KJI NEWSLETTER

This newsletter is published to fully inform the magistrates in Kosovo on the activities of the Kosovo Judicial Institute (KJI). This publication is distributed to judges and prosecutors throughout Kosovo. The edition of KJI Newsletter features some of the main issues which have been discussed during a round table discussion indicated below.

ROUND TABLE ON THE PROVISIONAL CRIMINAL PROCEDURE CODE OF KOSOVO

Article 40 par.1 item 5 and par 2 sub par 1 and 2
5) If in the same case he or she has taken part in rendering decision of a lower court or in the same court he or she has taken part in rendering a decision which is being challenged by an appeal.
(2) a judge shall be excluded:
1) from the panel if in the same criminal case or in a case against the same defendant, he or she has participated in pre-trial proceedings, including in proceedings to confirm the indictment; or
2) from proceedings to confirm the indictment if he or she has ordered detention on remand.

Within the scope of this provision there was a question whether: the pretrial judge should be excluded from the panel because he acted as a pretrial judge in the same case?

After a lot of discussions on this issue the conclusion was as following: **this provision is clear enough**, that the judge who has taken part in rendering decision of a lower court or in the same court he or she has taken part in rendering a decision which is being challenged by an appeal and the judge has participated in the pretrial proceedings, including in proceedings of confirmation of indictment should be excluded.

Article 187
(1) If an autopsy has not been performed in a professional institution, it shall if necessary, be performed by a physician or by two or more physicians preferably specialists in forensic medicine. The pretrial judge shall direct this expert analysis and shall enter the findings and opinion of the expert witnesses in the record.

The disputable issue in this article: who should direct the expert analyses when the expertise is performed outside of the professional institution?

From the discussions on this provision it was concluded that the pretrial judge shall always lead, direct the case even when the expertise is performed outside of the professional institution.

Article 225

(2) The pretrial judge may authorize an extension of the investigation for up to six months if this is justified by the complexity of the case. The pretrial judge may authorize another extension for up to six months for criminal offences punishable by at least five years of imprisonment. In exceptional cases the Supreme Court may authorize a further extension of up to six months.

(5) A decision by pretrial judge regarding the extension can be appealed by the public prosecutor, the injured party or the defendant to the three judge panel, If a decision of the pretrial judge is appealed only by the injured party and his or her appeal is successful, the injured party shall be considered to have thereby assumed prosecution as a subsidiary prosecutor.

The disputable issue related to the above mentioned provision is: with respect Article 225 par 5 which is related to the issues what will happen if the request of the prosecutor for extension of investigation is refused and if he or she does not appeal this decision, whereas the injured party appeals against it and his or her appeal is successful?!

From the discussions of participants there were some clarifications: at this stage it is still not considered that the prosecutor has withdrawn from investigation, but he is still a prosecutor of the case. There was no such case in the practice yet, but in case it happens the prosecutor must appeal against the decision for refusal of the request for continuation

of the investigation because there can not be two prosecutors for one criminal case at the same time meaning the public prosecutor and the subsidiary prosecutor.

Article 238
(1) <u>The public prosecutor or the defendant</u> may, on an exceptional bases request the pretrial judge to take testimony from a witness or request an expert analysis for the purpose of preserving evidence where there is a unique opportunity to collect important evidence or there is a significant danger that such evidence may not be subsequently available at the main trial. An appeal can be filed with the three judge panel against the refusal of the pretrial judge to take such testimony. .
(2) In cases under paragraph 1 of the present Article, the pretrial judge shall take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and in particular, to protect the rights of the defendant. The defendant and his or her defense counsel and the public prosecutor shall be present at the hearing for the taking of testimony. The injured party and his or her legal representative or authorized representative shall also be informed of the hearing and will have the right to attend. The taking of testimony before the pretrial judge shall be conducted in accordance with the provisions of chapters XX, XXI and XXII of the present code regarding witnesses ond expert witnesses.
(3) Article 165 is applied shall apply *mutatis mutandis,* to the examination of the witness and the expert witness.

