

# The Immediate Demand for an Efficient Protection of Witnesses of Justice in Albania

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**ABSTRACT:** In spite of the abundant information regarding Albania's struggle from transition towards the integration into the European Union, envisioning common international justice affairs still remains insufficient and it seems that any close connection to the international criminal courts and tribunals has been largely ignored. This paper gives a picture of the alleged 'internationalisation' of the witness protection legislation and touches two aspects: *firstly*, the issues of the current legal framework in relation to procedural and non-procedural witness protective measures and challenges to ensure their effectiveness and *secondly*, the incorporation of new provisions in the domestic laws related to the best practices on support and assistance for witnesses at international and regional levels. In order to comprehend Albania's compliance with the Rome Statute of the International Criminal Court and other European legal instruments, an analysis of official documents was carried out, and a range of interviews were performed with staff of the International Criminal Court, the Courts of Serious Crimes and a District Court in Albania. This study draws conclusions and develops a set of recommendations on the steps that Albania has to take in relation to providing adequate protection and assistance in support of witnesses testifying in serious crimes cases.

**KEYWORDS:** witness protective measures, international criminal court, judicial effectiveness and efficiency, process of familiarization.

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## 1. Introduction

There is a special judicial and public awareness of the criminal proceedings involving individuals who are accused for committing serious crimes especially homicides, organized crime, corruption, and trafficking in Albania. The novel dimension of witnesses testifying in organized crime, trafficking and terrorism cases has created a climate of serious intimidation, thereby limiting the State's capacity to provide adequate protective normative measures. As Albania is a State Party to the most relevant international legal instruments concerning the protection and intimidation of witnesses, Albanian authorities shall take appropriate measures to effectively protect witnesses from potential retaliation or intimidation, and to enhance international cooperation in this area. This obligation is also in line with Council of Europe (CoE) Recommendation (2005)<sup>9</sup> on the protection of witnesses and collaborators of justice which States that governments of Council's member states be guided, when formulating their internal legislation and reviewing their criminal policy and practice, by the principles and measures appended to the Recommendation. It also recommends that States should ensure that all these principles and measures are publicized and distributed to all interested bodies, such as judicial organs, investigating and prosecuting authorities, bar associations, and relevant social institutions (ECtHR - European Court of Human Rights, *R.R and others v. Hungary* 2013, § 20). The Criminal Code regulates this matter in the Article 312(a) which reads:

*“Intimidation or other violent acts to a person to secure false declarations or testimony, expertise or translation or to reject carrying out their obligation to the criminal prosecution bodies and the court is punished with a prison term of one up to four years.”*

The scope of the Albanian criminal procedure legislation, pursuant to Article 1 of the Code of Criminal Procedure (CCP) is to guarantee fair, equal and due legal proceedings, in order to protect the freedoms and lawful rights and interests of citizens, to contribute to the strengthening of the legal order and the implementation of the Constitution and other domestic legislation (Unified Criminal Judicial Practice 1999-2015, 346). Thus, pursuant to the Preamble and Article 15 of the Albanian Constitution, the protection of fundamental human rights, freedom and dignity, and the participation in criminal proceedings has a *constitutional dimension* as it stands at the basis of the entire juridical order. The legal framework which guarantees the protection of witnesses of serious crimes is as following:

1. The Constitution of the Republic of Albania;
2. UN Convention against Transnational Organized Crime and the Good Practices for the Protection of Witnesses in Criminal Proceedings, Involving Organized Crime and the Protocols among which the Protocol to prevent, Suppress and Punish Trafficking in Persons, Specially Women and Children;
3. United Nations Convention against Corruption, 31 October 2003, UNTS 2349, 41;
4. The Rome Statute of the International Criminal Court (Article 68);
5. European Convention of Human Rights and its Protocols;
6. European Convention on Mutual Assistance in Criminal Matters and its Protocol (1959);
7. Council of Europe Criminal Law Convention on Corruption (1999) (Article 22);
8. Recommendation (97) 13 on intimidation of witnesses and rights of the defence (1997);
9. Recommendation (2001) 11 concerning guiding principles on the fight against organised crime;
10. Recommendation (2005) 9 on protection of witnesses and collaborators of justice;
11. Code of Criminal Procedure of the Republic of Albania;
12. Criminal Code of the Republic of Albania;
13. Law No. 10173 dated 22.10.2009, "Protection of Witnesses and Collaborators of Justice" amended by Law 32/2017 dated 30.03.2017 and came into force on 1.08.2017;
14. Law No. 9110 dated 24 July 2003, "On the Organisation and Functioning of the Courts for Serious Crimes";
15. Law No. 97/2016, "On the Organising and Functioning of the Prosecution Office in the Republic of Albania";
16. Law No. 8677, dated 2.11.2000, "On the Organisation and Operation of Judicial Police";
17. Law No. 10193 dated 03.12.2009, "On the Jurisdictional Relations with Foreign Authorities in Criminal Matters";
18. Law No. 192, dated 03.12.2009, "On Preventing and Clamping down on Organised Crime, trafficking and Corruption through preventive measures against Assets" the so-called "Anti-Mafia" Law (Article 37(2)(b));
19. Law No. 37/2017, "Code of Criminal Justice for Children"(Article 18);
20. Law No. 95/2016, "On the Organisation and Functioning of Institutions for Combating Corruption and Organised Crime".

