSES	11
A. INTRODUCTION TO THE MEASURES AVAILABLE FOR PROTECTION	11
B. FAILURE TO INVESTIGATE ALLEGATIONS OF THREATS DILIGENTLY	12
C. FAILURE TO APPLY PROTECTION MEASURES OR APPLY THEM IN AN EFFECTIVE MANNER.....	14
V. FAILURE TO SUPPORT WITNESSES DURING TRIAL	17
A. LACK OF SUPPORT STRUCTURES	18
VI. OBSTACLES TO REALISATION OF VICTIMS' AND WITNESSES' RIGHTS PRESENTED BY REPEAT TESTIMONY.....	20
VII. CONCLUSIONS AND RECOMMENDATIONS.....	22

I. Introduction

In December 2008, the Council of Ministers of Bosnia and Herzegovina (BiH) adopted the National Strategy for War Crimes Processing (National Strategy), which sets out a systemic approach to better equip and organise the judiciary to investigate, prosecute, and adjudicate war crimes cases in a manner compliant with international legal norms and human rights standards. The National Strategy is ambitious and seeks to resolve all outstanding war crimes cases within fifteen years. A key measure therein is to ensure the “protection, support and same treatment to all victims and witnesses in the proceedings before all courts in BiH.”¹

Without proper protection and support of witnesses, the National Strategy cannot succeed in its purpose. These services are a necessary component to the collaboration of witnesses, particularly victim-witnesses, which has been the linchpin to all successful war crimes prosecutions in BiH. Testimonies of witnesses are the principal evidence in war crimes cases because documentary evidence is often unused, unavailable, or nonexistent as a result of an absence or deficiency of investigation into the crimes at the time they were committed.

Although the involvement of victims and witnesses is so important, BiH has done little to ensure that it will continue. BiH has not taken sufficient steps to guarantee the rights of witnesses to life without unjustified infringements to security or privacy, to protection from acts of harassment and violence, and to participation in trials with dignity. When witnesses are threatened, the judiciary often does not act to determine whether those threats are legitimate or serious. Yet, it also often does not

¹ National Strategy for War Crimes Processing (National Strategy), 29 December 2008, Section 1.2: Introduction, Objectives and Anticipated Results.

institute the available protective measures when they might be appropriate or apply them effectively. To exacerbate matters, BiH also lacks structures that can financially, logistically, psychologically, or emotionally support witnesses, even exceptionally vulnerable ones, throughout the criminal process. Despite these failings, the courts oblige witnesses to testify - frequently about traumatic events. Worse still, many witnesses are required to give their testimony repeatedly.

These concerns amount to a systematic failure to ensure the protection of victims' and witnesses' rights. This is a fundamental problem in which justice cannot be achieved without violating the human rights of victims of crimes. As a result of the systemic shortfalls, victims and witnesses are increasingly unwilling to collaborate in prosecutions for reasons of fear of reprisal or of reliving traumatic events, which are increasingly distant in the past. Many victims no longer believe that trials can deliver justice and have misgivings about attending court. These concerns are aggravated when victims or witnesses are returnees and/or minorities in their place of residence.

Over a year has passed since the National Strategy was adopted and BiH has done little in that time to improve the protection, support, and equal treatment of witnesses in criminal proceedings. BiH has not advanced the situation of victims and witnesses and gained their trust or ensured their willing participation in war crimes proceedings. Given the central role of those conditions to the successful prosecution of war crimes, the Organization for Security and Cooperation in Europe (OSCE), Mission to BiH notes that it is an appropriate time to re-emphasise the rights of witnesses, in particular victim-witnesses, to protection and support; to outline the systemic shortfalls in the witness protection and support system in BiH; and to recommend measures available to justice sector actors that would move BiH towards greater compliance with international legal norms and human rights standards and closer towards achieving the aims of the National Strategy.

II. Scope of report and monitoring methodology

This Report deals solely with issues of protection and support related to witnesses involved in war crimes proceedings before BiH courts since 2004 to present. While many of the issues addressed herein relate to the specific category of victim-witnesses, the scope of this Report is confined to issues faced with protection and support in the context of criminal proceedings, i.e. the general security situation of victims or need for psychological and social assistance among victims is not within the scope of this Report.

OSCE Mission to BiH has monitored or obtained information about 184 war crime cases (50 "group cases" involving 177 accused and 134 individual cases) that have

been tried before BiH courts between 2004 and 2009.² All war crimes proceedings taking place before cantonal or districts courts are monitored from the time that the indictment is raised until the sentencing or appeal while a majority, but not all, war crimes cases before the State Court of BiH are also monitored (84 cases at the State Court of BiH and 100 cases before entity level courts). This Report is based on an extensive number of hearings observed in the context of the war crimes pillar of the OSCE justice sector monitoring programme. In addition, interviews and exchanges with court staff, legal practitioners, and other concerned actors, such as victim representatives and witness support service providers, conducted for the purpose of this report and during the regular course of OSCE activities, have been taken into consideration in the formulation of the findings contained in this report.

III. Rights of victims and witnesses in criminal proceedings

Although people have a legal and civic duty to testify in criminal proceedings, the country must organise those proceedings to avoid unjustifiably infringing upon victims' and witnesses' rights. This is the standard established by the constitutions of BiH and its entities and international law.

