



Organization for Security and Co-operation in Europe
MISSION IN KOSOVO

**WITNESS SECURITY AND PROTECTION IN KOSOVO:
ASSESSMENT AND RECOMMENDATIONS**

November 2007

GLOSSARY

ECtHR	European Court of Human Rights
IOM	International Organization for Migration
KPS	Kosovo Police Service
OSCE	Organization for Security and Co-operation in Europe
PCCK	Provisional Criminal Code of Kosovo
PCPCK	Provisional Criminal Procedure Code of Kosovo
UNHCR	United Nations High Commissioner for Refugees
UNMIK DOJ	United Nations Interim Administration Mission in Kosovo, Department of Justice
WPU	Witness Protection Unit

TABLE OF CONTENTS

GLOSSARY	2
EXECUTIVE SUMMARY	4
GENERAL OVERVIEW	5
INTRODUCTION.....	5
EXISTING LEGAL FRAMEWORK FOR WITNESS PROTECTION IN KOSOVO	6
Witness Protection Provisions of the Provisional Criminal Procedure Code of Kosovo	6
Implementation problems of the Provisional Criminal Procedure Code of Kosovo provisions for protecting witnesses.....	7
ASSESSMENT FINDINGS	7
PHYSICAL SECURITY AND WITNESS RELOCATION	7
PRACTICAL OBSTACLES IN WITNESS PROTECTION.....	8
RECENT IMPROVEMENTS.....	9
RECOMMENDATIONS	10
LEGISLATIVE CHANGES.....	10
COMMENTS TO VERSIONS A AND B OF DRAFT REGULATION ON WITNESS PROTECTION	11
VERSION A:.....	11
Section 1	11
Section 2	12
Section 3	12
Section 5	13
Section 6	13
VERSION B:.....	14
Section 4	14
Section 5	14
Section 7	14
Section 8	14
Section 9	14
Section 12	15
Other recommendations on legislative issues	15
PROGRAMMATIC CHANGES	15
a. Experience and Training.....	16
b. Court and Detention Facility Security	16
c. Issues of Critical Importance	17
d. Possible Model for the WPU	17
e. International Relocation.....	18
CONCLUSION	19
APPENDICES	20

EXECUTIVE SUMMARY

An effective criminal justice system operating under the rule of law cannot function properly without the presentation of relevant evidence in court proceedings. While citizens have a civic duty and frequently a legal obligation to provide information regarding criminal activity that they have witnessed, very often witnesses are reluctant to do so, out of fear that their cooperation with law enforcement officials threatens their own safety and the safety of their family members. Protecting such endangered witnesses¹ has been and remains one of the greatest challenges for the judicial authorities in Kosovo. Despite the availability of procedures in domestic law² for protecting witnesses (such as anonymous and distance testimony, non-public hearings, physical separation of the defendant from the witness), witnesses often refuse to come forward with information. All too frequently, witnesses who initially make statements to the police later change their testimony or become unwilling to testify at trial, because they fear reprisals. Not surprisingly, incidents of witness intimidation and injury occur often enough to justify this reluctance on the part of witnesses.

This problem in Kosovo has long been documented and reported.³ In late 2006, at the request of UNMIK Department of Justice (DOJ), the OSCE and the United States Office Pristina (USOP), through the United States Department of Justice, co-sponsored an assessment mission in Kosovo targeting the problem of witness protection. This project undertook to evaluate existing law and current procedures for protecting witnesses, with the aim of making comprehensive recommendations for improvement. This report is the result of that project.

In summary, the Witness Protection Program must be sufficiently funded in order to support an adequate level of specialized police staff, and to carry out all the many functions required for an effective program. A more comprehensive law governing this program must also be adopted. The decision to enroll an endangered witness in the program - which is extra-judicial in nature - should not be a matter for courts to decide, but should be within the discretion of the public prosecutor, in consultation with the case investigators and with the experts of the Witness Protection Unit, or by a commission if there is one. Moreover, efforts must be made to develop networks and cooperation with countries willing to accept protected witnesses from Kosovo for relocation. In addition, judges must make better use of the protection procedures in existing law. Only by undertaking these measures can Kosovo hope to reduce the threats and

¹ The term "witnesses" refers to eyewitnesses, victims of crimes as well as to cooperating witnesses. All these types of "witnesses" can provide crucial testimony at trial.

² Provisional Criminal Procedure Code of Kosovo, entered into effect on April 4, 2004.

³ See, e.g., the Legal System Monitoring Section of the OSCE Mission in Kosovo reports: *Review of the Criminal Justice System in Kosovo* (2006); *The Response of the Justice System to the March 2004 Riots*, 2 December 2005, pp. 8-21; *Review of the Criminal Justice System (April 2003-October 2004) Crime, Detention and Punishment*, 14 December 2004, pp. 74-77; *Review of the Criminal Justice System (March 2002 - April 2003) Protection of witnesses in the criminal justice system*, 20 May 2003.

intimidation against witnesses in Kosovo, and thereby encourage greater involvement and participation of witnesses.

GENERAL OVERVIEW

Introduction

Protecting witnesses from threats or intimidation has been, and remains, one of the greatest challenges for justice authorities in Kosovo. Despite the legal framework and increased use of means for concealment of identity in order to protect witnesses in court proceedings, the number of witnesses willing to testify in court is still very limited. Incidents of witness intimidation are recorded regularly.

Since 2003, UNMIK has sought to address this problem by implementing a "Witness Protection Program" pursuant to UNMIK DOJ Circular 2003/5 to deal with the most serious cases of endangered witnesses.⁴ However, the lack of a detailed legal framework has made the task all the more arduous. In 2006, UNMIK began finalising a Regulation to formally establish a Witness Protection Program.⁵ At the request of UNMIK DOJ, the OSCE and the USOP agreed to conduct an assessment of the existing witness protection practices and procedures, identify the most pressing needs and make recommendations for implementing improvements in the legal framework as well as in the operating procedures.

The USOP and the OSCE, working closely with UNMIK DOJ, provided a team of experts to conduct a needs-assessment. Over the course of a week in the fall of 2006, the team met with UNMIK and Kosovo officials who are responsible for witness protection, as well as with a representative sampling of officials in the criminal justice sector who frequently face situations involving endangered witnesses.⁶ The aim of this project has been to identify the steps that must be taken in order to improve Kosovo's ability to protect endangered witnesses in the most serious criminal cases – ultimately to strengthen the rule of law.⁷ Often, ensuring the security of witnesses cannot be accomplished in isolation, and there is an increasing awareness among countries in the region that international cooperation plays a vital part in a successful witness protection program, for witness relocation, information sharing and other purposes. Several states in Southeast Europe, recognizing this, have signed a convention regarding mutual assistance in the area of witness protection.⁸ In order for Kosovo to fully participate in such regional efforts, it must improve its system for protecting witnesses.

⁴ See Appendix 1 (UNMIK DOJ Circular 2003/5).

⁵ See Appendix 2 (Draft Regulation On the Witness Protection Program).

⁶ See Appendices 3 and 4 (listing expert consultants and persons interviewed).

⁷ The views expressed in this report do not necessarily represent the views of the OSCE, the USOP, the U.S. Department of Justice, or UNMIK Department of Justice.

⁸ See Appendix 5 (excerpt from Police Cooperation Convention for Southeast Europe).

Existing Legal Framework for Witness Protection in Kosovo

According to the case law of the European Court of Human Rights (ECtHR), the life, liberty or security of witnesses must not be “unjustifiably imperiled.”⁹ Thus, public authorities have a duty to protect witnesses and their close relatives against interference, threats and danger, prior, during and after the trial.¹⁰ Effective protection of witnesses is crucial for the legal system to function properly.¹¹

a. Witness Protection Provisions of the Provisional Criminal Procedure Code of Kosovo

The Provisional Criminal Procedure Code of Kosovo (PCPCK) permits concealing the identity of witnesses, non-public hearings, temporary removal of the defendant from the court-room during witness testimony, distance testimony (e.g. through videoconferencing or closed circuit TV), or video-taped examination prior to the court hearing with the defense counsel present.¹² Two leading ECtHRs cases have established that the use of anonymous testimony from an investigation, as long as the defendant or his/her attorney has the opportunity to question the witness, does not necessarily violate the defendant’s Article 6 right to a fair hearing. However, a conviction should never be based solely or “to a decisive extent” on the basis of anonymous statements.¹³ The PCPCK follows this

⁹ “It is true that Article 6 [...] does not explicitly require the interests of the witnesses in general, and those of victims called upon to testify in particular, 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 organize their criminal proceedings in such way that those interests are not unjustifiably imperiled. 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.” European Court of Human Rights, *Van Mechelen and Others v. the Netherlands*, 21363/93, 21364/93, 21427/93, 23 April 1997, para.53; *See also Doorson v. the Netherlands*, 20524/92, 26 March 1996, para.70; *P.S. v. Germany*, 33900/96, 20 December 2001, para.22.

¹⁰ “While respecting the rights of the defence, the protection of witnesses, collaborators of justice and people close to them should be organised, where necessary, before, during and after trial.” The Committee of Ministers of the Council of Europe, Recommendation (2005)9 *On the Protection of Witnesses and Collaborators of Justice*, 20 April 2005, Article II(2). For an overview over the general issues related to the protection of witnesses in the criminal justice system, see United Nations Office on Drugs and Crime, Informal Working Group on *Witness Protection in the Justice System*, Vienna 22-24 September 2005.

¹¹ “[I]t is unacceptable for the criminal justice system to fail to bring defendants to trial and obtain a judgement because witnesses have been effectively discouraged from testifying freely and truthfully.” *Id.*, Preamble.

¹² Articles 168 – 174, Provisional Criminal Procedure Code of Kosovo (PCPCK). Prior to the enactment of the PCPCK, UNMIK Regulation No. 2001/20 *On Protection of Injured Parties and Witnesses in Criminal Proceedings* of 20 September 2001 (as amended by UNMIK Regulation No. 2002/1 of 24 January 2002) and Administrative Direction No. 2002/25 of 13 November 2002 provided for measures to conceal the identity of witnesses while providing testimony.

¹³ *See Doorson v. the Netherlands*, *supra* at 9, para.68-71 and *Kostovski v. the Netherlands*, 11454/85, 20 November 1989, para.44.

guidance in providing that “[t]he court shall not find the accused guilty solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused.”¹⁴

The use of anonymous testimony can be problematic, especially when the witness is not relocated at the end of the proceedings. One major reason is that the defendant can often guess the true identity of the anonymous witness, based on the nature or specifics of the testimony. In addition, as described above, a conviction which is based “solely” or “to a decisive extent” on anonymous testimony, can raise concerns regarding compliance with international fair trial standards.¹⁵

b. Implementation problems of the Provisional Criminal Procedure Code of Kosovo provisions for protecting witnesses

Despite the availability of protective measures in the law, the reality is that their implementation does not always work as a practical matter.¹⁶ For example, most courts do not have separate entrances for witnesses that would help protect their privacy and shield them from public pressure or scrutiny. Furthermore, this situation is exacerbated by the irresponsible behavior of some local newspapers that have in a number of cases revealed the identities of “anonymous” witnesses. Finally, there is little, if any, prosecution of individuals who threaten or assault witnesses or disclose official secrets, namely the identity of protected witnesses.

