



Dealing with the Past Principles

Principle: The identity of witnesses must be protected

Case studies



Principles for dealing with the past

Dealing with the past principles is a civic initiative promoted by an informal coalition of 5 organizations and an expert: Humanitarian Law Center Kosovo, Kosovo Center for Rehabilitation of Torture Survivors, Integra, Youth Initiative for Human Rights, BIRN and Nora Ahmetaj. The group has taken a joint initiative to design and adopt a set of principles that will inform and guide political and public actors on how to deal with victims, survivors, the painful past, and historical narratives. The initiative aims to prevent harmful discourse and actions related to the legacy of the conflict and will serve as a reference document, where anyone who violates its principles should be held morally responsible. The aim is therefore to apply these principles and respect the values and feelings they embody, in order to ensure that victims and survivors are not harmed and that actions related to dealing with the past will contribute to the reconciliation process¹. Now that the principles have been developed and organized, as well as well explained, it is crucial that they be presented to the general public and promoted correctly. We believe that one way to get people to understand the importance of principles is to tell about the harms, consequences, and pain that can be caused in situations where the principles are violated. Therefore, the coalition will publish several analyses which will be compiled by the Humanitarian Law Center Kosovo (HLCK) and we will try to bring concrete examples from the past where the principles have been used properly, or misused. One of these principles is "The identity of witnesses must be protected".

The identity of witnesses must be protected

Kosovo society must be very careful about the dangers of revealing the identity of witnesses in war crimes cases. Safeguards (affirmative and legal) should aim to limit the witness's exposure to potential threats and should ensure proper (appropriate) action against external threats.

Foreword

Witnesses are secondary subjects of criminal proceedings who have seen or have certain knowledge about an event and who can be considered as credible persons in front of the court, and who are of great importance in terms of the progress and issuance of the final verdict in relation to a criminal proceeding. According to the Criminal Procedure Code of the Republic of Kosovo (CPCRK) it is considered that "as a witness is invited a person who is believed to be able to provide information about the criminal offense, the perpetrator and the circumstances relevant to the criminal proceedings"².

Like any other subject in criminal proceedings, witnesses have their rights and obligations, in accordance with the criminal legislation in force of the Republic of Kosovo. The witness is invited by the court, as it is believed that he will be able to contribute to the criminal proceedings by providing important information about the criminal offense committed, the perpetrator, and other circumstances of the criminal offense. Therefore, referring to the CPCRK, "every person invited as a witness is obliged to respond to the invitation, and when otherwise provided by this Code, he is also obliged to testify"³, unless he is released from the obligation to testify⁴."

But in addition to the obligations that a person has at the moment when he is appointed as a witness in a criminal proceeding, believing that he has knowledge about an event, he also enjoys his rights which are also defined by law. He has the right to be protected from the dangers that may threaten him, both during the judicial proceedings of the criminal procedure and from the threats that may come from outside it. A witness should feel free to give his testimony, as otherwise if he is influenced by another person, then his testimony may change and thus be useless to the proceedings. Therefore, especially

¹ Principles ENG (vahr-ks.org)

² Code of Criminal Procedure, Article 124, Paragraph 1, page 55, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>

³ Code of Criminal Procedure, Article 124, Paragraph 36, page 55, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>

⁴ Eligible Witnesses and Witnesses Released from Obligation to Testify, See "Code of Criminal Procedure, Articles 126-127, Page 57, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>



in sensitive cases, where witnesses can request that their identity is not known and on the other hand their statements be made in hearings without the presence of the public, respectively in closed hearings, the court itself in accordance with laws and legal provisions in force, will have to provide them with security and protection.

Therefore, in a democratic society, in addition to guaranteeing fair and impartial trials, it is more than necessary for the court to take care of the safety of the subjects in the procedure. All witnesses who appear in war crimes cases should be provided with adequate protection from possible threats against them as a result of the evidence they give before the court. Therefore, when a witness seeks protection or anonymity, the court will have to protect them through the respective legal measures for these cases.

During the criminal proceedings, the witness may testify publicly in front of everyone, or depending on the sensitivity of the case and the potential danger that the witness may have, he may be heard in a closed session. For this, the witness at any stage of the proceedings may file a request for protection or an order for anonymity⁵.

But even outside the court procedure, in cases when the court deems it reasonable or even in cases when the safety of the witness is violated, then measures may be presented which are defined by the legislation in force, where witnesses can be provided with the necessary protection so that they can testify freely and not feel endangered in their private lives. This at the same time contributes to a much more efficient and impartial judicial process.

In Kosovo, there is a legal basis which foresees for the use of protective measures, if there is a serious risk to a person, or his relatives, which is regulated by the law on witness protection⁶.

Therefore, in order to justify the importance of applying the principle we are elaborating on, we have further here analyzed how the above-mentioned principle has been violated, where the identity of legally protected witnesses in criminal proceedings has been exposed in a completely unjust way, endangering their lives and integrity.