The rights of victims and witnesses include the right to life, liberty and security, and respect for private and family life, which the European Convention on Human Rights (ECHR) guarantees to all people and to which the constitutions of BiH and its entities give primacy over all other laws.³ In addition to the ECHR, the 1966 International Covenant on Civil and Political Rights (ICCPR),⁴ the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment are relevant and apply in BiH. These instruments contain key prohibitions against the violation of rights of people, which include victims and witnesses of crimes.

2 As of 4 November 2009.

3 Articles 2, 5 and 8. Article 13 of the ECHR also guarantees the right to an effective remedy for any violation of rights. The European Court of Human Rights (Strasbourg Court) has interpreted the right to effective remedy to include, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible. *Aksoy v. Turkey*, ECtHR, 16 December 1996, para. 98.

4 In 2006, the Human Rights Committee, which monitors state obligations under the ICCPR, expressed "concern about the underfunding of district and cantonal courts dealing with war crimes cases and the unsatisfactory implementation of witness protection legislation at the Entity level" in BiH. The Committee recommended that BiH "allocate sufficient funds and human resources to the district and cantonal courts trying war crimes and ensure the effective application of the State and Entity Laws on Protection of Witnesses." U.N. Doc. CCPR/C/BIH/CO/1, para. 13.

Notably, the ECHR and the ICCPR denote only minimum standards. The Council of Europe (CoE), of which BiH is a member, has adopted a series of recommendations on victims' and witnesses' rights that have outlined general principles and mechanisms that States Parties should implement in order to fully realise people's fundamental rights.⁵ Two important principles that these recommendations set forth are that victims should be questioned in a manner which gives due consideration to their personal situation, rights, and dignity and that states should enact legislation and form practice to ensure that witnesses may testify freely without intimidation. The CoE recommendations also identify witness protection and support mechanisms necessary to guarantee the fundamental rights of victims and witnesses while they participate in criminal proceedings, such as the use of pseudonyms and establishment of witness protection programmes.

In addition to the rights afforded to victims and witnesses in connection with criminal proceedings, BiH is also under the duty to treat victims of gross violations of international law with humanity and respect for their dignity and human rights, recognised as part of the right to an effective remedy in the UN Basic Principles on Reparation for Victims of Gross and Systematic Human Rights Violations.⁶ Furthermore, the State is required to use the law to accord "special consideration" to victims, in particular to avoid their re-traumatisation.⁷

The victims of sexual violence merit special attention in the context of witness protection and support. As recognised by the European Court of Human Rights, those victims have heightened interests in privacy because of the stigma attached to their injuries.⁸ Testifying can be an exceptionally difficult ordeal for these individuals, particularly when they must unwillingly confront a defendant, risking re-traumatisation in many instances.⁹

Considering the obligation of states to guarantee minimally to all people the fundamental rights under the ECHR, but also to administer justice and prosecute criminal offenders, the European Court of Human Rights has held that states must "organise their criminal proceedings in such a way that [victims' and witnesses']

5 Those include CoE Recommendation No. Rec. (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, CoE Recommendation No. Rec. (97) 13 Concerning Intimidation of Witnesses and the Rights of the Defence, and CoE Recommendation Rec. (2005) 9 on the Protection of Witnesses and Collaborators of Justice.

6 Basic Principles on Reparation for Victims of Gross and Systematic Human Rights Violations, Article 3.

7 Basic Principles on Reparation for Victims of Gross and Systematic Human Rights Violations, Article 10.

8 See *Bocos-Cuesta v. the Netherlands*, ECtHR, 10 November 2005, para. 69; *Accardi and others v. Italy*, ECtHR, 20 January 2005, para. 1.

9 Several international instruments discuss their participation in criminal proceedings. Those include the CoE Parliamentary Assembly Resolution 1212 (2000) on Rape in Armed Conflicts; the CoE Recommendation 1325 (1997) on Trafficking in Women and Forced Prostitution; and more generally, the CoE Recommendation Rec. (2002) 5 on the Protection of Women against Violence; and the United Nations General Assembly Declaration on the Elimination of Violence against Women.

interests are not unjustifiably imperilled.”¹⁰ Therefore, BiH’s obligation to ensure the protection, support, and equal treatment to all victims and witnesses who collaborate in war crimes prosecutions follows, not only from the National Strategy and under national laws, but also from the Constitutions of BiH and its entities, as well as international law.¹¹

IV. Shortfalls in the protection of the security of victims and witnesses

Although BiH is obliged by its own Constitution and international law to protect victims and witnesses from threats that arise from their testimony, the country does not take the necessary steps to fulfil this obligation. Instead, the judiciary does not sufficiently investigate allegations of threats against witnesses. It also often does not apply protective measures when appropriate or in a consistent and co-ordinated manner to ensure effectiveness. Although guidelines might assist courts in addressing this latter concern, and the laws on witness protection require the courts to develop rules of procedure, only the State Court has done so, and only several years after the laws were passed. These matters are obstacles to the systematic prosecution of war crimes cases as envisioned by the National Strategy.

a. Introduction to the measures available for protection

The criminal procedure codes and the special laws on witness protection set out measures that can be applied to protect witnesses and the conditions for their application.¹² If used correctly, these measures can significantly contribute to protection of the life, security, and privacy of witnesses. They are directed at shielding the content of testimony from the public or from preventing the public and, in extreme cases, the defendant from knowing the identity of a witness. Available measures range from what is classically referred to as out-of court protection, including relocation and guarded transport, to in-court protection, which may include assignment of pseudonyms, testimony behind screens or with voice-image

10 *Doorson v. The Netherlands*, 26 March 1996, para. 70. The Strasbourg Court continues by noting that “principles of fair trial also require that in appropriate cases the rights of the defence are balanced against those of witnesses or victims called upon to testify.”