ASSESSMENT FINDINGS

Physical Security and Witness Relocation

UNMIK’s Witness Protection Program provides for the physical protection of witnesses before, during and after trial by a specialized police unit, known as the UNMIK Witness Protection Unit (WPU). UNMIK DOJ Circular No. 2003/5 *on the Witness Protection Program* briefly describes the procedures for enrolment in the Witness Protection Program. Recommendations for enrollment in the program are initiated by the prosecutor or judge, in conjunction with the

¹⁴ Article 157(3), PCPCK.

¹⁵ The Human Rights Committee has also raised concern whether the use of anonymous witnesses complies with fair trial principles as embodied in the International Covenant on Civil and Political Rights (See Human Rights Committee, Concluding Observations on The Netherlands (2001), UN doc. CCPR/CO/72/NET, para.12; see also Concluding Observations on Colombia (1997), UN doc. CCPR/C/79/Add. 75, para.21 and 40).

¹⁶ For example, in November 2006, the OSCE monitored a trial involving an allegation of attempted murder. In the hearing, the witnesses sat next to the defendant and in their testimony contradicted prior written statements made during the investigation and would not corroborate prior statements incriminating the accused. The witnesses had previously stated that the defendant intentionally fired a gun at them, which injured multiple people. It is unclear whether witness intimidation, a side agreement, or family interference/reconciliation led to this change in testimony. Of note, neither the judges nor prosecutor suggested that the witnesses give their testimony without the presence of the defendant as allowed under the PCPCK, Article 170(1) item

relevant investigative unit. The WPU then performs a threat assessment. The witness also undergoes physical and psychological evaluation to determine whether he or she can tolerate the stress of being in the program. If accepted, the witness and his or her immediate family are transferred to a secure site for the duration of the trial. After the trial ends, an attempt is made to relocate the witness outside Kosovo on a temporary or permanent basis.¹⁷ Past experience of the program, however, has resulted in only a very small number of cases in which key witnesses have been successfully relocated.

The Witness Protection Program is aimed at protecting witnesses in the most serious criminal cases such as organized crime,¹⁸ trafficking in persons¹⁹ and war crimes.²⁰ The program has been functioning without the benefit of a detailed law governing procedures for enrolling witnesses into the program, changing their identities, and relocating them outside Kosovo after the trial is over. At present, its only legal basis is a two-page UNMIK DOJ Circular, which is insufficient to regulate this vital function. A comprehensive legal framework is needed, and its enactment and implementation should be a top priority. There are two versions of such a draft law (Versions A and B -- See Appendix 2). Comments on these versions are included in the Recommendation section below.

Practical Obstacles in Witness Protection

Protecting witnesses and encouraging their cooperation is difficult in Kosovo for several reasons. First, due to the small size of Kosovo and close family ties, a relatively high number of witnesses are likely to be known by the alleged perpetrators and/or by the public, and thus are more likely to suffer intimidation and require protection. Accordingly, internal relocation of witnesses is not an effective tool to ensure their safety. Second, the history of discrimination and oppression by authorities against residents of Kosovo has made them distrustful of the government and judiciary in general, and reluctant to serve as witnesses in criminal cases. Many Kosovo residents simply do not believe they have a moral or legal duty to serve as witnesses in criminal cases.²¹ Consequently, relocation outside Kosovo is the only means of ensuring the safety of some witnesses who face high risk of revenge by defendants or their criminal co-conspirators.

¹⁷ UNMIK DOJ Circular No. 2003/5 *on the Witness Protection Program*.

¹⁸ UNMIK Regulation No. 2003/25, *On the Provisional Criminal Code of Kosovo* (PCCK), 6 July 2003, Articles 274 and 310.

¹⁹ Article 139, PCCK.

²⁰ See Chapter XIV: Criminal Offences Against International Law, PCCK.

²¹ Article 158 of the PCCK states: "Any person summoned as a witness has a duty to respond to the summons and, unless otherwise provide for by the present Code [...] to testify." Article 167 of the PCCK provides for fine or imprisonment of witnesses who refuse to appear or testify without legal justification.

Thus far, the WPU's efforts to relocate witnesses have occurred mainly through informal channels of communication.²² The Assessment Team found that WPU suffers from three main deficiencies that hinder its effectiveness: lack of sufficient funds to support the basic requirements of the witness protection program; lack of a comprehensive witness protection law regulating this vital and extremely sensitive function and lack of local and international specialized police with expertise in protecting witnesses.

According to the Chief of the WPU,²³ many administrative problems arise because the WPU's budget is not separate from other international and local institutions in Kosovo. Most funds are channeled through the Kosovo Police Service (KPS) budget or other entities, causing bureaucratic delay and preventing an efficient allocation of resources. In addition, the current organizational and administrative structure raises security risks because the WPU must provide receipts and other documents to justify expenditures to outside institutions, which may compromise the confidentiality of WPU activities and endanger the safety of protected witnesses.

Another major problem regarding the confidentiality of WPU operations is the lack of a clear system for filing, sharing, storing, and ultimately destroying sensitive information related to WPU activity and protected witnesses. Thus, confidential information may be leaked when circulated for bureaucratic/internal reasons. This can jeopardize the safety of protected witnesses. There is also a failure to properly safeguard and maintain confidentiality when changing the identity of protected witnesses. Civil Registry employees are responsible for modifying personal details of protected witnesses.²⁴ These deficiencies should be addressed in the witness protection law and coordinated with the draft law on protection of personal data that is currently pending approval in the Kosovo Assembly.

Recent Improvements

All five District Courts in Kosovo were recently equipped with technological upgrades to improve witness protection, with funds donated through the U.K and U.S. liaison offices in Prishtinë/Priština.²⁵ These systems consist of closed circuit television in each court, enabling witnesses to testify without being physically present in the courtroom. This technology also features voice and visual alteration capability to conceal a witness's identity. In addition,

²² According to an interview by the OSCE with the Chief of the WPU, there have been unsuccessful attempts to persuade the United Nations High Commissioner on Refugees (UNHCR) and the International Organisation for Migration (IOM) to become involved in relocation of witnesses.

²³ Interview with Chief of UNMIK WPU in September 2006.

²⁴ Interview conducted by the OSCE with the Chief of the WPU in October 2006.

²⁵ Press release of the Kosovo Judicial Council, March 16, 2007.

the new system permits these courts to establish video conferencing links.²⁶ These improvements expand the available options for protecting endangered witnesses or vulnerable witnesses, such as juveniles or victims of sexual assaults. The video conferencing capability means that it is now possible for witnesses to testify from different locations, potentially even from outside of Kosovo.

RECOMMENDATIONS

Legislative Changes

The draft law on the Witness Protection Program is structured to supply the statutory basis for a program that provides physical protection, including the possibility of relocation of witnesses and closely related persons who are endangered as a result of giving testimony in a criminal proceeding. Currently, these services are permitted under UNMIK DOJ's Circular 2003/5.

The two versions of the draft law do not alter the protective measures currently available under Chapter XXI (Articles 168-74) of the PCPCK, which authorizes courts to issue orders that allow witnesses to testify anonymously, provide for other means to conceal their identities, including the use of aliases, as well as to implement other measures to ensure the non-disclosure of an endangered person's identity during the course of their participation in trial proceedings.

As part of the assessment mission, both versions (A and B) have been reviewed, along with Kosovo's existing laws for witness protection. There is a consensus that a new law is needed to regulate a program for physical protection, but the Assessment Team recommends a number of revisions which should be made prior to enactment. In addition, long-term planning devoted to developing a more comprehensive strategy for dealing with witness security and protection is necessary. In particular, Kosovo must consider alternatives to having anonymous witnesses. In brief, the team recommends that a law be passed that sets forth the structure and procedures of a very narrowly tailored witness protection program to provide physical protection and in extreme cases, relocation, for endangered witnesses and persons very closely related to them.

²⁶ Video links between district courts require ISDN (Integrated Services Digital Network) service. At the time of the installation, however, ISDN lines were available only in Prishtinë/Priština and Prizren.

Comments to Versions A and B of Draft Regulation On Witness Protection

Version A:

Section 1

The term “authorized prosecutor” should not include private prosecutors. Cases involving witnesses whose testimony is critical enough to warrant their enrollment in the program will necessarily be only the cases warranting prosecution by the public prosecutor.

The definition of “family member” should be replaced with a definition of “other eligible endangered persons” which should be defined as “the witness’s immediate family members including a spouse, children and parents, and other persons who would be endangered by virtue of his/her very close relation with the witness.”

The term “witness protection program” should be defined as an exclusive program operated by the witness protection unit of the police to implement protective measures for persons meeting the criteria for the protective measures envisioned in this law (i.e., other than those provided under Chapter XXI of the PCPCK), and who have formally entered the program under a written agreement.

The term “protected person” should be defined as a witness and/or other eligible endangered person who has been formally accepted into the witness protection program and has entered a written agreement with the WPU.

“Protection unit” should be defined as a specialized unit with the police, responsible for assessing a person’s physical and psychological suitability for enrollment in the program, recommending and implementing specific measures and otherwise administering the witness protection program.

“Protective measure” as defined in this law, should only include the measures provided by the WPU, under the present law, and not include those measures provided by a court pursuant to Chapter XXI of the PCPCK.

“Protocol agreement” should be defined as a written agreement signed by both the WPU and the protected person or his/her representative, which governs the provision of personal protection for the duration of the person’s enrollment in the protection program.

“Serious risk” should be defined as a warranted fear of danger to the life, physical or mental health of the witness or other eligible endangered person as a reasonably anticipated consequence of his/her giving evidence during an examination or testimony during any stage of the criminal proceeding, including the investigation phase.

Section 2

Rather than list categories of cases for which the witness protection program might be available, the better approach is to leave this to the discretion of the public prosecutor, in consultation with the officers and the Witness Protection Unit, using the criteria listed below in the comments to Section 3.

Section 3

The decision to provide physical protective measures under this draft law is left to the decision of the court. However, the provision of physical security, in light of its extrajudicial nature, should not be solely the court's decision²⁷ because the court is not in the best position to conduct the analysis needed for this decision. This determination, which usually occurs during the investigation phase, requires evaluating the prosecutor's need for the testimony and balancing that with the commitment of resources that must be allocated to provide the physical security and related services. These considerations are more appropriately weighed by the prosecutor's office and the witness protection unit or whichever entity is charged with providing physical security. Several countries have formed "witness protection commissions" composed of representatives from different agencies to act as the decision-making body for determining whether an endangered witness should be enrolled in the program, while other countries leave the decision entirely within the discretion of the prosecutor. While there are a variety of different models, there is little, if any, precedent for relegating this decision solely to the court.²⁸ The use of a commission to determine eligibility for the program is preferable to relegating this decision to the courts. Consider having the chair of the commission rotate among the representatives from the various bodies serving on the commission.