The disputable issue in this Article: in the beginning of paragraph 1 of the provision of Article 287 it is said: **The public prosecutor or the defendant may…** it does not mention the injured party, the disputable issue now is whether we have equality of arms of the parties in the procedure meaning here that the injured party is not treated equally with the public prosecutor?

The discussions concluded that: there should be equality of arms, nevertheless it is considered that when the prosecutor prosecutes a case he or she protects the public interest including here the injured party and he or she is obliged to act accordingly, and when the injured party is in the position of subsidiary prosecutor he or she resumes all the competencies of the public prosecutor except the ones that belong to the public prosecutor as a state authority.

Article 202
The police have the right to detain and gather information from persons found at the scene of the criminal offence who may provide information important for the criminal proceedings if it is likely that the gathering of information from these persons at a later time and date would be impossible or would significantly delay the proceedings or cause other difficulties.

<u>The detention of such persons may last no longer than necessary for names, addresses, and other relevant information to be gathered, and in any case shall not exceed six hours. Such detention should only be used when no other means are available to gather the information.</u>

The disputable issue in this provision: does this provision include the defendant or persons other than the defendant?

It was concluded that this provision speaks only for the people other than the defendant

Article 211
The police may deprive person of liberty if there are reasons for detention under Article 281 paragraph 1 of the present code, but shall be obliged to bring him or her without a delay to pretrial judge to rule on detention on remand.

Everybody shared the opinion that this provision was mistakenly inserted into the code and should be removed from the Criminal Procedure Code.

Article 212, par.2
(2) Arrest and detention under paragraph 1 of the present Article shall be authorized by the public prosecutor or, when due to exigent circumstances such authorization cannot be obtained prior to arrest, by the police who must inform the public prosecutor immediately after the arrest.

The disputable issue in the provisions of Article 212 par 2: if the public prosecutor can order the measure of 72 hour arrest through a telephone?

The provision is clear and hereby it is confirmed that the prosecutor does not give his or her authorizations orally but they should be issues **in a written form,** this implies that the public prosecutor should have a written reasoning for the order or authorization issued if not for a personal decision of arrest.

Article 218 par 1
(1) During all examinations by the police, an arrested person has the right to the presence of defense counsel. If defense counsel does not appear within two hours of being informed of the arrest, the police shall arrange alternative defense counsel for him or her. Thereafter if the alternative defense counsel does not appear within one hour of being contacted by the police the arrested person may be examined only if the public prosecutor or the police determine that further delay would seriously impair the conduct of the investigation.

What if the **defense counsel** is not provided within the foreseen deadlines?

It was concluded that it is a violation of the defendant's rights and every statement taken will be considered as inadmissible before the court.

Another issue that was raised in this article is: what if the defendant is not examined within 72 hours?
It was concluded that the law should be respected and that no one can be held in arrest or police detention for over 72 hours without being examined. Every kind of delay will be

considered as violation of human's rights and freedoms. It was also said that the police should not wait for almost 70 hours to examine the defendant. The pretrial judge and the prosecutor should within this period of time decide on the reasonability of keeping someone in the detention without heaving to wait for 72 hours before the case is sent to the prosecutor or pretrial judge.

Article 220
(1) The public prosecutor shall initiate and investigation against a specified person, on the basis of a criminal report or other sources, if there is a reasonable suspicion that the person has conducted a criminal offence which is prosecuted *ex officio.*

The disputable issue in this provision: should the decision be rendered before the investigation is initiated, because how can a procedure be terminated before being initiated?

The conclusion was that in a regular procedure it would be good to render a decision on initiating the investigations before initiating the investigation, this however shall not apply for the summary proceedings because in these proceedings there are only investigative actions rather than actual investigations.

Article 221 par 1
(1) The investigation shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom the investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pretrial judge.

One of disputable issues that was derived from this provision was: does the defendant have a right to appeal against the decision for initiation of investigation and why doesn't the defendant, like the judge receive a copy of decision for initiation of investigations against him or her?