11 National Strategy, Section 1.2: Introduction, Objectives and Anticipated Results.

12 On 1 March 2003, as part of a combating crime package “designed to ensure that the Court of BiH can fight organised crime and corruption effectively,” the OHR High Representative imposed the BiH Law on Protection of Witnesses under Threat and Vulnerable Witnesses. Official Gazette (hereinafter, “OG”) of BiH 3/03, 21/03, 61/04, 55/05. Subsequently, equivalent laws were adopted at the entity levels. RS OG 48/03 and FBiH OG 36/03.

alteration techniques, and testimony in closed/confidential session. In addition, authorities may, and should, prosecute the perpetrators of threats and intimidation.

When the more extreme measures, such as relocation and change of identity, are necessary, they are available only at the state level under the BiH Law on the Witness Protection Programme.¹³ This law directs the State Investigation and Protection Agency (SIPA) to develop and maintain a witness protection programme in order to meet the safety needs of witnesses during and after criminal proceedings. The Mission is not aware that similar measures are currently implemented at the entity level in a systematic manner; in some instances, prosecution authorities at the entity level avail themselves of SIPA services *ad hoc*. This leaves open a vast area of regulatory and systematic issues which need to be met in terms of strengthening the institutionalised provision of witness protection in BiH, particularly with respect to personal safety. In 2008, a new *Draft Law on the Witness Protection Programme* was proposed by the Council of Ministers of BiH, under which SIPA would have the competence to expand its witness protection programme activities to witnesses testifying before the entity courts. Nonetheless, despite the need, the law was not adopted.

Moreover, according to the OSCE Mission's understanding, the current witness protection programme operated by SIPA is already strained by a lack of sufficient resources and, at times, an unrealistic, but necessary, reliance on the ordinary police, which do not have specialist witness protection units, to carry out risk assessments and implement other measures such as out-of-court protection.

The National Strategy has identified this obstacle to effective prosecutions and has committed to SIPA that: “... it will be additionally staffed and equipped with material and technical resources, and basic and specialized training and education of officers in the field of witness protection will be organized and provided.”¹⁴

b. Failure to investigate allegations of threats diligently

Although the witness protection system may suffer from resource and regulatory flaws, the existing system is not wholly ineffective. The fact that witness protection measures have been applied with intended effect demonstrates that the existing system is useful. Nevertheless, shortfalls in protection of witnesses have a more basic origin, which is the judiciary's lack of urgency in addressing allegations of threats to witnesses.

¹³ Law on Witness Protection Programme in BiH, OG BiH 29/04.

¹⁴ National Strategy, Section 4: Witness Protection and Support.

In many war crimes cases monitored by the Mission, witnesses have informed the court that they or their family members have been threatened,¹⁵ offered a bribe,¹⁶ or subjected to some other form of intimidation both prior to and during the main trial.¹⁷ In several cases, even defendants in a position to reveal the identity of co-perpetrators have been threatened by co-perpetrators.¹⁸

Although threats and intimidation are widespread, and local media is flush with reports of such incidents, it appears that little proportionate action has been taken to address these allegations. Indeed, prosecutors have been so bold as to state in public hearings that they concluded that threats to witnesses are serious and on this basis propose that defendants be held in custody, while admitting that they have not investigated those threats.¹⁹ In an interview with the local media in July 2009, the Prosecutor's Office of BiH claimed that it opened investigations into the unlawful influencing of witnesses, but admitted that nobody has ever been indicted for such a crime.²⁰ The same appears to be the case at the entity level. Judges have also appeared unconcerned.²¹ To date, the Mission is aware of only three cases in which unlawful influencing was investigated and prosecuted, resulting in conviction.²²

Threats or the fear of retaliation, which can, in part, be attributed to the failure of action by the judiciary to curb such threats, can have disastrous effects. In some cases, witnesses have either failed to identify any of the accused as being perpetrators of crimes or have excused the accused of any responsibility.²³ When the witness is a returnee and a minority in his or her place of residence, his or her concerns may be heightened. For instance, some cases suffered long delays because prosecutors had difficulties convincing individuals who had once provided information essential to a case to testify after that individual returned to their pre-war home. Trial monitoring programme findings indicate that the latter happens especially in war crimes cases where defendants are influential in the local community. One prosecutor openly admitted that as long as there are some influential persons with alleged involvement in war crimes who continue to hold positions in government and public institutions, the witnesses will be reluctant to come forward or to accuse members of their own ethnicity.

15 Cantonal Court of Mostar case of *Petar Matić & Ante Krešić*; District Court of Trebinje case of *Momir Skakavač*; Cantonal Court of Zenica case of *Dominik Iljašević*.

16 Cantonal Court of Mostar case of *Miroslav Marijanović & Ante Buhovac*; District Court of Banja Luka case of *Predrag Dobrnjac & Nenad Šukalo*.

17 District Court of Banja Luka case of *Trivić et al.*; District Court of Banja Luka case of *Predrag Dobrnjac & Nenad Šukalo*; Cantonal Court of Sarajevo case of *Borislav Berjan*.