The factors for enrollment into the Witness Protection Program enumerated in 3.3 cover the general considerations. However, the Assessment Team recommends enumerating them in more detail, as follows:

- Seriousness of the crime;
- Significance of prosecution and its importance to Kosovo or international interests;
- Significance and relevance of witness testimony and whether alternative sources are available;
- Nature, degree, and type of threat against witness;
- Willingness of the witness to be enrolled in the program;
- Physical and psychological suitability of witness – consideration of issues that would concern a potential receiving country, such as an extensive

²⁷ By contrast, court-ordered protective measures that affect how testimony is taken in a court proceeding are matters that should fall under the court's control.

²⁸ See Appendix 6 (chart comparing witness protection systems in several countries).

criminal record, language/cultural barriers, and medical or psychological issues.

The draft's inclusion of 3.3(c) which requires consideration of the "severity of the threat to the protected person significantly outweighs the financial costs of placing the protected person in a witness protection program" should be rephrased to: the "severity of the threat to the protected person significantly outweighs the burden of placing the protected person in a witness protection program."

In addition, the provision should indicate that these factors will be evaluated by experienced prosecutors and police officers of the WPU. Also, instead of referring to the "protected person" at this stage in the process, the provision should refer to the "endangered witness" because at that stage, the determination has not yet been made that the person will be enrolled in the program.

Sections 3.4-3.6 should also be revised. As recommended above, this decision should not be a judicial one; instead, the determination should be made by the public prosecutor, after a thorough assessment by witness protection professionals (such as psychologists and others), or by a interagency commission following the general procedural requirements set forth in 3.5 and 3.6.

The factors listed in section 3.7 (a) - (l) should be covered by the terms of the protocol agreement with the protected person, not in a court order. Moreover, it should be clear that the provision of these services will be made on a case-by-case determination, as appropriate. To the extent that any of these factors involve the procedural measures regulated by Chapter XXI of the PCPCK, those should also be referenced in the agreement. Other services that might be listed for consideration include:

- other ancillary services such as psychological counseling;
- assistance in liquidating real and personal property, or concealing the identity of ownership in such property; and
- employment training.

Section 5

Subsection (g)(3) is better phrased as "to undertake all available and proper measures . . ." because there can be no guarantee that all *necessary* measures, which may be beyond the control of the WPU, can in fact be undertaken.

Section 6

Section 6(f) should be replaced by a more general provision permitting termination of a person's enrollment in the WPP, such as " the prosecutor may request termination for good cause, in the interests of justice." The phrase "upon

a finding by a judge or panel of judges that the level of threat ceases to exist” in section 6(g) should be deleted because a foreign state may not necessarily need such an order to terminate the protection.

Version B:

Section 4

While judges play an important role in ensuring that endangered witnesses are safeguarded throughout the trial proceedings, their role should be more limited in determining enrollment in a witness protection program that involves long-term physical security. See also comments to section 3 of version A, above.

Section 5

The same comments to section 3 of version A apply.

Section 7

Section 7(2)(g)(iii) is better phrased as “To undertake all available and proper measures . . .” because there can be no guarantee that all *necessary* measures, which may be beyond the control of the WPU, can in fact be undertaken.

Section 8

In keeping with the comments above, the entity with authority to terminate enrollment in the program should be the same as the entity with decision making authority for accepting applicants into the program, but the court is not in the best position to make these determinations. The comments to section 6 under version A also apply.

Section 9

Section 9 should include a general provision to protect information about applicants who are being considered for enrollment in a witness protection program, as well as for persons who are accepted for enrollment in the program. Such information must be well safeguarded from unauthorized disclosure during all stages of a person’s participation. In addition, the law should criminalize, with appropriate penalties, all forms of witness intimidation and unauthorized disclosures relating to the identity of persons participating in the program

Section 12

Section 12 should permit the Special Representative of the Secretary General or the succeeding authority to delegate the task of drafting an Administrative Instruction – or other implementing directives and guidelines – to the relevant Ministry.

Other recommendations on legislative issues

- Criminal penalties for threatening witnesses should be strengthened and expanded in Articles 309 and 310 of the PCCK, and not be restricted to certain types of cases.
- Criminal penalties must be structured to provide incentives to encourage defendants to cooperate with law enforcement. For example this may take the form of a reduced sentence in return for a criminal defendant's agreement to plead guilty and cooperate with the authorities. At the same time, penalties for non-cooperating defendants must also be sufficiently high to permit such reductions for cooperating defendants.
- The PCPCK should be amended to provide explicit authority for defendants to enter agreements with the prosecutor to plead guilty and to cooperate.²⁹
- Consider passing legislation that would address short-term, emergency needs of endangered witnesses that do not rise to the level of protection required in a more formal witness protection program, but which could be administered through the Public Prosecutor's Office.

Programmatic Changes

The performance of UNMIK's WPU in providing principally overt protection to a limited number of threatened witnesses has been adequate in some cases and inadequate in others. There remains a large and unacceptable gap between what is needed and what can be provided. Several fundamental issues must be addressed in order to raise the level of security and protection for witnesses.

²⁹ See proposed provision to regulate guilty plea agreements, in Appendix 7. This draft provision to regulate negotiated plea agreements was submitted as a joint proposal to the Minister of Justice in March 2007, by the Chamber of Advocates, the Kosovo Judges Association and the Kosovo Public Prosecutors Association.

a. Experience and Training

Recommendation 1: The high turnover of personnel in the WPU adversely affects its operation. UNMIK and Kosovo Police Service management and officers working on witness protection related matters should be appointed for long-term tenures (at least two years) in order to enable them to develop expertise and experience in this highly complex field.

Recommendation 2: Ultimately, the lack of continuity will also hamper any transition of witness security and protection duties from a principally internationally-led mission to one that is run by KPS unless efforts are made to concurrently develop and implement a KPS-administered WPU in Kosovo. Because of the sensitive nature of witness protection, however, only a very small number of KPS management and staff officers should be involved. These individuals should be identified and thoroughly vetted, and then begin “shadowing” the international WPU staff. This should begin as soon as possible. Ideally, only new or recent hires of the KPS should be selected for this assignment.

Recommendation 3: All staff should be adequately trained on key areas of witness security for which they are responsible – for e.g., conducting psychological and threat assessments, providing close protection, and so forth. Whenever possible, such training opportunities should be coordinated with other witness protection professionals in the region in order to build the necessary networks for improving regional cooperation and to exchange “best practices.”

b. Court and Detention Facility Security

Recommendation 4: An effective witness security program must also rely upon the existence of adequate court security measures and procedures. The court security measures available in Kosovo are poor to non-existent. A court security training and implementation initiative must be conducted in conjunction with the development, implementation, and administration of a witness protection program

Recommendation 5: A “court security committee” should be formed in each district, consisting of the chief judge, the chief prosecutor, the chief law enforcement official, and the facility (building) engineer or superintendent. This committee would be responsible for taking the lead in identifying gaps in court security and in developing appropriate solutions, in consultation with specialists when possible. This might include setting up special entrances and segregated facilities for endangered and/or protected witnesses. These regional committees should coordinate their efforts to devise minimum standards that would be applicable in all courts, to ensure a certain level of consistency.

Recommendation 6: Provide security training for all members of the court personnel – judges, attorneys, clerks, administrative staff and guards. This

should cover personal safety as well as educate court personnel on the methods and capabilities of the WPU.

Recommendation 7: Develop a checklist of indicators that would trigger protective measures for threatened judges and other court staff.

Recommendation 8: Segregate criminal cooperators who are enrolled in the protection program from the general prisoner population in secure, separate prison facilities.

c. Issues of Critical Importance

Recommendation 9: Witness protection is inherently an expensive undertaking – it may require around-the-clock personnel for extended periods, vehicles, safe-houses, ancillary support services and an array of equipment. WPU must be funded in advance each year. The funding of security activities cannot be determined on a case by case basis. Funds must be allocated each fiscal year (the costs reflect only payments made directly or on behalf of protected persons; they should not include salary and expenses of staff), and may be categorized as follows:

- Daily subsistence payments
- Housing costs
- Medical costs-short term only
- Documentation expenses
- Travel expenses
- Purchase or replacement costs of household good
- Educational/vocational expenses
- Miscellaneous costs

Recommendation 10: Enable WPU to conduct procurements in a manner that will avoid the disclosure of confidential information or in any way reveal to third party providers that such procurements are for protected witnesses.

d. Possible Model for the WPU

Recommendation 11: The assessment team's recommendation is that a witness security and protection program in Kosovo should have all its services contained within one office, within the operations pillar of the police, which would provide the entire range of appropriate protective services – for example, assistance with life skills, social/psychological counseling, re-documentation, overt/covert protection, international relocation or a suitable combination thereof. The WPU should have its own procurement authority.

Recommendation 12: Consider setting up a dedicated, permanent facility for short-term physical protection of endangered witnesses and their

immediate families. Reliance on rented safe-houses raises a host of logistical and administrative problems, including the difficulty of maintaining secrecy of the safe-house locations. Instead, a more permanent facility that is better guarded and that has sufficiently large facilities to offer better services – such as an onsite medical office and recreational space – may be a better and more cost-effective option in the long term.

Recommendation 13: There must be close cooperation between the public prosecutor's office and the witness protection unit in all aspects of operating the program.

Recommendation 14: Consider setting up a special fund from confiscated assets that could be used to supplement services for victim witnesses covered by the annual budget.

Recommendation 15: Consider instituting new rules specifically tailored to govern a system of filing, sharing, storing and destroying information related to witness protection functions.

e. International Relocation

Recommendation 16: Given Kosovo's small size and tightly knit communities, witnesses under severe threat realistically need international relocation in order to ensure their safety. However, this remedy is extremely problematic for several reasons. For one thing, the proper implementation of international cooperation and exchanges depends heavily on personal networks developed over time, among a very small community of witness protection professionals. The UNMIK WPU has not yet developed the necessary networks with established witness protection units in countries in the Balkans or the rest of Europe. In large part, this is due to the high turnover of personnel. Thus, opportunities for promotion within this unit and added benefits should be a priority, to encourage personnel retention.

Recommendation 17: Kosovo should begin implementing an "international relocation planning office" within its WPU, regardless whether the WPU is handled by KPS or by an international mission.