With respect to paragraph 1 of Article 221 after long discussions it was concluded that: the defendant does not have the right to appeal if he does not receive a copy of the decision for initiation of investigation, because, in this stage of procedure there are no violations of human rights and freedoms foreseen by the European Convention on Human Rights and Constitutional Framework of Kosovo
As to the question why does the pretrial judge receive a copy of the decision on initiation of investigation, this is for the purpose of informing him on the initiation of investigation against NN person.

Article 254

(1) The public prosecutor or the court can order a site inspection or a reconstruction to examine the evidence collected or to clarify facts that are important for criminal proceedings.
(2) Such site inspection or reconstruction shall be conducted by the pretrial judge or the presiding judge, by the public prosecutor or by police. The public prosecutor and police may conduct such site inspection or reconstruction for their own knowledge to assist in their determination or credibility of fact finding, but in such case when notice to the defendant or his or her defense counsel is not givel, the results are inadmissible in the court. The public prosecutor may repeat such site inspection or reconstruction with notice as required by the present article. If so, the results shall then be admissible.

The disputable issue in this provision: who should do the site inspection?

One thing that can be said in relation to the provision of Article 254 is that this is one of the most disputable issues and that no joint conclusion was reached. For this reason the UNMIK legal Office is required to give an interpretation on this provision!

However everybody present agreed that the records from the site inspection should be kept, irrespectively of who makes the inspection.

Article 257
(1) covert photographic or video surveillance, covert monitoring of conversations in public places, metering of telephone calls or disclosure of financial data may be ordered against particular person if:
Par. 3, sub par item (i)
(i). a criminal offence punishable by imprisonment of at least four years;

The disputable issue was with par. 3 sub par 1 item i,
How is the sentence of at least four years interpreted?

From the discussions it was concluded that: her we are dealing with criminal offences which are punishable from 1 to 5 years but not criminal offences which are punishable with 1 to 3 years of imprisonment, so it is important to notice that someone may be punished with punishment of imprisonment 4 years or more.

Article 258,
(1) A public prosecutor may issue an order for each of the following measures:
1) Covert photographic or video surveillance in public places;
2) Covert monitoring of conversation in public places;
3) an undercover investigation: or
4) Metering of phone calls
(2) A pretrial judge may issue an order for each of the following measures on the basis of an application by the public prosecutor:
1) covert photographic or video surveillance in private places;
2) Covert monitoring of conversation in private places;

3) search of postal items;
4) Interception of telecommunications;
5) Interceptions of communications by a computer network;
6) Controlled delivery of postal items;
7) use of tracking or positioning devices;
8) a simulated purchase of an item;
9) A simulation of a corruption offence; or
10) Disclosure of financial data .
(3) An application for one of the measures provided for in paragraph 1 or 2 of the present article shall be made in writing including the following information:
1) The identity of the duly authorized judicial police officer or the public prosecutor making the application;
2) A complete statement of the facts relied on by the applicant to justify his or her belief that the relevant criteria in Article 257 are satisfied; and
3) A complete statement of any previous application known to the applicant involving the same person and the action taken by the authorizing judicial officer on such application.
(4) In emergency cases, if the delay that would result from a pretrial judge issuing an order under paragraph 2 of the present article would jeopardize the security of investigations of the life and safety of an injured party, witness, informant or their family members, a public prosecutor may issue a provisional order for one of the measures provided for in paragraph 2 of the present Article. Such provisional order ceases to have effect if it is not confirmed in a written by a pretrial judge within twenty four hours of issuance. When confirming the provisional order of a public prosecutor, the pretrial judge shall make a written determination as to its lawfulness *ex officio.* A public prosecutor may not use his or her authority under this paragraph to issue an order pursuant to Article 259 paragraphs 3 to 5 of the present Code.

The issue that was put foreword for discussion within the scope of Article 258: can the order for wire tapping be issued without knowing the name and family name of the suspect?

The conclusion was that in order to issue an order for any of the measures from this chapter, the name and family name of the suspect should be known as well as other conditions required for ordering these measures in Article 259 should be met.