18 District Court of Banja Luka case of *Saša Lipovac & Dražen Nikić*; Court of BiH case of *Predrag Bastah*.

19 Court of BiH case of *Gasal et al.*

20 Balkan Investigative Reporting Network, Courts Disagree over Custody for Indictees, 9 October 2008, available at <http://www.bim.ba/en/136/10/13878/?&ifrs=1%29&tpl=58>, last accessed July 2009.

21 Cantonal Court of Mostar case of *Džidić et al.*

22 It appears that there have been cases sentencing defendants for obstruction of justice for interfering with witnesses in relation to Cantonal Court of Sarajevo case of *Novo Rajak*, Court of BiH case of *Abduladhim Maktouf*, Municipal Court of Zenica case of *Admir Mustafić*.

23 Cantonal Court of Zenica case of *Dominik Iljašević*.

It is exactly because of the societal conditions leading to a high prevalence of witness intimidation that the judiciary must exercise extra vigilance to condemn those who unlawfully interfere in the criminal process. By neglecting to do so, the state is failing in its obligation to guarantee the fundamental rights of witnesses, especially victim-witnesses, to life, security, and privacy. It is also jeopardising the success of war crimes prosecutions, thereby imperilling the victims' right to an effective remedy.

c. Failure to apply protection measures or apply them in an effective manner

Even when courts determine that witnesses should be protected, they often fail to implement protective measures in a manner that can ensure their effectiveness. The Mission has observed that justice actors sometimes do not exercise the care necessary to ensure that any measures rendered at one stage of the criminal proceedings, or the lack thereof, are meaningful and do not preclude protection at a future time. In addition, the entity courts, owing to a lack of material resources, have generally failed to provide any protection to witnesses, and some have refused to provide whatever protection they might be able to provide within their limitations.

In general, the protection of witnesses must be co-ordinated and take place from the earliest stages of their involvement in the criminal process. Often, the pre-trial procedure for imposing restrictive measures on the defendant, such as custody, would be the first opportunity to address whether the protection of the identity of witnesses is a key question. The contents of the confirmed indictment and the disclosure of evidence to the defence for its preparation for the main trial are other circumstances requiring consideration of witness protection measures. The effectiveness of measures implemented during the main trial is, in part, dependent on these prior measures. During main trial, some measures such as a pseudonym must be maintained throughout, while particular measures, such as voice-image distortion, are granted only when a witness under threat is testifying. Measures may also be relevant after testimony, and are particularly important in BiH, as witnesses are often called to testify on repeated occasions, as will be discussed in a later section of this report.

When protection has not been co-ordinated, its efficacy can be compromised. For instance, witnesses using pseudonyms have complained that courts have delivered summonses to their homes indiscreetly, such as through the regular post. One witness also reported that she discovered a summons lying at the entrance to her home when she came home one day.²⁴ In these cases, the rendering of a pseudonym

24 Newspaper article by V. Faladžić – S. Rožajac, "Genocide Witnesses in Mortal Danger", *Oslobodenje*, 20 February 2008.

to protect the witnesses' identities becomes ineffectual because the community in which they live will have learned about their involvement in a case.

Monitoring also reveals incidents of witnesses being led into disclosing protected information. Judges and prosecutors have sometimes been the ones involved in creating such situations. For instance, the State Court redacts the names of witnesses in an indictment on the off-chance that those witnesses may seek protection of their identity later on, yet justice officials have been known to use the names of those witnesses in public sessions, often stating when they will testify, thereby undermining previous or future attempts to protect their identities.²⁵ In contrast, entity courts have generally made no effort even to conceal in their indictments the names of the witnesses whose testimonies will be sought, with a few exceptions.

Frequently defence counsels have also violated orders for protection by revealing the names of protected witnesses in a public hearing. Judges have responded with warnings when this has occurred. There are no known instances, however, where parties have been sanctioned for revealing the names of protected witnesses. This is so even though the Mission has observed cases where the same defence counsel have repeatedly violated the protection of witnesses in a public hearing and have received repeated warnings from the court on this account. In one case, the court did not sanction the defence, but chose to exclude the public from subsequent hearings, rendering the trial almost entirely closed.²⁶ Contrasting with this approach, the State Prosecutor's Office has recently opened an investigation against a journalist who allegedly disclosed the identity of a witness who testified in a protected session on two occasions; the magazine was warned when disclosure happened the first time.²⁷

Recently, a trial panel decided, in advance of testimony, that protected witnesses would be heard in the presence of the public, but then ordered the same attendant public, including the media, to keep the identity of those witnesses and the content of their testimony – that is, everything that the public and media heard – secret.²⁸ By such orders, the courts wilfully placed confidential information into the hands of the media and public, thereby endangering the protected witnesses and information.²⁹

Unlike the Court of BiH, entity courts lack material and financial resources to implement some witness protection measures. They have neither the in-house technical means to facilitate video link and voice-image distortion, nor separate entrances for witnesses and screens to separate the courtroom from the public gallery. Naturally, this has had a negative impact on the implementation of

25 Court of BiH cases of *Mitar Rašević & Savo Todović* and *Boban Šimšić*.

26 Court of BiH case of *Radić et al.*

27 Balkan Investigative Reporting Network, *Journalist under Investigation by the State Prosecution*, 26 November 2009, available at <http://www.bim.ba/en/194/10/24009/>, last accessed December 2009.

28 Court of BiH cases of *Milorad Trbić* and *Radomir Vuković*; Cantonal Court of Sarajevo case of *Predrag Mišković* case.

