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THE WOMEN'S LEGAL RIGHTS INITIATIVE

PROSECUTOR PROTOCOL ON DOMESTIC VIOLENCE IN ALBANIA

October 2006

This publication was produced for review by the United States Agency for International Development. It was prepared by Chemonics International in partnership with the Centre for Development and Population Activities, MetaMetrics, and Partners of the Americas.

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A Task Order Under the Women in Development IQC

Contract No. GEW-I-00-02-00016-00

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

ALBANIA PROSECUTOR PROTOCOL

The goal of domestic violence prosecution is:

- To prevent and reduce domestic violence in all its forms by appropriate legal means
- To guarantee legal protection, especially safety, to members of the family who are subjects of domestic violence with special attention to children, the elderly and the disabled
- To uphold the law
- To hold the abuser accountable
- To provide an opportunity for abuser rehabilitation if appropriate.

Definitions

Domestic violence occurs when any act of violence is committed within the family including but not limited to: (Article 3, On Measures Against Violence in Family Relationships)

- Murder (Articles 76 – 83, 85 of Penal Code)
- Threat (Article 84)
- Torture (Articles 86 and 87)
- Wounding (Article 88/b)
- Termination of pregnancy without consent (Article 93)
- Denial of help (Article 97)
- Causing of suicide (Article 99)
- Abduction (Article 109, 109/a)
- Trafficking (Article 110/1 and Article 114/b, re minors 128/b)
- Trespass (Article 112)
- Forcing into and exploiting for prostitution (Article 114)
- Insult (Article 119)
- Defamation (Article 120)
- Limitation of the freedom of expression/speech, of movement or assembly (Article 261)
- Violation of private life (Article 121)
- Rape (Articles 100-107)
- Other obscene acts (Article 108)
- Abandonment (Article 124)
- Denial of living means (Article 125)
- Illegal taking of child (Article 127)
- Coercion for cohabitation or termination of marriage (Article 130)
- Damage to property or economic well-being (Articles 150-154)
- Limitation on freedom to administer their income (robbery/theft – (Articles 139 and 134)
- Serious intentional injury (Article 88, 88/a)
- Non serious intentional injury (Article 89)
- Other intentional injury (Article 90)

Serious injury due to negligence (Article 91)
Non serious due to negligence (Articles 92)
Wrongful use of telephone (Article 275)

While the following actions are not listed in the existing criminal code, they are included as domestic violence under the law “On Measures Against Violence in Family Relations:

Prohibition on holding monetary means, despise, direct physical, psychological, sexual and economic abuse of children and putting children in dangerous situations where they witness violence. The last is addressed to the perpetrator of violence not the victim.

AND one of the following relationships applies: (Article 3)

1. “***Members of the family***” are
 - a. Spouses or cohabitating partners
 - b. Brothers, sisters, relatives of direct blood line, including adoptive parents and children
 - c. Spouses of persons provided in paragraph b
 - d. Persons related by direct blood line, including parents and adoptive children of the spouse or the cohabitating partner,
 - e. Brothers and sisters of the spouse if these have been living together during the last 3 (three) months

Special Role of Prosecutor in Protection of Victims

- Under the protection order law, prosecutors may present petitions for protection orders or emergency protection orders. (Article 15) Prosecutors should be extremely careful about doing this so as to empower the victim rather than taking away the victims power of decision making.
- The prosecutor may also be heard in court if s/he has presented the petition. (Article 19, 21)
- The prosecutor will be sent a copy of the order within 24 hours of its issue if they presented the petition. (Article 20, 22)
- If the prosecutor presented the petition, they may request it to be amended or terminated but only if there is a fundamental change of circumstances that indicates there is no longer a need for protection. (Article 25) Prosecutors should be particularly careful about doing this because it could put the victims at more risk of danger.
- If a petition for emergency protection order is presented at a rural police unit, that police unit should contact the prosecutor on call. The prosecutor should contact the judge on call and get the protection order issued. (Article 16)

Special Role of Prosecutor in Enforcement of Protection Orders

- Under the protection order law, orders are executive titles and go into effect immediately. (Article 26)
- If the respondent actively interferes with or places obstacles in the way of compliance with the order, the bailiff is obligated to report that to the prosecutor

who then can apply Article 320 of the Criminal Code. (Article 26) It is extremely important that prosecutors act swiftly in such cases because it is an extremely dangerous time for the victims.