Article 272
(4) The rulings shall be served on the defendant and where applicable, a copy shall be served on the person protected under the measure.

Based on what is indicated in Article 272 par 4 the issue was why isn't the decision served to the public prosecutor as well. Is the prosecutor denied the right to appeal being one of the parties in the procedure.

The discussions concluded that a copy of a decision should also be served to the public prosecutor.

Within the scope of Article 272 par 4 there is a term used "person" and not persons?

It was concluded that it should be particular person and if they are more than they should be indicated as particular persons, individuals.

Article 273
(3) The ruling shall be served on the defendant and a copy shall be sent to the relevant police station on the territory where measure is to be implemented.

The disputable issue in this Article: why isn't the decision sent on the prosecutor as well?

The discussions concluded that a copy of a decision should also be sent to the public prosecutor, same as in Article 272. This applies for Articles 273, 274 and 275 as well.

Article 285
(2) The defendant and his or her defense counsel shall be informed of the motion no less than three days prior to the expiry of the current detention on remand
(3) Detention on remand ordered by the pretrial judge may be extended by the three judge panel for a period not exceeding two months, within the limits provided for in Article 284 of the present code, following written submissions from the defendant and his or her defense counsel
(4) Detention on remand ordered by the pretrial judge may be extended by the pretrial judge for a period not exceeding one month, within the limits provided for in Article 284 of the present code, following a hearing conducted in accordance with Article 282 paragraphs 3, 4, 5 and 6 of the present code.

The disputable issue in this provision: what if the confirmation judge rejects the indictment and the prosecutor does not appeal against it, who in that that case in the one to order for release of the accused from detention if he or she is still in detention?

The discussions concluded that: if the indictment is rejected during the procedure for confirmation of indictment the decision for releasing the person from detention on remand should be rendered by the **confirmation judge,** because if the decision for rejection of the indictment is not appealed by the prosecutor than there is no one else to rule to cancel the detention on remand, this is also supported by Article 151 which considers the confirmation judge as a presiding judge.

Article 306
(2) Immediately upon receiving the indictment, a judge who will conduct the proceedings to confirm the indictment shall check whether the indictment is drawn up in accordance with article 305 of the present Code. if he or she finds that it does not comply with the provisions of the article 305 of the present code, he or she shall return it to the prosecutor to amend within three days. The judge may, on the motion of the prosecutor, extend this prescribed period of time for good reason. If the subsidiary prosecutor of the private prosecutor fails to observe the time limit it shall be

considered that thy have refrained from prosecution and the proceedings shall be terminated.

The disputable issue raised in this provision: what if the prosecutor does not amend the indictment within three days in conformity with Article 305, will it be considered that he or she has refrained from prosecution of what?

The general conclusion was that the prosecutor should act according to the deadline provided for by the court according to Article 305.

Article 393
(1) In rendering a judgment by which the accused is punished by imprisonment, the trial panel shall order detention on remand if conditions set forth in Article 281 paragraph 41 of the present code are met and shall cancel detention on remand if the accused is in detention on remand and the grounds on which it was ordered have ceased to exist.
(2) Trial panel shall always cancel detention on remand and order the release of the accused if:
1) the accused is acquitted of the charge;
2) He or she is found guilty but the punishment has been waived;
3) He or she is punished by fine or has received a judicial admonition;
4) One of the alternative punishments is imposed with exception of the punishment of semi-liberty (Article 53 of the Provisional Criminal Code);
5) Due to the inclusion of the detention on remand in the amount of punishment he or she has already served the sentence or
6) The charge is rejected except in a case in which it is rejected on grounds of lack of competence of the court.
(3) Paragraph 1 of the present article shall apply to ordering or canceling detention on remand after the announcement of the judgment until it becomes final. A decision thereon shall be rendered by the three-judge-panel.
(4) Before ordering or terminating detention on remand under paragraphs 1, 2 and 3 of the present article, the panel shall first hear the opinion of the public prosecutor, if the proceedings were initiated upon his or her request, and either the accused or his or her defense counsel.
(5) If the accused is in detention on remand and the panel finds that the grounds on which detention on remand was ordered still exist or that there are grounds under paragraph 1 of the present article; it shall extend detention on remand under a separate ruling. It shall also render a separate ruling when detention on remand is to be ordered or cancelled. An appeal against this ruling shall not stay execution.
(6) Detention on remand ordered or extended under the provisions of paragraphs 1 through 5 of the present Article may last until the judgment becomes final, but no longer than the expiry of the term of punishment imposed in the judgment of the court of first instance.
(7) An accused in detention on remand who has been punished by imprisonment may upon his request be transferred to a penal institution under a ruling of the presiding judge even before the judgment has become final.

