

KJI NEWSLETTER ***June 2004***

This newsletter is published to fully inform the magistrates of 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.

Strengthening the professional training as a right

International and European guarantees

According to internationally recognised principles, holders of judicial office (whether a professional or a lay judge) as well as prosecutors shall be individuals of integrity and ability with appropriate training or qualifications in law.¹ Under European standards judges should be provided with appropriate training free of charge as part and parcel of their proper working conditions.² Under the European Charter on the statute for judges, moreover, an authority independent of the executive and legislative powers shall ensure the appropriateness of training programmes as well as of the organisation implementing them, in light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties. The statute further guarantees to judges the

maintenance and broadening of the knowledge necessary for performing their duties. This should be achieved by providing judges regular access to training.³ The authority charged with overseeing training must not only be independent, but also be allocated the actual resources to carry out its functions.⁴

The EU project “Institution Building of the KJI”

This project, which was launched in the beginning of May, is funded through the European Agency for Reconstruction which already provided extensive financial support to KJI during 2002 and 2003.

The hands-on management of the project lies with the undersigned, who reports to the Agency through the Belgian-registered consulting company Transtec, the lead partner of the consortium founded for the project.

¹ Basic Principles on the Independence of the Judiciary (adopted by the United Nations in 1985); Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990).

² Recommendation No. R (94) 12 on the Independence, Efficiency and Role of Judges (Committee of Ministers of the Council of Europe, 13 October 1994, Principle III, Article 1(a)).

³ Articles 1.1, 2.3 and 4.4 (Council of Europe document DAJ/DOC (98) 23).

⁴ Explanatory Memorandum, point 2.3.

The other EU-based partner of the project consortium is the German Foundation for International Legal Cooperation (*IRZ-Stiftung*). Our local partner is Kosovo Law Centre and, in particular, its Director, Professor Haki Demolli.

I myself am a Finn, who started out as a crime investigator, prosecutor and practising lawyer. Since 1990 I have worked in the European Commission and Court of Human Rights in Strasbourg. In 1998-99 I was chief lawyer of the Human Rights Chamber for Bosnia and Herzegovina in Sarajevo. I have also been a judicial trainer in various recent member States of the Council of Europe.

The project office, which is located on the KJI premises, permanently comprises myself, a translator / interpreter and an assistant. The second long-term expert on the project, Dr. Rainer Deville, is a German judicial training expert with experience also from South-Eastern Europe. The third longer-term expert, Mr Colin Ackerley, is a British specialist with a wealth experience in human resources development, including from Central and Eastern Europe. These two experts have already carried out an initial visit to KJI and have met with KJI staff and various key stakeholders. Project Director Diane Sheinberg of Transtec was also present in Pristina for the launching of the project. Local and international short-term experts will be completing the project team in the months to come.

Objectives

The specific objectives of the project are as follows:

- To develop KJI's administrative and management capacity to provide both initial and continuous legal education to judges and prosecutors
- To develop an examination and the training curricula for initial legal education for judges and prosecutors
- To develop training curricula for continuous legal education for judges and prosecutors
- To develop a training programme for lay judges that will upgrade the awareness among them of their function as a means of strengthening a community-based judicial system

A project Steering Committee will be responsible for:

- Reviewing project policy and addressing strategic project issues;
- Reviewing project progress and approving any work plan modifications;
- Ensuring proper coordination of entities involved.

The Steering Committee will comprise representatives of EAR, KJI, KJPC, Pillar I and Pillar III. It will meet for the first time on 17 June. KJPC will be represented by Judge Neshrin Lushta, former National Co-Director of KJI.

Extensive consultations with the local judiciary

A significant number of consultations have taken place during the first month of the project (the inception period) with the objective of obtaining as wide as possible a range of opinions on the issues surrounding magistrates training in Kosovo. The Team Leader has furthermore outlined the project to various representatives of other donor-funded programmes.