Exposure of the identity of the protected witness

The annual report on war crimes trials compiled by the Humanitarian Law Center Kosovo (HLCK) in 2013, is entitled "Witnesses still the Achilles heel in high-profile trials⁷." The name of this report has come as a result of the difficulties which have appeared to the invited witnesses to give their testimonies in the trials which were held during that year, where it is also explained that they did not testify freely, due to the fear they have experienced or because of the pressure which has been exerted on them. This report describes how the witnesses withdrew their preliminary evidence with which they supported the indictment or refused to be prosecution witnesses due to the influence exerted on them⁸.

Also, the report on the progress of the European Commission for 2016 stated that "the witness protection system, despite the fact that it has adequate capacities, currently has no witnesses under protection due to lack of trust in this system⁹."

Influence and pressure on witnesses also occurred in the two main cases which were held during 2013. They were the indictments filed by the prosecution against S.G. and others and the other indictment in the "Drenica" case, where both cases had in common the charges with which the defendants were charged with committing war crimes against the civilian population. At the same time on the basis of these charges brought against them, S.G. and two other co-accused were convicted of those offenses, based on all the evidence and evidence gathered during the proceedings, while in the "Drenica" case some of the defendants were convicted of the charges against them.

⁵ Code of Criminal Procedure, Article 221, Paragraph 1, Page 100, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2861>

⁶ Law on Witness Protection, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2758>

⁷ Humanitarian Law Center Kosovo, 2013 Report, Page 8, <https://www.hlc-kosovo.org/storage/app/media/2013.pdf>

⁸ Ibid, Page 8, <https://www.hlc-kosovo.org/storage/app/media/2013.pdf>

⁹ Humanitarian Law Center Kosovo, 2016 Report, Page 10, <https://www.hlc-kosovo.org/storage/app/media/2016.pdf>



These trials have been characterized by a large number of witnesses who have been invited by the court to testify before the court. But not all has gone as it should legally.

As in the case against S.G. and others as well as in the case "Drenica" one of the names of the main witnesses of these cases has been exposed.

In the trial which was held against S.G. and others to prove the guilt of the defendants, the prosecution had proposed 6 witnesses, of which 4 had testified via video link, 3 of whom based on their requests were held in conditions of full closure of the main hearing for the public and only the parties to the proceedings were present at the hearing¹⁰. In conclusion, in the appellate procedure, the court had issued a judgment regarding the guilt of the defendants, where each of them had individually been sentenced to imprisonment for a period of 8 years¹¹.

During this period, when the main trial was held against S.G and others, the identity of one of the witnesses proposed by the prosecution was exposed, who at the same time appeared as one of the main witnesses of the event. This witness, upon a request to the court, had exercised his right to defend his identity in the proceedings.

Despite the fact that this request was approved by the court in order for his identity to remain anonymous, the complete opposite had happened. This is because his identity was publicly exposed, with his name, surname, and photos. This was done in the town of Skenderaj, where several posters were placed. These posters also included a text stating that "only people sold like J.B. tarnish the holy war of the KLA¹²."

Such action is sanctioned according to the Criminal Code of the Republic of Kosovo. Considering that the witnesses' identity was protected, the publication of these posters violated his safety. Moreover, he was targeted as a traitor and sold.

On the other hand, according to the data that have been published in the media, it is assumed that the same witness has testified in another case in which an indictment was filed with allegations of committing crimes during the war. Respectively, the defendants were charged with committing crimes against the civilian population. This case is also known to the public as the "Drenica" case, in which also the then-mayor of Skenderaj, S.L. is accused.

On the occasion of the issuance of the first instance judgment, dated 27 May 2015, S.L. was found guilty of the crimes he was charged with, for which the court sentenced him to 12 years in prison. Following the issuance of this judgment, the lynching of an anonymous witness had begun, where the name and surname of the same had been publicly mentioned by a relative of defendant S.L. In her statement after the sentencing of S.L., she considered the witness as an enemy and missionary of Serbia¹³.

Although, in conclusion, the Supreme Court acquitted the defendant of the charges against him for committing war crimes against the civilian population¹⁴, influence on witnesses was present during the criminal proceedings.

Such actions are in complete contradiction with the Criminal Code of the Republic of Kosovo, in which such a thing is incriminated within the criminal offense of "Revenge". Article 388 of this Code states that "Whoever undertakes any act harmful to any person for the purpose of retaliation for reporting or disclosing information on actions and omissions that pose a threat or violation of the public interest, is punishable by a fine or imprisonment up to two years¹⁵."

