Kosovo Judicial Institute
Instituti Gjyqësor i Kosovës
Kosovski Institut za Pravosudje

OSCE Building ID no 47, 99 Ramiz Sadiku Street
Tel: +(381-38) 248-688/689
Fax: +(381-38) 248-688/204

KJI NEWSLETTER
May 2005

This newsletter is published to fully inform the magistrates in Kosovo on the activities of the KJI. This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles from KJI Staff relating to issues of interest to judges and prosecutors working in Kosovo.

*The Jurisprudence of the ICTY: a Useful Guide for National Courts**

Dr. jur. Jan Christoph Nemitz – Associate Legal Officer, ICTY/ICTR**

Introductory Remarks

Primary focus on three topics:

1) **Law and Jurisprudence on the Admission of Evidence**
2) **Law and Jurisprudence on Protective Measures** for witnesses
3) **Law and Jurisprudence** on sentencing issues

1) The Admission of Evidence

Preliminary remarks
Not many rules: no lay Judges as in common law system, but professional Judges
Generally in favour of admitting evidence as long as the evidence is relevant and is deemed to have probative value, Rule 89(C) RPE.
General standards governing the admission of evidence

- Basic distinction between admissibility of evidence and the weight the evidence is later given under the principle of free evaluation of evidence
- The fact that a Chamber provisionally rules against the admissibility of some evidence does not prevent this ruling from being reversed if probative value is later found
- The mere admission of a piece of evidence does not, in itself, signify that the content of the evidence will be perceived as true
- When objections are raised on grounds of authenticity, the Chamber can still admit the evidence and later decide upon the weight given to the evidence in the light of the trial record as a whole

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- The fact that the author of a document has not been called to testify does not prevent the document from being admitted. Also, an unsigned and unstamped document is not necessarily void of authenticity
- Hearsay evidence is admissible, but the probative value of the evidence is usually less (lack of cross-examination)
- The parties are directed to produce their evidence pursuant to the best evidence rule
- Exclusion of improperly obtained evidence: methods cast substantial doubt on reliability, and admission would seriously damage the integrity of the proceedings (Rule 95 of the RPE); violation of Rule 42 in general not sufficient, but torture
- Chambers can intervene *ex officio* to exclude evidence, for example when striking a balance between the rights of the accused and the rights of victims and witnesses

In principle, the probative value of oral – *viva voce* – evidence, *i.e.* witnesses – will be given a higher probative value: (i) the judges and parties can observe the demeanour of the witness, (ii) the other party can cross-examine the witness, (iii) and the judges can direct questions at him or her. The legal issues surrounding the admission of oral evidence are comparatively few; in contrast, the parties and the Chambers of the ICTY have extensively dealt with legal questions arising from the admission of written evidence, because:
Massive amount of documentation; length of the proceedings; growing number of cases; limited resources; completion strategy: less oral testimony, more written documents
Now there are three main ways to admit documents into evidence without life testimony of witnesses: Rule 92*bis*, Rule 89(F), and Rule 94.

Rule 92*bis*
Vast amount of documents are admitted into evidence under Rule 92*bis*. It was incorporated in the RPE in 2000 in order to save time and resources of the Tribunal without curtailing the rights of the accused. What is essential is that a written statement can be admitted into evidence in lieu of oral testimony, if the written statement does not deal with the acts and conduct of the accused. This is important, because the 92*bis*-statement is given only in front of one party and a member of the Registry – thus, no cross-examination is possible, and this is in particular potentially harmful for the accused. However, in the ICTY's practice, a lot of written statements do contain information referring to the acts and conduct of the accused. In such a case, the Chamber can admit the written statement insofar as it does not relate to the acts and conduct of the accused – and for the remaining parts, the witness can be called, and he can give oral testimony limited to certain paragraphs that deal with the accused's acts and conduct. The Chamber can also order that the witness whose written statement has been admitted pursuant to Rule 92*bis* appears in court for the cross-examination of the other party, if the statement is very important for this party.

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In general, Rule 92*bis* statements contain information which is often of a cumulative nature (other witnesses have already testified similarly), or information on the historical, political or military background or on the ethnic composition of certain groups of populations. They may also contain information on the impact of crimes upon victims or the character of the accused (Problem: hybrid information: cruelty during criminal act).

