

**DECISION OF THE
HIGH REPRESENTATIVE**

n. 102/03

In the exercise of the powers vested in the High Representative by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, according to which the High Representative is the final authority in theatre regarding interpretation of the said Agreement on the Civilian Implementation of the Peace Settlement; and considering in particular Article II.1. (d) of the last said Agreement, according to the terms of which the High Representative shall "Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation";

Recalling paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of any difficulties as aforesaid "by making binding decisions, as he judges necessary" on certain issues including (under sub-paragraph (c) thereof) "measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities";

Recalling further paragraph 12.1 of the Declaration of the Peace Implementation Council which met in Madrid on 15 and 16 December 1998, which made clear that the said Council considered that the establishment of the rule of law, in which all citizens had confidence, was a prerequisite for a lasting peace, and for a self-sustaining economy capable of attracting and retaining international and domestic investors;

Considering the need to provide for efficient conduct of investigation, prosecution and trial of crimes which lie within the competence of the State of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina introducing the principles by which that purpose can be accomplished in the best possible manner;

Recalling that pursuant to the aforesaid, a working group comprised of the most distinguished legal experts from the field of criminal procedure law from both Entities of Bosnia and Herzegovina and from the Brčko District of Bosnia and Herzegovina, prepared a draft text of the Criminal Procedure Code of Bosnia and Herzegovina, which was submitted to the Council of Ministers of Bosnia and Herzegovina in September 2002;

Recalling further that the Council of Ministers of Bosnia and Herzegovina adopted the said Code at its 95th session held on December 19, 2002 and forwarded it to the BiH Parliamentary Assembly in order to be discussed in an expedited procedure, and whose House of Representatives at its 7th session held on January 13, 2003 did not adopt the proposal of the Council of Ministers to treat the Code in accordance with Article 104 of the Rules of Procedure of the House of Representatives but decided to treat it under regular procedure;

Regretting that notwithstanding the matters aforesaid, the said Code has not been adopted yet;

Stressing the need for the existence of criminal procedure at the state level of Bosnia and Herzegovina which shall be in conformity with modern internationally recognized standards in the field of criminal procedure and which shall comply with guarantees enshrined under the European Convention on Human Rights which itself forms part of the Constitution of Bosnia and Herzegovina and enjoys priority over all other law in Bosnia and Herzegovina;

Mindful both of the urgency and of the need to adopt the Criminal Procedure Code of Bosnia and Herzegovina for all the reasons as aforesaid and in order to protect the interests of the citizens of Bosnia and Herzegovina;

Mindful further that the draft Criminal Procedure Code was designed with a separate law on witness protection in mind;

Affirming that a legal framework allowing for witness protection measures in a clearly regulated manner is necessary to guarantee both the rights of individuals to a fair trial under the European Convention on Human Rights, the appropriate outcome of trials where unlawful coercion is exerted against witnesses, the safety of witnesses under threat and the well-being of witnesses who, as a result of the crime or otherwise, are under harmful psychological pressure;

Having considered and borne in mind all these matters, the High Representative hereby issues the following

DECISION

Enacting the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, which is hereby attached as an integral part of this Decision. The said Law shall enter into force as a law of Bosnia and Herzegovina, with effect from the date provided for in Article 27 thereof, on an interim basis until such time as the Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, without amendments and with no conditions attached.

This Decision shall enter into force forthwith and shall be published without delay in the Official Gazette of Bosnia and Herzegovina.

Sarajevo, 24 January 2003.

Paddy Ashdown
High Representative

LAW ON PROTECTION OF WITNESSES UNDER THREAT AND VULNERABLE WITNESSES

CHAPTER I

GENERAL PROVISIONS

Article 1 Purpose

This Law regulates the measures to provide for the protection of witnesses under threat and vulnerable witnesses in criminal proceedings conducted by the Court of Bosnia and Herzegovina (hereinafter: the Court) or the Chief Prosecutor of Bosnia and Herzegovina (hereinafter: the Prosecutor) in criminal offences over which the Court has jurisdiction.