I would like to thank all those whose valuable comments I have already had occasion to obtain. I hope to meet with more magistrates and others in the weeks and months to come.

The project team welcomes judges' and prosecutors' cooperation and feedback on this project. The same is true, I am certain, for KJPC's representative on the Steering Committee.

More information on the progress of the project will follow in a future newsletter. In the meantime, summary translations into Albanian and Serbian of the Terms of Reference are available from the project office, tel. 038 248 688 or 689, extension 109, or 044 403 179.

Leif BERG
Project Team Leader

Summary report of the seminar on trafficking in human beings (Second Part: the first part has been published in the May Newsletter)

2) Prosecution of perpetrators

a) Criminal Substantive Law

The Regulation on the prohibition of trafficking in persons in Kosovo came into force in January 2001 (UNMIK Regulation 2001/4) and complied with the Palermo Trafficking Protocol. This regulation has become part (although partially) of the Provisional Criminal Code, which has superseded this regulation on 6 April 2004. Article 139 of the Provisional Criminal Code defines trafficking in persons in three parts or elements, in the same way as the UN Protocol: the acts, the means and the purpose. In order to convict a person of

trafficking, all three elements must be present. If the victim is underage, the use of force is not required.

High punishments have been foreseen by the new code to be imposed on the traffickers, but it has to be noted that in pending cases, transitional provisions such as Article 2 PCC apply to the benefit of the defendant, as the most favorable law. In some cases, Regulation 2001/4 is more favorable than the new code: e.g. confiscation of property, penalties for persons engaging victims under 18 years old, or an offence committed by an official person in the exercise of his/her duties.

In comparison with Regulation 2001/4, the new code does not foresee the exclusion of criminal liability for victims of trafficking for prosecution of prostitution, illegal entry, presence or work in Kosovo. This is a serious problem, which needs to be addressed, as this will function as an effective barrier for victims to report to the police and cooperate with the criminal justice system.

Additional charges for other types of crime can be applied and relevant criminal sanctions can be imposed on these perpetrators for severe punishments, using not only the provisions condemning trafficking but also the provisions on money laundering, smuggling, migration offences, crimes against sexual integrity, conspiracy or co-perpetration and criminal association (article 26 PCC), as well as Article 201 on facilitation of prostitution, (although this article is redundant with article 139), Article 137 on slavery (although it is difficult to investigate such cases as they are overlapping with trafficking cases), article 140 (withholding documents), Article 274 on Organized Crime, Article 310 which penalizes intimidation of victims during criminal proceedings for organized crime, Article 117 on crimes against humanity, which punishes enslavement, rape, sexual slavery and enforced prostitution, and Article 114 on unauthorized border or boundary crossing (previous section 8 of the Regulation).

This also allows ensnaring many offenders in the same criminal case.

Accessory sentences foreseen in the new code can also be useful: prohibition on exercising an activity (such as operating a coffee bar), confiscation of objects and material benefits and closing down of a business (articles 54, 57, 60 and 82 to 85 PCC).

b) Procedure Criminal law

Since April 6, significant changes have arisen in the criminal procedure law of Kosovo.

- Prosecution of trafficking cases and criminal sanctions

Regarding the matter of Trafficking in Persons, various investigative methods and techniques are available in the Provisional Criminal Procedure Code and prosecutors can use the provisions creatively in order to lead a successful prosecution. The use of various investigative techniques as well as creative charging decisions can lead to convictions and sanctions against traffickers. The prosecutors' knowledge of the patterns of trafficking, the magnitude of funds generated and the trauma experienced by victims can assist the court in imposing appropriately severe sanctions.

The Kosovo justice system has limited resources and a large number of cases along with a significant backlog of criminal cases. The allocation of financial and manpower resources specifically to trafficking cases is therefore difficult. It is important for prosecutors and others in law enforcement and the judicial system to remember that the fight against

traffickers also prevents and punishes other criminal offences such as organized crime, corruption, extortion, blackmail, drug abuse, sexual assaults and the spread of disease.