The disputable issue in this provision: who extends the detention on remand during the time when the judgment is being rendered and after the judgment is announced?

This provision was clarified with the stand point of the Supreme Court. When the judgment is announced the decision for extending the detention on remand is rendered by the **trial panel,** whereas after the judgment is rendered such decision is rendered by **panel of judges.**

Article 463
(1) Detention on remand may exceptionally be ordered against a person in Article 281 paragraph 1 subparagraph 3 of the present code applies and there is a grounded suspicion that he or she
1) If he or she is hiding or his or her identity can not be established of if other circumstances indicate that there is a danger of flight, or
2) If there are grounds for detention on remand under Article 281 paragraph 1 subparagraph 2 points (ii) and (iii) of the present code and the act involved is
(i) A criminal offence against public order and legal transactions under chapter XXVIII of the provisional Criminal Code or against sexual integrity under chapter XIX of the Provisional Criminal Code;
(ii) A criminal offence with elements of violence punishable by two years or more of imprisonment;

The issue that was raised in this provision: is it sufficient to only refer to the provisions of Article 281 paragraph 1 subparagraph 2 points (i), (ii) and (iii)!?

There was an opinion that it is not sufficient to only refer to the provision of Article 281 paragraph 1 subparagraph 2 points (i), (ii) and (iii) for imposing detention on remand, but such a decision should contain in a clear and detailed manner all the reasons which justify the imposition of such measure.

Article 316
(1) The judge shall render a ruling to dismiss the indictment and to terminate the criminal proceedings if he or she determines that:
1) The act charged is not criminal offence;
2) Circumstances exist which exclude criminal liability;
3) The period of statutory limitation has expired, an amnesty or pardon covers the act, or other circumstances exist which bar prosecution or
4) There is not sufficient evidence to support a well-grounded suspicion that the defendant has committed criminal offence in the indictment.
(2) The judge shall render a ruling to dismiss the indictment and to suspend the proceedings, if he or she determines that the indictment was not filed by an authorized prosecutor or that the motion of the injured party is missing or that permission of a public entity is missing or has been withdrawn or that other circumstances exist which temporarily bar prosecution.

(3) The judge shall render a ruling to declare the court not competent and refer the matter to the competent court, if he of she determines that the criminal offence is the indictment falls within the jurisdiction of another court. The parties may file an appeal of such ruling to three-judge-panel.
(4) The judge shall render a ruling to confirm the indictment, if he or she determines that none of the circumstances under paragraphs 1 through 3 of the present article exist.
(5) The judge shall render a separate ruling to declare specific evidence inadmissible if he or she determines that such evidence obtained during the investigation or proposed by the prosecutor for presentation at the main trial is inadmissible. Article 154 of the present code shall apply *mutatis mutandis*.
(6) In rendering a ruling under the present article, the judge shall not be bound by the legal destination of the criminal offence as set forth by the prosecutor in the indictment or be bound by any agreements between the prosecutor and the defense regarding modification of the charges or the guilty plea.

There were two disputable issues in this provision: Does the defendant have a right to appeal the decision on confirmation of indictment and the second issue is the unclear paragraph 6 which mentions the agreement between the prosecutor and defense?