Article 2 Definitions

Terms used in this Law shall have the meaning that follows from the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: CPC BiH), the Criminal Code of Bosnia and Herzegovina and the Law on the Court of Bosnia and Herzegovina, unless otherwise stipulated by this Law.

Article 3
Witnesses under threat and vulnerable witnesses

- (1) A witness under threat is a witness whose personal security or the security of his family is endangered through his participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his testimony.
- (2) Family in paragraph 1 of this Article means persons allowed to refuse to testify under the CPC BiH.
- (3) A vulnerable witness is a witness who has been severely physically or mentally traumatized by the events of the offence or otherwise suffers from a serious mental condition rendering him unusually sensitive, and a child and a juvenile.
- (4) A protected witness is a witness heard according to the provisions of Articles 14 through 23 of this Law.

Article 4
Application of witness protection measures

The Court may order such witness protection measures provided for by this Law as it considers necessary, including the application of more than one measure at the same time. When deciding which of the witness protection measures is to be applied the Court shall not order the application of a more severe measure if the same effect can be achieved by application of a less severe measure.

Article 5
Informing witnesses

- (1) The Court, the Prosecutor and other bodies participating in the proceedings shall, *ex officio*, advise a witness who may be under threat or a vulnerable witness of the witness protection measures available under this Law.
- (2) A witness under threat and a vulnerable witness shall be entitled to legal aid in accordance with the law.

CHAPTER II
WITNESS PROTECTION MEASURES

Article 6
Access to psychological and social assistance and professional help

During the investigation, the Prosecutor, and after the indictment has been issued, the Court, shall ensure that the body responsible for issues of social care is aware of the involvement of the vulnerable witness in the proceedings and shall enable the assistance of this body as well as psychological support to the witness, including the presence of appropriate professionals at examination or hearings.

Article 7
Order of presentation of evidence at the main trial

In the course of the main trial, the Court may hear witnesses under threat and vulnerable witnesses at the earliest possible time and shall have the possibility of hearing those witnesses at the main trial in a different order from the one stipulated by the CPC BiH.

Article 8
Examination

- (1) The judge or the presiding judge shall exercise an appropriate control over the manner of the examination of witnesses when a vulnerable witness is examined, particularly to protect the witness from

harassment and confusion.

- (2) In exceptional circumstances, the Court may, with the consent of the parties and the defense attorney, hear a vulnerable witness by posing questions directly to the witness on behalf of the parties and the defense attorney.

Article 9

Testimony by using technical means for transferring image and sound

When determining whether there are justified reasons for examining a witness using technical means for transferring image and sound in such manner as to permit the parties and the defense attorney to ask questions although not in the same room as the witness, the need to provide for the protection of witnesses under threat and vulnerable witnesses shall also be taken into account.

Article 10

Removal of the accused

- (1) Where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly, the Court may, either ex officio or upon the motion of the parties or the defense attorney, and after hearing the other party and the defense attorney, order that the accused be removed from the courtroom.
- (2) The accused shall be enabled to follow the testimony through technical means for transferring image and sound, or the testimony shall be recorded and presented to the accused.
- (3) The defense attorney shall be present at the hearing. After the testimony has been presented to the accused but before the witness is released, the defense attorney and the accused shall have the opportunity to consult.
- (4) A decision pursuant to paragraph 1 of this Article is subject to appeal by the parties and the defense attorney. The Panel of the Appellate Division shall consider the appeal within 72 hours following the day the appeal is received.

Article 11

Exception from the imminent presentation of evidence

When determining whether the records on testimony given during the investigative phase may be read or used as evidence at the main trial, the Court shall also take into account the need to provide for the protection of a witness under threat who would expose himself or his family to great personal danger and the protection of a vulnerable witness who would expose himself to significant emotional distress by appearing at the main trial.