CONCLUSION

The experience of many countries demonstrates that effective measures to defeat organized criminal groups require the cooperation of criminals who are willing to cooperate with law enforcement officials and testify against co-conspirators. Such cooperation is impossible without the ability of prosecutors and law enforcement officials to provide sufficient protection to these individuals. In addition, victim witnesses must be given adequate protection to encourage their full participation in criminal proceedings. For Kosovo, this will require enacting legislation to provide a sound legal basis for witness protection, as well as creating and adequately funding the institutional structures to implement such a comprehensive program. Without effective means to protect witnesses, whether they are victims or cooperating defendants, Kosovo cannot hope to make any significant progress in prosecuting organized crime or other serious offences.

APPENDICES

- 1 UNMIK DOJ Circular 2003/5
- 2 Draft Versions (A and B) of Regulation on the Witness Protection Program
- 3 List of Assessment Team Experts
- 4 List of Persons Interviewed and Sites Visited
- 5 Police Cooperation Convention for Southeast Europe (excerpt – Article 10)
- 6 Comparative Chart on Witness Protection Programs
- 7 Draft Additions to Relevant Provisions of the Kosovo Provisional Criminal Procedure Code and Provisional Criminal Code Permitting Negotiated Plea Agreements

APPENDIX



WITNESS PROTECTION PROGRAM

Reference: Justice/2003/5

1. This Circular sets forth the procedure followed by the UNMIK Police/KPS Witness Protection Unit (WPU) with respect to the Witness Protection Program (the "Program").
2. The term "witness" is defined in section 1(b) of UNMIK Regulation No. 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings ("Regulation") as referring to a person "who is summoned, or has relevant knowledge and may be summoned to testify before the Court, or one whom the Court has named as a witness to be summoned".
3. The WPU has the responsibility to protect vulnerable witnesses prior to and subsequent to their testimony at trial by transferring them to a secret secure site. It is to be noted, however, that the WPU also review the options on a case-by-case basis and may adopt an alternative to enrollment in the Program.

Recommendation for Enrollment

4. To enroll a witness into the Program, a prosecutor or a judge after consultation with either the Central Criminal Investigations Unit (CCIU), the Kosovo Organized Crime Bureau (KOCB), or the Trafficked Persons Investigation Unit (TPIU) should make a written recommendation to the WPU stating the reasons for believing that the witness is or may be at serious physical risk.
5. Section 1(c) of the Regulation provides a definition of "serious risk" as being "a warranted fear of danger to life, health or property of the injured party or witness as an anticipated consequence of the witness or injured party giving information during an interrogation or testimony in Court".

Assessment

6. Once a recommendation is received by the WPU, a threat assessment investigator will independently assess the potential risk factors for the witness concerned. If the WPU determines that the witness is eligible for the Witness Protection Program, the witness will be asked to undergo another assessment to determine his or her suitability for the Program.
7. During this assessment period, the WPU will transfer the witness to an intermediate site. The witness will also undergo psychological and physical tests to determine whether he or she is able to tolerate the particular stresses associated with being within the Program.

8. If, during the assessment period, the WPU determines that the witness is unprepared or unsuitable for the rigors of long-term protection, the witness will be withdrawn from the Program. The witness can, at any time, voluntarily withdraw.

Transfer to Secure Site

9. If the WPU determines upon assessment that the witness is suitable for the Program, the witness and his or her immediate family are relocated to a secure site in Kosovo. This site has extremely limited capacity to house witnesses and their families, which may be a reason for the WPU to consider alternatives to enrollment in the program, as mentioned in paragraph 3.
10. The witness and his or her immediate family will remain at the secure site for the entire period of the trial as well as for the necessary time for relocation to be arranged, as described in paragraph 11 below. However, the witness can, at any time, still voluntarily withdraw from the Program.

Relocation

11. After completion of the criminal proceedings, the WPU seeks to temporarily or permanently relocate the witness and his or her family outside of Kosovo. They will be relocated to any foreign country willing to accept them. The host country will make provisions for the witness, such as accommodation and job training, and he or she will not be eligible for further enrollment in the host country's witness protection program.
12. It is imperative that witnesses are not misled into believing that they are guaranteed relocation outside Kosovo or that they can choose the country to which they may be relocated.



Paul E. Coffey
Director
Department of Justice

To: The President of the Supreme Court of Kosovo
The President of the Higher Court of Minor Offences
All Presidents of the District Courts
All Presidents of the Municipal Courts
All Presidents of the Minor Offences Courts
The Public Prosecutor of Kosovo
All District Public Prosecutors
All Municipal Public Prosecutors

Cc: Mr. Stefan Feller, UNMIK Police Commissioner
Mr. Larry Inmon, Head, Witness Protection Unit

APPENDIX

2

VERSION A



INSTITUCIONET E PËRKOQSHME TE VETËQEVERISJES
PROVISIONAL INSTITUTIONS OF SELF GOVERNMENT
PRIVREMENE INSTITUCIJE SAMOUPRAVE

KUVENDI I KOSOVËS
СКУПШТИНА КОСОВА
ASSEMBLY OF KOSOVO

Resolution No. 2006/XX

ON THE WITNESS PROTECTION PROGRAM

The Assembly of Kosovo,

Pursuant to the authority given according to section 9.1.26(a), 9.1.27,9.1.45 of the Constitutional Framework on the Provisional Institutions of Self-Government (UNMIK Regulation No. 2001/9) and annex XV(i) of UNMIK Regulation No. 2005/53, Amending UNMIK Regulation No. 2001/19 On the Executive Branch of the Provisional Institutions of Self-Government in Kosovo,

Recognizing that the intimidation of injured parties and witnesses severely undermines the effort to effectively investigate and prosecute serious crimes in Kosovo, including war crimes, inter-ethnic crimes, terrorism, and organized crime, and constitutes an obstacle to the establishment of the rule of law in Kosovo, and

For the purpose of establishing a witness protection program as an additional protective measure to ensure the safety and security of an injured party or witness or family member, during and after a criminal proceeding,

Hereby proposes as follows,

REGULATION ON THE WITNESS PROTECTION PROGRAM

Section 1
Definitions

For the purposes of the present Regulation:

(1) The term “authorized prosecutor” means a public prosecutor, private prosecutor, or subsidiary prosecutor.

(2) The term “family member” means the spouse, extra-marital partner, a blood relation in a direct line, an adoptive parent, an adopted child, a brother, a sister, or a foster parent.

(3) The term “injured party” means a person whose personal or property rights are violated or endangered by a criminal offense.

(4) The term “judge” means the pre-trial judge or the presiding judge.

(5) The term “police” means the Civilian Police of the United Nations Mission in Kosovo also known as the UN International Police and the Kosovo Police Service. It shall include the judicial police.

(6) The term “protected person” means an injured party, witness or family member who is threatened and has been ordered to be placed in a protection program on the basis of a well grounded fear of danger to his or her life, physical and mental health or property, as an anticipated consequence of his or her giving evidence during an examination or testimony in at any stage of the criminal proceeding upon signing a protocol agreement with the protection unit of the police.

(7) The term “witness protection program” means an exclusive program operated by the police to implement and execute protective measures ordered by a court to protect the life, health, freedom and property of an injured party or witness and a family member during and after a criminal proceeding.

(8) The term “protection unit” means a specialized unit within the police responsible for recommending and implementing protective measures, and operating the witness protection program.

(9) The term “protective measure” means a measure ordered by a court to protect an injured party or witness or family member during and after a criminal proceeding as set forth under the applicable law.

(10) The term “serious risk” means a warranted fear of danger to the life, physical or mental health of the injured party, witness, or a family member of an injured party or witness as an anticipated consequence of the injured party or witness giving evidence during an examination or testimony in court or during an investigation.

(11) The term ‘protocol agreement’ means a written agreement signed by the protection unit of the police and the threatened person governing the provision of personal protection for the duration of time in the witness protection program.

Section 2
Scope of the Regulation

The present regulation sets forth the procedures governing an order for the enrollment of a protected person in a witness protection program during and after a criminal proceeding and shall be applied only if any one or more of the following criminal offences cannot be proved without the testimony of the protected person:

- (a) Criminal offences against Kosovo and its residents;
- (b) Criminal offences against international law;
- (c) Criminal offences committed in an organized manner; and
- (d) Criminal offences punishable to a term of imprisonment of five (5) or more years.

Section 3
Witness Protection Program

3.1 At any stage of the criminal proceedings, an authorized prosecutor, defendant, defence counsel, or protected person may file a written petition to a judge or panel of judges for the enrollment in a witness protection program under the authority and administration of the protection unit of the police.

3.2 The provisions of Chapter XXI of the Provisional Criminal Procedure Code of Kosovo governing a petition for a protective measure shall also apply *mutatis mutandis* to a petition filed pursuant to this section.

3.3 Where protective measures ordered under Chapter XXI of the Provisional Criminal Procedural Code of Kosovo are insufficient to guarantee the safety and security of a protected person, a judge or panel of judges may in compelling circumstances order that a protected person be enrolled in a witness protection program upon the determination that:

- (a) There exists an exceedingly high level of risk to the protected person;
- (b) The testimony of the protected person is extremely relevant to a material issue in the case, which, in its absence, may substantially affect the court's findings; and
- (c) The severity of the threat to the protected person significantly outweighs the financial costs of placing the protected person in a witness protection program.

3.4 Before making an order under this section, the judge or panel of judges shall conduct a hearing, in a closed session, at which the protected person at issue and other persons deemed necessary, such as police or military personnel providing security, shall be examined. Apart from these persons, only the authorized prosecutor, essential court and prosecution personnel and defence counsel may be present.

3.5 The judge or panel of judges may request the protection unit to submit an independent assessment within forty-eight hours (48) on whether there exists an exceedingly high level of risk to the protected person to justify enrollment in a witness protection program. During this assessment period, the protected person may undergo psychological and physical examinations to determine whether he or she is able to endure the effects of enrollment in the witness protections program.

3.6 The judge or panel of judges shall render a decision on the petition within forty-eight (48) hours after the conclusion of the hearing.

3.7 An order issued under this section shall provide additional measures as follows:

- (a) physical protection of the threatened person and property;
- (b) relocation to a safe place;
- (c) temporary protection of identity, information and documents of the protected person;
- (d) social rehabilitation;
- (e) professional re-qualification;
- (f) change of the identity;
- (g) maintenance, change of work place and temporary employment;
- (h) legal assistance;
- (i) financial assistance for the period of time in the program;
- (j) protection and special treatment in cases where the accused has been placed in a correctional facility as a pre-trial security measure or sentenced by imprisonment;
- (k) declarations of the witness under another identity and their administration with special means for voice deformation and non-appearance; and

- (l) special physical and technical measures of protection in the place where the protected person resides and during the all transportations.