Rule 89(F)

In the *Milosevic* trial, the Appeals Chamber had to decide whether written statements of witnesses would be admissable as evidence pursuant to Rule 89(F), even if the statements relate to the acts and conduct of the accused. The witness would appear in court, testify as to the correctness of his written statement, and he would be available for cross- and re-examination. The main issue that arose was whether the admission of all written testimony has to fall under Rule 92*bis*: if this was the case, no statements could be admitted that go to the acts and conduct of the accused. This issue was much debated in the Appeals Chamber. The majority of the Appeals Chamber held that the situation at hand was not a Rule 92*bis*-situation, because the witness was present at trial and could orally testify as to the correctness of his statement. Judge Hunt dissented to this decision and stated that written statements could only be admitted into evidence pursuant to Rule 92*bis*, *i.e.* to the exclusion of parts going to the acts and conduct of the accused.

Rule 94

Another common way of introducing documents into evidence without life testimony is the taking of judicial notice pursuant to Rule 94. The Rule deals in its first paragraph with facts of common knowledge: the Chamber can take judicial notice of these facts without requiring evidence supporting them. A bit more problematic is usually the second paragraph: the Chamber can take judicial notice of facts or documentary evidence that has been adjudicated in another proceeding. Potentially problematic: the right of the accused to cross-examine witnesses against him or her, *cf.* Article 21(4)(e). In order to safeguard this right, the jurisprudence has stated that the following preconditions have to befulfilled:

- it must be a concrete fact
- it must be a fact and not a legal conclusion (Exp: Existence of an armed conflict)
- the fact must have been contentious in the former proceedings, and it must have been fully litigated
- the fact does not deal with the criminal responsibility of the accused
- the fact is not part of a reasonable dispute between the parties of the actual proceedings
- the fact was not part of a plea agreement in the former proceedings
- the fact does not affect the accused's right to a fair trial

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Facts that fulfil these prerequisites and that have been taken judicial notice of are, *prima facie*, perceived as being true. However, they can still be attacked by a party. This party has the burden of proof.

2) Protective measures for Witnesses

Preliminary Remarks
Standards were already set in proceedings against first accused – *Dusko Tadic* – in August 1995; as of today of high relevance; in ICTR almost only pseudonym witnesses

The main protective measures can be divided into four categories:

- Seeking confidentiality - the identity of the witnesses is not disclosed to the public/media
- Seeking protection from retraumatization – avoiding confrontation with the accused
- Seeking anonymity – victims and witnesses are not disclosed to the accused and his or her counsel
- Seeking confidentiality in relation to address, current whereabouts are not disclosed to accused and his or her counsel

Also: free passage; relocation of witnesses, including abroad

The applicable law of the ICTY Chambers have to balance the rights of the accused and those of the victims and witnesses

Public hearing:
Article 20 ICTY Statute: A trial has to be fair and expeditious, "with full respect to the rights of the accused and due regard for the protection of victims and witnesses"; "the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with the RPE".

Article 21(2) ICTY Statute: "[t]he accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute".

Article 22 of the ICTY Statute: "[p]rotection measures [of victims and witnesses] shall include […] the conduct of in camera proceedings and the protection of the victim's identity".

These Articles have been further concreticized in the RPE in relation to the anonymity of witnesses in the public.

Rule 53(A) – non-disclosure of documents to the public in exceptional circumstances and if the interests of justice so require; Rule 69 – non-disclosure of identity of victim or witness

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who may be in danger or at risk/only to defence; Rule 75 – assignment of a pseudonym; giving of testimony through image- or voice-altering devices; Rule 79 – testimony given in closed session.
Thus, the protection of victims and witnesses is an acceptable reason to limit the accused's right to a public trial.
This is in line with Article 14(1) ICCPR and Article 6(1) ECHR: Everyone is entitled to a fair and public hearing, but: the press and the public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice.

Victims and witnesses in cases of sexual assault - retraumatization
Already in the Report of the Secretary-General it was stated that protection for victims and witnesses should be granted, "especially in cases of rape or sexual assault" (Report, para. 108). As a result, the RPE contain in Rule 96 a specific rule for the admittance of evidence in cases of sexual assault: corroboration of the victim's testimony is not required, and consent is not allowed as a defence if the victim has been subject to physical or psychological constraints. Also, evidence on the victim's prior sexual conduct is inadmissible.

When it comes to protective measures of such victims in the courtroom, the *Milosevic* Trial Chamber has held that temporary screens can be installed in the courtroom, positioned in a way that the victim cannot see the accused, but that the accused can see the victim on the monitor in the courtroom.