Article 12

Limitation of the right of an accused and his defense attorney to inspect files and documentation

- (1) In exceptional circumstances, if revealing some or all of the personal details of a witness or other details would contribute to identifying a witness, and would seriously endanger the witness under threat, the preliminary proceedings judge may, upon the motion of the Prosecutor, decide that some or all of the personal details of a witness, may continue to be kept confidential after the indictment is issued.
- (2) The prosecutor shall immediately notify the accused and his defense attorney of the submission of the motion referred to in paragraph 1 of this Article.
- (3) If possible, the preliminary proceedings judge shall hear the accused and his defense attorney prior to taking the decision referred to in paragraph 1 of this Article. The decision of the preliminary proceedings judge must be taken within 72 hours following the day the motion is received.

- (4) No appeal shall be permissible against the decision referred to in paragraph 1 of this Article.
- (5) If the preliminary proceedings judge was unable to hear the accused and his defense attorney prior to the decision referred to in paragraph 1 of this Article, the Court shall hear them immediately upon receiving the indictment.
- (6) The Court may revoke the decision referred to in paragraph 1 of this Article, either *ex officio* or upon the motion of the accused or his defense attorney.
- (7) Upon the motion of the Prosecutor, the Court shall revoke the decision referred to in paragraph 1 of this Article.
- (8) The Court shall always bear in mind the need to release, as soon as possible, the information to which the decision referred to in paragraph 1 of this Article pertains. Sufficient details shall be released for the defense to prepare for examination of a witness. The information must be released at the latest when the witness testifies at the main trial.

Article 13

Additional measures to provide for the anonymity of a witness

- (1) In exceptional circumstances, where there is a justified fear that if some or all of the personal details of the witness are released it would seriously endanger the personal security of a witness or his family, and the danger would persist after the testimony is given, the Court may, either *ex officio* or upon the motion of the parties or the defense attorney, decide that the personal details of the witness shall remain confidential for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final.
- (2) The Court may, after hearing the parties and the defense attorney, decide that the anonymity of the witness be preserved by allowing the witness to testify behind a screen or utilizing electronic distortion of the voice of the witness or the image of the witness, or both the image and the voice, by using technical means for transferring image and sound.
- (3) The Court may, at any time, revoke the decision from paragraph 1 of this Article, either *ex officio* or upon the motion of the parties or the defense attorney.

Article 14

Witness protection hearing

In exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony, the Court may conduct a witness protection hearing in accordance with Articles 15 through 23 of this Law.

Article 15

Motion for a witness protection hearing

- (1) A motion for a witness protection hearing may be made by:
 - a) a judge, the Presiding Judge or the judge of the Panel;
 - b) the Prosecutor; or
 - c) the suspect or the accused or his defense attorney.
- (2) The motion must comprise:
 - a) information establishing the identity of the witness and the proceedings in which the witness is to testify;

- b) facts indicating that the personal security of the witness or the family of the witness is at risk through his participation in the proceedings; and
 - c) circumstances about which the witness is to be examined.
- (3) If the motion is made by the Prosecutor or the suspect or the accused or his defense attorney, the motion must be submitted to the Court in a sealed envelope clearly indicating on its outside that it is a motion for witness protection hearing under Articles 14 through 23 of this Law.

Article 16
Determination of the need for hearing

- (1) On receipt of the motion for a witness protection hearing, the Panel of three judges shall, without delay and not later than within 15 days following the day the motion is received, determine whether such a hearing is justified.
- (2) The Court shall base its determination on:
- a) the facts in the motion for hearing of a protected witness; and
 - b) the documentation before it of the criminal case.

Article 17
Appeal against the decision of the Panel

- (1) An appeal against a decision pursuant to Article 16 of this Law shall be allowed.
- (3) The Panel of the Appellate Division shall consider the appeal referred to in paragraph 1 of this Article without delay and shall deliver its decision no more than 15 days from the day the appeal is received.