3.8 The protection unit of the police shall implement the measures provided in paragraph 1 of this section.

Section 4
Protection Unit

The protection unit of the police shall have the following responsibilities:

- (a) Make a recommendation to a judge or panel of judges on whether a protected person should be enrolled in a witness protection program on the basis of a threat assessment requested by the court and available resources;
- (b) Submit an annual budget report to the Police Commissioner on the financial costs involved in operating the witness protection program;
- (c) Enter into a Protocol Agreement with a protected person;
- (d) Execute an order for a protected person to be enrolled in the witness protection program issued under this Regulation;
- (e) Adopt standard operating procedures for carrying out protective measures, to include procedures safeguarding all information pertaining to the provision of such measures to protected persons;
- (f) Retain original documents of the person with a disguised or changed identity; and
- (g) Ensure the presence of protected persons during criminal proceedings.

Section 5
Protocol Agreement

4.1 Within seven (7) days of the issuance of an order under this Regulation, the police and the protected person shall conclude a written Protocol Agreement (hereinafter referred to as 'the Agreement') outlining the terms and conditions of enrollment in the witness protection program.

4.2 The Agreement shall contain the following information:

- (a) The parties to the Agreement;
- (b) The consent of the protected person in the form of a written declaration that he or she knowingly and willingly enrolled in the witness protection program;
- (c) The description of the protective measures to be implemented;
- (d) The duration of enrollment in the witness protection program;
- (e) A declaration that all previous disclosures are true and accurate to the protected person's knowledge and that the he or she is aware that the Agreement may be terminated if any false information is given during the proceeding or where relevant information has been knowingly withheld from the authorities;
- (f) The obligations of the protected person as follows:
 - 1) To give a full testimony at any stage of the criminal proceedings, in accordance with the applicable law, without reservation or condition, concerning all facts, events and circumstances of the case of which the protected person is aware or any related case;
 - 2) To answer clearly and precisely all questions put to him or her during the proceedings by judicial authorities or police;
 - 3) To accept and respect the conditions of enrollment in the witness protection program;
 - 4) To fully understand the nature of the classified information and under any circumstance, not to disclose any information on the protective measures ordered by a judge or panel of judges;
 - 5) To avoid any action or inaction that may compromise the integrity and effectiveness of the witness protection program;
 - 6) To abide by instructions of the Protection Unit and actively participate in the execution of the protective measures;
 - 7) To inform, without delay, the Protection Unit about all changed circumstances which may have an affect on the protection program;

- 8) To report his or her financial records, legal transactions, assets, liabilities and other obligations before enrollment in the program;
 - 9) To remain liable for all financial obligations incurred by before and during his or her enrollment in the witness protection program; and
 - 10) To submit to a medical examination.
- (g) The obligations of the protection unit as follows:
- 1) To execute the protective measures as set forth in the order issued under this Regulation with only necessary restrictions of the rights and freedom of the - protected person;
 - 2) To provide the protected person with necessary medical and legal assistance for the duration of his or her enrollment in the witness protection program; and
 - 3) To undertake all necessary and proper measures to ensure the safety and security of the protected person as required by law.
- (h) The grounds upon which enrollment in the witness protection program may be suspended or terminated;
- (i) The date, place and signature of the parties; and
- (j) In the case the protected person is a minor, a parent or legal custodian appointed by the court shall sign the agreement, taking into account the best interest of the minor and the legal capacity as provided by law.

Section 6

Termination of Enrollment in the Witness Protection Program

Enrollment in the witness protection program may be terminated under the following circumstances:

- (a) Expiration of the Agreement governing enrollment in the witness protection program;
- (b) Death of the protected person;
- (c) Upon the written request from the protected person to withdraw from enrollment in the witness protection program;

- (d) If the protected person knowingly makes a false declaration in either the proceedings or the Agreement or has knowingly withheld relevant information material to the case;
- (e) If the protected person does not fulfill any one of the obligations under the agreement without good reason;
- (f) Upon a request of the Chief Prosecutor or the Protection Unit, the judge or panel of judges may terminate the enrollment in the witness protection program for the protected person where:
 - 1) The reason justifying protection no longer exists;
 - 2) During the course of the protection program, criminal proceedings are initiated against such person due to commission of a criminal offence;
 - 3) The protected person fails to comply with the rules and guidelines issued by the Protection Unit, or violates the obligations which compromise the provision of protection; or
 - 4) The protected person refuses to seek employment in order to obtain an income;
- (g) A foreign state requests termination of protection provided to the person transferred in its territory upon a finding by a judge or panel of judges that the level of threat ceases to exist.

Section 7
Confidentiality

7.1 A person who becomes aware of information related to the provision of protected measures to a protected person as part of his or her official position or job shall maintain the confidentiality of this information.

7.2 Any individual described in paragraph (1) of this section who releases information related to the provision of protected measures to a protected person either intentionally or through negligence shall be subject to criminal liability under Articles 169 or 311 of the Provisional Criminal Code of Kosovo.

Section 8
International Cooperation

8.1 The protective measure of relocating protected persons may be provided on the basis of an international agreement or reciprocity signed by the competent bodies and foreign state. The competent authority may file a confidential petition for relocation of the protected person through diplomatic channels to a foreign state.

8.2 The petition shall not contain any information that may reveal the identity or temporary location of the protected person.

Section 10
Transitional Provisions

Within sixty (60) days of the entry into force of this Regulation, the Ministry of Internal Affairs shall formally establish the protection unit in accordance with the applicable law

Section 11
Implementation

The Special Representative of the Secretary-General may issue Administrative Directions for the implementation of the present Regulation.

Section 12
Entry into Force

The present Regulation shall enter into force on the date of its approval and promulgation by the Special Representative of the Secretary-General.

Resolution No. 2006/xx

President of the Assembly

Mr. Kolë Berisha

APPENDIX

2

VERSION B

ON THE ESTABLISHMENT OF A WITNESS PROTECTION PROGRAMME

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council Resolution 1244 (1999) of 10 June 1999,

Taking into account United Nations Interim Administration in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo and UNMIK Regulation No. 1999/24 of 12 December 1999 on the Law Applicable in Kosovo,

Recognizing that the intimidation of injured parties, cooperative witnesses and witnesses severely undermines efforts to effectively investigate and prosecute serious crimes in Kosovo, including war crimes, inter-ethnic crimes, terrorism and organized crimes, and constitutes a significant obstacle to the establishment of rule of law in Kosovo,

Considering that the Provisional Criminal Procedure Code of Kosovo (PCPCK) entered into force on 6 April 2004 and considering, in particular, Chapter XXI: Protection of Injured Parties and Witnesses,

For the purpose of establishing a protection programme to provide for and regulate the protection of witnesses, cooperative witnesses and their immediate family members,

Hereby promulgates the following:

Section 1 Definitions

For the purposes of the present Regulation:

- (1) The term “family member” means the spouse, extra-marital partner, a blood relation in a direct line, an adoptive parent, an adopted child, a brother, a sister, or a foster parent.
- (2) The term “injured party” means a person whose personal or property rights are violated or endangered by a criminal offense.
- (3) The term “judge” means the pre-trial judge or the presiding judge.
- (4) The term “police” means the Civilian Police of the United Nations Mission in Kosovo also known as the UN International Police and the Kosovo Police Service. It shall include the judicial police.
- (5) The term “protected person” means an injured party, witness, cooperative witness or family member who is threatened and has been ordered to be placed in a witness protection programme on the basis of a well grounded fear of danger to his or her life,

physical and mental health or property, as an anticipated consequence of his or her giving evidence during an examination or testimony in at any stage of the criminal proceeding upon signing a protocol agreement with the protection unit of the police.

(6) The term “witness protection programme” means an exclusive programme operated by the police to implement and execute protective measures ordered by a court to protect the life, health, freedom and property of an injured party or witness and a family member during and after a criminal proceeding.

(7) The term “protection unit” means a specialized unit within the police responsible for recommending and implementing protective measures, and operating the witness protection programme.

(8) The term “protective measure” means a measure ordered by a court to protect an injured party or witness or family member during and after a criminal proceeding as set forth under the applicable law.

(9) The term “serious risk” means a warranted fear of danger to the life, physical or mental health of the injured party, witness, or a family member of an injured party or witness as an anticipated consequence of the injured party or witness giving evidence during an examination or testimony in court or during an investigation.

(10) The term “protocol agreement” means a written agreement signed by the protection unit of the police and the protected person governing the provision of personal protection for the duration of time in the witness protection programme.

(11) The term “official secret” means information or documents proclaimed by law, other provisions, or by a decision by the competent authority issued on the basis of law to be an official secret and whose disclosure has caused or might cause detrimental consequences, pursuant to Article 347 of the Provisional Criminal Code of Kosovo.

Section 2 Scope of the Regulation

(1) The present regulation sets forth the procedures governing an order for the enrollment of a protected person in a witness protection programme during and after a criminal proceeding and shall be applied only if any one or more of the following criminal offences are involved:

- (a) Criminal offences against Kosovo and its residents;
- (b) Criminal offences against international law;
- (c) Criminal offences committed by an organized criminal group; and

- (d) Criminal offences punishable by a term of imprisonment of five (5) or more years.

Section 3 The Commission

(1) A Commission shall be established as a board of three (3) members consisting of one person from each of the following nominating bodies: Supreme Court of Kosovo, the Office of the Public Prosecutor of Kosovo and the Kosovo Police Service.

(2) The Head of each nominating body shall designate one person from that body to be a member of the Commission and one deputy to act in that member's absence. Each member and deputy may hold a position on the Commission for a maximum term of five (5) years. Each Commission member or deputy may be reappointed on the expiry of the term of office.

(3) The Head of each nominating body or the Commission may terminate the position of the Commission member or deputy designated from that body for any of the following reasons:

- (a) Termination of service in the nominating body;
- (b) For good cause on the request of the Commission member or his or her deputy;
- (c) Breach of the Commission's internal rules of procedure; or
- (d) On the commencement of disciplinary action within the nominating body.

(4) The Commission shall adopt internal rules of procedure governing its work.

(5) The designee of the Kosovo Police Service shall be the Chairman of the Commission.

(6) Members of the Commission may be disqualified according to the standards outlined in Chapter III of the Provisional Criminal Procedure Code of Kosovo for the disqualification of judges. The Chairman of the Commission shall rule on petitions for disqualification of members of the Commission according to these standards. The Director of the Kosovo Police Service shall rule on petitions for disqualification of the Chairman of the Commission according to these standards.

(7) The Commission shall ensure that its proceedings and decisions remain secret and shall not disclose any details of its operations.

(8) The Commission shall determine whether the benefit to the criminal proceedings of having the protected person present testimony outweighs the financial costs of placing the protected person in a witness protection programme.

Section 4
Request for Enrollment and Standards for Admittance into the Witness Protection Programme

(1) At any stage of the criminal proceedings, a public prosecutor, defendant, defence counsel, or protected person may file a written petition to a judge or panel of judges for the enrollment in a witness protection programme under the authority and administration of the protection unit of the police.

(2) If the judge or panel of judges determines that there is a risk of imminent harm to the protected person, the judge or panel of judges may order the protection unit to provide temporary protection to such person until a final decision is made regarding the request for enrollment into a witness protection programme.