The question which arises is whether the existing legal framework provides adequate normative witness protection and whether the procedural and non-procedural measures are effectively and efficiently applied and implemented by the competent institutions. Another issue is whether witnesses with dual status (victims-witnesses) are protected from any recurrence of trauma or re-traumatization before, during and after their testimony in the proceedings. How does the court address cases of witness intimidation, fear of revenge against the witness and his or her family; and what are the legal consequences of refusal to testify and false testimony? In answering these questions, the analysis is limited to the provisions of the CCP, Law No. 10173 dated 22.10.2009, "Protection of Witnesses and Collaborators of Justice" (Law on witness protection) and the Law No. 95/2016, "On the Organisation and Functioning of Institutions for Combating Corruption and Organised Crime".

Despite the 2017 judicial reform, the amendments incorporated in the CCP aiming to improve the status and the legal position of the victims in the criminal process, and other participants such as witnesses, remain mostly unknown and unprotected by the law in force. The importance of witness testimony in criminal proceedings is substantial to the fact finding process. There is no doubt that witness testimony represents one of the most important sources of evidence in the Albanian judicial system. Thus, as all the more discussed in the parliamentary debate concerning the drafting of the 2009 Law on witness protection, the physical protection of witnesses contains an essential element for the functioning of the justice system (Punime te Kuvendit, Legjislatura e 18-te no.3 2009, 754). Hence, in addition to the *imperative obligation* to ensure fair, true and public testimony in compliance with the rights of the accused, the law should also provide for the obligation upon the judiciary to take precautionary measures for witnesses in case of any intimidation, threat or attempted murder by the perpetrators or persons related to them (Article 79(c) Criminal Code).

In the ECtHR case *R.R and others v. Hungary* (Application no. 19400/11, 2013, §28-29) the Court noted that "*the first sentence of Article 2 para. 1 [of the Convention] enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction*". It further stressed that "*the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences*" against the person protected by the enforcement authorities. In the instant case, the applicants submitted that their exclusion from the Witness Protection Program entailed the risk that criminal elements might take vengeance on them due to their role as collaborator of justice. Despite the level of life threat, the authorities terminated the protection program. Thus, the Court found a violation of

Article 2 of the Convention which implies the positive obligation on the authorities to take preventive operational measures to protect witnesses and collaborators of justice whose lives are at risk from the criminal acts of another individual.

Even though the witnesses are not considered as 'a party' to the proceedings, unless they have a dual status of victim-witness, their important role and rights should be clearly established and implemented by the judicial bodies to protect their interest as truth-tellers. In both the ECtHR cases of *Doorson v. Netherlands* (§ 70) and *Van Mechelen v. Netherlands* (§ 53), the Court took into account the importance of intimidated witnesses as an important category. It noted the following:

*"It is true that Article 6 does not explicitly require the interests of witnesses to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."*

Mindful that there is no definition of the terms 'witness' and 'testimony' in the CCP, this legal loophole certainly 'gives leave' to potential misinterpretation of these terms. However, Article 155 of the CCP provides that everyone has the right to testify, except for those with mental or physical disabilities. Other categories excluded from testifying are provided in Article 156. Meanwhile, the Law on the "Protection of Witnesses and justice collaborators" first adopted in 2004 and further reviewed and promulgated in 2009, amended in 2011 and recently in 2017 has a comprehensible definition for "justice witness" meaning "a person, who, in the capacity of witness or aggrieved person, declares or testifies about facts and circumstances that constitute evidence in a criminal proceeding, and who is in a situation of danger, because of these declarations or testimony".

The Albanian law on witness protection provides the protection of life and health only to certain categories of persons such as the witnesses and collaborators of justice, their relatives and other persons close to them; and to "aggrieved persons" i.e. victims who testify as witnesses (UNODC Country Review Report on Albania 2016, 6). The Article 3 of the Law on Witness Protection fails to address the new amendment of the term "aggrieved person" with the term of "victim" in line with Article 284 of Law 35/2017. As a consequence, the 2017 amendments failed in terms of:

1. providing *direct* protection to experts who testify, to their relatives or other persons close them;
2. expanding its scope to crimes or offences committed intentionally, namely: active corruption of persons exercising public functions, active corruption of foreign public employees, active trading in influence, active corruption in the private sector, assault to an official on duty, threatening a public official on duty, assaulting family members of a person acting in exercise of his State duty, and threat to a judge.