Article 18
Scheduling of the Hearing

After the decision to hold a witness protection hearing becomes final, the presiding judge of the Panel shall schedule the date, time, and place of the hearing.

Article 19
Hearing

- (1) A witness protection hearing is conducted by the Panel referred to in paragraph 1 of Article 16 of this Law in accordance with the provisions of the Criminal Procedure Code of Bosnia and Herzegovina on the hearing of witnesses, unless otherwise stipulated by this Law.
- (2) The witness shall be informed that
- a) he will be heard as a protected witness;
 - b) his identity shall not be revealed to any person other than the members of the Panel and the minute taker of the Panel;
 - c) he shall not appear in person before the Panel at any hearing other than the witness protection hearing; and
 - d) he is not obliged to answer questions that would indicate his identity or the identity of the members of his family.
- (3) The Panel shall hear a witness in detail on the circumstances suggested by the party making the motion and on all other circumstances the Panel considers necessary.

Article 20
Record

- (1) The record of the witness protection hearing shall not contain information relating to the identity of the protected witness.
- (2) The record shall employ a pseudonym for the witness, as determined by the Panel, which shall be used during the criminal proceedings and in the decisions of the Court.
- (3) The members of the Panel and the minute taker of the Panel shall sign the record of the witness protection hearing.
- (4) The Court shall take measures to ensure the confidentiality of the record by:
 - a) keeping the record separate from all other documentation of the criminal case in a secure place;
 - b) returning the record to the secure place after its use at the appropriate hearing in the criminal procedure and when the decision has become final; and
 - c) providing for long-term archiving of the record in a manner that limits access to the document only to the President of the Criminal Division for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final.

Article 21
Use of a recorded testimony

- (1) At the main trial of the criminal case, the Court shall have the testimony of the protected witness read out loud from the record of the witness protection hearing.
- (2) The judge or the Panel shall not need the agreement of the parties in the case to have the testimony read out loud.
- (3) With the consent of the Prosecutor and the accused and his defense attorney, the judge or the Panel may waive the reading of the testimony out loud.
- (4) The witness may not be called to give testimony other than the testimony at the witness protection hearing.

Article 22
Additional Questions

- (1) The Court may, either ex officio or upon the motion of the Prosecutor or of the accused or his defense attorney, decide that the protected witness be heard on additional questions:
 - a) to clarify previously given testimony; or
 - b) relating to information that was not covered by the previously given testimony and are material to the case.
- (2) The Panel shall conduct an additional witness protection hearing at which the witness is asked the additional questions and the answers are recorded and read out loud in the manner provided for in Article 21 of this Law.

Article 23
Verdict Requires Other Evidence

The Court shall not base a conviction solely on evidence provided according to Articles 11 or 14 through 22 of this Law.

CHAPTER III

OTHER PROVISIONS

Article 24 Confidentiality

- (1) Information that a person who performs official duties in connection with witness protection measures acquires in the course of those duties relating to witness protection measures, constitutes an official secret.
- (2) The Court or the Prosecutor shall warn persons who are present at hearings, or who are otherwise given possession of such secret information in the exercise of their official or professional duties, that the unauthorised disclosure of such information is a criminal offence.
- (3) A person who performs official duties in connection with witness protection measures and who acquires information referred to in paragraph 1 of this Article cannot be required in any proceeding in any court, tribunal, or commission of inquiry, however described, to produce any document or divulge or communicate any matter relating to that information.

Article 25 Rules of Procedure

The Court shall adopt rules of procedure ensuring the appropriate use of the means to protect witnesses stipulated in this Law, and guaranteeing that witnesses are afforded other appropriate protection or care as provided for by the laws of Bosnia and Herzegovina as appropriate.

CHAPTER IV

TRANSITIONAL AND FINAL PROVISIONS

Article 26 Applicability to ongoing criminal proceedings

This Law applies as appropriate also in criminal proceedings that are ongoing at the time this Law comes into force.

Article 27 Entry into force of the Law

This Law shall enter into force on March 1, 2003.