29 See e.g., OSCE Eighth Report in the Case against *Milorad Trbić*, July 2009.

protective measures that depend on these resources and even on those that do not. That is, the lack of resources result in a general reluctance to apply any protective measures required by international standards, even feasible ones such as assigning pseudonyms. In discussions with the OSCE Mission, entity-level judicial officials have admitted to a disinclination to provide protective measures to witnesses. They have made statements in the media to the effect that they or their courts do not implement protection measures. Some courts have consistently denied motions for witness protection and told witnesses that measures were unnecessary, although those are courts where allegations of threats and intimidation directed towards witnesses have been raised.³⁰

It may be no surprise then that once witnesses are told that the court alone decides who needs and does not need protection, it appears that they feel discouraged from requesting protective measures. Some entity courts have reported that no witnesses actually ask for protection, although all witness representatives state that there have been witnesses in their areas of representation who would have liked to testify subject to protection. In response, witness representatives opine that justice actors do not duly explain to witnesses what measures are available and what their rights are with regard to the criminal process and protection of their fundamental rights by the state.

To address this concern, the OSCE Mission to BiH has recently developed and begun to distribute leaflets informing witnesses and injured parties in general about their rights. The OSCE Mission has approached prosecutors and other relevant parties with request that those leaflets be distributed to all injured parties and witnesses informing them of their rights to protection and support under the law.

Although the lack of material resources poses a serious threat to the administration of justice at entity courts, it should be borne in mind that not all protective measures require special equipment and facilities, as is the case with the use of pseudonyms, which a few entity courts have used. Moreover, innovative thinking can achieve the purpose of some specific measures without the material resources that would be usually required, as can be the case when a court uses a makeshift screen to hide a witness's image from the public during testimony or when witnesses use the separate door reserved for judges to enter the courtroom instead of the one used by the accused and the public. It is also possible for entity courts to borrow video link equipment from the State Court.

In summary, the laws on protection of witnesses may be subject to gaps and different interpretations. This is demonstrated by the disparity in protection approaches. Courts have an obligation to develop rules of procedure governing protection under both the special laws and the criminal procedure code. Nevertheless, this responsibility has been wholly neglected at the entity courts. The State Court developed rules of procedure for

30 Balkan Investigative Reporting Network, *Witnesses Left Unprotected*, 28 February 2008, available at <http://www.bim.ba:80/en/104/10/8168/?tpl=58>, last accessed December 2009.

the implementation of witness protection measures only many years after the laws on protection of witnesses were adopted. They did so to ensure effective and consistent implementation of these services.³¹ The National Strategy has subsequently called for such rules to be adopted as soon as possible at the entity level.³²

V. Failure to support witnesses during trial

There is an additional concern regarding the support that vulnerable witnesses receive or to which they have access. BiH is obliged to protect witnesses not only from threats and disclosure of their identity, but also from the possible distressing effects of the criminal justice process. Testifying in a war crimes case is intrusive and can violate the privacy of witnesses. In addition, testifying requires that victim-witnesses revisit and relive traumatising experiences, thus potentially subjecting them to retraumatisation.

The laws on witness protection provide for two primary support avenues for those witnesses who have been physically or mentally traumatised by the events connected to the crime. Specifically, the first is access to psychological, social assistance and professional help.³³ It is notable that there is no further elucidation on what these categories consist of or what the role is of national authorities who provide such services in connection with the judicial process. In addition to this support, the laws on witnesses also provide for support of vulnerable witnesses during the actual trial stages of the proceedings.³⁴ Potential shortfalls in the interpretation and understanding of the laws on witness protection could lead to critical violations of witness rights.

Although the laws stipulate that support should be given to victims and witnesses, in reality, only the State Court of BiH has the capacity to provide psycho-social support to witnesses. Entity level courts and prosecutor's offices in BiH presently lack the structures that could provide such support services. In the absence of this

31 Court of BiH, Rules of Procedure on Protection of Witnesses, adopted in plenary session on 29 September 2008.

32 National Strategy, Section 4: Witness Protection and Support.

33 Article 6 of the BiH Law on Protection of Witnesses provides that during the investigation and trial, the prosecutor or court shall ensure, without disclosing any of the witness's personal details, that the body responsible for social care is aware of the vulnerable witness's role in the proceedings and shall "enable the assistance of this body as well as psychological support to the witness, including the presence of appropriate professionals or hearings."

34 In this respect, Article 8(1) of the BiH Law on Protection of Witnesses states that the judge shall "exercise an appropriate control over the manner of the examination of witnesses when a vulnerable witness is being examined, particularly to protect the witness from harassment and confusion." In conjunction with this, Article 8(2) further articulates that in exceptional circumstances and if the Court finds it in the witness's best interest, the Court can hear a vulnerable witness by posing question direction on behalf of the parties and defence attorney.

support, witnesses may be disinclined to testify at trials, thereby endangering the prosecutorial process. Thus, in failing to establish a system of support to witnesses, in particular victim-witnesses who may face re-traumatisation during testimony, but in compelling them to testify anyhow, BiH has jeopardised those victims' and witnesses' rights.

a. Lack of support structures

It is unfortunate that, despite the explicit guarantee of psycho-social support to vulnerable victims and witnesses, there is only one structure that delivers such services in a sustainable and accountable manner, namely the Witness and Victim Section (WVS) at the Court of BiH. Nor are there clear and concrete policy guidelines for those agencies – a limited number of non-governmental organisation (NGO)s – who are currently involved in giving support. Rather, support is given in an *ad hoc* and unregulated manner.