- Issuance of a protection order or emergency protection order does not in any way inhibit bringing a criminal charge for the same acts or omissions that might be classified as criminal offenses. (Article 27) This is often very important as a protection mechanism for victims.

Special Considerations by the Prosecutor for Victims of Domestic Violence

Because of the nature of domestic violence, the likelihood that this is not the first offense nor will it be the last, and the ongoing danger to the victim and others, a domestic violence case will be charged if it meets the criteria even if the victim does not wish to proceed with prosecution. Often times the abuser is threatening the victim to withdraw charges and if the prosecutor insists on going forward, the abuser will see that domestic violence is a crime against the state like any other crime and marriage does not give a person a right to violate the law. Further threats and abuse to the victim will not result in charges being dropped but only in more charges being brought.

It is very important to get statements, photos and evidence at the time of the incident because minds quickly change due to threats, a belief that the abuser will change or the necessity to maintain the abuser in the household for income. Speaking to the victim early on will help reduce the fear of the victim and begin to make the victim more comfortable with the prosecutor. Consider asking the court to accept pre-trial admission of evidence because of the likelihood that the victim will be threatened to deny the violence and stop the process. (Criminal Procedure Code Article 316(b))

Some specific things to think about in domestic violence cases include:

- Have there been previous incidents at that address or with those people whether or not charges were filed? Be sure to ask about medical records to find corroborating evidence.
- Does the abuser have a previous criminal history of assault on others? If so, it shows a tendency to use violence to resolve issues.
- Is a divorce in process? Often the abuser will increase violence at the time of divorce because of a fear of loss of control over the victim.
- The presence of a weapon is a warning of extreme danger. Be sure to ask that the weapon is confiscated. (Criminal Procedure Code Article 208)
- Be prepared to impeach the victim at time of trial with earlier statements and evidence.
- Consider having a domestic violence expert testify. Check with the local NGOs who give services to victims. (Criminal Procedure Code Article 314)

Even if it is decided not to file a criminal charge, the victim should be notified and the record should be kept. Domestic violence does not stop by itself and it is likely there will be a repeat incident. The evidence of an earlier incident may be useful or the charge can be refiled. (Criminal Procedure Code 291, 292)

Often the victim of domestic violence is afraid to testify because of threats and intimidation by the perpetrator. Under existing law, there are some ways you can protect the victim:

Criminal Procedure Code 316 – The prosecutor can ask for pre-trial admission of evidence to preserve the evidence. The perpetrator then has no reason to threaten the victim because the evidence is already admitted.

Criminal Procedure Code 340 – The prosecutor can ask for a closed hearing to protect the witnesses and victim.

Criminal Procedure Code 364 – if the victim is a child, elderly or disabled, s/he can be questioned in their own home.

Criminal Procedure Code 341 – Any person being disruptive in the trial can be removed by the court. For example of the respondent is making faces, gestures or comments to the victim, he should be removed.

Articles of the Criminal Code to Consider in Domestic Violence Cases

Article 17- Often the offender will claim that he is not responsible because he could not control his actions blaming his wife for making him angry. This is not a valid defense. When the same man gets angry at his boss, he does not hit him. When he gets mad at his friends or a stranger in a bar, he does not hit him. It is only his wife he hits because he believes he can get away with it.

Article 18 – The abuser will often claim he is not responsible because he was drunk. That is not a defense and if done deliberately to justify his beating could be an aggravating factor.

Article 30 – Supplementary punishments are often very effective especially for offenders in higher occupational levels. (Article 38-42) Depending on the abuser, Article 43 might be very effective if the abuser is a high level person or in an occupation that commands respect such as a doctor or lawyer.

Article 34 – Fines are not useful punishments for those who have money because the money is just taken from the household budget thereby harming the victims. They are not useful for the poor because they can't be paid anyhow. Further, the message is that society doesn't prevent you from beating your family, just taxes you for it. That is not the message the law should be sending.