The usual trafficking offence is committed by an organized group with ten or more persons involved, which is constantly active carrying out an ongoing recruitment process, exercising on a multi-leveled base (including kidnapers, collectors and money launders), with national and international scope. The purpose of the crime is in every case to gain great profits. The evidentiary tools to use appear obvious: tapping telephones, seizure of computer data and records, seizure of bank records, seizure of cash generated by the crime when found at border crossings, bank deposits, or other money laundering opportunities. Where possible seizure of other assets such as homes, furnishings, cars and clothes as the illegal proceeds of criminal activity should occur. The seizure of assets can be as effective as a jail sentence in deterring criminal activity.

The new Criminal procedure Code has introduced a new concept by abolishing the investigative judge and establishing the prosecutor as the entity in charge of the investigation and prosecution. Another new participant: the judicial police has been created to support the prosecutor in his/her tasks and to apply investigative measures. This police entity is specialized in certain offences, and certain departments, and units. Officers have been designated and are

being trained in order to perform the relevant duties. A team approach, by establishing a good relationship between the prosecutor and the judicial police and joint decision making appear to be crucial for effective law enforcement.

- Special investigative techniques, covert and technical measures of surveillance and investigation

The list of measures to use is comprised in the Provisional Criminal Procedure Code. These are: examination of the defendant, use of witnesses' expert testimony, search warrants (home, computers, deposit boxes, seizing every kind of evidence). The victim witness poses a special challenge as endemic problems exist: brutalization, re-victimisation, emotional and unstable attitude of victims. Good cooperation with victim assistance providers can produce better victim witnesses and therefore better cases.

Others techniques recommended to be used by prosecutors include: cooperative witness (this new provision in conjunction with wiretapping is a very useful tool), immunity, plea bargaining, covert measures, undercover operations, metering telephones, surveillance cameras, reversal standards operations, wiretaps on computers and electronic devices, body recorders, financial investigations, international cooperation / extradition, protocols, exchange of information, good network and coordination with other partners and law enforcement authorities.

3. Victim protection and assistance: psycho-social and criminal proceedings aspects

a) Psychological perspective

Prosecutors and other justice officials dealing with trafficking cases should be aware of the psychological effects of trafficking on the victim when preparing these cases and when interrogating or taking the statements of victims and witnesses.

The abuse suffered by victims of trafficking and the common tactics used by the traffickers can lead to a deep trauma, and to specific physical and psychological reactions. The reactions observed among trafficked persons are resignation, submissiveness, maladaptation, secrecy and a general lack of trust in others. Indeed due to the violence, abuse and threats they have been subjected to, victims of trafficking see their abilities to respond to or face danger annihilated. They become obedient only to avoid violent reactions against them and are prevented from turning to the police or trying to escape on their own. The victims, because of the accumulated trauma and fears, are incapable of trusting anyone; they are doubtful of themselves and others and can thus have no trust in the judicial system. Many trafficked persons will opt to first and foremost protect themselves and their families by not disclosing their story and might end up in a series of lies. Feelings of shame and guilt are also strongly observed.

Based on these aspects, magistrates and investigators should establish a safe environment; explain to the victim that he/she is under protection and that his/her basic needs will be addressed. They also should build confidence by avoiding judgment of the person and his/her words. Questioning him/her should be calm, by listening and respecting the victim, and by avoiding promising things that cannot be produced in order not to repeat the manipulation the victims have gone through.

b) Victim assistance and protection during investigation and trial

Adequate information to and participation of the victim in the process helps to ensure the victim's cooperation with prosecution. Increased right for victims of crime gives something of an equal footing with the rights of the criminal. This is why law enforcement systems now include victim's advocates and/or victim's assistance in their offices.