As with other aspects of witness protection and support already touched upon, certain support structures may exist, but those have been underutilised by the judiciary. For instance, the BiH Prosecutor's Office previously appointed a focal point within the office to act as Co-ordinator for witnesses, in relation to issues that arise at the pre-indictment phase. Among the Co-ordinator's responsibilities was to direct witnesses to appropriate institutions for services and liaise with WVS in case they needed to be involved. Nevertheless, it appears that the Coordinator's role has been allowed to lapse entirely.

The BiH Court also benefits from the specialised WVS within its Registry. The WVS has the responsibility to provide psychological, organisational, and administrative support to both prosecution and defence witnesses in war crimes trials. The unit is staffed with professional psychologists and social workers with expertise in working with traumatised victims of crime. Witnesses are given a 24-hour telephone number that they may call to pose additional questions and concerns, when they receive the summons. Financial assistance provided to witnesses by the WVS is modest in nature and includes expenses necessary to secure the witness's testimony in court, such as a travel allowance and the hiring of care for a witness's dependants while the witness is away testifying. The WVS assists in transport and logistical arrangements for witnesses and, immediately prior to testimony, invites witnesses to waiting rooms in a high-security corridor of the courthouse. Staff provide witnesses with a description of the testimonial process and discuss with them the psychological risks and benefits of testifying, but they refrain from getting involved in deciding whether victim-witnesses should do so. During a witness's testimony, specialized and trained personnel of the WVS can be present in the courtroom for the purpose of communicating to the judges the witness's stress level and the possibility that certain actions and questions will have negative effects on the witness. Alternatively, staff may monitor testimony

by live-streaming of video feed into their office. Staff also take the opportunity to provide advice to the judges in relation to the treatment of witnesses when it is deemed appropriate to do so. Importantly, the WVS provides support on a strictly neutral basis, serving both Prosecution and Defence witnesses, often in the same case.

The WVS, however, does not engage in more intensive or long-term provision of counselling for witnesses. The WVS faces certain limitations in the services it is presently able to provide, and has faced criticism about the effectiveness of its work.³⁵ For instance, until the witness arrives at the court to testify, the WVS only makes contact by telephone, although sometimes a witness support officer will meet with a witness prior to testimony to assess the witness's needs. In addition, the WVS's involvement typically begins post-indictment, because it reviews confirmed indictments to identify potentially vulnerable witnesses. By that stage, victim-witnesses may have already been contacted numerous times by prosecutors and police and may feel insecure or retraumatized. Nevertheless, WVS staff may also meet earlier with witnesses, if invited by the Prosecution or Defence to do so.

At the entity level, there are no government-funded structures carrying out psycho-social witness support in war crimes cases. Although the laws on witnesses assign the Centres for Social Welfare with the responsibility for supporting witnesses, those centres have not been actively engaged. Additionally, most centres do not have qualified mental health professionals to provide psychological support or counselling of any kind to war crimes witnesses, nor do they liaise systematically with the Mental Health Centres to do so. Social Welfare Centres are also understaffed and underfunded, leaving them incapable of providing any support to witnesses in criminal cases.

Rather, certain prosecutor's offices and courts rely on the good services of regional or thematic NGOs. NGO contact with the authorities or the witnesses is initiated in a variety of ways, but remains largely unregulated. On one side of the spectrum, an NGO has signed a Memorandum of Understanding with the prosecutor's office, while in some regions justice actors seem unaware that NGOs are active and can furnish such services.

The availability and quality of NGO psycho-social support services varies widely. Some NGOs have professional staff working for them and their resources have allowed them to do support work in a reliable and consistent manner, while others are mainly comprised of victims advocating for specific interests and rights. NGO mandates and their manner of working also differ widely, in the sense of what kind of support they provide, to whom, at which stages of the proceedings, the nature of their involvement in the proceedings, and the advice they provide to witnesses.³⁶ A couple

35 Balkan Investigative Reporting Network, *Justice Requires Support for Witnesses*, 18 May 2007, available at <http://www.bim.ba/en/63/10/2939/>, last accessed October 2009.

36 Of interest, the Centre for Civic Initiatives has published a guidebook in local language outlining the main stages of criminal proceedings.

of NGOs have psychologists, psychotherapists, and social workers on their staff, while others simply arrange transport for witnesses and provide accommodation, meals, and refreshments as needed. There are also groups that offer advice about the process of testifying and the legal rights and duties of witnesses. Notwithstanding the urgent needs met by these NGOs in many instances, the situation is marked by a lack of standards, transparency, and accountability. Many prosecutors remain sceptical about the ability of NGOs to provide psycho-social support services without compromising the integrity of the criminal process or the rights of the witnesses, with a few rare exceptions of long-standing and professional NGOs.

In recognising the fragmentation and limitations of the system for witness support, the National Strategy has recognised the necessity to establish a country-wide network of witness and victim support co-ordinated by the VWS. The Strategy foresees that, within this support network, regional offices for support will be established to cover courts from certain region, in which NGOs will be involved in implementing the measures of these regional offices.³⁷ Development of this network is intended to go hand in hand with strengthening of capacity of Social Welfare and Mental Health Centres and appointment of in-house psychologists in courts and prosecutor's offices.