Article 48 – Often abusers will express deep repentance but without accompanying actions, it means little. Be very careful of such expressions. Also be very careful if the abuser claims the relationship has returned to normal. Normal means that the abuser is again in control by bullying tactics, threats or actual violence. It is normal only in that the victim has become too frightened to speak out and no new act of physical violence has occurred. You must speak to the victim alone away from the abuser and ask what the situation really is.

Article 50 – Aggravating circumstances can be used when the act is against pregnant women or children or other people who cannot defend themselves such as the elderly or people with disabilities. Aggravation can also be present by taking advantage of family relations to do or cover up the act. Usually by the time the police are called, the violent act has occurred dozens of times previously so this is not the first act.

Article 58 – To prevent loss of a job for the abuser, the sentence can be divided up into two days per week i.e. they can serve it on Saturday and Sunday or whatever their days off from work are. This will prevent loss of family income.

Article 60 – The abuser can be ordered to get education or training such as specific education about domestic violence or child abuse or medical treatment especially for alcohol or drug abuse. If this is part of the sentence, it must be included that the organization delivering the treatment or education report back to the court weekly on the attendance and participation of the defendant. If s/he is not attending or actively participating, s/he should be arrested and brought to the court to answer for violating the order and other punishments given.

Article 93 – Often domestic violence will begin when the woman becomes pregnant and the abuser will often target the stomach. If the beating causes the loss of the fetus, consider imposing this section.

Article 102-107 – With all sexual offenses, consider whether the victim gave her consent. Simply being the wife or having previously engaged in sexual relations is not sufficient to claim that consent was given. The law does allow prosecution for marital sexual offenses.

Article 110 – If the victim is locked in a house or otherwise not free to move about, consider this section.

Article 119 – Insulting may well apply if done in public.

Article 125 – Remember that denial of child support is a criminal offense.

Article 127 – Unlawful taking of a child is also a crime. Be sure to check if there is a divorce in process or a protection order and what those might require regarding child custody. However, be careful if the victim is hiding a child to prevent further child abuse. In that instance, the action is to prevent crime not to commit one.

Article 134 and 150 – In all theft and destruction of property cases, remember that community property belongs equally to both parties and one does not have the right to take, keep or destroy it. (Family Code, Article 73)

Article 301 – Offenders will often obstruct justice and remove evidence in domestic violence cases.

Article 307 – When victims refuse to testify, it is often because of extreme fear for themselves and the children. The most severe violence usually occurs after the victim has taken steps to escape from the abuser. Thus it would be extremely unjust to charge a victim who is only taking what steps she knows to protect her life and that of her children. (See also Article 165 in Criminal Procedural Code)

Article 311 or 312/a – More appropriate would be to use these articles, depending on the facts, to charge the abuser for threatening the victim.

Articles of the Criminal Procedure Code to Consider in Domestic Violence Cases

Article 58 – The injured person has a right to reimbursement for the injury caused.

Article 61 – Or the injured person may file a civil lawsuit in connection with the criminal.

Articles 169-170 – The process of confrontation is very dangerous for a victim of violence and is not advised. The victim has often for years been subject to abuse from this abuser. She will not feel safe to speak honestly in front of him no matter how much the prosecutor might promise protection. If she does, it is very likely the abuser will become even more violent once he is out of court.

Article 208 – Seizure of a gun or other weapon is recommended as it often leads to more serious violence and often death.

Article 232, 237 – House arrest is never appropriate in domestic violence cases especially if a protection order has been issued.

Article 285, 286 - Be very suspicious if the victim seeks to waive the right of complaint or withdraws the complaint. It is very likely that the abuser is threatening the victim to do so. The prosecutor should go ahead with the prosecution anyhow to protect the victim and prevent re-occurrence of the violence.

Article 338 - Efforts for reconciliation are very dangerous for the victim and not advised. Family violence often continues for years before the police are involved therefore this is not the first time. A pattern of abuse and threats has been established. The victim will not feel safe to publicly refuse reconciliation even if the judge or prosecutor promises protection. Violence is often increased or becomes more serious at the time when the abuser fears the victim is escaping his control. He is often very good in presenting a public face of repentance but the facts in the privacy of the home are very different.