Witness protection is being provided mainly in cases related to organized crime, drug trafficking and prostitution but no corruption related cases (UNODC, *Country Review Report of Albania*, 2016:83-84). In such circumstances, the relevant authorities should take the appropriate measures to extend the scope of the protection which can be provided to all the aforementioned offences to experts, their relatives and other persons close to them (UNODC, *Country Review Report of Albania*, 2016:83-152). Meanwhile, the purpose of the law is very comprehensive as its aim is to regulate the special, temporary and extraordinary measures, the manner and procedures of the protection of witnesses and justice collaborators, as well as the organization, functioning, competences and relationships between the institutions charged with proposing, assessing, approving and implementing the protection program. One of the Judges of the Court of Serious Crimes noted that Albanian law on witness protection and the Statute of the Courts for Serious Crimes contain provisions for a high standard of protection for witnesses with the aim to ensure that victims can participate in proceedings and witnesses testify freely and truthfully without fear of retribution or suffering of further harm.

The criminal legal provisions dictate the procedure of the questioning of the witnesses when they come to testify in criminal proceedings in a manner that aims to assist somehow the witnesses. The Courts for Serious Crimes and the Courts of Appeal for Serious Crimes in particular have the discretion to determine the cross-examination in accordance with the legislation on the protection of witnesses collaborators, thus diverging from the general principle that all evidence must be produced in the accused person's presence during a public hearing with a view to allow adversarial argument (*Kostovski v. The Netherlands* 1989, § 41). For instance, cross-examination and the reading of witness previous statements (in order to help the witness refresh his or her memory), can be performed in the presence of the accused and the Defence counsel (Kramberg 2017, 501). In such cases, there will be no visual contact between the witness and the accused or in other cases the identity of the witness will not disclose to the accused and the Defence counsel in accordance with the Article 8 of the Law No. 9110.

Some of the witness legal responsibilities are envisaged in the CCP such as compellability of appearance before the Court, the observation of Court's orders, and the requirement of answering truthfully to the questions addressed to him or her, except for self-incriminating facts (Article 157 of the CCP), kinship relations, facts related to professional secret (Article 159 CCP), and State secret (Article 160 of the CCP). In accordance with Article 165 of the CCP, a witness is liable for false testimony or refusal to testify when during the questioning he or she makes contradictory or incomplete statements or statements which are in contrast with the evidence, or refuses to testify. After the warning of the Court to charge the witness of criminal liability for false testimony, the Prosecutor can proceed with the case pursuant to Article 307 of the Criminal Code which reads:

*“Refusing to answer questions concerning knowledge of a criminal offence or its perpetrator, constitutes criminal contravention and is punishable by a fine or up to one year of imprisonment. When the refusal to testify is made for purposes of profit or any other interest given or promised, it is punishable by imprisonment from one up to four years.”*

This provision is not applicable to witnesses exempted by law to give information or who are enrolled in the protection program.

The District Court in Shkodra does not have any case where the Judges applied sanctions against witnesses for refusing to testify and there is no indication why sanctions do not apply. In an international context, a close analysis of the definition of the provision on false testimony and a comparison to Article 70 of the Rome Statute of the International Criminal Court namely “*Offences against the Administration of Justice*”, shows that Article 312 of the Albanian Criminal Code is very vague and does not clearly address proper legal terms such as ‘corruptly influencing a witness’, ‘obstructing or interfering with the attendance or testimony of a witness’, ‘retaliating against a witness for giving testimony’ or ‘destroying, tampering with or interfering with the collection of evidence’.

## **2. The Application of Procedural Measures In the Code of Criminal Procedure**

Effective prosecutions related to organized crime, corruption or trafficking depend on the willingness of the witnesses to come testify. Indeed, testifying in such criminal proceedings cases is an act of courage in an insecure environment, however, fear of

reprisals, intimidation and life threatening acts require careful consideration from the Judges, the Prosecutors, and the Defence.

In terms of legal provision, witness protection is guaranteed through procedural and non-procedural measures. Procedural measures are provided in Articles 165(a) and 361(b) of the CCP and Article 8 of the Law No. 9110 on the Organisation and Functioning of the Courts for Serious Crimes. The Court, upon the request of the Prosecutor and when the witness protection program is not applicable, decides on the application of protective measures for a witness in cases where giving testimony might put him or her, or his or her family members at serious risk for his or her life or health. The determination on the application of procedural measures is made when specific elements are met such as:

- a. The nature of the crime (organized crime, trafficking, terrorism, corruption);
- b. The type of witness-victim (child, victim of sexual assault, co-defendant etc.);
- c. The relationship with the defendant (relative, defendant's subordinate in a criminal organization);
- d. The degree of fear and stress of the witness;
- e. The Importance of the testimony (UNDOC 2008, 32).