Concrete recommendations on implementing the measures envisaged in the National Strategy emerged from a December 2009 recent meeting of representatives of the judiciary, of the state and entity level ministries of justice, human rights, and social welfare, of social welfare and mental health centres, and civil society organisations from around BiH.³⁸ The participants deliberated on how to establish psycho-social support services for witnesses in war crimes cases at the entity level and implement the proposed solutions to the current lack of institutional services through the mutual involvement of both civil society organisations which assist victims and witnesses in participating in trials and the WVS.

VI. Obstacles to realisation of victims' and witnesses' rights presented by repeat testimony

The aforementioned concerns with regard to the violation of witnesses' fundamental rights to life, liberty and security, privacy, and effective remedy are compounded by the fact that many witnesses have testified repeatedly, in numerous trials before the courts of BiH and the ICTY.³⁹ It is not uncommon that some witnesses testified and

37 National Strategy, Section 4: Witness Protection and Support.

38 See *Conclusions and Recommendations, Roundtable on "Establishing a psycho-social support system for witnesses and victims in war crimes cases in BiH,"* organised by OSCE Mission to BiH on 3-4 December 2009.

39 References have been omitted to avoid the risk that witnesses' identities might be revealed if a comparison of the testimonies given in the different cases is made because witnesses often do not testify under the same protective measures in each of case in which they testify.

gave statements more than four or five times in relation to a single criminal case or incident.⁴⁰ In these cases, witnesses were observed to be fatigued and strained.⁴¹

This happens because a number of obstacles, such as the lack of co-ordination between courts that may have overlapping jurisdictions and because circumstances prevent prosecutor's offices from trying all defendants for a single war crimes incident at one time, for instance, because the identity and involvement of some perpetrators may be unknown or difficult to prove at the time or because some defendants are hiding, out of the territory, or may flee. In addition, repeat testimony can come about because the BiH Prosecutor's Office separated the proceedings, returning the case against a lower level accused to an entity level prosecutor's office for action and, as a consequence, the same witnesses appear before different courts.⁴² Requiring continuous, but avoidable, repetition of testimony is an affront to a victim's personal dignity and right to privacy.⁴³ Moreover, it can lead to the re-traumatisation of victim-witnesses.

There are ways to avoid the repetition of testimony. At the State Court, the panels of one case attempted to address issues of multiple testimonies by holding a joint hearing.⁴⁴ In addition, some prosecutors have introduced witness statements in lieu of their testimony, thereby only requiring that the witness testify in person if the defence wishes to cross-examine them. Furthermore, holding status conferences, as independent sessions or as a part of a hearing, has proved to be a very efficient tool before both international tribunals and domestic courts. During these, judges ask the parties to announce what kind of evidence they intend to produce, to link it to the charges involved, to give a timeline for the presentation of their evidence, and, very importantly, discuss which facts are not disputed or can be considered as previously adjudicated. Ensuring that status conferences take place as early as possible in the proceedings and as frequently as necessary before all courts trying such complex cases as war crimes will surely achieve a better organised case and avoid undue inconvenience to witnesses.

Other resolutions may be found in the use of facts that have been established as proven in ICTY judgments, which may be accepted as proven in cases in BiH.⁴⁵ There is also growing discussion on extending this rule to include judgements of other domestic

40 Cantonal Court of Mostar cases of *Džidić et al.* and *Petar Matić & Ante Krešić*; District Court of Banja Luka case of *Sulejman Berbić & Čamil Bilić*.

41 District Court of Banja Luka case of *Sulejman Berbić & Čamil Bilić*; Cantonal Court of Mostar case of *Petar Matić & Ante Krešić*.

42 Court of BiH case of *Marko Škrobić*; District Court of Banja Luka case of *Tomo Jurinović*.

43 Privacy not only applies to the protection of private information and identity, but to one's personal honour. CCPR General Comment No.16. para 11.

44 See OSCE Third Report in the Case against *Milorad Trbić*, April 2008.

45 The Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH, OG BiH 61/04, 46/06, 53/06, 76/06, 14 December 2002.

courts, such as the State Court. Legislative amendments would probably be required for this, as well as introducing additional possibilities to shorten the proceedings and hear fewer witnesses, which have been adopted at the ICTY. Such rules include, for example, the motion that the defence can file for the acquittal of an accused after the presentation of the prosecution evidence and in relation to certain charges that it considers not proven.⁴⁶

Another procedural possibility that can have positive effect on witnesses is the use of plea agreements. In general, plea agreements can relieve witnesses from appearing before the court, from repeating testimony when they are not inclined, and from being re-traumatized. On occasion, plea agreements are concluded only after the presentation of evidence and after almost all witnesses were heard. OSCE monitoring reports have noted great advantages if plea agreements are considered and concluded at an early stage of the proceedings, before witnesses are asked to testify.⁴⁷

VII. Conclusions and Recommendations

Although the National Strategy recognises many of the obstacles in the system of witness protection and support in BiH, little has been done in the past year to improve the situation of witnesses, including the particularly sensitive category of victim-witnesses. In light of the central role of victims and witnesses to war crimes proceedings in BiH, the judiciary should endeavour to remedy the issues outlined in this report as soon as possible.