Anonymity
A hotly debated issue is the non-disclosure of the identity of a certain witness to the accused.
The knowledge of the identity of the witness testifying against the accused is of high importance. The European Court on Human Rights (ECHR) held that if the defence is unaware of the identity, "it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable", *Kostovski*, para. 42, ECHR series A, Vol. 166, 23 May 1989 (Exp.Witness L).
However, again: balancing exercise: "Fair trial" does not only mean fair treatment to the accused, but also to the prosecution and the witnesses, as can be seen in Article 20 ICTY Statute. Thus, in "exceptional circumstances", a Chamber can order the non-disclosure of the witness' identity to the defence.
Strict limitations to the non-disclosure of the witness' identity to the defence:

- there must be a real fear for the safety of the witness or her or his family
- the testimony of this witness must be important to the Prosecutor's case
- the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is not trustworthy

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- the measure has to be proportionate: if the protection of the witness can be achieved by a less restrictive means, that measure should be applied

Also, the following guidelines should be observed: the Judges must be able to observe the demeanour of the witness; the Judges are aware of the witness' identity; and the defence has the opportunity to cross-examine the witness on issues unrelated to his or her identity or whereabouts

As a general rule: the balance between the rights of the accused to a fair and public hearing and the interests of victims and witnesses dictates clearly in favour of an accused's right to know the identity of Prosecution witnesses, in order to safeguard the accused's right to prepare his or her defence.

Confidentiality in relation to current address

In *Brdjanin and Talic* (in 2002), the Prosecution had provided the defence – before the beginning of the trial - with witness statements pursuant to Rule 66(A)(i), and in each statement, the information related to the identity of the witness had been redacted. The Prosecution had argued that over a period of two years, witnesses had been increasingly harassed and intimidated – not tolerable when thinking of importance of witnesses for trials.

However, the Trial Chamber told the Prosecution that it first has to demonstrate "exceptional circumstances" before protective measures can be granted. Thus, the Prosecution has to demonstrate a particular risk for the witness' safety. If these exceptional circumstances can be established, the Trial Chamber may order the non-disclosure of a witness' identity until such time that there is still left "adequate time for preparation of the defence" before the trial, Rule 69(A).

Specific issue: Protective measures and the cooperation with national courts

Recent decisions dealt with the question of protective measures for witnesses when their statements are given to the Prosecutor's Office of Bosnia and Herzegovina at the War Crimes Chamber ("Bosnia Prosecutor"). The ICTY Prosecutor has a duty to assist the Bosnia Prosecutor, where appropriate (SC Res 1503/2003 and 1534/2004; *cf.* Rule 11*bis* [D][iii]). The Bosnia Prosecutor requested confidential information regarding ICTY trials for use in his own investigations.

It was held that the information can be given to the Bosnia Prosecutor in case the witnesses consent to this release. After this consent had been obtained, it was ordered that the ICTY Prosecutor may release the names, contact information and evidence of the witnesses to the Bosnia Prosecutor, provided that the Bosnia Prosecutor agrees that this information will be treated as confidential. It will only be disclosed to the suspect and/or his counsel if they give assurances under threat of criminal sanction that they will strictly maintain the confidentiality of the information. The Government of BiH – and thus its agents within the Bosnia Prosecutor - shall comply with these conditions, pursuant to Article 29 ICTY Statute.

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3) Sentencing

Preliminary Remarks: important not only for accused, parties, victims and witnesses: the sentences play a decisice role in the perception of the ICTY by the public in general

Available prison sentences

No capital punishment (UN law and policy: similar to ICC)

Problem: national courts in Rwanda impose death sentence - perceived injustice in sentencing in both *ad hoc*-Tribunals

Maximum punishment life imprisonment

"Including the remainder of the convicted persons life": no mandatory review

Only mentioned in Rules, not in Statute – so-called Judge-made law

Two acquittals on trial level (*Delalić* and *Papić*), three acquittals on appeals level (*Kupreškić*)

So far, the ICTY has rendered sentences between two years and life imprisonment (minimum of 20 Years) (*Stakic*; under appeal)

Criticism: in national jurisdictions, a single murder attracts usually a life sentence, at ICTY 15 years (*cf*., however, *Sieber* Report; German law)

"war" as a *de facto* mitigating circumstance

Interesting: Life imprisonment much more common at ICTR, although the members of the Appeals Chambers for ICTR and ICTY are the same

Determination of the Sentence

Prior to July 1998: Separation verdict and sentencing phase ("Judgement" and "Sentencing Judgement"); today together

As we have seen: no sentencing ranges (*cf*. German Code for International Crimes)

Jurisprudence gives precedents, but only some guidelines: circumstances of each case

Recourse to sentencing practice in the former Yugoslavia

Not binding, only "to take recourse to"

Sieber Report of the Max Planck Institute for foreign and international criminal law, Freiburg im Breisgau, Germany: 23 countries; murder, torture, rape.