Therefore, the confidential request of the Prosecutor shall be substantially reasoned on the use of one or more of the special questioning techniques and shall be submitted to the Presiding Judge of the panel in a closed envelope, with the note: "*Confidential: witness with hidden identity*" (Article 165(a)(2) of the CCP). Additionally, the Prosecutor shall insert also the sealed envelope containing the full identity of the witness with hidden identity. This provision entitles only the Presiding Judge to know the real identity of the witness with hidden identity in order to verify the capacity and incompatibility with the witness role. Following this assessment, the envelope with the real identity of the witness with hidden identity shall be returned to the Prosecutor. The Prosecutor's request is assessed in closed session and followed by a reasoned decision within forty-eight hours following the request. If the Court rejects the request, the Prosecutor may appeal the Court's decision within forty-eight hours from the notification of the decision. The Court of Appeals examines the Prosecutor's complaint in closed session and decides on the complaint within forty-eight hours. The Court of Appeals' decision is subject to appeal. If the request is accepted the Court decides on the pseudonym of the witness and the procedures for hiding the identity, notification, appearance and participation in the proceedings.

To resolve the question as to whether hidden identity or anonymity should be allowed or not, the rationale should consider that the law is not an exact science. The law accommodates general rules but also some exceptions. It is not possible to have only one formula and give the same interpretation to every case. For that reason, the courts should interpret the protective measures on a case-by-case basis and the use of anonymity should be considered as an exception to the rule (Betancourt, 2010). The justification for undisclosed identity requires the Court to verify whether the reasons invoked for witness's fear are convincing and genuine. The ECtHR case-law established that to be granted protective measures such as anonymity, the witnesses have to be in a real danger, and the threat must be real (*Kostovski v. Netherlands* 1989, 19).

During the investigation, the questioning of the person with a hidden identity and the assignment of the pseudonym shall be done by the Prosecutor, while the documents or statements shall be signed by his or her ascribed pseudonym. In addition, the witness shall participate in all stages of the proceeding only with the pseudonym ascribed by the Court. Pursuant to the rules referred to in Article 361(b) of the CCP, the questioning of the collaborators of justice, infiltrated or undercover persons, protected witnesses and witnesses with hidden identity is conducted under special measures for their protection, which are determined by the court, *ex officio* or upon the request of the parties. When technical means are available, the court may determine that the questioning is conducted at distance, within the country or abroad, through telephonic or audio-visual connections. In the Article 58(b)(c) of this Code, the sexually abused victim and the victim of human trafficking shall also be entitled to request to be heard during the trial through audio-visual tools. The use of communications technology as provided for in the Articles 361 and 361(a) of the CCP, and Article 12(d) of the Law on witness protection is in compliance with international instruments and enables the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings. Pursuant to Article 361(7) of the CCP, the procedure requires that a person authorized by the Court shall remain at the witness's location, certify his or her identity in order to ensure the correct process of questioning and of the implementation of protective measures.

Apart from the hidden identity, the Court shall also order appropriate measures for the voice and face distortion. If the recognition of identity or the examination of the person is indispensable, the Court orders the summoning of the person, or his forced accompaniment for the fulfillment of this act. Consequently, the Court orders necessary measures to be taken to avoid the appearance of the face of the person whose identity is modified. The right and obligation to order protective measures for the witnesses and the active role of the Judges to control the cross-examination when

the questions asked may reveal the witness identity, are related to Judges' exercise of their judicial discretion. During the cross-examination, the Judge(s) take(s) an active role by intervening when they consider such intervention would serve the interest of protecting the witness and the interest of justice.

Furthermore, the CCP provides that vulnerable persons such as the victims of the sexual criminal offences, trafficking or other domestic violence offences, upon their request, may be questioned as witnesses through audio and audio-visual tools. In such cases, when requested by the parties, the Court may decide to proceed with the hearing in closed session when it deems necessary to protect the witnesses in accordance with Article 340 of the CCP. Disclosing confidential and classified information to the public and media might endanger seriously the life, physical integrity, the liberty and health of persons protected by the Law on witness protection (Article 313(b) of the Criminal Code). Thus, the Criminal Code sanctions such disclosure with fine or imprisonment up to three years and when the offence has caused the death as a consequence, it is punishable by imprisonment up to ten years. Further, the Criminal Code sets out consequences for disclosing secret data related to the identity, collaboration or protection process, or location of witnesses and justice collaborators, who benefit special protection. Disclosing a secret that resulted in death, serious injury or serious danger to life and health of witnesses or justice collaborators, their family members or police officers in charge of their protection, is punishable by imprisonment from three up to eight years.