In principle the appealing of the decision on confirmation of indictment is not prohibited, there are means to address this issue to the Supreme Court through extraordinary remedies for protection of legality which is required to take a stand point which would apply for the whole Kosovo.

It remains to be seen how will the Supreme Court rule on this issue when they receive the extraordinary legal remedies for protection of legality.

Whereas concerning paragraph 6 of the present Article which mentions the agreement it was concluded by everyone that the present setting of this paragraph is unacceptable and this needs to be clarified on what type of agreement it is referring to (this is another issue that will be directed to the UNMIK legal office for interpretation).

Everyone agreed unanimously that the agreement should be provided for by the Code and should be in a setting of proper provisions in order to be implemented and to avoid misinterpretations.

Article 320
(3) The main trial may also be held at another place within the territory of the competent court if upon a motion supported by reasoning of the president of the court approval is granted by the president of an immediately higher court.

This provision was found to bee clear and no further interpretation is needed.

Article 321
(2) Articles 269 and 163 of the present code shall apply to the contents of the summonses served on the accused and witnesses. The summons served on the accused shall state that he or she will be deemed to have renounced his or her right to appeal if he or she fails to declare an appeal within eight days of the date of the announcement of the judgement. When defense is not mandatory, the accused shall be instructed in the summons that he or she has the right to engage defense counsel but the main trial need not be postponed because defense has not come to main trial or because the accused has engaged defense counsel only at the main trial.

This provision was found to be clear and no further interpretation is needed.

Article 326
(1) If the prosecutor withdraws from indictment prior to opening of the main trial the presiding judge shall notify the persons summoned to the main trial. The injured party shall be specifically notified of his or her right to continue prosecution (Articles 62 and 64 of the present Code). If it has been impossible to serve the notification on the injured party because he or she has failed to notify the court of a change of address or place of current residence, the injured party shall be deemed to have abandoned prosecution.

This provision was found to be clear and no further interpretation is needed.

Article 332

(2) It shall be the duty of the presiding judge to confirm that the trial panel has been constituted in accordance with the law and whether there are reasons for excluding a member of the trial panel of the recording clerk (Article 40 pharagraphs 1 and 2 of the present Code).

This provision was found to be clear and no further interpretation is needed.

Article 341

(1) If a duly summoned accused fails to appear at the main trial withot justifying his or her absence, the presiding judge shall issues an order for arrest of the accused in accordance with Article 270 of the present Code. If the accused cannot be produced immediately, the trial panel shall adjourn the main trial and order that the accused be compelled to appear at the session. If the accused justifies his or her absence before being arrested, the presiding judge shall revoke the order for arrest.

This provision was found to be clear and no further interpretation is needed.

Article 376

(1) If the prosecutor finds in the course of the main trial that the evidence presented indicates that the factual situation as described in the indictment has changed, he or she may modify the indictment orally during the main trial and may also make a motion to recess the main trial in order to prepare a new indictment.

(2) If the trial panel grants recess of the main trial in order for a new indictment to be prepared, it shall determine the time an which the prosecutor shall be obliged to file a new indictment. A copy of the new indictment shall be served on the accused. No proceedings on the confirmation of such indictment shall be allowed. If the prosecutor fails to file a new indictment within a prescribed period of time, the court shall resume the main trial on the basis of the previous indictment.

(3) When the indictment has been modified the accused of the defense counsel may make a motion to recess the main trial in order to prepare the defence. The trial panel shall recess the main trial to allow for the preparation of defence, if the indictment has been substantially modified or extended.

The issue that was disputable in this provision: the modification of the indictment at the main trial?

The discussions concluded the following: The indictment may be modified or supplemented only if during the main trial the situation and factual state has changed and new facts and evidence have been presented which show a new situation. At the same time if the defendant has entered into the guilty plea for one factual situation, whereas according to the prosecutor another factual situation is true, the prosecutor may require administration of evidence, after this the prosecutor may modify or supplement the indictment.