Disclosure of the identity of witnesses in these cases mentioned above and specifically the persons who committed such an

¹⁰ Ibid, Page 54, <https://www.hlc-kosovo.org/storage/app/media/2013.pdf>

¹¹ Humanitarian Law Center Kosovo, Judgment of the Court of Appeals, October 29, 2014, <https://www.hlc-kosovo.org/storage/app/media/Sabit%20Geci%20at%20al/Sabit%20Geci%20at%20al-%20Aktgjykim-29102014.pdf>

¹² Kallxo.com, 08.06.2013, <https://kallxo.com/gjate/kundershtohet-zbulimi-i-identitetit-te-deshmitarit-te-mbrojtur/>

¹³ Telegrafi, 28.05.2015, <https://telegrafi.com/flet-gruaja-e-sami-lushtakut/>

¹⁴ Humanitarian Law Center Kosovo, An overview of war crime trials in Kosovo in the period 1999-2018, Page 109, <https://www.hlc-kosovo.org/storage/app/media/HLC-Kosovo-An-overview-of-war-crime-trials-in-Kosovo-1999-2018.pdf>

¹⁵ Criminal Code of the Republic of Kosovo, Article 388, Paragraph 2, Page 151, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2834>



act, remained un-investigated/un-convicted, which allows for recurrence due to impunity by the competent authorities. These cases should give an alarm to the investigation, in order to start the proceedings at the first moment they see endangerment of witnesses as well as obstruction of court processes.

In addition to incriminating of the offense mentioned above, disclosure of the identity of a witness, which in criminal proceedings means disclosure of the identity and personal data of a person protected in criminal proceedings, is considered a criminal offense which is punishable by up to 3 years' imprisonment. According to the Criminal Code of the Republic of Kosovo, such an action is considered a violation of the secrecy of the procedure, and Article 392, paragraph 2 of the same code states that "Anyone who without authorization discloses identity or personal data of the person defended in criminal proceedings or in the special defense program, is punishable by imprisonment of up to three years¹⁶."

This act also affects the intimidation of other potential witnesses who have knowledge of certain events and who will be reluctant to appear to testify in court. Seeing the actions/threats that have been taken against a witness who should have been protected, may affect the complete withdrawal of a testimony or a change of the same. This has a direct impact on the administration of justice, which prevents justice from being achieved.

Regarding the revelation of the identity of the protected witness, at the time of the incident, the Humanitarian Law Center Kosovo (HLCK) reacted with a press release. According to this press release, HLCK has expressed its concern regarding the publication of posters, photography, and the message conveyed by such an action, saying that "This extreme act extremely endangers the life and safety of the person who is supposed to be a protected witness in a war crimes trial, as well as his family¹⁷." The press release also called on the competent authorities to find the persons responsible for placing the posters as soon as possible and to prevent such actions in the future.

Intimidation and coercion of witnesses to change statements

Disclosure of witness identities is not the only defect that has plagued Kosovo war crimes trials. Intimidation and coercion of witnesses whose identities have not been revealed to change their statements have also been identified.

On 17 November 2016 an indictment was filed against defendants E. Th. and others where, among the rest, some of the defendants are also accused of obstructing and influencing prosecution witnesses who testified in the Drenica case, a case which is still pending. Five years since the filing of this indictment, this case has not yet received the epilogue of the first instance, which may lead to the statute of limitations for the criminal offense.

The principle of protecting the identity of witnesses is of particular importance because it relates to the first transitional justice mechanism, which deals with prosecutions and criminal trials. The prosecution also includes issues related to witness protection, which at the same time presents the most serious obstacle to the efficient delivery of justice in war crimes trials. As specified in the "Manual on Transitional Justice¹⁸", the main obstacle in prosecuting perpetrators of criminal offenses is the fact that witness statements are changed due to intimidation or blackmail against them, including here protected witnesses.

Therefore, instructing and reminding all persons about the rights and obligations they have, is one of the main principles of criminal procedure and at the same time contributes to the establishment of justice, with special emphasis on war crimes.

¹⁶ Criminal Code of the Republic of Kosovo, Article 392, Paragraph 2, Page 153, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2834>

¹⁷ Humanitarian Law Center Kosovo, Facebook Post, <https://www.facebook.com/HLCKosovo/posts/345938155534472>

¹⁸ Transitional Justice Handbook - Concepts, Mechanisms and Challenges, Pages 42-43, https://www.hlc-kosovo.org/storage/app/media/Animacionet/hlc_tj_publication_final%2019.1%20MANUAL%20eng.pdf



Case studies

Recommendations

In order to have as few such cases in the future, in the first place we recommend that the "Principles for Dealing with the Past¹⁹", be respected and adapted by all political and public actors, who deal with the treatment of the past.

Court cases related to influencing witnesses (the criminal offense of influencing the administration of justice) should be processed urgently and only in this way can be created an appropriate security or climate for witnesses. Procrastination of court proceedings of this type affects the loss of trust of witnesses in the competent bodies.

In order to reduce the number of persons who violate this principle, the prosecution should launch investigations and file new indictments against persons who disclose the identities of witnesses.

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¹⁹ [Principles ENG \(yihf-ks.org\)](http://yihf-ks.org)

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