### **3. Witness Protection Program and the Application of Non-Procedural Protective Measures**

In relation to the non-procedural protective measures, the framework of protection programs includes: change of identity; change of residence; furnishing false documents; temporary protection of identity, data and documents; giving testimony under another identity and administration with special means for voice and image distortion, and other forms set according to law, in compliance with Article 361(a) of the CCP; physical and technical protection, in the place where the protected person resides, as well as during his movements; social rehabilitation; provision of financial assistance; professional retraining; and provision of advice and specialised legal assistance.

The measures envisaged above are applicable without prejudice to the rights of the defendant. Establishing procedures for the physical protection of witnesses, relocating them and limiting the disclosure of information concerning their identity is a State

responsibility. As a protective measure of last resort, Albania has signed relocation agreements with 20 European countries, pursuant to article 27 of the Law on the protection of witnesses (UNODC, *Country Review Report of Albania* 2016, 86).

The Law on Witness Protection establishes two bodies responsible for the preparation, assessment, approval and implementation of the protection program for justice witnesses and justice collaborators:

- a) the Commission for the Assessment of the Protection Program for Justice Witnesses and Justice Collaborators (the Commission) and,
- b) the Directorate for the Protection of Witnesses and Justice Collaborators (the Directorate).

The Commission is responsible for assessing and approving the proposals of the Directorate for admission into the protection program, concrete protection measures, interruption and the conclusion of the program (Article 9(1) of the Law on Witness Protection). The Commission is also responsible for the appeal procedures for the complaints regarding the variation of a particular protection measure (Article 26 of the Law on Witness Protection). The Commission is chaired by the Deputy Minister of the Interior who covers issues of public order, and is composed of four other members such as a judge proposed by the High Council of Judiciary in the capacity of deputy chairman; a prosecutor proposed by the Prosecutor General, a judicial police officer proposed by the Director General of the State Police and the Director of the Directorate.

The Directorate for the Protection of Witnesses and Justice Collaborator is a special central structure of the State Police, within the Department for Investigation of Crimes, at the State Police Directorate General. The substantial personnel changes have been reported to be “*disruptive to an overall performance of any established unit*” (*Witness Protection IPA II 2014-2020*, 4). Even though the Directorate manages its own budget, activities and operational information very confidentially, its self-financing remains a major problem and as such would need a substantial amount of work within current legislation. The Directorate has duties and special competences regarding the preparation of proposals for the acceptance into a protection program, the following up of the implementation and on the application of special and auxiliary protective measures. In addition to the conduct of psychological and physical assessment of the conditions of the person proposed to be admitted to a protection program, an assessment of the situation of danger has to be performed so that the commission is able to evaluate whether the person is suitable for admission into the protection program.

In specific and urgent cases, upon the request of the proceeding prosecutor, the Directorate decides on the immediate implementation of “*temporary protection*”

*measures*” pursuant to Article 18 of the Law on Witness Protection. The temporary protection measures are established in compliance with the situation of danger, and in such forms that guarantee, temporarily and preliminarily, the necessary level of protection. For this purpose, the Directorate and the protected person sign a temporary protection agreement. The Prosecutor General or the Chief Special Prosecutor should submit the proposal for acceptance of the person into the protection program within 30 days from the date of the start of implementation of the temporary measures. The Directorate is also responsible for the administration of the database related to its activities and the progress of the protection program. Periodic reports, mainly statistics, are made available to the Commission every six months. There is no legal provision obliging the Directorate to disclose information, whether in a summary or reduced manner, to other state institutions, media or the public.

In addition to the common non-procedural measures and the temporary protection measures, Article 22 of the above law provides also “*extraordinary protection measures*”. It is the responsibility of the State Police, pre-trial detention institutions or institutions of the execution of criminal decisions to order and implement such measures according to the level of the situation of danger for witnesses, justice collaborators and related persons.

One of the characteristic of protection programs is that they are implemented for an indefinite time period. The CoE Resolution 2038 (2015) and Recommendation 2063 (2015) on Witness protection as an indispensable tool in the fight against organized crime and terrorism in Europe reaffirm that witnesses who stand up for truth and justice must be guaranteed reliable and durable protection, in particular legal and psychological support and robust physical protection before, during and after the trial. However, protective measures can be extended throughout the phases of the criminal proceedings, as well as after its completion depending on:

- ✦ the existence of the situation of danger;
- ✦ the suitability of the protected person in relation to the special protection measure applied;
- ✦ the implementation of the obligations provided in the protection agreement by the protected person.

Meanwhile, the protection measures can be interrupted by the Commission in the following circumstances:

- a) if during the investigation and trial of the criminal case, it is proven that the witness or justice collaborator is giving false testimony;
- b) if the protected person commits an intentional criminal offence;

- c) if the protected person is involved in a criminal activity and he didn't declare it while under the protection program;
- d) if the witness, justice collaborator or other protected persons do not respect the obligations mentioned in the protection agreement and/ or the conditions of collaboration with justice;
- e) if an authority of another State seeks the termination of the protection program implemented in its territory.