In the context of the implementation of the National Strategy, competent authorities should proceed to assess the realistic needs of the justice sector and allocate the much needed resources for the protection and support of witnesses, as well as for administrative matters that facilitate their testimony. Proposals made in the Strategy may need to be further detailed and refined not only as regards the necessary procedural steps to be taken from now on, but also in connection to clarifying the responsible stakeholders who should be involved. Among the open questions to be answered are which of the NGOs can be considered as interlocutors in a support network, on the basis of which criteria, and who will be the authority to make such determination; which ministries need to be consulted and provide input to the process; how the sustainable funding for the development and maintenance of this structure will be obtained; what the nature of the co-operation and co-ordination between the regional offices and the NGOs or social welfare centres will be; and if any legal amendments are necessary to facilitate improvements.

46 ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), Rule 98*bis* Motion for Judgment of Acquittal.

47 See OSCE Ninth Report in the Case against *Paško Ljubičić*, December 2008 and OSCE Ninth Report in the Case against *Željko Mejakić et al.*, September 2008. The reports also discuss many other benefits to plea bargaining.

In addition to these general matters, in light of the aforementioned findings, the Mission recommends the following:

On the shortfalls in the protection of the security of witnesses

- BiH authorities should initiate concrete legal and systemic steps to deal with the absence of witness protection measures applicable at the entity level.
- In line with the National Strategy, authorities should ensure that SIPA receives additional staff and material and technical resources, as well as that provisions are made to train officers in the appropriate areas of witness protection.
- Judicial actors must seriously engage in the verification of allegations of threats and bribery. Court presidents, chief prosecutors, and the HJPC should highlight the importance of this matter with colleagues and take steps to verify what protective and investigative steps have been taken by them.
- Entity courts should ensure that the rules of procedure governing the implementation of witness protection measures under the criminal procedure codes and special laws on witness protection are developed. Although the State Court rules of procedure could serve as a starting point, entity courts should endeavour to draft rules of procedure and guidelines that take into account their particular resource limitations. In turn, the BiH authorities should ensure the provision of material assistance to courts to establish properly functioning in-court procedural protections (such as video link), while judicial actors at the entity courts should provide protection when possible and within their courts' limitations.

On the failure to support witnesses, especially victim-witnesses, during proceedings

In line with the recommendations on establishing a psycho-social support system for witnesses and victims in war crimes cases in BiH submitted through the OSCE Mission to the Supervisory Body of the National Strategy for War Crimes Processing in December 2009⁴⁸:

- Authorities should take immediate steps to implement the strategic measures as foreseen in the National Strategy for War Crimes Processing in respect to which deadlines for implementation were prescribed but not respected.
- The Supervisory Body of the aforementioned National Strategy has the competence to supervise implementation of the establishment of a witness support network. As such, this body should appoint an expert group/committee/

48 *Conclusions and Recommendations, Roundtable on "Establishing a psycho-social support system for witnesses and victims in war crimes cases in BiH,"* organised by OSCE Mission to BiH on 3-4 December 2009.

board including relevant focal points in the competent state institutions to assist the Witness Support Section of the Court of BiH in planning and realising the establishment of a witness support network, as defined in the Strategy.

- Pending the strengthening of the financial and staffing capacities of the social welfare centers, the expert group should also develop a model of psycho-social support to witnesses in the entities as a provisional solution.
- Planning and providing for training for mental health centers, social welfare centers and prosecutor's offices should be an integral component of setting up the witness and victim support network.
- In order to ensure protection of the witnesses' rights and integrity of the criminal proceedings, the role of NGOs should be regulated by a formal legal framework.
- Such a network should be established with the aim of providing support of a logistical, financial, legal and psycho-social nature and is related to testifying in war crime cases. This support should be based on a professional and principled approach (e.g. neutrality, confidentiality) in order to provide assistance to witnesses testifying in war crime cases. Establishment of a witness support network for individuals testifying in war crime cases should serve as a basis for expanding support services to vulnerable witnesses involved in other criminal cases.

In addition:

- Consideration should be given to strengthening and expanding psycho-support services available at the state level. The WVS, in conjunction with the Prosecutor's Office of the State Court, should ensure mechanisms for the involvement of the WVS section regularly during the investigative phase. In the alternative, the State Prosecutor's Office may wish to establish its own witness support unit or revisit the idea of having a Co-ordinator for witnesses. The Chief Prosecutor should ensure that guidelines for the involvement of this Co-ordinator are formed and that the Co-ordinator is utilised.
- Relevant authorities may wish to develop policy guidelines on how to provide witness and victim support for the use of practitioners that come in contact with victims and witnesses. Such guidelines can refer to the best practices that each interlocutor identifies, including those developed at the ICTY,⁴⁹ and particularly by the State Court Registry and NGOs that operate in BiH and the region. Training to sensitise legal practitioners to the specific needs of victim-witnesses is strongly recommended.

49 See ICTY Manual on Developed Practices, released on 28 May 2009, available at <http://www.icty.org/sid/10145>, last accessed October 2009.

On obstacles to realisation of victims' and witnesses' rights presented by repeat testimony

- Because of the particular and unique issues surrounding the prosecution of war crimes in BiH, such as witness fatigue, BiH authorities are strongly recommended to consider ways in which the current criminal procedure codes can be appropriately used or adapted to deal with the prosecution of the large number of war crimes cases. This may include those mentioned in this report, such as the use of ICTY adjudicated facts more widely and the extension of this principle to include facts established in binding decisions of the State Court. Other measures should also be considered such as providing a mechanism whereby the defence could motion for the acquittal of an accused following the presentation of the prosecution's evidence and in relation to certain charges that it considers not proven, or the increased use of plea agreements.