The Provisional Code of Criminal Procedure of Kosovo provides these rights in the Chapter of the Injured Party. Importantly, the injured party has the right to call attention to all facts and to propose evidence. The difference with the previous applicable procedure is that the prosecutor is now responsible for the investigation and the presentation of evidence at the main trial. It is important to carry out a thorough, careful and impartial investigation and to work closely with the victim assistant or the authorized

representative in order for them to ensure good cooperation of the victims. By notifying them, informing them on the procedure, explaining the process, answering their questions, ensuring victim participation, and by testifying as to what they have observed regarding victim behavior, the victims' assistant can be a valuable member of the justice team. It is also important for the prosecutors to use and get the support of the shelter workers.

The European Court of Human Rights has ruled that the remedy described under article 13 of the Convention for the protection of Human Rights and Fundamental Freedoms when combined with Article 2 on the right to life, includes the right to a thorough, impartial and careful investigation, in death cases. Some are urging that the same right to a remedy can be combined with Article 3 on the prohibition of torture in trafficking cases. States have had filed petitions against them in the European Court of Human Rights to grant this remedy and money damages have been awarded. It might be considered that the obligations of the Kosovo Code combined with the ECHR may create a cause of action against the Kosovo PISG for failure to reasonably perform the duty to investigate and prosecute traffickers...

The provisions related to the protection of injured parties and witnesses are contained in chapter XXI of the new Criminal Procedure Code. Article 169 PCPC provides the possibility for all parties to the procedure to file a written petition with a

judge for a protective measure or an order for anonymity in case there is a serious risk for the injured party, witness or his or her family member. Article 170 states the considerations that can be taken by the judge to order such protective measures.

The issue of trauma should be emphasized to the Court. The best tool to protect the victim is to provide the statement of the witness/victim on video tape. As the witness statement is only admissible in court when it can be challenged by the defendant and the defense counsel (article 156 of PCPC), they can propose to the judge that defense questions be presented in writing to the witness. This procedure has been upheld as a valid confrontation by the ECHR. Closed circuit can be utilized as a less restrictive protective measure to protect the victim while still affording the defense the opportunity to confront. Video tape or closed circuit still provides the emotional aspects of victimization, which a summary or written statement will not reproduce. Moreover, this tool avoids the problem of re-victimizing as it protects the victim from the beginning of the investigation.

Absent protective measures, to ensure the admissibility of the statement of the witness before the court, when the victim is being repatriated to his/her country of origin, is to have the victim's testimony taken before by the pre-trial judge in the presence of the defense prior to repatriation.

The provisions on anonymous witnesses are troublesome; judges and prosecutors should avoid using these provisions unless absolutely necessary as a last resort. The use of anonymous witnesses and the resulting lack of adequate defense opportunity to confront not only the witness but challenge the credibility of the testimony may often require a new trial. However the statement of an anonymous witness may be more easily and properly used as corroborating evidence.

Magistrates should ensure that if a defendant pleads guilty, he/she will be punished for the crime committed even if the facts admitted by the defendant diminish the activity involved. The trauma associated with the crime should be brought and strongly demonstrated before the court by the prosecution under articles 314 and 359 PCPC.

These codes which recently entered into force may not be the last words as significant gaps remain. Specific measures contained in UNMIK Regulation 2001/4 which provided for procedural safeguards with regard to victim protection and assistance have been left out in the PCPC, which gives rise to significant concerns.

The new criminal procedure code does not foresee: the appointment of a Victim Assistance Coordinator liaising with relevant law enforcement authorities, other organizations and administrative departments; the non criminalization and deportation of trafficking victims for certain convictions; a reparation fund for victims of trafficking; provisions

providing refugee status to victims of trafficking, and other procedural guarantees. One of the changes regarding the provision of free legal counsel foreseen in the Regulation has now been limited in the new code to the appointment of an authorized representative (Article 82 PCPC). Many believe this deletion prevents the trafficked victim from obtaining an effective remedy.