The termination of the protection program occurs when the situation of danger no longer exist or the protected person has died, or at the written request of the protected person or his or her guardian. Pursuant to CoE Resolution 2038 (2015, 9), any decision to terminate a witness protection measure or program should be taken "*only after a comprehensive examination of the existing threats to the life of the protected persons*". Following the end of the protection program, the protected person may choose to keep his or her new identity, if he or she has been given one, or to take back his or her true identity. Financial assistance is provided to the protected person or his/her dependent family members in case the person under a protection program is killed or physically injured to the degree that becomes incapable of working because of the failure of protection measures implemented.

#### **4. Challenges to Ensure Effectiveness of the Witness Protection Program**

The success of witness protection in Albania is largely dependent on political, cultural and proper investigative practices. The lack of availability and effectiveness of judicial protection, the expediency of the investigative and judicial process, but also the cooperation with the witness himself or herself are reasons of concern. The Albanian justice system is not yet at the point where investigative and judicial functions are perfectly operating. District Courts, in particular, face greater obstacles regarding protective support and assistance services for witnesses than other European or Balkan countries. This is mainly due to the limited professional and financial capacities to provide protection, despite the fact that Article 37(2)(a) and (b) of the Anti-Mafia Law (2016) established a special fund for the prevention of criminality which is meant to serve for the development of witness protection programs and assistance to the victims of organized crime.

While the Judicial System's perception (including the Judges, the Prosecution, and the Defence) towards the importance of witnesses in the process of truth-finding is considerable, it is not satisfactory yet. Notwithstanding the participation of victims-witnesses in criminal proceedings, the confrontation with the accused and the process of narrating their personal experience as victims or eyewitnesses might cause painful memories during the testimony. Still, the Judges prefer to be guided by the principle of the primary consideration of the rights of the accused (the cross-examination and public trial) than granting protective measures to the witnesses.

Lack of adequate legal provisions addressing witnesses' needs, limited public information on the role and purpose of witness testimony, the deficiency of assessing a substantial danger of threat or intimidation in a small country when "everyone knows everyone" and the delay in the length of criminal proceedings for various reasons (lack of addresses, refusal to testify for fear of reprisals, intimidation or revenge) are a serious indicator of the incapability of relevant judicial bodies.

Another reason of the failing witness protection is that the Court of Serious Crimes case-law experiences problems where protected witnesses abused or violated the security measures granted by the Court. For instance, the Court ordered procedural protective measures for witness X, on the credible existence of a real risk of threat related to his testimony. Despite the fact that the police were ordered to guard him within the house for an unlimited time, the witness was secretly leaving his house to meet with persons. As a consequence, the Court considered that indeed the protection of a witness is its concern, but the safety is the witness' responsibility. Such an obligation (to protect the witnesses) must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities to protect the life of a witness (ECtHR *R.R and others v. Hungary* 2013, § 29).

Therefore, protected witnesses have to cooperate fully with the Court and a future Witness Protection Unit (WPU) in order to conduct a complete risk-assessment and to minimize security threats. Witness confidence in addressing their needs and concerns to a WPU contributes to their feeling secure at all stages of the proceedings. As a care provider with professional staff and friendly and supportive attitude, the WPU has a particular value in the outcome of a fair trial and the wellbeing of a witness.

The 2016 EU Commission Report on Albania noted that the implementation of basic procedural rights in practice, such as the right to information, access to legal aid and specific safeguards for victims-witnesses of crime is ineffective and the competent authorities need to increase the level of protection provided in the existing legislation (EU Albania Progress Report, 2016:67). Despite the 2017 justice system reform, there are no legal provisions in place which ensure fully witnesses and victims' right to access

assistance and support services including procedural, emotional and psychological support, in proportion to their needs. Moreover, the Report noted that on access to justice, *“the State Commission for Legal Aid has not yet developed effective mechanisms for outreach and access to its services, including at regional level. The vast majority of cases involving vulnerable groups are still handled by civil society organisations, with donor support”* (EU-Albania Progress Report 2016, 67).

In relation to EU integration, Albania is part of the witness protection Balkan network. Witness Protection in the Fight against Serious Crime and Terrorism (WINPRO) and Witness Protection in the Fight against Organised Crime and Corruption (WINPRO II) have identified numerous problems in the Western Balkans such as deficiencies in techniques, training and procedures; disparities between the legal arrangements of the various jurisdictions, inadequate national and cross-border cooperation between the relevant witness protection units, and financial sustainability of protection programs (IPA II 2014-2020 Multi Country Witness Protection, 3). Some significant solutions to minimize these problems would be the mutual recognition and the unification of protective measures. Also, exchange of information with other international law enforcement agencies would encourage witnesses of crime to come forward to denounce and report criminal acts since they feel assured that their lives and livelihood are duly protected and secured throughout the country, the region and abroad.