Lex mitior: Meaning of the concept (ECHR, ACHR, ICCPR)

Current sentencing ranges in former Yugoslavia Not applicable for ICTY

Gravity of the crime

Gravity of the crime is "litmus test" for the sentence, reflecting totality of conduct.

Not explained in Statute or Rules Based on national legal systems: harmfulness of conduct and culpability of the offender (*e.g*., multiple victims and direct commission)

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Aggravating Circumstances

Difference between the gravity of the crime and aggravating circumstances
Accused shall be punished for the totality of his criminal conduct

> "Only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed that offence, such as the manner in which the offence was committed, may be considered in aggravation" (*Kunarac* Trial Judgement, section 4D)
>
> indecent courtroom behaviour can only be considered in relation to the resocialisation prospects of the accused, *e.g.* as negating his remorse
>
> otherwise, accused would be sentenced for acts that were not charged, which would be against the purpose of an indictment
>
> Prohibition to take twice into account a factor that is an element of the crime, *e.g*. persecutory intent (discussed in *Vasiljević* Appeal Judgement) or civilian status of victims (*M. Simić* Sentencing Judgement, para. 70)
>
> Underlying reason: accused shall be sentenced for totality of the criminal conduct, but he must not be punished twice for the same act (***ne bis in idem***)

Gravity of the offence and aggravating circumstances provide margin of proportionate sentences within which mitigating circumstances are considered and final sentence is meted out.

Mitigating Circumstances

Pre-crime

> *E.g*., the accused helped people of other ethnicities and was a caring family member: ambivalent

During perpetration of the crime

> If perpetrator tried to bolster the effect of the crime

Post-crime

> Substantial co-operation with the Prosecution does not have to be self-incriminating (*Vasiljević* Trial Judgement, para. 299)

Guilty plea and plea bargaining (more and more frequent in light of completion strategy)
Guilty plea has to be informed, voluntary, unequivocal, and based on adequate factual basis: Chamber does not have to accept it
Accused pleads guilty and the Prosecution drops one or more charges
Sentencing recommendations by Defence and Prosecution - not binding on the Trial Chamber, but regularly followed: exception - trials again *Dragan* and *Momir Nikolić* (*Miroslav Deronjić*)

> Impact of guilty plea generally influenced by timeliness of the plea (problem with *nemo tenetur*-principle)
>
> Underlying reasons for mitigating effect of guilty plea:
>
> Acknowledgement of guilt Showing of remorse

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Jurisprudence indicates that showing of sincere remorse is required in order to grant a mitigating effect to a guilty plea.
Advantages:
Facilitating of reconciliation, witnesses do not have to testify in court, saving of resources.
Possible problem: sentences perceived as being too lenient could have negative impact on reconciliation; trade with justice.
Hybrid circumstances: education of the accused, nature of employment, religiously and ethnically tolerant family background:
Mitigating: could hint at positive resocialisation prospects Aggravating: should have known better (*Dr. Blagoje Simić*, medical doctor); could happen again

Some guidelines given by Appeals Chambers in relation to sentencing Respective Crimes:
Genocide is "crime of crimes" (*Kambanda* Trial Judgement, para. 16) Is the inherent gravity of a crime against humanity more serious than that of a war crime?
Jurisprudence: No distinction in inherent gravity between crime against humanity and war (*Tadić* Sentencing Appeals).
Different opinion by, *e.g.*, Judge Cassese in *Erdemović* Appeal Judgement:
Discussion: widespread or systematic requirement means greater risk to possible victims to which perpetrator contributes: thus, it can be argued that a crime against humanity, all else being equal, is intrinsically more serious than a war crime (which does not mean that a war crime cannot be more serious than a crime against humanity)

> Interesting to note that practice of sentencing shows that crimes against humanity are punished more severely than war crimes (*Meernik/King*, The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis, Leiden Journal of International Law, 16 (2003), pp 717 [735-36])

Modes of criminal liability

Superior authority as aggravating circumstance (if both 7[1] and 7[3], the first is applicable and the latter is aggravating circumstance, ***Blaškić***).
"Where both Article 7[1] and Article 7[3] responsibility are alleged under the same count […] a Trial Chamber should enter a conviction on the basis of Article 7[1] only, and consider the accused's superior position as an aggravating factor in sentencing" (*Blaškić* Appeal Judgement, para. 91)