The Kosovo Judicial Institute wishes to thank very much for their expertise, participation and support all experts who contributed to this seminar: Ms Nicoleta Munteanu, Ms Nesrin Lushta, Ms Ariana Qosaj-Mustafa, Ms Marjan Wijers, Mrs Katy Burdja, Mrs Diana Tudorache, Mrs Suzi Ferri-Dedolli, Mr Mark Miller, Ms Elisabeth Rennie and Ms Annette Williams.

Sylvie Nicole
Programme Co-ordinator, KJI

Project activities June 2004

- Round Table Discussion on Property Rights
- Seminar on Pre-Trial Proceedings under the Provisional Criminal Procedure Code of Kosovo
- Round Table Discussion on the Provisional Criminal Procedure Code
- Seminar on the Provisional Criminal Procedure Code – Confirmation of indictment
- Seminar on Copyright Law

Round table Discussion on Property Rights

The KJI, together with the Special Chamber of the Kosovo Supreme Court will offer a seminar on 8 June, on the jurisdiction and the functions of the Special Chamber on Kosovo Trust Agency related matters. This session, already organized on 27 April, will be repeated for another group of civil law judges from the Supreme Court, district and municipal courts, and will intend to explain the exact competencies of the Special Chamber as well as to discuss the problems the regular courts are currently facing with pending cases. The experts contributing to this seminar will be the international registrar and judges from the Special Chamber of the Supreme Court, a lawyer from the Kosovo Chamber of Advocates and a judge from the Commercial Court. Representatives from Kosovo Trust Agency will also participate to this Round Table discussion.

Seminar on Pre-Trial Proceedings under the Provisional Criminal Procedure Code

The KJI, together with the Council of Europe will offer a two-day seminar on 10 and 11 June, on new criminal procedural mechanisms introduced by the new code. This seminar, opened to criminal law judges, will intend to focus on measures related to the presence and security of the alleged defendant and witnesses/victims, other specific investigative actions such as search, seizure, confiscation, as well as the right to an effective counsel, covert investigative measures and admissibility of evidence. These presentations will be illustrated by relevant case law of the European Court of Human Rights. Experts contributing to this seminar will be a legal officer from UNMIK, four experts from the Council of Europe and a lawyer from Prishtinë/Priština.

Round Table Discussion on the Provisional Criminal Procedure Code of Kosovo

The KJI will reiterate a field-training programme in Prishtinë/Priština on 16 and 17 June with a Round Table Discussion on the new Provisional Criminal Procedure Code of Kosovo (PCPCK). The topics and debates presented in the other regions will also be discussed among the criminal law judges and prosecutors coming from Prishtinë/Priština region. Three judges from the Supreme Court of Kosovo and a Kosovar criminal law expert will be present as speakers.

Seminar on the PCPCK – Confirmation of indictment

The Kosovo Judicial Institute will hold on 24 June a Practical Skills seminar focusing on the articles 309 to 315 of the Provisional Criminal Procedure Code related to the confirmation of the indictment. Topics discussed during this session will refer to the form and content of the rulings that have to be rendered under these articles.

Seminar on civil matter - Copyright Law

The Kosovo Judicial Institute will organize on 29 June a training session on Copyright Law, for judges working in the Supreme Court and District Courts of Kosovo. This seminar will deal with the content and the legal protection of copyright in Kosovo. A presentation on the different types of copyright and their legal protection according to European Law will be set out, as well as cases which are pending before the District Court of Prishtinë/Priština. Problems faced by associations dealing with this issue will also be discussed. A judge from the Kosovo Supreme Court, a judge from the District Court of Prishtinë/Priština, a Professor of Prishtinë/Priština Law Faculty and a KJI judicial trainer will contribute to this seminar. The legal representative of independent associations of journalists and electronic medias in Kosovo as well as the Chairman of the Kosovo Agency for the protection of copyright will also participate to this session.