(3) Before making an order for enrollment into the witness protection program, the judge shall conduct a hearing, in a closed session, at which the witness at issue and other persons deemed necessary, such as police and military personnel providing security, shall be examined. Apart from these persons, only the public prosecutor, essential court and prosecution personnel and the defence counsel may be present.

(4) A protected person may be enrolled in a witness protection programme upon:

(a) The prosecutor's determination that:

- (i) the testimony of the witness is relevant to a material issue in the case, which, in its absence, may affect the court's findings; and
- (ii) there exists a high level of risk to the protected person; and

(b) The Commission's determination that the benefit to the criminal proceedings of having the protected person present testimony outweighs the financial costs of placing the protected person in a witness protection programme under Section 4 paragraph 7 of the present Regulation.

Section 5
Witness Protection Programme

(1) In addition to the protective measures set forth under Chapter XXI of the Provision Criminal Procedure Code of Kosovo, the judge or panel of judges may order that an injured party or protected person be enrolled in a witness protection programme.

(2) An order issued under this section may provide additional such measures as may be appropriate to include but not limited to the following:

- (a) physical protection of the threatened person;

- (b) relocation to a location outside Kosovo;
 - (c) temporary protection of identity, information and documents of the protected person;
 - (d) social rehabilitation;
 - (e) professional re-qualification;
 - (f) change of identity;
 - (g) maintenance, change of work place and temporary employment;
 - (h) legal assistance;
 - (i) financial assistance or the period of time in the programme;
 - (j) protection and special treatment in cases where the accused has been placed in a correctional facility as a pre-trial security measure or sentenced by imprisonment; or
 - (k) special physical and technical measures of protection in the place where the protected person resides and during all the transportations.
- (3) The protection unit of the police shall implement the measures provided in paragraph (2) of this section.

Section 6 Protection Unit

- (1) The protection unit shall have the following responsibilities:
- (a) Submit an annual budget report to the Police Commissioner on the financial costs involved in operating the witness protection programme;
 - (b) Enter into a protocol agreement with a protected person;
 - (c) Execute an order for a protected person to be enrolled in the witness protection programme issued under this Regulation;
 - (d) Adopt standard operating procedures for carrying out protective measures, to include procedures safeguarding all information pertaining to the provision of such measures;

- (e) Retain original documents of the person with a disguised or changed identity; and;
- (f) Ensure the presence of protected persons during criminal proceedings.

Section 7
Protocol Agreement

(1) Within seven (7) days of the issuance of an order under this Regulation, the police and the protected person shall conclude a written protocol agreement (hereinafter referred to as 'the Agreement') outlining the terms and conditions of enrollment in the witness protection programme.

(2) The Agreement shall contain the following information:

- (a) The parties to the Agreement;
- (b) The consent of the protected person in the form of a written declaration that he or she knowingly and willingly enrolled in the witness protection programme;
- (c) The description of the protective measures to be implemented;
- (d) The duration of enrollment in the witness protection programme;
- (e) A declaration that all previous disclosures are true and accurate to the protected person's knowledge and that he or she is aware that the Agreement may be terminated if any false information is given during the proceeding or where relevant information has been knowingly withheld from the authorities;
- (f) The obligations of the protected person as follows:
 - (i) To give full and truthful testimony at any stage of the criminal proceedings, in accordance with the applicable law, without reservation or condition, concerning all facts, events and circumstances of the case of which the protected person is aware or any related case;
 - (ii) To answer clearly, precisely, and truthfully all questions put to him or her during the proceedings by judicial authorities or police;
 - (iii) To accept and respect the conditions of the enrollment in the witness protection programme;
 - (iv) To not commit any criminal offences;

(v) To fully understand the nature of the classified information and under any circumstance, not to disclose any information on the protective measures ordered pursuant to this Regulation;

(vi) To avoid any action or inaction that may compromise the integrity and effectiveness of the witness protection programme;

(vii) To abide by instructions of the protection unit and actively participate in the execution of the protective measures;

(viii) To inform, without delay, the protection unit about all changed circumstances which may have an effect on the protection programme;

(ix) To report his or her financial records, legal transactions, assets, liabilities and other obligations before enrollment in the programme;

(x) To remain liable for all financial obligations incurred before and during his or her enrollment in the witness protection programme;

(xi) To submit to medical and psychological examinations; and

(xii) To exert reasonable effort in seeking employment opportunity or any lawful activity for producing income.

(g) The obligations of the protection unit as follows:

(i) To execute the protective measures as set forth in the order issued under this Regulation with only necessary restrictions on the rights and freedom of the protected person;

(ii) To provide the protected person with necessary medical and legal assistance for the duration of his or her enrollment in the witness protection programme; and

(iii) To undertake all necessary and proper measures to ensure the safety and security of the protected person as required by law.

(h) The grounds upon which enrollment in the witness protection programme may be suspended or terminated;

(i) The date, place and signature of the parties; and

(j) In the case the protected person is a minor, a parent or legal custodian appointed by the court shall sign the agreement, taking into account the best interest of the minor and the legal capacity as provided by law.

Section 8
Termination of Enrollment in the Witness Protection Programme

(1) Enrollment in the witness protection programme may be terminated under the following circumstances:

(a) Expiration of the Agreement governing enrollment in the witness protection programme;

(b) Death of the protected person;

(c) Upon the written request from the protected person to withdraw from enrollment in the witness protection programme;

(d) If the protected person knowingly makes a false declaration in either the proceedings or the Agreement or has knowingly withheld relevant information material to the case;

(e) If the protected person does not fulfill any one of the obligations under the agreement without good reason;

(f) Upon a request of the Chief Prosecutor, the protection unit, or foreign state, the judge or panel of judges, upon decision of the Commission, may terminate the enrollment in the witness protection programme for the protected person where:

1) The reason justifying protection no longer exists;

2) During the course of the witness protection programme, criminal proceedings are initiated against such person due to commission of a criminal offense punishable by more than one year imprisonment; or

3) The protected person fails to comply with the rules and guidelines issued by the protection unit, or otherwise does not fulfill an obligation in the Agreement.

Section 9
Confidentiality

(1) A person who becomes aware of information related to the provision of protective measures to a protected person as part of his or her official position or job shall maintain the confidentiality of this information, which shall be considered an official secret.

(2) Any individual described in paragraph (1) of this section who divulges an official secret under this Regulation related to the provision of protective measures to a protected person either intentionally or through negligence shall be punished in accordance with criminal applicable law.

Section 10
International Cooperation

(1) The protective measure of relocating protected persons may be provided on the basis of an international agreement or reciprocity signed by the competent bodies and foreign state. The competent authority may file a confidential petition for relocation of the protected person through diplomatic channels to a foreign state.

(2) The petition shall not contain any information that may reveal the identity or location of the protected person.

Section 11
Transitional Provisions

(1) Within sixty (60) days of the entry into force of this Regulation, the Ministry of Justice shall formally establish the protection unit in accordance with applicable law.

Section 12
Implementation

(1) The Special Representative of the Secretary-General may issue Administrative Directions for the implementation of the present Regulation.

Section 13
Entry into Force

(1) The present Regulation shall enter into force on the date of its approval and promulgation by the Special Representative of the Secretary-General.

APPENDIX

3

Appendix 3 **Assessment Team Experts**

Joseph Paonessa, Chief Inspector, Headquarters Branch Chief, Witness Security Program, Investigative Services Division, United States Marshals Service. Mr. Paonessa has served in the U.S. Marshals Service (USMS) since 1983. Throughout this time, he has managed a wide range of witness security and protection services. Most recently, he headed the WITSEC Headquarters where he was responsible for oversight of witness protection operations throughout the United States. He retired from the USMS at the end of 2006, but continues to work in this field on a consulting basis. Since 1998, Mr. Paonessa has traveled throughout Europe and Latin America, speaking at conferences and participating in other programs to further the development, implementation, and administration of effective witness protection programs. In April 2006 Mr. Paonessa received the USMS Director's Distinguished Service Award, the highest award presented by the USMS, for his contributions to the international community of witness protection initiatives.

Eric Seidel, Deputy Chief, Rackets Bureau, New York County District Attorney's Office, New York, New York. Mr. Seidel has been a prosecutor for over 27 years, in local, state and federal offices. He served as an Assistant United States Attorney in the Southern District of New York, the Deputy Attorney General in-charge of the New York State Organized Crime Task Force and an Assistant District Attorney in the Brooklyn District Attorney's Office where he was chief of the Organized Crime Bureau, handling a wide range of investigations and prosecutions involving organized crime, murder, terrorism, white collar frauds, street crimes, and public corruption by elected and appointed government officials. In that capacity, he has sponsored numerous witnesses into WITSEC and has investigated and tried many cases using witnesses in WITSEC. He has also participated in many international conferences as an expert on witness protection in Lithuania, the Czech Republic, Serbia, Croatia and Poland. Mr. Seidel also teaches a course on Organized Crime, as an adjunct professor at Fordham University School of Law in New York City.

Fabio Licata, Magistrate Judge, Tribunal of Palermo, Italy. Judge Licata has presided over several important trials involving mafia crimes, including blackmail, criminal association, corruption on public contracts and has dealt extensively with cases in which witness safety was an issue. As judge of the section of "preventive measures" ("misura di prevenzione"), he has dealt with many proceedings on seizure and confiscation of huge estates of members of Cosa Nostra and their figureheads. As judge of preliminary hearings and preliminary investigations, he has handled many proceedings on organized crime (mafia, drug, corruption etc.), issued many warrants of arrest and numerous sentences against member of organized crime (especially charged of associazione mafiosa, murder, money laundering, drug trafficking, blackmail, corruption etc.) as well as in cases of violence and abuse against woman and children.