> But*: "Establishing a gradation does not entail a low sentence for all those at a low level of the overall command structure" (Čelebići Appeals Chamber, para. 847)*

Indeed: a comparison of the sentences for Article 7(1) and 7(3) liability shows that there is virtually no difference between the length of prison sentences for both modes of liability; Article 7(3) is not reserved for high level perpetrators (*Meernik/King*, p. 738

***The material was presented at the Seminar on War Crimes, organised by KJI on 7 and 8 June 2005.**
**** All the views and opinions expressed are those of the Author alone**

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Project activities May 2005

Initial Legal Education Program

The three-month Pilot Initial Legal Education Program (ILEP) started on 15 April 2005. Sixty selected candidates will undergo a program aiming to develop their professional and practical skills as future judges in Kosovo. In May 2005 the candidates had completed the modules presenting Criminal Law and Procedure and the Civil law and Procedure.

Induction Training for Lay-Judges

In May 2005 KJI continued with a cycle of induction training programs for lay-judges which will be held in all five regions in Kosovo. On 5 May KJI held an Induction training session in Prizren. The following sessions will be in Gijlan/Gnijlane and Mitrovicë/Kosovska Mitrovica. The Induction training program aims to provide basic overview on the functions and responsibilities of the lay-judges in both criminal and civil procedure as well as main ethics related aspects of the position of lay-judge.

Workshop on property law:

In accordance with the KJI Yearly Training Programme and the Standards Implementation Plan, the Institute was planning to organize four workshops on Property Rights during 2005.
On 12 May KJI organized a Workshop in Gijlan/Gnijlane and on 17 May – in Pejë/Peč.
The workshops provide an opportunity to the participants to exchange experiences with colleagues and aim to develop a list of issues which need to be solved in practice.

Workshop on the Provisional Criminal Procedure Code of Kosovo

The KJI organized on 24 May a workshop on the Provisional Criminal Procedure Code of Kosovo for the judges and prosecutors from Gijlan/Gnijlane region. The workshop was focused on the Detention on Remand. The participants were given an opportunity to hear presentations on the main procedural issues relating to the detention on remand. Distinguished legal professionals – judges from District and Supreme Courts presented different cases giving a possibility for discussion on the specific problems regarding the conduct of Detention on Remand.

Workshop on Minor Offences

The Workshop, organized by the KJI on 26 May 2005 was a continuation of a series of Workshops with the same title offered by KJI to the Minor Offences Judges. Participants had discussed the possibilities to reduce the workload at the Minor Offences Courts by developing proposals supported by their practical experience for handling specific cases.

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Project activities June 2005

Seminar: War crimes

On 7 and 8 June 2005 KJI organized a seminar focusing on war crimes as a phenomenon and on the role of the international community and ICTY in the prosecution of such cases. The seminar was planned as a training session aiming to enhance the judges'/prosecutors' understanding on the active role they shall play to gradually overtake these kinds of cases in the future.

Forthcoming events

Induction Training for Lay-Judges

In June 2005 KJI will conduct the next session of the induction training programs for lay-judges in Prizren. The first one-day session was held in Prishtinë/Pristina in March 2005. The next session will be organized in Gijlan/Gnijlane. The Induction training program gives a basic overview on the functions and responsibilities of the lay-judges in both criminal and civil procedure as well as main ethics related aspects of the position of lay-judge.
Planned date: 16 June 2005

Seminar on Judicial Ethics

Target group: judges and prosecutors
KJI in collaboration with the National Centre for State Courts (NCSC) will organize series of training sessions in all the five regions in Kosovo focused on the practical aspects of judicial ethics. The training aims to give a deeper look into the position of the judge as a single decision maker or as a decision maker in the panel. The seminar will highlight the responsibility of the judge in regard to the Rule of Law and social order in the context of the newest amendments of the Codes of Ethics and Professional Conduct.
Planned dates:
14 June 2005 - Prishtinë/Pristina
15 June 2005 - Gijlan/Gnijlane
17 June 2005 - Prizren
20 June 2005 - Peje/Pec
22 June 2005 –Mirtovicë/Kosovska Mitrovica

Workshop on the Criminal Procedure Code

Target group: Judges handling criminal cases and prosecutors
The subjects that will be discussed at the Workshop will focus on criminal proceedings on Detention on Remand, Main trial and Appeal procedure. The training will offer an interactive discussion to the participants on the disputable issues in the aforementioned proceedings. The discussion will focus mainly on examining the casework and specific procedure for court hearings on criminal cases. The Workshop will take place at the premises of KJI in Prishtinë/Pristina.
Planned date: 28 June 2005