Article 400

(1) Persons entitled to appeal (Article 399 of the present code) shall be obliged to announce an appeal. They may announce an appeal immediately after the announcement of the judgment or after the instruction of the right to appeal (Article 394 paragraph 1 of the present Code, but no later than eight days after the date of the announcement of the judgment.
(2) If a person entitled to appeal fails within a legally stipulated interval to announce an appeal, he or she shall be deemed to have waived the right to appeal, except in instances from paragraph 4 of the present Code.
(3) If none of the present persons entitled to appeal (Article 399 of the present code) announces an appeal, the final written judgment need not contain a statement of grounds. In such instances, transcription af the audio-record of the main trial is also not necessary
(4) If the accused has been punished by imprisonment and no appeal has been announced, the written judgment shall nevertheless contain a statement of the grounds and the audio- record of the main trial shall be transcribed.
(5) Until the court of second instance renders its judgment, the appellant may withdraw the appeal that has been filed. The withdrawal of an appeal may not be revoked.

The disputable issue in this provision: Does the prosecutor lose the right to appeal if he or she fails to announce the appeal in cases when the accused is punished with imprisonment, and does this apply for the injured party as well?

Most of participants concluded that a stand point should be made by the Supreme Court of Kosovo on this issue. Everyone shall have the right to appeal once the accused has been tried – punished with imprisonment punishment irrespectively of announcing or not their appeals.
The same applies for the injured party because he or she is one of the persons with the right to appeal, but not in all criminal offences and in all the grounds of appeal.

Article 407
(1) An appeal shall be filed with the court which rendered the judgement in first instance with sufficient number of copies for the court and <u>opposing side</u> and defense counsel to reply to it.
(2) A belated appeal (Article 421 of the present Code) or an appeal which is impermissible (Article 422 of the present Code) shall be dismissed by a rulling of the presiding judge of the court of first instance.

The disputable issue in this provision of Article 407: who is the opposing side?

The discussions concluded that the opposing side are: public prosecutor, the accused and the injured party for the cases when he or she has the right to appeal according to Article 399.

Article 412
(3) If the accused is in detention on remand or is serving his or her sentence, the presiding judge of the court of second instance shall take the necessary steps for the accused to be brought to the hearing.

Disputable issue in paragraph 3 of this provision: the presiding judge of the trial panel (in Albanian version) of the Code!

The conclusion was that it is a mistake (in Albanian version) because in the court of second instance there is no trial panel but only a panel of judges except in the cases involving juveniles and when there is a main trial.

Article 428
(**1) The court of second instance shall return all files to the court of first instance together with a sufficient number of certified copies of its decision to be served on the parties and other persons concerned.**
(2) If the accused is in detention on remand, the court of second instance shall send its decision and the files to the court of first instance no later than three months from the day it has received the files from the court below.

The disputable issue in article 428: who may be other persons concerned?

According to this paragraph other persons concerned are: persons who have any interest on the related criminal offence, for example the injured party who has the right to compensation or person who's item has been confiscated.

Article 430
(2) The Supreme Court of Kosovo shall consider an appeal against a judgement of a court of second instance in a session of the panel, according to the provisions applying to the appellate procedure in second instance. A hearing may not be conducted before the Supreme Court.

The disputable issue in paragraph 2: are we dealing here with the third instance?
The conclusion was that we are dealing here explicitly with the third instance, because the hearing is not allowed in the second instance.

Article 441
(3) if the indictment was dismissed at the proceedings of the confirmation of indictment by a final ruling because there was not sufficient evidence to support a well grounded suspicion that the defendant has committed the criminal offence as described in the indictment and if new facts and evidence are discovered and obtained, a new indictment can be filed if the three judge panel determines that new evidence and facts justify this.

The disputable issue in this provision: Article 441 paragraph 3 (in the Albanian version on the Code) says when indictment was **refused**…, whereas in Article 316 it says that the indictment is **dismissed**….

The discussions concluded that these provisions need to be harmonized, because we are dealing here with dismissal not with refusal of indictment **(although in the English version the term used is dismissal (not refusal) in both Articles) this issue shall as well be sent to the UNMIK Legal Office for interpretation).**