APPENDIX

4

Appendix 4 **Interviews and Site Visits**

Judges

Rexhep Haxhimusa, President, Kosovo Supreme Court
Carol Peralta, Chief International Judge
Esat Shala, President, District Court of Pejë/Peć

Prosecutors

Ismet Kabashi, Deputy Chief Public Prosecutor of Kosovo
Besim Kelmendi, Prosecutor, Office of the Public Prosecutor of Kosovo
Flamur Kelmendi, Chief District Prosecutor, Pejë/Peć
Osman Kryeziu, Chief District Prosecutor, Pristine/Priština

Police

Kosovo Police Service

Sheremet Ahmeti, Deputy Police Commissioner, KPS
Nazmija Bashovic, Director, KPS Criminal Intelligence Unit
Fatos Haziri, Director, KPS Organized Crime Directorate
Rrahman Sylejmani, Assistant to Deputy Police Commissioner

UNMIK Police

Scott Anderson, Deputy Police Commissioner
Steven Curtis, former Police Commissioner
Lars Finstad, Director of Specialized Units
Reshat Maliqi, Assistant Deputy Police Commissioner Operations
David Morris, CIVPOL Criminal Intelligence Unit

Witness Protection Unit

Alice Berzoini, Incoming Head, Witness Protection Unit
Trent Humphrey, Outgoing Head, Witness Protection Unit

UNMIK/ DOJ

Department of Justice/ Legal

Alexander Borg-Olivier, UNMIK Legal Advisor
Annunziata Ciaravolo, former Deputy Director, Chief International Prosecutor
Steven Dietrich, Deputy Head, UNMIK Legal Policy Division

William Irvine, Head, Penal Management Division
Albert Moskowitz, former Director, DOJ
Ralph Stephani, Head, Department of Organized Crime

Other

Assembly Commission on Judicial Legislative and Framework Matters

Blerim Kuçi, Deputy Minister of Internal Affairs

Theo Kuys, Deputy Director of Dubrava Penitentiary

Valon Maxharraj, Lipjan Detention Center

Jonuz Salihaj, Minister of Justice

Site visits

Dubrava Penitentiary

Lipjan Detention Center

APPENDIX

5

POLICE COOPERATION CONVENTION FOR SOUTHEAST EUROPE

Preamble

The Republic of Albania, Bosnia and Herzegovina, the Republic of Macedonia, the Republic of Moldova, Romania and the State Union of Serbia and Montenegro

Hereafter referred to as "Contracting Parties",

Desiring to cooperate in order to pursue common security interests,

Resolved to effectively combat cross-border threats to public order and security and international crime by entering into a security partnership,

Aiming at further intensifying and enhancing the police cooperation,

Determined to further strengthen mutual assistance in police matters,

Have agreed on the following:

Article 1

Scope of the Convention

The Contracting Parties shall strengthen their cooperation with respect to fighting threats to public security and/or order as well as with respect to prevention, detection and police investigation of criminal offences. This is done under national law, unless otherwise indicated in this Convention.

Article 2

Definitions

For the purpose of this Convention

- a) **"Law enforcement authorities"** shall mean the authorities which in accordance with the national law of the Contracting Parties have the necessary competence to apply the provisions of this Convention;
- b) **"Officials"** shall mean any individual designated by the law enforcement authorities;
- c) **"Borders"** shall mean the Contracting Parties' land borders, borders on water courses, maritime borders, their airports and sea ports, defined by national law, internationally recognised;
- d) **"Third State"** shall mean any State other than the Contracting Parties;
- e) **"Residence permit"** shall mean an authorisation of whatever type issued by a Contracting Party which grants right of residence within its territory. This definition

intended to advance and accelerate cooperation between the Contracting Parties, particularly by providing assistance:

- a) in the form of the exchange of information for the purposes of this Convention;
 - b) in executing requests for mutual police assistance in criminal matters;
 - c) with the tasks carried out by the authorities responsible for border surveillance.
- (3) Liaison officers shall have the task of providing advice and assistance. They shall not be empowered to take independent police action. They shall supply information and perform their duties in accordance with the instructions given to them by the seconding Contracting Party and by the Contracting Party to which they are seconded.
- (4) The Contracting Parties may agree within a bilateral or multilateral framework that liaison officers from a Contracting Party seconded to third States shall also represent the interests of one or more other Contracting Parties. Under such agreements, liaison officers seconded to third States shall supply information to other Contracting Parties when requested to do so or on their own initiative and shall, within the limits of their powers, perform duties on behalf of such Parties. The Contracting Parties shall inform one another of their intentions with regard to the secondment of liaison officers to third States.

Article 10

Witness Protection

- (1) The law enforcement authorities of the Contracting Parties designated for the witness protection shall directly cooperate in the area of witness protection programmes.
- (2) The cooperation shall, in particular, include the exchange of information, assistance as regards logistics, and taking over of persons to be protected.
- (3) An Agreement will be signed for each particular case of taking over of persons to be protected, in order for mutual rights and obligations to be regulated.
- (4) The person to be protected must have been placed under the witness protection programme of the requesting Contracting Party. The person to be protected will not be included in the witness protection programme of the requested Contracting Party. When taking supportive measures in connection with the protection of these persons the national legislation of the requested Contracting Party shall apply accordingly.
- (5) In principle the requesting Contracting Party shall bear the costs of living for the persons to be protected. The requested Contracting Party shall bear the expenses for personnel and material resources for the protection of these persons.
- (6) For serious reasons and after having duly notified the requesting Contracting Party, the requested Contracting Party can cease the supportive measures. In this case, the requesting Contracting Party shall retake the person concerned.

APPENDIX

6

Comparative Chart on Witness Protection Programs¹

¹ Prepared by the Office of the Resident Legal Advisor, U.S. Embassy Belgrade

Country	Year Enacted	Eligibility	Who Applies?	Who decides?	Domestic Relocation	International Relocation or Witness Exchange
<u>Albania</u>	2004	Witnesses and family (Art 8) Justice Collaborators and family (Art 9)	Prosecutor (Art 5 §A)	Commission on the Evaluation of Special Measures of Witness Protection and Justice Collaborators (Art 6)	Yes (Art 10)	Both explicitly envisioned as part of international agreements (Art 22)
<u>Australia</u>	1994	Witnesses and family, Justice Collaborators and family (Art 4): See statutory definition of "witness" (Art 3)	State Police Commissioners, CEO of the Australian Crime Commission, other bodies approved by the Minister. See statutory definition of "approved authority" (Art 3)	Commissioner of the Australian Federal Police (Art 8)	Yes (Art 13)	Acceptance of foreign witnesses envisioned (Art 10)
<u>Austria</u>	1997	Individuals who are at risk because they provide useful hints or information and help to solve crimes related to organized crime, crimes against the state, drug related crime and extremely serious capital crimes (Section 41A of the Penal Code)	No mention in statute	Department 5 (BK/5), Sub-Department 5.4 (Bureau of Witness Protection) of the Criminal Intelligence Service (bundeskriminalamt)	No mention in statute	Yes
<u>Bosnia & Herzegovina</u>	2004	Witnesses and family (Art 2)	No mention in statute	The Witness Protection Department within the State Investigation and Protection Agency (SIPA) (Art 3)	No mention in statute	Acceptance of foreign witnesses envisioned (Art 3)
<u>Bahamas</u>	2005	Participants with information regarding offences set out in the Second Schedule (or any matter which the Minister, after consultation with the Attorney General and the Commissioner of Police consider necessitating use of the Program) (Part III, Art12)	Attorney General (after consultation with the Director of Public Prosecutions and the Commissioner of Police) (Part III, Art 8 §1)	Administrative Centre (Part III, Art 8, §1)	No mention in statute	Agreements or memoranda of understanding envisioned (Part III, Art 9 §2)
<u>Bulgaria</u>	2005	Participants (e.g. witnesses, suspects, defendants), sentenced persons, and persons descending or ascending from the aforementioned or those in particularly close relation to them. (Art 3)	Endangered persons, investigative bodies, supervising prosecutors, or directors of detention facilities <u>Apply to the</u> District Prosecutor and trial phase Judge Rapporteur who review the application before deciding whether to submit it to CPEP (Art 15, par 1/2)	Council for Protection of Endangered Persons (Art 13)	Yes (Art 6)	Acceptance of foreign witnesses / requests to foreign governments envisioned (Art 27)

	1996	Witnesses and those who because of their relationship with the witness may also require protection (Sec 2)	Law Enforcement Agency or International Criminal Court / Tribunals (Sec 6)	Commissioner of the Force (Sec 5)	No mention in statute	Reciprocal agreement envisioned (Sec 14, par 2)
<u>Canada</u>	1996	Witnesses and "close persons" (Art 36)	State Attorney General (Art 9)	The Board (as prescribed by the Witness Protection Act) (Art 8)	Yes (Art 15)	Receipt of / requests to send witnesses envisioned (Art 42)
<u>Croatia</u>	2004	Witnesses, experts, interpreters, attorneys, or those in a close relationship to them (Sec 2)	Police, Judges, State Prosecutor's (Sec 4)	Minister of the Interior (Sec 4)	Yes (Sec 3)	Cooperation by agreement envisioned (Sec 21)
<u>Czech Republic</u>	2001	Witnesses, family or persons close thereto (Sec 1)	No mention in statute	Witness Protection Units (Sec 2)	No mention in statute	No mention in statute
<u>Germany</u>	2001	Witnesses, justice collaborators, family or close persons (Chapter II, Art 9 [2])	Public Prosecutor, or in some cases the Deputy Anti-Mafia District Public Prosecutor or Head of Police - Director General of the Public Security Department (Chapter II, Art 11 [1])	Central Commission (Chapter II, Art 11 [1])	Yes (Chapter II, Art 13 [4])	No mention in statute
<u>Italy</u>	1991	(1) Witnesses, victims (2) persons the danger to whom may influence the person testifying (3) non-testifying persons who participate in investigation / adjudication of serious crime (Sec 4)	Public Prosecutor, or in some cases the Deputy Anti-Mafia District Public Prosecutor or Head of Police - Director General of the Public Security Department (Chapter II, Art 11 [1])	Central Commission (Chapter II, Art 11 [1])	Yes (Chapter II, Art 13 [4])	No mention in statute
<u>Latvia</u>	2005	(1) Witnesses, victims (2) persons the danger to whom may influence the person testifying (3) non-testifying persons who participate in investigation / adjudication of serious crime (Sec 4)	Public Prosecutor, or in some cases the Deputy Anti-Mafia District Public Prosecutor or Head of Police - Director General of the Public Security Department (Chapter II, Art 11 [1])	Central Commission (Chapter II, Art 11 [1])	Yes (Chapter II, Art 13 [4])	No mention in statute
<u>Latvia</u>	2005	(1) Witnesses, victims (2) persons the danger to whom may influence the person testifying (3) non-testifying persons who participate in investigation / adjudication of serious crime (Sec 4)	Public Prosecutor, or in some cases the Deputy Anti-Mafia District Public Prosecutor or Head of Police - Director General of the Public Security Department (Chapter II, Art 11 [1])	Central Commission (Chapter II, Art 11 [1])	Yes (Chapter II, Art 13 [4])	No mention in statute
<u>Lithuania</u>	1997	(1) Participants of the clandestine activity (2) Participants of the criminal proceeding-witnesses, victims, experts, defenders, suspects, accused, defendants, convicts (3) Officers of law and justice administration-judges, prosecutors, bailiff of court, interrogators, investigators (Art 3)	Individual Seeking Protection (Art 12)	Law Enforcement and Justice Administration: Prosecutor General, Regional Chief Prosecutor or Area Chief Prosecutor Witnesses, Victims, Experts, Suspects, Accused, Convicts: Above mentioned officials plus: Head of the Police Department of the Ministry of Interior and Head of a City Police Commissariat (Art 12)	Yes (Art 5)	No mention in statute