Considering that Albanian witness protection aims to adhere to the best practices or standards developed by the UN, ICC and EU, it is a precondition to perform a correct detailed examination of how to improve legislation and practical support measures for the protection of victims and witnesses, with due regard to the real needs of protected witnesses. Additionally, the application of special comprehensive and comprehensible protection measures on the basis of social, cultural, political, ethnic, or religious backgrounds of witnesses following the example of EU (Directive 2011/99/EU, 2011) would be of help. In addition, the lack of a special Unit within the Albanian Court to provide support and assistance to the witnesses and victims will be discussed below.

## **5. The Benefits of the Process of Familiarisation in Albanian Courts**

The assessment as to whether a court has been successful in delivering justice depends on *firstly* its ability to procure the testimony of witnesses, and *secondly* its ability to protect witnesses. William Reisman, Stegfried Wiessner and Andrew Willard (2007) have argued that in order to attain a clarified world public order and human dignity, the

law should at all times serve the human beings. This means that the State authorities should establish the proper bodies in order to interpret, apply and implement appropriately the witness protective measures. As already mentioned, the efficiency of ICC prosecutions depends greatly on the fulfillment by States Parties of requests or ICC witness protection orders (Oosterveld, Perry, and McManus 2001, 808).

The duty to cooperate with the ICC imposed on Albania as a State Party in terms of witness protection and support can be understood not only as a general commitment to cooperate, but also an obligation to amend its domestic laws to permit cooperation with the Court. Hence, it is necessary for Albania to learn from the witness protection and assistance experience of international tribunals, in particular, the ICC and reflect on steps that should be taken in this respect. Although international courts and tribunal mostly deal with the international context of witness testimony and protective measures, the national practice should be in consistency with international development in case there is a domestic legislative gap in this respect. International and national courts do not operate in isolation from the larger international legal system (Fauchald and Nollkoemper, 2014). Hence, domestic legislation and policies should develop witness supportive services in accordance with the common practice of ICC, ICTY or SCSL (Best-Practice Recommendations for the Protection and support of witnesses – Special Court for Sierra Leone – An evaluation of the witness and victims section 2008, 13-14). Therefore, witnesses testifying in national courts should benefit from practices before international tribunals in terms of:

1. being made familiar with the statement they have given;
2. an explanation of the legal process and what will take place in the courtroom;
3. an explanation of the questioning process, and how witnesses should respond to different types of questions, and
4. familiarisation with the courtroom and most importantly to their rights and responsibilities.

In this context, Albania's compliance with the Rome Statute requires, alike successful cooperation agreements between the ICC and countries such as Canada, UK, Switzerland or Belgium which have created a new law on the implementation of the Rome Statute, to amend its existing legislation in order to fulfill its obligations under Article 93(1)(j) of the Rome Statute or Court's orders:

1. for the physical protection of witness, and
2. for the protection of the witnesses during the evidentiary and testimonial phases of ICC proceedings.

Revisiting the existing law may lead to amendments including the eligibility for protection of ICC witnesses in Albania, relocation, accommodation, change of identity, familiarization, the use of video-link, financial support to ensure the security for persons receiving protection, facilitate persons' re-establishment or assistance to become self-sufficient. The best solution to cope with such an issue is to try to seek a balance; as Koskeniemi (1990, 19) correctly stated that "*balancing seems inevitable in order to reach a decision*". For instance, for determining whether witnesses qualify for assistance because of their fear or distress about testifying, the UK's courts are required to take into account, *inter alia*, the nature and alleged circumstances of the proceedings, and the social, cultural, ethnic, or religious backgrounds of witnesses (Oosterveld, Perry, and McManus 2001, 816). This balancing approach by the UK's courts may serve as an inspiration to Albania and would, therefore, provide some criteria or characteristics for the eligibility of witnesses for protection and assistance.

In terms of support and assistance, to date, the Albanian witness protection law does not provide clear support and the relevant assistance components. The process of familiarization is inexistent for both victims and witnesses in the legal framework or practical aspect. There is no protocol or policy which includes informing the victims or witnesses on their rights, responsibilities, confidentiality, support and trial's procedure when they arrive in the Court to testify. The process of *familiarization* is one particular form of support for witnesses who come to testify before a court. The establishment of a WPU would make it possible that this process would be under its responsibility, in consultation with the Office of the Attorney General. This practice would include as follows:

- a. Assisting the witnesses to understand fully the court proceedings and the roles that they and the participants play in them,
- b. Reassuring the witness about his or her role in proceedings before the Court;
- c. Ensuring that the witness clearly understands he or she is under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witness the process of examination first by the Prosecution and subsequently by the Defence;
- e. Discussing matters that are related to the security and safety of the witness in order to determine the necessity of applications for protective measures before the Court; and,
- f. Making arrangements with the Prosecution in order to provide the witness with an opportunity to acquaint himself or herself with the Prosecution's Trial Lawyer and others who may examine the witness in Court.

Even though the WPU might not address all the needs of victims and witnesses, its creation would definitely improve the victims and witnesses participation in criminal proceedings and it would positively influence the successful outcome of a trial. It is of essential concern that apart from the Courts of Serious Crimes where there is a separate room for witnesses, other District Courts lack logistic and operational strategies to ensure safety for the witnesses. Further, the Court should *proprio motu*, in coordination with the Office of the Attorney General and the Registry, establish “A Victim/Witness Information Form” in order to provide operational and support for the victims and witnesses for instance: psychological, physical protection and medical needs.

The fact that trials are frequently delayed for extended periods of time, especially when carried out in the absence of defendants or as accelerated trials, and that no measures are taken to protect witnesses from threats or intimidation when they come to Court is another challenge. Obviously, in serious crime related cases, there is a high potential of risk that intimidation and stigmatisation start the moment witnesses appear before the Court. Hence, the practice of familiarisation can be considered very profitable for the Courts in Albania. Bearing in mind that the application of witness preparation is mostly limited in the ICC, witness preparation in the Albanian courts is a common practice, justified sometimes by the parties as a process of *re-examining the witness’s evidence to enable more accurate, complete and efficient testimony* (Ambos 2009, 599-614). The Article 361(4) of the CCP allows the Court to help the witnesses refresh their memory by reading previous statements; however, sometimes the parties rehearse and interfere with the witness’s testimony. In many cases, the testimony was declared inadmissible and rejected by the Judges in the Courts of Serious Crimes. The adoption of a familiarisation process in the Albanian courts should not include witness preparation for they are both distinguishable; the first aims to familiarise the witness with the rights, responsibilities, support and assistance services, while the latter aims to prepare a witness to trial, coaching and correcting their statements or stories. To conclude, the establishment of neutral Witness Protection Unit within the Registry of District Courts and the Courts of Serious Crimes aiming to carry out the practice of witness familiarisation from the moment the witness arrives at the Court to give oral testimony (*The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-504, § 10 and 24), would ensure that the (vulnerable) witnesses can testify in a secure manner and also take into consideration their privacy, dignity and well-being. It should be emphasised that it is the Judges who owe independent obligations towards witnesses and when needed would order special measures to protect their well-being without making witness preparation a general rule. This is because witnesses are perfectly capable of: (i) reviewing prior statements; (ii) confirming their accuracy or explaining

any inaccuracies when testifying, and (iii) asking questions on the process of testifying and what to expect in court. Therefore, the Judges should take a more active stand in order to avoid any witness interference (*Ongwen*, ICC-02/04-01/15-504, § 16).

## 6. Conclusions

Despite the committed work of many organs and sections of the Court for Serious Crimes and District Courts, the Albanian judicial system continues to struggle in a number of areas related to organised crime, human trafficking and corruption. It also faces new challenges which have arisen with the triggering of the Courts protection mandate. While the amended Witness Protection Law and related by-laws or policies represent a significant step forward, much remains to be done to ensure the security of other witnesses and increase the credibility of witness testimonies in Albania (OSCE, 2006).

In my view, it is of importance to reconsider the role that the witnesses play before any criminal court by: *firstly*, clearly defining what a witness's role and position is in the legal instruments of a Court and *secondly*, providing adequate protection by maximizing the consideration of harm and intimidation. Unlocking witnesses' rights in international and national tribunals is a first step towards adequate procedural and non-procedural protection. To achieve this, States should invest in outreach activities to educate their citizens on the basis of respect for life, rule of law and justice. Every court should invest in the familiarization process to assist the witnesses so that they can fully understand their rights and responsibilities and feel secure and confident before the court.

Misperceptions of the role of witnesses in the Albanian courts, the lack of a witness support unit and lack of information related to witness protective measure in criminal proceedings have led to lots of cases of intimidation and refusal to testify. Therefore, one of the effective solutions is the timely and accurate information on the protection measures and support services in order to adequately manage the witnesses' expectations but also sanction them in case of infringing the protection measures.

Furthermore, Albania's integration process requires the government to be responsible, by including the main stakeholders and the national public opinion in a straightforward debate with respect to the ICC. It also implies the responsibility for Albania to keep itself updated of the development of witness protection programs. The necessity of political will at the national level for national complementarity programs is very important towards exploring responses to new challenges connected to Albanian

criminal issues. The challenge remains the shaping and implementing of national prosecutions for organized crime and the need to raise awareness for an efficient and functional national Witness Protection Program.

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