<u>Macedonia</u>	2005	Witnesses (including victims), justice collaborators, and persons close to them (Art 1)	Ministry of Interior, competent public prosecutor or judge applies to the Public Prosecutor who submits a proposal (Art 15)	Council for Witness Protection (Art 10)	Yes (Art 26) (Art 30)	Cooperation by agreement envisioned (Art 30) (Art 40)
<u>Montenegro</u>	2005	Witnesses (any person with information vital to proving the criminal offence, regardless of status in criminal procedure) and persons close to them (Art 1) (Art 4)	Witness, state prosecutor, judge handling the case, Director of the Institute for the Enforcement of Criminal Sanctions or the Head of the Crime Police Administration Apply to the Chief State Prosecutor who submits a proposal (Art 14)	Commission for the Application of the Witness Protection Programme (Art 6)	Yes (Art 26) (Art 29)	International relocation and cooperation envisioned (Art 29) (Art 44)
<u>Poland</u>	1997	Witness or the person closest to him (Art 14)	Individual seeking protection (Art 17)	Public Prosecutor (Art 17)	Yes (Art 14)	Cooperation by international agreement is envisioned (Art 15)
<u>Romania</u>	2002	Witnesses, family, persons close to them (Art 9)	Criminal investigative body and prosecutor (Art 5)	Prosecutor or Court (Art 7)	Yes (Art 12)	International cooperation is authorized (Art 24)
<u>Russia</u>	2005	Victims, witnesses, private prosecutors, suspects, experts, civil claimants and defendants, legal representatives, eye witnesses, close relatives and associates thereof (Art 2)	Individual Seeking Protection (Art 16)	Judge, Prosecutor, head of an Inquiry agency or investigator dealing with the crime at issue (Art 3)	Yes (Art 6)	Not Explicit (Art 5)
<u>Serbia</u>	2006	Participants of the criminal proceedings and close persons (Art 5)	Public prosecutor, investigative judge or president of the panel of judges (Art 25)	Commission for the Implementation of the Protection Program (Art 7)	Yes (Art 14)	International cooperation envisioned (Art 39)
<u>Slovak Republic</u>	1998	Endangered witnesses, protected witnesses and their close persons (Sec 1)	Criminal investigator or prosecutor during criminal proceedings and judge during judicial proceedings (Sec 3)	The Commission (Sec 4)	Yes (Sec 7, Par 8)	International cooperation envisioned (Sec 11)
<u>United States</u>	2000	Witnesses, potential witnesses, family or close persons (Title 18, Pt II, Ch 224, Sec 3521, par [a]1)	Assistant United States Attorneys (Federal Prosecutors)	The Attorney General - who may also delegate this responsibility (... Sec 3521, par [a]1)	Yes (... Sec 3521, par [a]1)	Not explicitly mentioned in the statute

APPENDIX

7

**Draft Additions to Relevant Provisions of the Kosovo Criminal
Procedure Code and Criminal Code Permitting
Negotiated Plea Agreements¹**

I. Draft Article on Negotiated Guilty Plea Agreements in Criminal Procedure Code. (This should be added to the Code as a sub-chapter and should be inserted between sub-chapters “Filing of the Indictment” and “Confirmation of the Indictment” as this would be the most appropriate time in the proceedings for negotiating a guilty plea.)

Guilty Plea Agreements

Article ____

(1) At any time following the filing of the indictment and before the completion of the main trial, the public prosecutor and the defence counsel may negotiate the terms of a written plea agreement under which the defendant agrees to plead guilty in return for:

- a) the public prosecutor’s agreement to withdraw some of the charges in the indictment;
- b) the public prosecutor’s agreement to recommend a more lenient punishment to the court, including one below the minimum provided for by law; or
- c) other consideration in the interests of justice, such as the wavier of the punishment as foreseen by article 303 of the present Code.

(2) In cases when the defendant wishes to enter into a guilty plea agreement, the defendant’s counsel, or the defendant if not represented by counsel, shall request the prosecutor for a preliminary meeting to commence negotiations for a plea agreement. At all such negotiations, a defendant must be represented by counsel, in accordance with Article 73.1.5 unless authorized by the court to proceed without representation.

(3) Upon receiving a request for a preliminary meeting, the prosecutor shall inform the chief of his or her respective office, who shall give written authorization for such meeting(s) for plea agreement discussions, at which the defendant’s statements will be given limited immunity as provided in paragraph 5 below. All plea agreements must be in writing and cleared by the Chief of the respective public prosecutor’s office before being formally offered to the defendant.

(4) The written plea agreement may include a provision that the public prosecutor will make an application under Article 299 for an order declaring the defendant be a “co-operative witness” as defined in Article 298 of the present Code. If such defendant provides assistance, as a co-operative witness, to the public prosecutor or agrees to become an informant for the police, the public

¹ This provision was drafted by the Honorable John R. Tunheim, and incorporates the comments of USDOJ/OPDAT and a panel of senior level Kosovar judges, prosecutors and defence attorneys who participated in a roundtable discussion of an earlier draft on March 22, 2007.

prosecutor shall recommend to the court more lenient punishment that reflects the extent of the assistance and cooperation provided by the defendant, while taking into account the severity of the criminal charges.

(5) The defendant and the defence counsel shall be present during the plea negotiations and must agree to the terms of any written plea agreement before it may be presented to the court. The public prosecutor shall inform the injured party of the negotiated plea agreement, once the agreement reaches its final form. When the injured party has a claim for damages arising from the criminal conduct that is charged in the indictment, the plea agreement must address the injured party's claim, and the public prosecutor must inform the injured party that the defendant is seeking to negotiate a plea agreement. The injured party must be given an opportunity to present a statement to the court regarding such property claim prior to the court's acceptance of the plea agreement.

(6) The court shall not participate in the plea negotiations, but may set a reasonable deadline not longer than three (3) months for the conclusion of the negotiations to prevent delay.

(7) At any time prior to acceptance of the plea agreement by the court, either the public prosecutor or the defendant may reject a plea agreement and the court shall schedule the main trial as provided for under Article ___ of the present Code. If the public prosecutor and the defence counsel or defendant fail to reach a guilty plea agreement, or if the plea agreement is not accepted by the court, the statements of the defendant made during the plea negotiations (as provided in paragraph 2 and 3 above) shall be inadmissible as evidence in the main trial or other related proceeding, except for impeachment purposes to counter the defendant's statement.

(8) A written plea agreement must state every term of the agreement, must be signed by the chief public prosecutor of the respective office, the defence counsel and the defendant, and shall be binding on each party. At a minimum, the plea agreement must specify:

- (a) the charges to which the defendant will plead guilty;
- (b) whether the defendant agrees to cooperate;
- (c) the rights that are waived;

(d) defendant's liability for restitution to an injured party and confiscation of all material benefit pursuant to Articles 489-99 of the present Code.

(8.1) The plea agreement may also include a provision in which the parties agree on a range of punishment to be proposed by the prosecutor if the defendant cooperates substantially, and that if the court imposes a sentence outside of this range to the detriment of one party, that party shall be entitled to appeal the sentence.)

(9) The written plea agreement must be presented to the court in a hearing open to the public, except as provided in paragraph 11.

(10) The court may officially accept or reject the plea agreement in accordance with the factors to be considered in paragraph 12. The guilty plea agreement shall enter into effect only after it is officially accepted by the court on the record.

(11) Upon the request of either party the court may order the hearing to consider the guilty plea agreement to be closed to the public and may order the written plea agreement to be sealed if the defendant agrees to be a co-operative witness.

The injured party may not attend a hearing closed by the court under this paragraph.

(12) In considering whether to accept the guilty plea agreement, the court must personally question the defendant, his or her defence counsel and the public prosecutor, and shall determine whether:

- a) The defendant understands the nature and the consequences of the guilty plea;
- b) The guilty plea is voluntarily made by the defendant after sufficient consultation with defence counsel, if defendant has a defence counsel, and the defendant has not been forced to plead guilty or coerced in any way;
- c) The guilty plea is supported by the facts of the case that are contained in the indictment, materials presented by the prosecutor to supplement the indictment and accepted by the defendant; and any other evidence, such as the testimony of witnesses, presented by the prosecutor or defendant; and
- d) None of the circumstances under Article 316, paragraphs 1 to 3 of the present Code exists.

(13) In considering the guilty plea agreement, the court must invite the views of the prosecutor, the defence counsel and the injured party. If the defendant's agreement to cooperate and plead guilty is under seal pursuant to paragraph 11, the court shall permit the injured party to make a statement at the end of defendant's cooperation, prior to sentencing.

(14) If the court is not satisfied that all of the conditions set forth in paragraph 12 of the present article are established, the court shall reject the guilty plea and the case shall proceed to trial as provided for by the present Code.

(15) If the court is satisfied that all of the conditions in paragraph 12 of the present article are established, the court shall accept the guilty plea agreement and order that the agreement be filed with the court. The court shall set a date for the parties to make their statements regarding sentencing after which the Court shall impose the punishment. This date, however, may be deferred for the defendant to serve as a co-operative witness.

(16) After the court accepts the guilty plea and the written plea agreement, but before the punishment is imposed, the court may not permit defendant to withdraw the guilty plea or the prosecutor to rescind the plea agreement unless the court finds that any of the conditions in paragraph 12 are no longer satisfied. The party seeking to withdraw from the agreement bears the burden of proof in making such application to the court.

17. To the extent that the provisions of this article conflict with other provisions of the current Code or the Provisional Criminal Code, these provisions take precedence.

Other related amendments:

Article 62.7 (new provision)

The rights of an injured party to seek the return of property or compensation from a defendant who has entered a guilty plea agreement with the public prosecutor shall not be prejudiced in any way as the result of a defendant's agreement to enter a plea agreement.

Article 73.1.5 (new provision)

For all cases in which a defendant seeks to enter an agreement to plead guilty to a crime that carries a punishment of one year or more of imprisonment, the defendant must be represented by counsel unless authorized by the court to proceed without such representation.

Article 301.3 (new provision)

Upon application by the public prosecutor, the court may revoke an order authorizing a defendant to act as a cooperative witness under Articles 298-300, pursuant to a plea agreement, if the defendant has materially breached the agreement.

Article 379.1

In cases where the defendant who is a cooperative witness pleads guilty pursuant to a plea agreement, the prosecutor may recommend to the court a range of punishment, a judicial admonition or one of the alternative punishments under Article 41 of the Provisional Criminal Code.

II. Draft Addition to Article 66 in Criminal Code on Mitigating Punishment

(3) When the perpetrator has entered a plea of guilty in accord with the terms of a guilty plea agreement accepted by the Court under Article ___, and the written plea agreement includes a clause mandating mitigation of punishment, the court shall impose a sentence that mitigates punishment. In such case, the court must consider the views of the prosecutor, the defence counsel, the defendant and the injured party as to the extent of leniency of the punishment, and shall be guided by but not bound by the limits imposed in Article 67.